BILATERAL JUDICIAL REFORM

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ABSTRACT

Most debates about judicial reform are predictable and pointless. Progressives, who are unhappy with the current right-leaning judiciary, propose reforms that make it harder for conservatives to prevail in court. Conservatives, who are pleased with the current right-leaning judiciary, oppose reforms that make it harder for conservatives to prevail in court. The federal courts cannot be reformed through unilateral disarmament. Rather, any federal judicial reform must be bilateral. This Article offers ten neutral proposals that would equally weaken the right and the left.

Part 2 introduces the first grouping of reforms about the Supreme Court Justices.

- Proposal #1: Require Justices to ride circuit and preside when federal courts of appeals sit en banc.
- Proposal #2: Impose statutory caps for outside income earned through book royalties, advances, and other similar business dealings.

Part 3 introduces the second grouping of reforms about the Supreme Court's docket.

- Proposal #3: Mandate that the Supreme Court remains in session year-round, with at least one public sitting for oral argument and one conference per calendar month.
- Proposal #4: Establish a standard timeline for review of petitions and applications on the merits, emergency, and capital dockets.
- Proposal #5: Appeals in the Court's mandatory jurisdiction must be scheduled for oral argument.

Part 4 introduces the third grouping of reforms about litigation in the lower courts.

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- Proposal #6: Cases seeking a temporary restraining order can be decided by a single district court judge but can only yield relief to the named parties and are limited to no more than seven days in duration.
- Proposal #7: Cases seeking a preliminary injunction or equivalent relief against the federal government or a state government are referred to the en banc court, which appoints a randomly drawn three-judge panel with two circuit court judges and one district court judge.
- Proposal #8: Injunctions of statutes against the federal and state governments are automatically stayed, and if a three-judge panel submits a "certificate of division," the case is appealed to the Supreme Court's mandatory jurisdiction, with oral argument and decision based on emergency docket timeline.
- Proposal #9: En banc circuit courts and state courts of last resort could submit cases to Supreme Court's mandatory jurisdiction with a "certificate of split" (actual split of authority on question of federal law) or a "certificate of importance" (case presents an exceedingly important, and unresolved question of federal law).
- Proposal #10: When a circuit judge reaches "Rule of 80," he is no longer able to vote on en banc court, and new judgeship is automatically created.

Most of these reforms, including expansion of mandatory jurisdiction, would require statutory amendments, though some proposals could be achieved through court rules. Here at least, I'm agnostic where the reform comes from. It is always better if courts self-regulate. I'll admit up front that some of these proposals are off-the-wall, and are primarily intended to stimulate debate, rather than to create a decisive action plan. A few of these proposals may create problems with judicial independence and the separation of powers, though I think they ultimately pass muster, or at least occupy a gray zone. My hope is that through some outside-the-box thinking, I can put ideas into the ether that eventually coalesce into tangible proposals.

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1. INTRODUCTION

Most debates about judicial reform are predictable and pointless. Progressives, who are unhappy with the current right-leaning judiciary, propose reforms that make it harder for conservatives to prevail in court. Conservatives, who are pleased with the current right-leaning judiciary, oppose reforms that make it harder for conservatives to prevail in court. Lather, rinse, and repeat. Proposals which only help one side of the aisle have slim chances of enactment. Indeed, efforts to address actual judicial emergencies by

creating new judgeships stall to avoid granting a windfall of appointments to a single president. The federal courts cannot be reformed through unilateral disarmament. Rather, any federal judicial reform must be bilateral.

This Article offers ten neutral proposals that would equally weaken the right and the left. These proposals do not need to be adopted as a package. Indeed, they can be adopted piecemeal or mixed-and-matched. Most of these reforms, including expansion of mandatory jurisdiction, would require statutory amendments, though some proposals could be achieved through court rules. Here at least, I am agnostic about where the reform comes from. It is always better if courts self-regulate.

I'll admit up front that some of these proposals are off-the-wall, and are primarily intended to stimulate debate, rather than to create a decisive action plan. A few of these proposals may create problems with judicial independence and the separation of powers, though I think they ultimately pass muster, or at least occupy a gray zone.

Three primary values that inform my proposals. First, the sharp decline in the Supreme Court's certiorari grant rate undermines one of the Court's primary roles: resolving circuit splits to promote a uniformity of federal law. The Justices are deciding fewer cases while divisions in the lower courts fester. [1] Second, the cloistered Supreme Court Justices are increasingly insulated from the lower courts and the American people and stay on the job longer than they should. Supreme Court Justices, and really all federal judges, with their powerful jobs and cushy perks, have little incentive to retire when the time is right. Third, expedited litigation leading up to the Supreme Court's emergency docket yields massive confusion, wastes significant resources, and forces judges to make difficult decisions under time constraints. Proposals to curb forum shopping and eliminate nationwide injunctions treat the symptoms, not the underlying illness. I suspect, or at least hope, that Court watchers of all stripes would generally agree with these three over-arching principles. The proposals advanced below each serve one or more of these primary values. And they do so at all levels of the federal judiciary.

Part 2 introduces the first grouping of reforms about the Supreme Court Justices.

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[1] Adam Liptak, *Supreme Court's Leisurely Pace Will Produce Pileup of Late June Rulings*, N.Y. TIMES (June 19, 2024), https://perma.cc/9VWK-LBNK.

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- Proposal #6: Cases seeking a temporary restraining order can be decided by a single district court judge but can only yield relief to the named parties and are limited to no more than seven days in duration.
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(case presents an exceedingly important, and unresolved question of federal law).

- Proposal #10: When a circuit judge reaches "Rule of 80," he is no longer able to vote on en banc court, and new judgeship is automatically created.

2. Reforms about the Supreme Court Justices

Proposals to reform the Supreme Court have a predictable character. Those who disfavor the Supreme Court's current majority vigorously advocate for term limits and Court expansion—anything to dilute/remove the current members.[2] Those who favor the Supreme Court's majority insist that nine is a magical number, and that term limits would create perverse incentives.[3] I offer two proposals that have nothing to do with the current debate about the Court.

Proposal #1 would bring the Justices closer to the inferior courts, and to the people. Under this proposal, whenever a circuit court sits en banc, the circuit justice would preside. Should the case then be appealed to the Supreme Court, the circuit justice would not need to recuse. And unlike the current practice, the circuit justices would rotate each year, so each member of the Court would, over time, visit courts throughout the nation. This proposal would promote both vertical and horizontal judicial comity. Moreover, the Justices may get a better sense of which petitions warrant a grant by hearing from colleagues on the lower court.

Proposal #2 limits a Justice's ability to profit off their position. In recent years, new Justices have signed lucrative book deals that pay millions of dollars.[4] While there are caps on how much Justices can earn from outside sources, there is a glaring loophole for advances on royalties.[5] As a result, book publishers can give a Justice what is in effect an indefinite, interest-

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2 *See* Khaleda Rahman, *Democrats Move to Expand Supreme Court After Trump Immunity Ruling*, Newsweek (July 2, 2024), https://perma.cc/567W-V9P3.

3 *See* Ronn Blitzer, *Mike Lee Unleashes Tirade Against Court Packing, Touts Past Biden Speech on the Subject*, Fox News (Oct. 13, 2020), https://perma.cc/UTH4-HAAW.

4 *See* Steve Eder et al., *How Supreme Court Justices Make Millions from Book Deals*, N.Y. Times (July 27, 2023), https://perma.cc/AWJ2-NHLE.

5 *See id.*

free loan that is ten times greater than their annual salary. In theory at least, the Justices would have to pay back any unearned royalties, but I am skeptical that the loan would ever be called on during a Justice's life. I am confident that outside groups will feel pressure to buy copies of the book to ensure a Justice's attendance at a public event, and book signing. There is no way to avoid this conflict when the pressure exists to repay the royalty advance. Proposal #2 would simply include advances on royalties in the current cap on outside income. The Justices can continue to write books, but they cannot earn millions of dollars off the prestige of their judgeships. If the Justices lose the motivation to write books without cushy royalty payments, they can use that found time to read more certiorari petitions.

2.1. Proposal #1: Require Justices to ride circuit and preside when federal courts of appeals sit en banc.

The Chief Justice appoints a circuit justice for each of the twelve regional courts of appeals.[6] More-senior Justices are usually appointed to the circuit they have the closest personal connections with. For example, Justices Alito and Sotomayor, who served on the Third and Second Circuits, respectively, are the circuit justices for those circuits.[7] And, by custom, the Chief Justice is the circuit justice for the nearby D.C. and Fourth Circuits.[8] Some assignments are made, I suspect, based on competency. There is a reason that Justices Scalia and Alito, who grew up far from the deep south, were assigned to the Fifth Circuit.[9] Similarly, Justice Kagan, who only briefly lived west of the Hudson, has responsibilities for the Ninth Circuit.[10] The more-junior Justices are appointed to cover the rest of the circuits, as needed.[11] These assignments are usually fairly constant, and only change when a new member of the Court is added.[12]

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6 28 U.S.C. § 42.

7 *Circuit Assignments*, SUP. CT. U.S., https://perma.cc/7YAY-HFG2.

8 *See id.*

9 *Id.*; *Allotment Order*, SUP. CT. U.S. (Sep. 28, 2010), https://perma.cc/Y8SA-3DYY.

10 *Circuit Assignments*, *supra* note 7.

11 *See id.*

12 *See generally Supreme Court Circuit Justice Assignments*, MYATTORNEYUSA (2019), https://perma.cc/5FJX-5727 (predicting that circuit allotments would change following Justice Kennedy's retirement).

The circuit justices have primary responsibility over emergency motions and other applications from a particular circuit.[13] The circuit justices can resolve these matters individually, *in chambers*, or can refer them to the full Court.[14] Before electronic communications were available, it may have been difficult to convene the full Court on short notice when the Justices were scattered. The *in chambers* option made sense. But in the modern era, when the Justices are always on call, *in chambers* opinions seem less frequent and rather quaint.[15]

Proposal #1 would substantially alter the responsibilities of circuit justices, but it would not be a *new* responsibility. Rather, it would restore one of the earliest roles assigned to members of the Supreme Court: circuit riding.[16] For the first century after ratification, each of the Supreme Court Justices would hear cases on the circuit courts of appeals.[17] The Supreme Court (more or less) upheld this practice in *Stuart v. Laird*.[18] Justices would often sit on panels and hear arguments with lower court judges.[19] And in some cases, where the Justice disagreed with a colleague, the case would be appealed to the Supreme Court.[20] Plus, the circuit justice would be able to hear the *same case* on appeal.[21] There was no required recusal.[22]

Perhaps it would be simple enough to restore some of the circuit riding statutory regime, starting with the Judiciary Act of 1789.[23] But the explosion of the docket in the lower federal courts would make the responsibility unbearable. My proposals would give the Supreme Court Justices more work, but I am not unrealistic. Instead, Proposal #1 would require the circuit

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13 *See* Amy Howe, *Court Issues New Circuit Assignments*, SCOTUSBLOG (Oct. 19, 2018, 2:21 PM), https://perma.cc/T7WC-S5E6; SUP. CT. R. 22(3).

14 Amy Howe, *Emergency Appeals: Stay Requests*, SCOTUSBLOG, https://perma.cc/T4UF-KXUD; SUP. CT. R. 22(5).

15 *See In-Chambers Opinions*, SUP. CT. U.S., https://perma.cc/B8PV-H6HR.

16 *See Riding the Circuit*, SUP. CT. HIST. SOC'Y, https://perma.cc/WR67-PM7D.

17 *Id.*

18 *See* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803).

19 *See Riding the Circuit*, *supra* note 16.

20 *See, e.g.*, Certain Named & Unnamed Non-Citizen Child. & Their Parents v. Texas, 448 U.S. 1327, 1330–31 (1980).

21 *See* Laird v. Tatum, 409 U.S. 824, 824 (1972); Hanrahan v. Hampton, 446 U.S. 1301, 1301 (1980).

22 *See Laird*, 409 U.S. at 833; *Hanrahan*, 446 U.S. at 1301.

23 Judiciary Act of 1789, ch. 20, 1 Stat. 73.

justice to sit on the lower courts in a regular, but less frequent occurrence: whenever the circuit sits en banc. Indeed, the circuit justice—rather than the circuit chief judge—would preside over the en banc court.

I see several virtues with this proposal. First, it would *force* the Supreme Court Justices to become familiar with their colleagues on the lower court. It is far easier to second-guess the judgments of unnamed faces on some faraway inferior court. But working with these circuit judges should increase vertical comity. Circuit justices will attend circuit judicial conferences, but there are only limited opportunities to mingle. Sitting on a panel and talking in conference would be a meaningful interaction.

Second, the circuit judges could impress on their circuit justice some of the problems and issues "on the ground" and seek help. That feedback, hopefully, could filter back up to the full court. Third, the circuit justice could help give their colleagues on the lower court a "view from the top," and shed light on the trends and directions of federal law. Fourth, having the circuit justice preside would give them experience as a presiding officer—a role they may never experience in their careers. (By contrast, circuit judges routinely preside several years into their tenures.[24]) The Ninth Circuit Court of Appeals has more than fifty active judges.[25] That court generally sits en banc with panels of ten, plus the chief judge sits on all en banc courts.[26] With Proposal #1, the chief judge of the Ninth Circuit would no longer be an automatic draw but would be part of the same random lottery to constitute the en banc court.

Fifth, it would serve the Justices well to get out of D.C. and see how justice is dispensed across the fruited plain. Indeed, Justices should be forced to rotate among the circuits every year to see the widest range of courts, from sea to shining sea, and flyover country in the middle. I see no actual pragmatic reason, other than nostalgia, for assigning Justices to supervise the courts they formerly worked on. At present, Justices Alito and Kagan have authority over the two most important circuits, the Fifth and Ninth

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[24] *See generally* 28 U.S.C. § 45(a)(1)(B) (requiring that a chief circuit judge must have previously served as a circuit judge for at least one year).

[25] *See The Judges of this Court in Order of Seniority*, U.S. CTS. FOR NINTH CIR. (Nov. 2023), https://perma.cc/KQ9Z-YKSR.

[26] *Court Coverage Tutorial: General Information*, U.S. CTS. FOR NINTH CIR. (Nov. 2023), https://perma.cc/A279-A3JY.

Circuits, respectively.[27] They keep these jobs at the discretion of the Chief Justice.[28] It would be nice to mix things up.

Sixth, Proposal #9 below would allow the en banc circuit courts to refer cases to the Supreme Court's mandatory jurisdiction with a "certificate of split" or a "certificate of importance." If those certificates had to be signed by a circuit justice, it would ensure the Justices that their docket is not overrun. But then again, I would hope circuit justices can hear the cries from lower court justices who are seeking resolutions on circuit splits and novel questions of federal law.

It may also be useful for Supreme Court Justices to sit by designation on state courts of last resort. I do not think Congress could mandate such service, as that would likely amount to commandeering of the state judiciaries.[29] I also don't think Congress could compel Supreme Court Justices to sit on state benches. But Congress and the Court could allow a state court to *request* a Justice to sit on its court by designation, which the Justices could oblige as a matter of horizontal judicial comity. I think it would be immeasurably informative for members of the federal judiciary to see how justice is dispensed in state court. The trickle-up effect of such service would be very valuable.

I recognize that there will be scheduling difficulties for the Justices to ride circuit—especially if Proposal #3 is adopted and the Court sits year-round. Perhaps the easiest way to schedule things would be for the Supreme Court to sit in Washington two weeks out of the month, and the other two weeks are reserved for circuit riding responsibilities. The circuit courts, with knowledge of that schedule, would only schedule en banc sittings for the weeks when there are no Supreme Court sittings. Moreover, circuits do not have en banc sittings every month, so there would be some downtime for the Justices. Proposal #1 can be managed.

I close with one related proposal: Congress should mandate that each Justice preside over one criminal trial and one criminal sentencing each year. That experience would provide valuable insights for the Justices when they review criminal appeals. Of course, it is well known that Chief Justice

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27 *Circuit Assignments*, *supra* note 7.

28 28 U.S.C. § 42.

29 *See* Josh Blackman, *State Judicial Sovereignty*, 2016 U. ILL. L. REV. 2033, 2127–28 (2016).

Rehnquist presided over a civil trial, which did not go well.[30] He was reversed by the Fourth Circuit in an unpublished opinion.[31] Neither Rehnquist nor any of his colleagues have tried a case since.[32] But prompt surrender sends the wrong message. The Justices could improve their ability to review trial records by spending some time in the trenches. I suspect Justices Sotomayor and Jackson, who served on the trial courts, would be willing to help.[33]

2.2. Proposal #2: Impose statutory caps for outside income earned through book royalties, advances, and other similar business dealings.

Being a Supreme Court Justice is a cushy gig. New Justices are immediately rewarded with multi-million-dollar book deals.[34] Moreover, Justices are routinely invited to speak at swanky conferences, lecture at prestigious universities, and hobnob with the upper crust, with all travel expenses paid—so long as they are disclosed.[35] Plus, the Justices decide many of the most important issues facing the country—and far outlive the tenure of their appointing presidents. No wonder Justices tend to die in office.[36] They have

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30 *See* Heislup v. Town of Colonial Beach, Nos. 84–2143, 85–1128, 1986 WL 18609 (4th Cir. Nov. 6, 1986) (per curiam) ("Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. William H. Rehnquist, Associate Justice of the United States Supreme Court, sitting by designation.").

31 *Id.* at *10.

32 *Rehnquist Has Presided over Just One Other Trial*, TAMPA BAY TIMES (Sept. 14, 2005), https://perma.cc/2VJB-5HB4.

33 *See Judge Sonia Sotomayor, Former Adjunct Professor at NYU Law, Nominated to Supreme Court*, N.Y.U. L. NEWS, https://perma.cc/CF3Z-XL94; *The Current Court: Justice Ketanji Brown Jackson*, SUP. CT. HIST. SOC'Y, https://perma.cc/THQ5-DCMJ.

34 *See* Nick Mordowanec, *Conservatives Call Out Sotomayor's $3M from Publisher Amid Thomas Reports*, NEWSWEEK (May 4, 2023, 4:52 PM), https://perma.cc/V3TE-FJ63; Ann E. Marimow & Emma Brown, *Amy Coney Barrett Received $425,000 Book Payment, Records Show*, WASH. POST (June 9, 2022, 6:08 PM), https://perma.cc/XAP2-JRPX.

35 Ariane de Vogue, *New Judiciary Ethics Rules Close 'Loopholes' to Require More Disclosure of Private Travel Costs*, CNN POL. (Mar. 29, 2023, 12:54 PM), https://perma.cc/ZVZ6-J752.

36 *See* Josh Blackman, *Justices Who Died in Office*, VOLOKH CONSPIRACY (Sept. 18, 2020, 9:50 PM), https://perma.cc/JJ6Z-6NLL.

little incentive to step down from one of the most important jobs in the world.

Of course, a Supreme Court Justice takes a significant pay cut by serving decades in federal service. Their salary is a fraction of what most law firm partners make.[37] Indeed, most Supreme Court law clerks earn multiples of what their boss made immediately after clerking.[38]

The Justices, however, do have means of supplementing their income in ways that lower court federal judges do not. In recent years, Justices have received multi-million-dollar book deals shortly after they were confirmed.[39] Presidents and other members of the executive and legislative branches secure book deals *after* their tenures conclude.[40] But on the Supreme Court, the book deals arrive immediately after the tenure begins, before the Justices have done anything of note. As a general rule, federal judges are limited to outside income of about $32,000 per year.[41] However, the publishers are able to evade this restriction by structuring the deals as advances on expected future royalties.[42] The publishers know all too well that the Justices have every incentive to sell as many books as possible to avoid having to repay the royalties.

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37 *Compare Judicial Compensation*, U.S. CTS., https://perma.cc/L9J5-BAMJ (listing, for 2019, Associate Justices' salaries as $258,900 and the Chief Justice's salary as $270,700), *with* Debra Cassens Weiss, *How Much do Partners Make? The Average at Larger Law Firms Tops $1M, Survey Finds*, ABA J. (Dec. 16, 2020, 3:42 PM), https://perma.cc/7EWT-75HQ (reporting, for 2019, average large law firm partner's salary as $1,054,000).

38 *See* Josh Blackman, *A Thought Experiment: Phase Out Supreme Court Clerks*, VOLOKH CONSPIRACY (Nov. 19, 2021, 8:00 AM), https://perma.cc/6Y46-TT5N (explaining that law firms routinely offer $500,000 bonuses to Supreme Court law clerks).

39 *See* sources cited *supra* note 34.

40 *See* Barbra Smith, *US Presidents Make $400,000 a Year While in Office, but They Can Make Millions After They Leave—Here's How*, BUS. INSIDER (Sept. 26, 2020, 12:16 PM), https://perma.cc/AA9V-3YX7.

41 *See* 5 U.S.C. § 13143(a)(1) (limiting earned income to "15 percent of the annual rate of basic pay for level II of the Executive Schedule"); *Earned Income*, CORNELL L. SCH.: LEGAL INFO. INST. (July 2021), https://perma.cc/RG8C-75V9; *Salary Table No. 2023-EX: Rates of Basic Pay for the Executive Schedule (EX)*, US OFF. PERS. MGMT., https://perma.cc/3FT7-XEVA (setting the annual rate of basic pay for level II employees at $212,100).

42 *See* 5 U.S.C. § 13143(a)(1) (limiting "earned income"); 5 C.F.R. § 2636.303(b)(5) (excluding royalties from the definition of "earned income").

(I doubt those royalties will ever be clawed back, but they would probably be forgiven after death or retirement if they were.)

Justices are enriching themselves based on the prestige and power of their jobs. If they want to write books, they should! But the royalties should be subject to the same cap on outside income to which all other federal judges are realistically subject.

Proposal #2 addresses this problem. Congress should expressly include advances on expected royalties as part of the capped compensation on outside income. Alternatively, Congress could exclude from the cap only those royalties on intellectual property that was created *before* a Justice's tenure began. That way, creative judges can continue to reap the oats they sowed.

Some Justices may still write out of a desire to reach people. Others may have a love of writing. Justice Scalia would often say that he "hate[d] writing," but "love[d] having written."[43] But for other Justices, this proposal would likely eliminate some incentives to write books and go on book signing tours. There is an upshot to this proposal: Justices, unencumbered by book deals, can use that free time to handle all of the other responsibilities they will gain with my other proposals, including circuit riding, more mandatory jurisdiction cases, and even more action on the emergency docket. Article III involves life tenure, not a life sentence. Justices can cash out when they step down.

2.2.1. Statutory and ethical constraints on outside income

The compensation for federal judges is fixed by statute.[44] In 2024, the Chief Justice will earn $312,200, the Associate Justices will earn $298,500, circuit judges will earn $257,900, and district court judges will earn $243,300.[45] These salaries pale in comparison with what federal judges could make in private practice.[46] Indeed, in recent years, several federal judges have left the bench well before they were eligible for senior status and obtained lucrative positions in large law firms.[47]

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43 William Jay, *Tribute: The Justice Who Said He Hated Writing*, SCOTUSBLOG (Mar. 4, 2016, 2:16 PM), https://perma.cc/U4FW-87E5.

44 28 U.S.C. §§ 5, 44(d), 135, 153(a), 252.

45 *Judicial Compensation*, U.S. CTS., https://perma.cc/XC24-2Z2Q.

46 Joshua Holt, *Biglaw Salary Scale*, BIGLAW INV., https://perma.cc/VU53-9VEC.

47 *See* Olivia Cohen, *Ex-Ninth Circuit Judge Watford Joins Wilson Sonsini in L.A.*, BLOOMBERG L. (June 12, 2023, 4:58 PM), https://perma.cc/26PS-4L5B; Mark Curriden, *Greg Costa Traded Judge's Robes for Gibson Dunn's Houston Office*, HOUS. CHRON. (Dec. 26,

Federal judges are allowed to earn outside income, but there are limits. As a general matter, most federal officers are limited to outside income that is less than "15 percent of the annual rate of basic pay for level II of the Executive Schedule."[48] In 2024, basic pay was $221,900, which would yield a limit on outside income of $33,285.[49]

The Judicial Conference of the United States administers this statutory regime "with respect to officers and employees of the judicial branch."[50] The Judicial Guide defines "outside earned income" as "all wages, salaries, commissions, professional fees, and payments and compensation of any kind for services rendered or to be rendered."[51] The Guide provides that "[c]ompensation received for teaching activity" is permitted, but is subject to the 15% cap.[52] Many federal judges perform a valuable service by teaching classes at law schools.[53] However, there are several exceptions to this cap. Not included in the 15% cap are "[r]oyalties, fees, and their functional equivalent, from the use or sale of copyright, patent, and similar forms of legally recognized intellectual property rights, when received from established users or purchasers of those rights."[54] And the commentary provides, "advance payment of permissible royalties, fees, or their functional equivalent is not outside earned income if it must be deducted from amounts that later become payable."[55] In other words, a federal judge can receive advances of future royalties, so long as the judge could later be forced to pay back unearned portions of the advance.

2022), https://perma.cc/7F87-3C28; Chinekwu Osakwe, *Maryland Federal Judge Joins Gibson Dunn After Leaving Bench at 47*, REUTERS (Mar. 1, 2023, 2:07 PM), https://perma.cc/NER2-S5QP; Justin Wise, *Wave of Federal Judges Ditch Bench for Lucrative Big Law Jobs*, BLOOMBERG L. (Mar. 16, 2023, 4:30 AM), https://perma.cc/Y5TY-C6HK.

48 5 U.S.C. § 13143(a); GUIDE TO JUDICIARY POLICY, Vol. 2C, Ch. 10, § 1020.25(a) (2024).

49 *Salary Table No. 2024-EX Rates of Basic Pay for the Executive Schedule (EX)*, US OFF. PERS. MGMT., https://perma.cc/3FT7-XEVA.

50 5 U.S.C. § 13142(3).

51 GUIDE TO JUDICIARY POLICY, Vol. 2C, Ch.10, § 1020.25(b) (2024).

52 *Id.* §§ 1020.30(b)(1)–(2), 1020.35(b).

53 My first teaching experience was in aid of Judge Kim R. Gibson's federal courts practice class at the Penn State Law School. (I was not compensated for the position). Hon. Kim R. Gibson & Josh Blackman, *Penn State Dickinson School of Law Federal Courts Practice—Skills 977D (Sections 101 and 201) Spring 2009*, https://perma.cc/ZU4H-Z9FW.

54 GUIDE TO JUDICIARY POLICY, Vol. 2C, Ch. 10, § 1020.35(b)(5) (2024).

55 *Id.* § 1020.50(c)(1).

The Judicial Conference's policies do not expressly apply to the Supreme Court Justices, though the statute does.

2.2.2. Federal judges who receive royalties

For all but nine federal judges, the royalties exception is insignificant. Perhaps some creative judges received valuable patents or copyrights from before their tenure began, in which case they would be entitled to the continued payment of royalties. (For example, Judge Pauline Newman, nominally a judge on the Federal Circuit,[56] received several patents.[57]) Such intellectual property was created before their Article III positions started, and these judges did not benefit from any resources by the federal judiciary.

However, while on the bench, inferior federal judges are unlikely to create much intellectual property of value. (Judicial decisions, thankfully, are in the public domain.[58]) Lower-court judges will sometimes write books about the law or other related topics. But due to their relative obscurity, these tracts will not be national bestsellers that justify a book tour. That is not to say that such books are not valuable. Some are extremely useful, such as books by Judge Posner, Sutton, and a few others.[59] (I do not include Judge Wilkinson's new romance novel in this category.[60]) But books from these lower-court judges do not justify significant monetary advances. I would wager that most federal judges

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56 Josh Blackman, *The Stealth Impeachment of Judge Newman in the Federal Circuit*, VOLOKH CONSPIRACY (Apr. 22, 2023, 4:23 PM), https://perma.cc/X7KB-55PK.

57 Rachel Weiner, *Colleagues Want a 95-Year-Old Judge to Retire. She's Suing Them Instead*, WASH. POST (June 6, 2023, 12:45 PM), https://perma.cc/4HLZ-JW5D.

58 *See* Georgia v. Public.Resource.Org, Inc., 590 U.S. 255, 267 (2020).

59 *See* Josh Blackman, *'Who Decides?' Review: The Supreme Court¸ The States and the Contest for Control*, WALL ST. J. (Jan. 28, 2022, 11:01 AM), https://perma.cc/6CF4-RKVN (reviewing Sutton, "Who Decides?").

60 Rachel Weiner, *Conservative Judge Writes Love Novel—and Reconsiders His Views*, WASH. POST (June 20, 2022, 5:19 PM), https://perma.cc/M39Y-D36X ("When the protagonist of 'Love at Deep Dusk' suggests that her gay friends need to respect that 'well-meaning traditionalists have a point in valuing what they value,' the response is sharp. 'I don't concede for a minute that so-called nice traditionalists have a point in having an opinion on our lives,' her Black lesbian friend replies. 'Because they don't get the privilege of making a point if they haven't lived through the bigotry.' The fictional exchange is surprising, mostly because of who wrote it. It appears in a novel released in February by J. Harvie Wilkinson III, one of the most conservative judges on the U.S. Court of Appeals for the 4th Circuit, appointed by Ronald Reagan in 1984.").

who write books will not earn $33,000 in royalties per year. They may not even earn that much over the lifetime of their books.

Supreme Court Justices, of course, stand in a different position. In recent years, Justices received extremely lucrative book deals. In January 2023, several months after Justice Jackson's Supreme Court tenure began, she received a book deal worth a reported $3 million.[61] Jackson was represented by the same lawyer who negotiated deals for the Obamas and James Patterson.[62] In April 2021, it was announced that Justice Barrett signed a $2 million book deal.[63] At that point, Barrett had written two majority opinions.[64] Shortly after Justice Gorsuch was confirmed, he received a $225,000 advance.[65] In 2010, after Justice Sotomayor joined the bench, she signed a $1.2 million book deal.[66]

To be precise, the Justices cannot be paid outright for their books as compensation—that amount would be subject to the 15% cap. Rather, publishers provide the Justices with advances on expected future royalties.[67] At least, that is what I think happens. As could be expected, judges do not disclose the precise terms of their arrangements. With advances, judges are obligated to account for that advance later or to repay it if the royalties do not materialize.[68] As a practical matter, the publishers who pay these massive advances expect that over the lifetime of the book, a Justice would earn $X in royalties. The publisher fronts that amount before the book is published, or even written, to secure the Justice's authorship. In theory, at least, if the book never sells enough copies, the Justice would be responsible for paying back the royalties. This is assuming the debt is simply never forgiven after the Justice retires or dies—at that point the Justice and their estate are no longer subject to the rules of

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61 Eder et al., *supra* note 4.

62 *Id.*

63 Daniel Lippman, *William Barr, Amy Coney Barrett Land Book Deals*, POLITICO (Apr. 19, 2021, 4:30 AM), https://perma.cc/YY4K-S4UD.

64 Josh Blackman, *Another Justice Signs a Book Deal Shortly After Being Confirmed*, VOLOKH CONSPIRACY (Apr. 19, 2021, 5:01 PM), https://perma.cc/77YQ-TJWV.

65 Debra Cassens Weiss, *Gorsuch Earned $225k Advance for Book, Ginsburg Leads in Reimbursed Travel, Disclosures Show*, ABA J. (June 14, 2019, 11:48 AM), https://perma.cc/AH6Y-RK7J.

66 *Justice Sotomayor Gets over $1 Million for Memoir*, SFGATE (May 30, 2011), https://perma.cc/4967-Y47C.

67 *See* Eder et al., *supra* note 4.

68 *See id.*

ethics.[69] In effect, the Justices are receiving interest-free loans that are not subject to any limits. Yet, under the Judicial Conference's policies, these advances are permitted so long as they are disclosed.[70]

The Supreme Court Justices, as we all know, are not subject to the Judicial Conference's guidance.[71] But they are subject to statutory caps imposed by Congress.[72] Indeed, the Court's 2023 "Statement of Ethics Principles and Practices" expressly acknowledged this limitation with the exception for royalties and advances:

> Justices may not have outside earned income—including income from teaching—in excess of an annual cap established by statute and regulation. In calendar year 2023, that cap works out to less than 12 percent of a Justice's pay. *Compensation for writing a book is not subject to the cap.*[73]

The statement did not even use the locution of "advance payment of permissible royalties." Instead, the statement said the quiet part out loud: "compensation." The royalties exception is a nice gravy train that the Justices are not interested in stopping.[74]

One common response I hear is that living in the suburbs of Washington, D.C., is expensive, and the Justices should be able to write books to supplement their income accordingly. I am entirely unsympathetic to this position. Federal circuit court and district court judges are expected to live in the same geographic location with lower base salaries and no opportunities for significant outside income other than teaching, which is capped at $32,000 per year.[75] Judges also live in even more expensive locales like New York and San Francisco. Moreover,

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69 *See* Jo Becker, *Justice Thomas's R.V. Loan Was Forgiven, Senate Inquiry Finds*, N.Y. TIMES (Oct. 26, 2023), https://perma.cc/S3ZH-HN3L ("Nearly nine years later, after Justice Thomas had made an unclear number of the interest payments, the outstanding debt was forgiven, an outcome with ethical and potential tax consequences for the justice.").

70 GUIDE TO JUDICIARY POLICY, Vol. 2D, Ch. 3, § 320(a) (2023).

71 *See Judicial Conference of the United States*, U.S. CTS., https://perma.cc/88G4-6LXM.

72 5 U.S.C § 13143(a)(1).

73 Letter from Senator Lindsey Graham, Ranking Member, to Hon. Richard J. Durbin, Chair, Comm. on the Judiciary (Apr. 25, 2023), https://perma.cc/7YQV-JLYA (emphasis added).

74 *See* Josh Blackman, *The Supreme Court's Statement of Ethics Principles and Practices*, VOLOKH CONSPIRACY (Apr. 27, 2023, 12:45 AM), https://perma.cc/2XJW-Y3XC.

75 Karl Evers-Hillstrom, *Supreme Court Justices Continue to Rack Up Trips on Private Interest Dime*, OPEN SECRETS (June 13, 2019, 6:05 PM), https://perma.cc/VXL2-MYM3.

Justices are routinely feted with free travel around the world to conferences and other gatherings.[76] So long as that travel is disclosed, it is above board.[77] Lower-court judges do not receive these swanky opportunities. People who accept Supreme Court nominations know full well what it costs to live in Washington, D.C., and what their earning potential will be. It is a fact that nominees now expect a multi-million-dollar signing bonus from a publishing company.

2.2.3. These book deals are problematic

There is nothing in the abstract that is unethical about judges writing books. In general, judges can write about "law-related and nonlegal subjects."[78] (Judge Wilkinson's romance novel does not fit this bill.) Indeed, judges are encouraged to publish their writings: "As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice . . . . To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so."[79] And judges can accept compensation for their writings if "the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety."[80] The problem here is not that judges are writing books. The problem is that they are being paid such extravagant amounts, with the expectation that they will sell those books to captive audiences.

The Canons provide that a judge's "[c]ompensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity."[81] To be sure, advances on expected royalties are not considered "compensation." But that loophole is big enough to fit a well-appointed home in suburban Washington, D.C. If this Canon were applied to advances on royalties, then the multi-million-dollar book deals would be *per se* unreasonable. None of these Justices would ever receive any

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76 Tom Dreisbach & Carrie Johnson, *When Judges Get Free Trips to Luxury Resorts, Disclosure is Spotty*, NAT'L PUB. RADIO (May 1, 2024), https://perma.cc/49WR-EXQQ.

77 *See* GUIDE TO JUDICIARY POLICY, Vol. 2A, Ch. 2, Canon 4(H)(3) (2019); Dreisbach & Johnson, *supra* note 76.

78 GUIDE TO JUDICIARY POLICY, Vol. 2A, Ch. 2, Canon 4 (2019).

79 *Id.* (quoting Commentary).

80 *Id.* Canon 4(H).

81 *Id.* Canon 4H(1).

money for their books if they were not Justices. Indeed, Justices Jackson, Barrett, and Sotomayor never even wrote a book before their appointments to the high court. Then-Professor Barrett, in particular, never saw fit to write an academic book but found $2 million worth of inspiration as soon as she joined the bench.[82] Justice Gorsuch, to his credit, published an academic book,[83] and continues to publish educational books on niche legal topics.[84] Ditto for former-Justice Breyer, who wrote, and continues to write, a series of nerdy books about legal topics that are unlikely to generate large advances.[85]

Under Canon 2B, judges should not "lend the prestige of the judicial office to advance the private interests of the judge."[86] And judges have been advised "in contracting for publication" to "retain a measure of control over the advertising (including the right to veto inappropriate advertising), so that the advertising does not exploit the judicial position or use the prestige of the judge's office to advance the private interests of the judge."[87] And it is permissible for judges to "engage in dignified promotion of the substance of their extrajudicial writings and publications."[88]

I find these book deals extremely problematic. As a threshold matter, publishers are throwing boatloads of money at people who have never published a book before. The *only* reason why these numbers are justified is because of their Supreme Court position. It's not like they gained any important insights

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82 *See* Josh Blackman, *Conservatives Should Not Be Surprised by Justice Barrett's Cautious Approach*, VOLOKH CONSPIRACY (July 20, 2023, 9:00), https://perma.cc/FZ4K-RWYH; Josh Blackman, *Another Justice Signs a Book Deal Shortly After Being Confirmed*, VOLOKH CONSPIRACY (Apr. 19, 2021, 5:01 PM), https://perma.cc/E77Q-K47X.

83 *See* NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA (2009).

84 *See* NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT (2019); NEIL GORSUCH & JANIE NITZE, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW (2024).

85 *See* STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); STEPHEN G. BREYER, MAKING OUR DEMOCRACY WORK (2010); STEPHEN G. BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES (2015); STEPHEN G. BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS (2021); STEPHEN G. BREYER, READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM (2024).

86 GUIDE TO JUDICIARY POLICY, Vol. 2A, Ch. 2, Canon 2(B) (2019).

87 GUIDE TO JUDICIARY POLICY, Vol. 2B, Ch. 2, § 220, No. 55 (2024).

88 GUIDE TO JUDICIARY POLICY, Vol. 2B, Ch. 2, § 220, No. 114 (2019).

or wisdom with such short tenures on the bench.[89] They are simply cashing in on a new government office—a payoff that is not subject to the rules. Let's be perfectly clear: the only reason these Justices are receiving lucrative advances is because of their governmental positions. The publishers are making a prediction that the Justices will be able to market the book with the power of their offices and hold book signings at various events where people will attend to see the Justices. The entire process is unseemly.

Moreover, these book deals create unavoidable conflicts of interest, in which Justices have incentives to sell more books and participate in more public events to avoid having to pay back the royalties. (To be clear, these Justices would *not* be able to pay back these royalties otherwise.) Advisory Opinion 114 explains that "a judge may sign copies of his or her work, which may also be available for sale[, but] there should be no suggestion that attendees are required to purchase books, or that participants may enjoy special influence over the judge."[90] Easier said than done. Justice Sotomayor's court staff is alleged to have nudged groups to purchase more books.[91] This sort of pressure is inescapable.

The current rules might make sense if a handful of talented judges receive modest advances. These current rules do not make sense when new Justices with no experience on the high court are suddenly offered massive payouts. This fronted money is fronted solely due to the "prestige of the judicial office." And it will be difficult to police whether Judges retain the requisite measure of control. For all the Strum and Drang about judicial ethics, I see these lucrative book deals as a glaring problem hiding in plain sight.

I do have priors here. Most books by Supreme Court Justices are not very good. I agree with Judge Posner's criticism of Justice Breyer's book, *Active Liberty*.[92] Posner wrote, "a Supreme Court Justice writing about constitutional theory is like a dog walking on his hind legs; the wonder is not that it is done well

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89 *See* Josh Blackman, *The Deeper Problem with Justice Barrett's Book Deal*, VOLOKH CONSPIRACY (Apr. 20, 2021, 8:00 AM), https://perma.cc/4R82-8MWD.

90 GUIDE TO JUDICIARY POLICY, Vol. 2B, Ch. 2, § 220, No. 114 (2019).

91 Brian Slodykso & Eric Tucker, *Supreme Court Justice Sotomayor's Staff Prodded Colleges and Libraries to Buy Her Books*, ASSOCIATED PRESS (July 11, 2023, 4:14 AM), https://perma.cc/PV7X-82XU.

92 *See A Brief History of Judging: From the Big Bang to Cosmic Constitutional Theory*, JOSH BLACKMAN (Nov. 27, 2012), https://perma.cc/M68P-P6ZS.

but that it is done at all."[93] People are not appointed to the Supreme Court because they are the best writers, or because they are the smartest attorneys, or even because they have the greatest insights. Rather, they are appointed because their political stars aligned. We read their opinions because they have the force of law. But (thankfully) their books lack the force of law. For the most part, people read these books because of the unfortunate cult of celebrity attending the Justices.

There are exceptions, of course. Justice Scalia's works are iconic and canonical. We will be reading his writings for decades to come. To a lesser extent, memoirs of fascinating people—like Justices Thomas and Sotomayor—are worth reading apart from their views on the law. But brand-new Supreme Court Justices who write books about the law are generally not going to persuade anyone. The books will generally be forgotten as soon as the book tour is over. But with millions of dollars at stake, Justices will keep writing books—or at least writing them with the assistance of ghostwriters.[94] It's a cushy gig!

2.2.4. How to fix this problem

Proposal #2 would solve this problem. Congress would include advances on expected royalties as part of the capped income. Justices could continue writing books, but they would only be able to receive royalties up to approximately

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93 *Id.*

94 SONIA SOTOMAYOR, MY BELOVED WORLD (2013) ("Given the demands of my day job, this book would not have been possible without the collaboration of Zara Houshmand. Zara, a most talented writer herself, listened to my endless stories and those of my families and friends, and helped choose those that in retelling would paint the most authentic picture of my life experiences. Zara, you are an incredible person with a special ability to help others understand and express themselves better; I am deeply indebted to your assistance. One of the most profound treasures of this process has been the gift of your friendship, which will last a lifetime."); Jodi Kantor, *On Book-Tour Circuit, Sotomayor Sees a New Niche for a Justice*, N.Y. TIMES (Feb. 3, 2013), https://perma.cc/SR6X-699F ("[Sotomayor's] book, written with the assistance of Zara Houshmand, a poet, and published simultaneously in English and Spanish, has won praise for its emotional pull.") (quoting acknowledgments). *But see* GORSUCH, *supra* note 84, at 326 (2020) ("Without Jane Nitze and David Feder, my collaborators, former clerks, and friends, this book simply would not have been possible. I am deeply grateful that they took time off before starting their new jobs to help assemble, develop, and refine the materials here. Their vision, insight, and enthusiasm always makes working with them a joy.").

$32,000 per year. Would Justices have less incentives to write books at these capped rates? Probably. If the Justices have so much more time not on their hands, they could personally review more cert petitions and edit their opinions down to be (mercifully) shorter. If Justices could not do a book signing, would they have less incentive to hit the road and speak to groups? Probably, though I hope I am wrong. Justice Scalia, for one, gave speeches to hundreds of groups over the years, even when he was not hawking his latest book.[95] Justices who see their mission as spreading knowledge about the law to the public should do so with or without royalties at stake. And Justices who seek to augment their income as their tenures career can consider retirement.

I could imagine one minor tweak so as not to punish judges who created valuable intellectual property before their judicial tenures began: royalties from IP that predated their appointment date would still be excluded.

3. Reforms about the Supreme Court's Docket

The first grouping of proposals concerns the Justices. This second group focuses on the Supreme Court's docket. The Justices will not like these proposals; they would have to hear more cases and take fewer vacation days. And I think all of these changes could be imposed as regulations of the Supreme Court's appellate jurisdiction.

Proposal #3 would eliminate the current October-June schedule. Instead, the Justices would remain in session year-round. Each month, the Justices would hold at least one public sitting for oral argument, which would entail at least one conference to vote on the argued cases. This proposal has several virtues. The Justices would no longer feel compelled to rush out a

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[95] Antonin Scalia, Scalia Speaks 3, 7 (2017) ("Dad [Justice Scalia] delivered hundreds of speeches over his career, around the United States and across five continents. (The trips he and my mother made to foreign countries over the summer were big events in my family: prime opportunities for my brothers and sisters to 'have a few friends over.') He spoke to legal organizations, of course, and those speeches include some of the sharpest and most concise articulations of his legal philosophy. These are speeches that lawyers still talk about, and that helped change the course of American jurisprudence. . . . We were surprised by the number of speeches, the breadth of their subject matter, and their consistently high quality. Neither of us knew that he'd delivered so many speeches that weren't about legal subjects, or to so many groups unassociated with the law. The sheer variety of the material and the many surprises we encountered made the process a joy.").

decision argued in April by the end of June, solely to meet some artificial vacation-induced deadline. This proposal would also allow the Court to grant cert petitions year-round and avoid the dead pool that is the long conference. This proposal can be implemented by the Court on its own or through Congress.

Proposal #4 makes the Supreme Court's calendar more predictable, as the Justices would file a timeline to resolve cases. First, on the merits docket, the Court would have to rule on a petition for certiorari within ninety days after it is filed. If the Court does not act on the petition within that window, the petition would be denied as a matter of law. Second, if the Court fails to act on an emergency application on the emergency docket within two weeks, the application would be denied as a matter of law. Third, on the capital docket, emergency appeals filed less than six days before the death warrant expires would (generally) be denied as a matter of law. (I say generally because there are exceptions.) This proposal would severely curtail the eleventh-hour filings that force the courts to rush through capital cases in a limited time.

Proposal #5 would require the Court to hold oral argument for any case in the mandatory jurisdiction. (And Proposals #8 and #9 below will further expand the Court's mandatory jurisdiction.) In theory at least, the Court could still issue a one-sentence summary affirmance of a mandatory jurisdiction case. However, I suspect that going through the motions of oral arguments will trigger the Justices to develop a fully-reasoned opinion. (I am less confident that Congress could mandate that the Justices *write* an opinion of some length in any particular case.)

Again, the Justices will not like these proposals. Ditto for those invested in maintaining the SCOTUS status quo. These changes would likely have to be imposed on the Justices from Congress.

3.1. Proposal #3: Mandate that the Supreme Court remains in session year-round, with at least one public sitting for oral argument and one conference per calendar month.

The Supreme Court follows a predictable schedule. At the end of September, the Justices hold the "Long Conference," where they resolve all of

the cert petitions that had lingered over the summer.[96] On the first Monday in October, oral arguments begin.[97] The Justices then hold roughly two weeks of oral argument each month—known as a *sitting*—from October through April.[98] Historically, the Justices would hear three arguments a day, three or four days a week.[99] But in modern times, the Justices sometimes hear one or two arguments a day, three days a week.[100] Generally, on the Friday after oral argument, the Justices hold a private conference, in which they vote on pending cases and review cert petitions.[101] Oral arguments usually wrap at the end of the April sitting.[102]

The Justices start to hand down opinions in December or January in some of the easier cases, while the tougher cases are pushed out by the end of June or the beginning of July.[103] After the last decision is handed down, the Justices hold a "Cleanup Conference," in which some petitions are granted and other lingering issues are resolved.[104] Then, the Justices disperse to the four corners of the globe for a three-month summer vacation.[105] The Justices may resolve emergency docket matters over the summer, but during July, August, and most of September, there are no oral arguments and no private conferences.[106]

Proposal #3 would break up that schedule: to avoid delays in granting petitions, scheduling oral arguments, and deciding cases, the Court should remain in session year-round, with at least one public sitting for oral argument and one conference per calendar month. No, the Justices will not like this proposal. Yes, they should follow this schedule anyway.

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96 John Elwood, *The Long Conference's Relists*, SCOTUSBLOG (Oct. 5, 2023, 5:38 PM), https://perma.cc/CPB6-QZTU.

97 *The Court and Its Procedures*, SUP. CT. U.S., https://perma.cc/EJ5H-Q2CS.

98 *See id.*

99 *See 1986–1987 Term*, OYEZ, https://perma.cc/2Y2B-7FAN.

100 *Id.*

101 *Id.*

102 *Id.*

103 *Supreme Court Procedures*, U.S. CTS., https://perma.cc/2U69-32M5.

104 Steve Vladeck, *The Cleanup Conference*, ONE FIRST (July 1, 2024), https://perma.cc/39J8-HVC4.

105 *See* Amanda Frost, *What the Supreme Court Did This Summer*, SLATE (Aug. 24, 2012, 4:04 AM), https://perma.cc/M6ZM-V2GF.

106 *See id.*

3.1.1. The Supreme Court's calendar

Congress has long exercised control over the Supreme Court's calendar. Since the Judiciary Act of 1789, Congress has instructed when the Supreme Court's term would begin.[107] The Judiciary Act of 1802 effectively canceled the Supreme Court's 1802 Term.[108] Under present law, the Supreme Court's term begins on the "first Monday in October," and the Court can hold sessions "as necessary."[109]

By tradition, the Supreme Court will hear oral arguments between October and the end of April.[110] Hearings in May are very rare.[111] Even more, oral argument sessions in June, July, and August are almost non-existent, [112] except the May 2020 sitting during the pandemic.[113] As a general matter, all cases argued in October through April are decided by the end of June or the beginning of July.[114] The Justices also do not hold formal conferences over the summer break.[115] Petitions for writs of certiorari are not conferenced from early July through late September.[116] However, especially in recent

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107 Judiciary Act of 1789, ch. 20, 1 Stat. 73 ("That the supreme court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum, and shall hold annually at the seat of government two sessions, the one commencing the first Monday of February, and the other the first Monday of August.").

108 It was for this reason that *Marbury v. Madison*, filed in the Supreme Court's original jurisdiction in 1801, was not decided until February 1803. *See Landmark Legislation: Judiciary Act of 1802*, FED. JUD. CTR., https://perma.cc/6E3V-6DKR.

109 28 U.S.C. § 2 ("The Supreme Court shall hold at the seat of government a term of court commencing on the first Monday in October of each year and may hold such adjourned or special terms as may be necessary.").

110 *The Court and Its Procedures*, *supra* note 97.

111 *May Oral Arguments at #SCOTUS Are Very, Very Rare*, JOSH BLACKMAN (Nov. 20, 2015), https://perma.cc/9SNZ-AMXR.

112 One notable exception was *Cooper v. Aaron*, in which the Court held a special oral argument session in late August 1958. A decade earlier, for *Ex Parte Quirin*, the Court held a special oral argument session in late July 1942. *See* Josh Blackman, *The Irrepressible Myth of* Cooper v. Aaron, 107 GEO. L.J. 1135, 1150–51 (2019).

113 *See* Amy Howe, *Court Sets Cases for May Telephone Arguments, Will Make Live Audio Available*, SCOTUSBLOG (Apr. 13, 2020, 12:24 PM), https://perma.cc/8W48-9V2Y.

114 *See The Court and Its Procedures*, *supra* note 97.

115 *Supreme Court Calendar October Term 2024*, SUP. CT. U.S., https://perma.cc/3LHB-JR67.

116 *See The Court and Its Procedures*, *supra* note 97.

years, the Court's emergency docket continues to tick throughout the summer.[117]

3.1.2. Rushed decisions by the end of June

The Court's October-June schedule creates many challenges. First, the artificial deadline in June forces many decisions to be rushed. A case argued early in the term can be labored over for nearly three trimesters. For example, *Students for Fair Admissions v. Harvard* was argued on October 31, 2022, and was decided on June 29, 2023, the penultimate day of that term.[118] By contrast, cases argued in the last week of April must be decided in less than two months. During the October 2021 term, *Kennedy v. Bremerton School District* and *Biden v. Texas* were argued on April 25 and 26, respectively.[119] Both significant cases were resolved in the final days of June. During the current term, the Justices argued *Trump v. United States*, the immunity case, on the final argument session of the term on April 25.[120] A decision is still expected by late June.[121] No one benefits from a rushed decision, especially in a momentous case on an important federal question.

The Justices do have the ability to hold a case over and re-argue it the next term. This was done with some frequency in earlier times. For example, *Roe v. Wade* was argued in December 1971, and again in October 1972.[122] *Baker v. Carr* was argued in April 1961 and again in October 1961.[123] *Brown v. Board of Education* was argued in December 1952 and again in December 1953.[124]

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117 *See* Harry Isaiah Black & Alicia Bannon, *The Supreme Court 'Shadow Docket'*, BRENNAN CTR. FOR JUST. (July 19, 2022), https://perma.cc/H8NL-V7HS.

118 Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 181 (2023).

119 Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 507 (2022); Biden v. Texas, 597 U.S. 785 (2022).

120 Docket of Trump v. United States, SCOTUSBLOG, https://perma.cc/QN42-NDDU.

121 *Id.*

122 Roe v. Wade, 410 U.S. 113 (1973).

123 Baker v. Carr, 369 U.S. 186 (1962).

124 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

Re-argument is rarer in modern times.[125] One outlier was *Citizens United v. FEC*. The Court heard oral argument on March 24, 2009, but the Court did not decide the case during the October 2008 term.[126] Instead, the Court held over the case for a special sitting before the start of the October 2009 term.[127] The case was re-argued on September 9, 2009—it was Justice Sotomayor's first argument on the Supreme Court and Solicitor General Kagan's first argument at the Supreme Court, or any court for that matter.[128] Jeffrey Toobin suggested that the case was re-argued to allow the Court to reach a broader question.[129] In modern times, this option is seldom exercised. A case argued in one term will almost certainly be decided that term. Indeed, the October 2019 term, which occurred during the early days of the COVID-19 pandemic, stretched until July 9, 2020, to ensure all opinions would be

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125 *See* JEFFREY TOOBIN, THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT 168 (2012) ("Reargruments were very rare. There had been none of this kind since Warren Burger's days as chief justice."). There have been several cases in recent years where the Court restored a case for re-argument during a single term. *See* Knick v. Twp. of Scott, Pa., 139 S. Ct. 452 (2018) ("This case is restored to the calendar for reargument."); Johnson v. United States, 574 U.S. 1069 (2015) (same). A few cases were re-argued after Justice Alito joined the bench in 2006. *See* Hudson v. Michigan, 547 U.S. 1096 (2006); Kansas v. Marsh, 547 U.S. 1037 (2006); Garcetti v. Ceballos, 546 U.S. 1162 (2006).

126 Citizens United v. FEC, 558 U.S. 310 (2010).

127 Citizens United v. FEC, 557 U.S. 932 (2009) ("This case is restored to the calendar for re-argument.").

128 TOOBIN, *supra* note 125, at 170 ("Elena Kagan, the solicitor general, took the front seat and three of her deputies piled into the back. She had been confirmed by the Senate a few days before the first *Citizens United* argument, and the reargument would mark her debut before the justices. Kagan, at the age of forty-nine, had never so much as argued a single case in any courtroom. *Citizens United* would be the first time.").

129 *Id.* at 168 ("[Chief Justice] Roberts didn't mind spirited disagreement on the merits of any case, but he worried that Souter's attack might damage the Court's credibility, or his own. So the chief came up with a stroke of strategic genius. He would agree to withdraw the majority opinion and put *Citizens United* down for reargument in the fall. For the second argument, the Court would write Questions Presented that left no doubt about the stakes of the case. The proposal put the liberals in a box. They could no longer complain about being sandbagged, because the new Questions Presented would be unmistakably clear. But—as Roberts knew—the conservatives would go into the second argument already having five votes for the result they wanted.").

handed down before summer break began.[130] Even in a global pandemic, the Justices stuck to the regular calendar as best as possible.

Ultimately, a case is decided before the Fourth of July, whether it is ready or not. This is no way to run the most important Court in the land. These decisions will affect hundreds of millions of people and will serve as precedents for generations. In the lower courts, judges take the time they need to get a case right. The Supreme Court should follow suit. Moreover, given more time, the Justices could work on achieving unanimity. Though, in my experience, the more unanimous a case is, the more issues go unresolved—not exactly an ideal substitute. In any event, as a benefit to law professors, the Justices could take more time to edit their work down and yield shorter opinions. To paraphrase a quote attributed to Twain, Pascal, Thoreau, Franklin, Cicero, and others, if only the Justices had more time, they could have written a shorter decision.[131]

3.1.3. The mid-January cert cutoff, combined with no arguments in May through September, creates undue delays in arguing cases

As explained above, the Supreme Court does not hear oral argument for five months out of the year.[132] If a case is not argued by the end of April, it will be set for argument in October or later. But an important factor in this timing is when a petition for certiorari is granted. Supreme Court advocates carefully study the Supreme Court's distribution schedule.[133] This calendar "identifies the dates on which petitions for writs of certiorari, along with corresponding briefs in opposition and reply briefs, will be distributed to the Justices."[134] The Justices hold private conferences to consider petitions and other filings on Fridays between the end of September and the end of June.[135] There is something of an unwritten rule: if a petition is granted by

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130 *October Term 2019*, SCOTUSBLOG, https://perma.cc/SD8P-SVDD.

131 *Quote Origin: If I Had More Time, I Would Have Written a Shorter Letter*, QUOTE INVESTIGATOR (Apr. 28, 2012), https://perma.cc/L6YC-56M3.

132 *See Supreme Court Procedures*, *supra* note 103.

133 *See Case Distribution Schedule*, SUP. CT. U.S., perma.cc/EN9Q-8HBP.

134 *Id.*

135 *See The Court and Its Procedures*, *supra* note 97.

early or mid-January, the case will be argued in April of the current term; if the petition is granted after mid-January, the case will be argued the following term.[136]

This timeline creates complicated dynamics. Petitioners who are in a hurry will rush to file a certiorari petition, such that it will be conferenced by mid-January. Respondents, who are not in a hurry, will use all manner of dilatory tactics to push the conference past the January cutoff. In response, Petitioners will urge the Court to move with dispatch to avoid falling off the oral argument cliff. In recent years, the parties have expressly asked the Justices for a prompt resolution so the case could be heard during the present term.[137] Indeed, in the challenge to the TikTok divestment bill, both sides

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136 *See, e.g.*, *The NY Times on "Running Out the Clock on Obama Immigration Plan," and #SCOTUS Timing*, JOSH BLACKMAN (Oct. 13, 2015), https://perma.cc/W934-TKLA.

137 *See, e.g.*, Emergency Application for a Stay Pending Appeal at 27, Idaho v. United States (2024) (No. 23–727), 2023 WL 8237585 at *27 ("Alternatively, the Court could construe this application as a petition for a writ of certiorari before judgment, grant the petition, and set this case for expedited briefing and *argument this Term*. . . .") (emphasis added); Application for a Stay of the Injunction Issued by the U.S. District Court for the W.D. of La. at 43–44, Murthy v. Missouri, 144 S. Ct. 1972 (2024) (No. 23–411), 2023 WL 6123773, at *39–40 ("To facilitate this Court's prompt resolution of this case, the government will file a petition for a writ of certiorari by October 13, 2023—nearly two months early, and in time to allow the Court to hear the case this Term in the ordinary course."); States' Reply in Support of their Application for a Stay Pending Certiorari at 2, Arizona v. Mayorkas, No. 22–544 (filed Dec. 21, 2022), 2022 WL 17881618, at *2 ("It should further grant certiorari on intervention issues now so that these recurrent issues are resolved this Term and do not evade this Court's review again."); Application to Vacate the Injunction Entered by the U.S. Ct. App. for the 8th Cir. at 4, Biden v. Nebraska, 142 S. Ct. 2355 (2023) (No. 22–506), 2022 WL 17330762, at *4 ("If the Court declines to vacate the injunction, it may wish to construe this application as a petition for a writ of certiorari before judgment, grant the petition, and set the case for expedited briefing and argument this Term to avoid prolonging this uncertainty for the millions of affected borrowers."); Petitioners' Response to Respondents' Motion to Dismiss the Petition as Improvidently Granted at 1, Dep't of Com. v. New York, 588 U.S. 752 (2019) (No. 18–557), 2019 WL 292988, at *1 ("The government intends to file forthwith a petition for a writ of certiorari before judgment, with a proposal for expedited briefing to allow for oral argument and decision this Term."); Reply Brief for Applicant at 13, Texas v. United States, 570 U.S. 928 (2013) (No. 12–496), 2012 WL 6591165, at *13 ("But the better course would be to note probable jurisdiction and set the case for oral argument this Term.").

asked the D.C. Circuit for a ruling by December 6, 2024, to ensure there was adequate time for the Supreme Court to review that term.[138]

Making the schedule even more unpredictable is the fact that the Justices have complete control to re-list or reschedule a petition.[139] According to Adam Feldman and Jack Truscott, a cert grant can take between 80 and 300 days.[140] There is so much variability.

Moreover, relists can be used strategically by the Justices to push a case till the following term.[141] I speculate that the Supreme Court intentionally delayed *Students for Fair Admissions v. Harvard*, so it would not be argued during the October 2021 term, along with already-scheduled landmark cases on abortion and guns.[142] Indeed, the Court granted *SFFA* on January

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138 Joint Motion for the Court to Adopt Procedures Governing These Original Actions, Grant Expedited Consideration, and Set Briefing and Oral Argument Schedule and to Expedite Consideration of this Motion at 8, TikTok v. Garland, No. 24–1113 (filed Nov. 20, 2023) ("To ensure that there is adequate time before the Act's prohibitions take effect to request emergency relief from the Supreme Court if necessary, the parties respectfully ask this Court to issue its decision on the merits of these actions by December 6, 2024."); David Shepardson, *US Court to Hear Challenges to Potential TikTok Ban in September,* REUTERS (MAY 28, 2024, 3:19 PM), https://perma.cc/4J8T-W4Y8.

139 Kimberly Strawbridge Robinson, *Supreme Court Adds Layer of Due Diligence: Relists Explained*, BLOOMBERG L. (Jan. 4, 2021, 6:01 AM), https://perma.cc/D9QS-XBML.

140 Adam Feldman, *Two Pieces to the Puzzle: Long Conference Petitions and Granted Cases for OT 2023*, EMPIRICAL SCOTUS (Sept. 11, 2023), https://perma.cc/6PXG-VR7R.

141 Josh Blackman, *After 5 Relists, SCOTUS Grants Cert in Puerto Rico Case Biden SG Will Probably Switch Positions on*, VOLOKH CONSPIRACY (Mar. 1, 2021, 6:36 PM), perma.cc/C7BQ-9VJW ("The briefing concluded on November 24, and the petition was distributed for conference on December 11. The case was then relisted five times. Finally, it was granted on February 26. Usually when a case is relisted several times, a Justice is working on a dissent from denial of cert. But here, after percolation, there was apparently enough support for a grant.").

142 *See* Josh Blackman, *SG Files Brief in Harvard Affirmative Action Case, Teeing the Case for Review This Term*, VOLOKH CONSPIRACY (Dec. 8, 2021, 5:47 PM), https://perma.cc/4VY4-ZHLN ("Will the Justices want to grant now? I mean, with guns and abortion on the docket, why not add affirmative action? And don't forget the emergency redistricting litigation that may trickle up before the midterms. This term will simply get more insane. If history is any guide, the Court relisted *Dobbs* umpteen times. A few relists would put this the Harvard case safely into next term."); *see also* Josh Blackman, Students For Fair Admissions *v. Universities For Division, Exclusion, And Inequity: The Petitions, The Arguments, And The Decision*, 77 SMU L. REV. 187, 191 (2024).

24, 2022.[143] The case would be argued the following term on Halloween 2022—and even then, the decision took a full nine months to decide.[144] The cert petition in *SFFA* was filed in February 2021, and the decision was announced in June 2023.[145] From start to finish, it took the Court twenty-eight months to decide the case! It is regrettable the Court could not decide the case during the natural life of William Consovoy, the lawyer who expertly litigated the case in the lower courts, and who tragically passed away in January 2023.[146]

In the normal course, a case granted in mid-January will generally be heard in April, with a decision by June—about a four-month sweep. But a case granted in late-January will not be heard until the following October, perhaps with a decision as late as the following June—an eighteen-month sweep. It is unfair to litigants and to the country to impose such a lengthy delay simply because a petition is granted on the wrong side of January. The decision to not hold arguments over the summer, combined with the artificial June deadline, creates massive delays that can even straddle presidential administrations.

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143 Docket of Students for Fair Admissions Inc. v. President & Fellows of Harvard College, SCOTUSBLOG, https://perma.cc/PS8L-ZJF4.

144 *Id.*

145 *Id.*

146 *See* Clay Risen, *William Consovoy Dies at 48; Took Conservative Cases to Supreme Court*, N.Y. TIMES (Jan. 12, 2013), https://perma.cc/SUX7-MZAM.

3.1.4. Cert petitions pile up over the summer

While the Justices galivant to Salzburg,[147] Aspen,[148] and Malta,[149] the petitions for writs of certiorari pile up in the hot, swampy summer. Generally,

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147 *See* Jack Crittenden, *Anthony Kennedy Still Teaching at McGeorge's Summer Program*, NAT'L JURIST (July 27, 2018), https://perma.cc/4G5A-AT2G ("Anthony M. Kennedy may have retired from the U.S. Supreme Court, but the 82-year-old jurist is still teaching a McGeorge School of Law's annual Salzburg, Austria summer program. Kennedy began teaching constitutional law at McGeorge in 1965 and has been a regular at the Salzburg program since 1990."). Justice Kennedy's jurisprudence was influenced by his international lampoons and European vacations. David G. Savage, *A Justice's International View*, L.A. TIMES (June 14, 2008, 7:00 AM), https://perma.cc/GG69-TL5T ("When the Supreme Court goes on recess at the end of this month, Justice Anthony M. Kennedy will be off to his summer teaching job in Salzburg, Austria. For the 19th year, he will teach a class called 'Fundamental Rights in Europe and the United States' for the McGeorge Law School. He tells his American and European students that the belief in individual freedom and the respect for human dignity transcends national borders. There is, he once said in an interview, 'some underlying common shared aspiration' in legal systems that protects the rights and liberties of all. . . . In recent years, Kennedy, 71, has become one of the strongest proponents of interpreting the Constitution's guarantees of liberty and equality broadly and in line with modern human rights law."); Roper v. Simmons, 543 U.S. 551, 578 (2005) ("It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. See Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae* 10–11. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.").

148 *See* Mattathias Schwartz, Jack Newsham & Katherine Long, *Buying Face Time: A Secret Invite List Shows How Big Donors Gain Access to Supreme Court Justices*, BUS. INSIDER (July 24, 2023, 4:00 AM), https://perma.cc/N7UB-LPME ("The Aspen Institute promises 'exclusive access to high-level gatherings' for donors in its Justice Circle, and the 2017 'speakers dinner' featuring Justice Elena Kagan was as exclusive as they get."); ASPEN INST., *A Conversation with Justice Elena Kagan Moderated by Elliot Gerson*, YOUTUBE (Mar. 1, 2016), https://youtu.be/zZJBuIgdz1E?si=-nouegxz58Jfhp96; Catherine Lutz, *Justice Elena Kagan Talks Power on the Supreme Court*, ASPEN INST. (July 18, 2017), https://perma.cc/T4XE-PYLT.

149 *Law Students Enjoy Once-in-a-Lifetime Opportunity to Learn From US Supreme Court Justice Ruth Bader Ginsburg*, S. TEX. COLL. L. HOUS. (Aug. 3, 2017), https://perma.cc/3UDW-MBWB ("Students from South Texas College of Law Houston recently experienced a once-in-a-lifetime opportunity: learning from a justice of the nation's High Court in an intimate, one-on-one setting. The Honorable U.S. Supreme

if a petition for certiorari is not granted at the "Cleanup Conference," which is held after all of the cases are decided at the end of June or early July, the petition will linger until the so-called "Long Conference" at the end of September.[150] The grant rates at the long conference tend to be lower, since there are so many more petitions to consider, and it is more likely that an important issue gets missed.[151] Moreover, the grant rate is lower at the "Cleanup" conference after arguments conclude, usually at the end of June or beginning of July,[152] since the Justices are otherwise preoccupied with the crush of opinions.[153] Petitioners usually try to rush a case to be considered before June, while Respondents seek delays to push a case to the long conference.[154] It is not fair that a grant's likelihood is determined based on whether a case is circulated before or after summer recess begins.

3.1.5. A twelve-month solution

I see three primary problems with the Supreme Court's current schedule. First, the artificial deadline of ending the term in June forces the Justices to rush through important decisions with a compressed schedule. Second, the Court's decision to not schedule oral argument in the summer creates an arbitrary mid-January cutoff, which delays the resolution of a case by as much as eighteen months. Third, the Court's decision to not hold any

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Court Justice Ruth Bader Ginsburg taught during the third session of STCL Houston's study abroad program at the University of Malta's Valletta campus the week of July 4."). I do not participate in these summer-abroad programs.

150 John Elwood, *Cert Grants from the Long Conference: The September Effect*, SCOTUSBLOG (Sept. 25, 2017, 4:09 PM) https://perma.cc/4SHZ-B5KA.

151 Adam Liptak, *Supreme Court's End-of-Summer Conference: Where Appeals 'Go to Die'*, N.Y. TIMES (Aug. 31, 2015), https://perma.cc/XS3D-XHTF ("The odds of persuading the Supreme Court to hear a case are always long. At the conferences held on many Fridays during the term, which lasts from October to June, the justices consider perhaps 200 petitions at a time and grant about 1.1 percent of them. At the long conference, the rate is roughly half of that, around 0.6 percent.").

152 Amy Howe, *"Clean-up" Conference Prompts Three New Grants, Lots of Separate Writings*, SCOTUSBLOG (June 30, 2022), https://perma.cc/J8Y6-2KE5.

153 *See* Elwood, *supra* note 150 ("Late June and early July thus represent a four-week Dead Zone that yielded only two grants over three terms.").

154 *See* sources cited *supra* note 137.

conferences over the summer forces a significant number of petitions to be considered at the "Long Conference," where the grant rate is much lower.

Proposal #3 would address each of these problems: every calendar month, the Court would hold at least one public sitting for oral argument and one conference. The benefits are manifold. First, with my proposal, there would be no arbitrary deadline to issue decisions. The Court would release the opinions when they are good and ready. A few more months of deliberations would only help a case argued in April. Would it be problematic to work on a case argued at the end of April for the same amount of time as a case argued in October? An August handdown of a solid opinion is better than a June handdown of a half-baked opinion. Other than the Justices' personal convenience and tradition, what could justify this compressed work schedule?

Second, if arguments are held year-round, there would no longer be an artificial cutoff for cert petitions. A case granted in February could be argued in May, a case granted in May could be argued in August, and so on. Moreover, there are advantages to having regularly scheduled sittings on the calendar. In recent years, the Court has routinely scheduled expedited oral argument for cases on the emergency docket.[155] I call this practice the "rocket

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[155] *See* Trump v. United States, 144 S. Ct. 1027, 1027 (2024) ("The case will be set for oral argument during the week of April 22, 2024."); Moyle v. United States, 144 S. Ct. 540, 540–541 (2024) ("The Clerk is directed to establish a briefing schedule that will allow the case to be argued in the April 2024 argument session."); Idaho v. United States, 144 S. Ct. 541, 541 (2024) ("The Clerk is directed to establish a briefing schedule that will allow the case to be argued in the April 2024 argument session."); Harrington v. Purdue Pharma L.P., 144 S. Ct. 44, 44 (2023) ("The Clerk is directed to establish a briefing schedule that will allow the case to be argued in the December 2023 argument session."); Arizona v. Mayorkas, 143 S. Ct. 478, 478 (2022) ("The Clerk is directed to establish a briefing schedule that will allow the case to be argued in the February 2023 argument session."); Dep't of Educ. v. Brown, 143 S. Ct. 541, 541 (2022) ("The Clerk is directed to establish a briefing schedule that will allow the case to be argued in the February 2023 argument session."); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 736, 736 (2021) ("The application is set for oral argument on Friday, January 7, 2022."); Biden v. Missouri, 142 S. Ct. 735, 735 (2021) ("The applications are set for oral argument on Friday, January 7, 2022."); Ramirez v. Collier, 142 S. Ct. 50, 50 (2021) ("The Clerk is directed to establish a briefing schedule that will allow the case to be argued in October or November 2021.").

docket."[156] Justice Kavanaugh has suggested that flexible scheduling of expedited oral argument would be a useful way to manage the Court's emergency docket.[157] To maintain maximum flexibility, it would be useful for the Court to reserve time year-round for oral argument sessions. These dates would make it easier to add emergency cases to the oral argument calendar each month. Some things cannot wait until the first Monday in October.

Third, if the Justices hold conferences at regular intervals, Petitioners would not be penalized for the "Long Conference" hold. In theory, at least, grant rates should be constant year-round. With regular conferences, the Justices could better address important issues that are percolating in the lower courts. In the lower federal courts, the business of the courts continues year-round. And so should the business on the Supreme Court.

3.1.6. SCOTUS is out for summer!

I recognize the Justices would likely raise objections to their recess being cut short. It must be nice to have a dedicated summer break. (Professors can relate, as I write this article after classes concluded.) This time off allows the Justices the chance to travel abroad on all-expenses-paid trips, speak at universities for extra income, and work on memoirs for lucrative advances.

In June 2012, shortly after *NFIB v. Sebelius* was decided,[158] Chief Justice Roberts decamped for a summer abroad program in Malta.[159] He quipped

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156 Josh Blackman, *SCOTUS Moves Capital Case from Shadow Docket to Rocket Docket*, VOLOKH CONSPIRACY (Sept. 9, 2021, 12:15 AM), https://perma.cc/37NL-TMLC.

157 Labrador v. Poe, 144 S. Ct. 921, 933 (2024) (Kavanaugh, J., concurring) ("In certain circumstances, moreover, the Court might benefit from oral argument or may even grant certiorari before judgment. . . . And I believe that the Court should continue to be flexible in employing appropriate procedures so as to best decide important emergency applications."); *see* Josh Blackman, *Justice Kavanaugh's Concurrence in* Labrador v. Poe, VOLOKH CONSPIRACY (Apr. 18, 2024, 5:44 PM), https://perma.cc/49YU-MQ8G.

158 *See* JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 235 (2013).

159 *Justices' Summer Plans Point to Late June Finish*, DESERET NEWS (May 27, 2012, 8:25 AM), https://perma.cc/F65Q-S68X ("Roberts will be in the Mediterranean island nation of Malta for a program led by the South Texas College of Law in Houston and the William Mitchell College of Law in Minneapolis."). This program occurred before my tenure at South Texas began.

that "Malta, as you know, is an impregnable island fortress . . . It seemed like a good idea."[160] The break affords the Justices an opportunity to decompress and spend some time apart, especially after a contentious end-of-term race. Requiring the Justices to appear with each other year-round could impact collegiality. Though in July 2012, Justice Scalia insisted there was no bad blood with the Chief.[161] "You shouldn't believe what you read about the court in the newspapers. No I haven't had a falling out with Justice Roberts," Scalia said.[162]

There is also risk of burn-out. In January 2024, Justice Sotomayor observed that she was "tired" and "working harder than [she] ever had."[163] Sotomayor cited, among other things, "bigger" cases, more amicus briefs, and a "more active" emergency docket.[164] She lamented, "There used to be a time when we had a good chunk of the summer break. Not anymore. The emergency calendar is busy almost on a weekly basis."[165] From my vantage point, this message is tone-deaf to millions of Americans who do back-breaking work for far less, with no support staff or amazing perks. I find it patronizing and elitist for a Supreme Court Justice to complain about not having a summer break.

A year-round calendar, and indeed the other proposals in this article, will not make Justice Sotomayor happier. Indeed, they will make her and the other eight Justices work harder, decide more cases, and take fewer vacations. If the Justices are unhappy with this arrangement, they can seek greener pastures.[166] Article III offers a life tenure, not a life sentence.

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160 Adam Liptak, *After Ruling, Roberts Makes a Getaway from the Scorn*, N.Y. TIMES (July 2, 2012), https://perma.cc/KR8V-VR63.

161 *Scalia Says No Fallout with Roberts Over Healthcare Decision*, REUTERS (July 18, 2012, 9:23 PM), https://perma.cc/6KLP-CAMD.

162 *Id.*

163 Joyce Cutler, *Sotomayor Calls Supreme Court Pace, Workload More Demanding (1)*, BLOOMBERG L. (Jan. 29, 2024, 5:27 PM), https://perma.cc/T9UK-KS5F.

164 *Id.*

165 *Id.*

166 *See* Frost, *supra* note 105 ("If nothing else, abolishing the justices' summer vacation might lead to greater turnover on the high court—a possibility that might appeal to Democrats, Republicans, and any justice who'd rather spend more time on the Mediterranean.").

Hundreds of millions of Americans must work hard year-round for far less money and infinitely less influence. The Justices will have to manage.

Perhaps the best argument in favor of a year-round session came from a young John Roberts. In 1983, the then-White House lawyer wrote a memo about potential court reform.[167] He quipped, "While some of the tales of woe emanating from the [C]ourt are enough to bring tears to the eyes, it is true that only Supreme Court [J]ustices and schoolchildren are expected to and do take the entire summer off."[168] He added, "The generally accepted notion that the [C]ourt can only hear roughly 150 cases each term gives the same sense of reassurance as the adjournment of the [C]ourt in July, when we know that the Constitution is safe for the summer."[169] (Or, as Gideon Tucker put it, "No man's life, liberty, or property are safe while the legislature is in session."[170]) Now that Roberts wears the robe, the Court decides less about sixty cases per year, and still takes a three-month vacation.[171]

3.1.7. Congress can do it

It would be better if the Court undertook this reform itself. But I think Congress could modify 28 U.S.C. § 2 as follows: "The Supreme Court shall hold at the seat of government a term of court commencing on the first Monday in October of each year" and hold oral argument session at least once in each calendar month "and may hold such adjourned or special terms as may be necessary."[172] This revision would not intrude on judicial independence. Nor would it affect how or when cases are decided. (Proposal #4 tackles these topics.) Proposal #3 would regulate how often the Court holds oral argument session. It is possible the Court convenes and immediately adjourns with no cases on the docket to argue. But if the Justices are required to hold Court once a month, they are more likely to schedule cases for those sessions. And if there are oral argument sessions, they will need to hold

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167 John M. Broder & Carolyn Marshall, *White House Memos Offer Opinions on Supreme Court*, N.Y. TIMES (July 30, 2005), https://perma.cc/GHM2-UH85.

168 *Id.*

169 *Id.*

170 Final Accounting in the Estate of A.B., 1 Tucker 247, 249 (N.Y. Surr. 1866).

171 *See* Frost, *supra* note 105; *The Supreme Court—The Statistics*, 137 HARV. L. REV. 490, 490 (2023).

172 28 U.S.C. § 2.

conferences to vote. While gathered, they may as well resolve pending cert petitions. To make things slightly more bearable, a session could be scheduled at the start of July and end of August to provide some continuous respite. But their presence would remain year-round.

Congress should also consider mandating that the Justices sit in courthouses outside of Washington, D.C. As a precedent, the Judiciary Act of 1789 established very specific schedules of when Justices would ride circuit in different states.[173] Over the years, the Supreme Court found its home in many places, following Congress from New York to Philadelphia, then to the Capitol in Washington, D.C., before finally settling at One First Street N.E.[174] (The Justices temporarily sat at the D.C. Circuit during The Anthrax Scare of 2001.[175]) Perhaps the Court could sit in several of the en banc courtrooms of the federal courts of appeals and see what lies west of the Potomac. Non-Beltway denizens could see how the Court operates in their hometowns, while the Justices, in turn, could soak in the ambiance of the heartland—what Justice Scalia called the "vast expanse in-between."[176] St. Louis, Cincinnati, and Denver are lovely in the summer. I see many upsides to this proposal, though security concerns would have to be addressed.

3.2. Proposal #4: Establish a standard timeline for review of petitions and applications on the merits, emergency, and capital dockets.

Much of the criticism of the Supreme Court's emergency docket is overwrought. More importantly, the focus of this criticism is largely in the past. Between 2017 and 2023, the Supreme Court was treading in uncharted waters. The combination of rapid changes during Trump's presidency, unexpected issues during the COVID-19 pandemic, coupled with a pivotal shift in the Court's composition, presented a perfect storm of nationwide

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173 *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73.

174 *Building History,* SUP. CT. U.S., https://perma.cc/T3R4-TZSF.

175 *See Anthrax Forces Justices from Chambers*, TAMPA BAY TIMES (Sept. 10, 2005), https://perma.cc/G6NM-FTLX.

176 Obergefell v. Hodges, 576 U.S. 644, 718 (2015) (Scalia, J., dissenting).

injunctions, emergency appeals, and unsigned orders.[177] But by the spring of 2024, the so-called "shadow" docket has more-or-less stabilized. Justice Kavanaugh's concurrence in *Labrador v. Poe* provides something of a unifying theory to handle the slew of urgent matters that are appealed to the Supreme Court.[178] Rather than continuously carping about the substance of these cases, it would be far more productive to address the procedures by which all Supreme Court cases are resolved—and not just emergency docket cases.

Proposal #4 would establish a standard timeline for review of petitions and applications on the Supreme Court's three primary dockets. First, the merits docket includes discretionary petitions for writs of certiorari, as well as mandatory jurisdiction appeals.[179] Second, the emergency docket includes non-capital emergency applications for stays, injunctions, and other expedited relief.[180] Third, the capital docket includes applications to stay or implement executions.[181] Historically, the capital docket and the emergency docket have been treated as one entity, but I argue it makes sense to separate them since they have wildly different effects.[182] The capital docket applies to a single person, whose execution cannot be undone. The emergency docket often applies to nationwide policies, in which policies can be started, stopped, and restarted based on a court order. To be clear, none of these rules would dictate *how* cases should be resolved. Rather, these rules would create specific protocols for the timely review of important matters.

3.2.1. Can Congress impose timelines on how quickly the Justices resolve matters?

Preferably, the Supreme Court should impose timelines to regulate how long certain matters take. However, realistically, self-regulation is unlikely. A more fruitful inquiry is whether Congress could impose timelines on the Justices by statute. Would such a statute be constitutional?

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177 *See* Josh Blackman, *Justice Kavanaugh Speaks at the Fifth Circuit Judicial Conference* (May 10, 2024, 5:53 PM), https://perma.cc/VDF6-V32K.

178 *See* Blackman, *supra* note 157.

179 *See id.*

180 *See Emergency Docket 2024-25*, SCOTUSBLOG, https://perma.cc/6FA7-7F4L.

181 *See id.*

182 *See id.*

I think this approach can be modeled as either a carrot or a stick, both of which lead to the same outcome. The latter approach would impose a mandate to decide a case in a specific period. I can't think of any similar statutes that require courts to decide an issue within a particular time horizon. Generally, courts are expected to recognize exigent circumstances that may justify moving quicker, and rule accordingly. But these norms are internally driven. Mandating that the Court decide a case within a particular time frame could intrude on judicial independence and the separation of powers.

Thankfully, there is also the carrot approach. Congress has near-complete control over the Supreme Court's appellate jurisdiction—tabling for a moment the controversial topic of jurisdiction stripping.[183] What if Congress *withdrew* the Supreme Court's appellate jurisdiction if the Court did not rule on a matter within a particular time? If the Supreme Court fails to act promptly, they lose appellate jurisdiction, and the judgment of the lower court would remain in effect. The parties could not complain; they received all the process that was due since there is no constitutional right to a Supreme Court appeal. I doubt the Supreme Court could claim that their judicial independence was broached. They could either decide the case or not. That is their decision.

With the carrot approach, the Justices would not be *forced* to act quickly, but if they drag their feet, they lose jurisdiction and surrender any say in the matter to the lower court. This is not jurisdiction *stripping*, but jurisdiction *expediting*.

Several statutes could serve as the basis for this proposal. At present, federal law imposes a loose obligation on the lower federal courts to act with dispatch for urgent cases. For example, 28 U.S.C. § 1657 generally grants federal courts the discretion to "determine the order in which civil actions are heard and determined," with one important caveat.[184] The statute provides that "the court shall expedite the consideration of . . . any action for temporary or preliminary injunctive relief, or any other action if good cause therefor is shown."[185] It is not clear whether this statute applies to the Supreme Court. But the McCain-Feingold Bipartisan Campaign Reform Act of 2002 (BCRA), expressly applies to the Supreme Court. It provides, "It shall

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183 *See Ex Parte* McCardle, 74 U.S. 506, 512–13 (1868).

184 28 U.S.C. § 1657.

185 *Id.*

be the duty of the United States District Court for the District of Columbia *and the Supreme Court of the United States* to advance on the docket and to expedite to the greatest possible extent the disposition" challenges brought under that statute.[186] To use another analogy, Congress has imposed a quorum requirement on the Supreme Court.[187] If the Court lacks a quorum of six, the decision of the lower court is simply affirmed.[188] Here, Congress has eliminated the Supreme Court's ability to decide a case if certain procedural rules are not met, and in that case, leaves in place the decision below. I think these statutes are perfectly constitutional and serve as models for my proposal.

Congress has broad power over the Supreme Court's appellate jurisdiction. But in fairness to *Marbury v. Madison*, I am less certain that Congress could impose deadlines on how quickly original jurisdiction cases must be resolved. Congress cannot add or subtract from that original jurisdiction, so the carrot approach would not work. The Justices could sit on state-versus-state water rights cases for as long as they want. (And those cases do tend to take forever. *Texas v. New Mexico* began in 1960 and was most recently addressed by the Court in 2023.[189]) But any case that arises in the Supreme Court's appellate jurisdiction could be placed on an expedited calendar. I admit my position here is tentative, but it could present a novel mode of congressional regulation of the Court's calendar.

3.2.2. The discretionary merits docket timeline

The Supreme Court exercises near-absolute control over the timing of its merits docket. At least with mandatory jurisdiction appeals under the BCRA, discussed above, the Court must "expedite [cases] to the greatest possible extent."[190] But for discretionary docket cases, the Justices can think fast,

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186 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (emphasis added).

187 *See* 28 U.S.C. § 1.

188 28 U.S.C. § 2109; *see* Missud v. Ct. of Appeals of Cal., 577 U.S. 918, 918 (2015); *"Because the Court Lacks a Quorum"*, JOSH BLACKMAN (Oct. 13, 2015), https://perma.cc/4V3J-D9K7.

189 Docket of Texas v. New Mexico, SCOTUSBLOG, https://perma.cc/4EJK-6YHS.

190 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

but move slow.[191] The Justices have absolute discretion to grant or deny these petitions.[192] The Court denies the overwhelming majority of petitions.[193] However, pinning down the precise rate, is somewhat complex, since the Court is more likely to grant petitions from repeat players such as the Solicitor General, certain non-profits, and well-regarded lawyers in private practice.[194] But on the whole, a petition is likely to be denied.

The Court's discretion over the merits docket is most visible with regard to the disposal of petitions for writs of certiorari. The rules provide fairly strict deadlines for when cert petitions must be filed.[195] Petitioners can seek extensions from the circuit justice.[196] Respondents can file a brief in opposition to certiorari or can waive a response.[197] In some cases, the Court will call for a response.[198] These filings are made on predictable timelines.[199] But once a case is fully briefed, the petition goes into a holding pattern.[200]

Generally, the Justices will consider a petition at a private conference, which is scheduled for the Friday of a week in which the court is in session.[201] As noted in Proposal #3 above, the Court does not hold conferences between the first week in July and the last week in September.[202] As a result, any petition that is fully briefed over the summer will be held over for the so-called "Long Conference."

After a petition is circulated for discussion at a conference, one of four things can happen to a petition. First, the most common outcome is an immediate *denial*.[203] Indeed, the overwhelming majority of petitions are denied

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191 *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

192 *See* Blackman, *supra* note 157.

193 Adam Feldman & Alexander Kappner, *Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001-2015*, 61 VILL. L. REV. 795, 795 (2017).

194 *See id.* at 837–38.

195 SUP. CT. R. 13(1)–(3).

196 *Id.* 13(5).

197 *Id.* 15(1)–(2).

198 *See id.* 20(4)(b).

199 *See id.* 13(1)–(5).

200 *See Supreme Court Procedures*, *supra* note 103.

201 *See The Court and Its Procedures*, *supra* note 97.

202 *See id.*

203 *See* Will Baude, *Arthur D. Hellman on the Supreme Court's Shrunken "Discuss List"*, VOLOKH CONSPIRACY (Nov. 21, 2023, 8:40 AM), https://perma.cc/W7SF-5QXG.

without any discussion.[204] Only those petitions on a "discuss" list are even talked about.[205] At least with a prompt denial, the Court puts the hapless petition out of its misery. In other cases, the Court takes actions that may build up some hope but will invariably lead to defeat.

Second, a petition can be *relisted*. A relist indicates that the petition was discussed at the conference, but was not resolved, and so was rescheduled to be discussed again at the next conference.[206] Perhaps there are only three votes for certiorari, and a Justice is trying to whip up a fourth vote. Or there are already four votes for certiorari, but the Justices want to more carefully scrutinize the petition. Multiple relists may also indicate that a Justice is working on a separate writing, such as a dissent from denial of certiorari, or a statement regarding the denial of certiorari.

Third, before the conference, a petition can be *rescheduled* to the next conference. The difference between a relist and a reschedule is that with the latter, the case is never brought up at conference.[207] The reasons for a reschedule are more cryptic. Perhaps a Justice requests more time to research a case before it is discussed. Maybe there is a delay in receiving the record or some other document. None of these rationales are publicized, of course. A case can be rescheduled many times before it is ever actually conferenced. The public will only learn about a relist or a reschedule because of notations on the public docket.

The fourth outcome is the rarest, but the most coveted, at least for the petitioner: a cert grant. After a case is granted, the case is put on a fairly orderly calendar, which involves a briefing schedule and a date for oral argument.[208]

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204 *See id.*

205 *See id.*

206 *FAQs: Announcements of Orders and Opinions*, SCOTUSBLOG, https://perma.cc/WH93-2JK4.

207 *See* John Elwood, *Reschedule Watch*, SCOTUSBLOG (Nov. 7, 2018, 11:46 AM), https://perma.cc/UV34-MUGE.

208 *See* SUP. CT. R. 16(2).

3.2.3. Strategic relists and reschedules

In recent years, the Court has consistently relisted a case once before granting it.[209] The thinking goes that this extended review period allows the Justices to ensure there are no "vehicle" problems. If a case is relisted twice, or more, then that signifies the petition will probably not be granted and set for oral argument. For example, the petition in *Buffington v. McDonough* asked the Court to overrule *Chevron*, was rescheduled seven times, and relisted four times before Justice Gorsuch wrote a solo dissent from denial.[210] The California Sanctuary City Case was relisted 13 times, then denied with Justices Thomas and Alito in dissent.[211]

Other times, a case will be relisted on many occasions as part of a "hold." The Justices may hold a petition while a related case is being decided.[212] On a hold, the Justices will keep relisting the case until the related case is resolved.[213] Then, the Court would grant the petition, vacate the lower court opinion, and remand the case in light of the new precedent.[214] This

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209 Ralph Mayrell & John Elwood, *The Statistics of Relists Over the Past Five Terms: The More Things Change, the More They Stay the Same*, SCOTUSBLOG (Jan. 4, 2022, 4:14 PM), https://perma.cc/CE7H-X9GR.

210 Josh Blackman, *Seven Reschedules, Four Relists, Zero Joins for Justice Gorsuch's* Chevron *Dissental*, VOLOKH CONSPIRACY (Nov. 8, 2022, 1:57 AM), https://perma.cc/M5HH-2RGE.

211 Josh Blackman, *Why did the Supreme Court Deny Certiorari in the California Sanctuary City Case After 13 Relists?*, VOLOKH CONSPIRACY (June 16, 2020, 9:00 AM), https://perma.cc/E25X-LEEY.

212 *See* Josh Blackman, *Making Sense of the Relists in* Arlene's Flowers, Dignity Health, and Roman Catholic Diocese of Albany, VOLOKH CONSPIRACY (Oct. 5, 2021, 9:32 PM), https://perma.cc/HLR2-3BES.

213 Scott L. Nelson, *Opposing Cert: A Practitioner's Guide*, PUB. CITIZEN, https://perma.cc/P9ZQ-CEUK.

214 *See* Blackman, *supra* note 212; Josh Blackman, *SCOTUS GVRs* Roman Catholic Diocese of Albany v. Lacewell *and Denies Cert in* Dignity Health*; Justices Thomas, Alito, and Gorsuch Would Have Granted Cert*, VOLOKH CONSPIRACY (Nov. 1, 2021, 9:58 AM), https://perma.cc/UR37-3HS4; Josh Blackman, *After a Decade of Litigation, 77-Year-Old Barronelle Stutzman Retires and Settles Arlene's Flowers Case for $5,000*, VOLOKH CONSPIRACY (Nov. 18, 2021, 5:13 PM), https://perma.cc/7B66-6A66; Josh Blackman, *30 Months After Only Three Justices Would Have Granted Cert in* Roman Catholic Diocese of Albany*, the New York Court of Appeals Holds* Fulton *Changed Nothing*, VOLOKH CONSPIRACY (May 21, 2024, 11:36 PM), https://perma.cc/L6XG-4PFN.

process is known as a GVR, and is very common after a new decision is issued.[215]

Multiple relists can also yield a GVR, even when there is not a hold. In *Andrus v. Texas*, for example, the case was rescheduled twice and relisted after *twenty* conferences.[216] The Court ultimately GVR'd the case.[217] At the time, I speculated that one Justice—probably Sotomayor—was able to whip up more votes for the remand.[218] Another related case was *Lombardo v. City of St. Louis*.[219] This excessive force case was rescheduled thirteen times and was then relisted several more times.[220] Eventually, the case was GVR'd with Justices Alito, Thomas, and Gorsuch in dissent.[221] Here, too, I speculated there was an "aggressive campaign" to GVR the case rather than deny cert outright.[222] After the remand, the plaintiffs lost, and the Supreme Court ultimately denied cert over dissents from Justices Sotomayor and Jackson.[223]

The two-relist rule, however, is not hard and fast. Some cases relisted more than once will ultimately yield a cert grant. The petition in *United States v. Vaello-Madero* was relisted five times and was then granted.[224] The petition in *New York State Rifle & Pistol Association v. Bruen* was relisted twice and was then granted cert with a rewritten question presented.[225] The petition in *Arizona v. San Francisco* was relisted four times and then granted.[226]

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215 *See Glossary of Supreme Court Terms*, SCOTUSBLOG, https://perma.cc/W25X-L2G4.

216 *See* John Elwood, *Sequel Watch*, SCOTUSBLOG (June 10, 2020, 11:38 AM), https://perma.cc/9ZLK-DVQB.

217 *See* Andrus v. Texas, 590 U.S. 806, 808 (2020).

218 Josh Blackman, *Why did the Court GVR* Andrus v. Texas*, Rather than Grant Cert?*, VOLOKH CONSPIRACY (June 16, 2020, 8:45 AM), https://perma.cc/DSD6-JDB6.

219 Docket of Lombardo v. City of St. Louis, SCOTUSBLOG, https://perma.cc/6SGA-WXRY.

220 *See id.*

221 S*ee* Lombardo v. City of St. Louis, 594 U.S. 464, 468 (2021) (per curiam).

222 Josh Blackman, *The 3-3-3 Court GVRs George-Floyd-Like Case After Chauvin Sentencing*, VOLOKH CONSPIRACY (June 28, 2021, 3:57 PM), https://perma.cc/Y94D-4JZH.

223 Lombardo v. City of St. Louis, 143 S. Ct. 2419 (2023) (mem.).

224 Blackman, *supra* note 141.

225 Josh Blackman, *Making Sense of the Limited Cert Grant in* NYS Rifle & Pistol Association v. Corlett, VOLOKH CONSPIRACY (Apr. 26, 2021, 11:50 AM), https://perma.cc/6PD7-JLHP.

226 Josh Blackman, *The Court Punts by Granting Cert on QP 1 in* Arizona v. San Francisco, VOLOKH CONSPIRACY (Nov. 30, 2021, 1:10 AM), https://perma.cc/NC2J-2B8Y.

Perhaps the most significant exception to the two-relist rule was *Dobbs v. Jackson Women's Health Organization*. The petition was filed in June 2020.[227] The Court first distributed *Dobbs* for the 9/29/20 conference.[228] It was then rescheduled for 10/9/20,[229] again for 10/16/20,[230] and again for 10/30/20—three days after Justice Barrett was confirmed.[231] Finally, the petition was distributed for the 1/8/21 conference.[232] In total, the petition was rescheduled before eight conferences.[233] What happened next? The petition was relisted after the conferences on January 15, January 22, February 19, February 26, March 5, March 19, March 26, April 1, April 16, April 23, and April 30.[234] The *New York Times* reported that the Mississippi Attorney General and Solicitor General "watched the Supreme Court seem to ignore their case for months" and "found the apparent indecision strange" as the "the justices were dragging their feet."[235] Maybe they would decide to not hear the case at all. Finally, at the May 13 conference, the case was granted, limited to the first question presented of whether *Roe v. Wade* should be overruled.[236]

The *New York Times* would later report that Circuit Justice Alito, who has authority over the Fifth Circuit, rescheduled *Dobbs* while waiting for Justice Ginsburg's vacancy to be filled.[237] Moreover, the *Times* further reported

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227 Docket of Dobbs v. Jackson Women's Health Organization, SCOTUSBLOG, https://perma.cc/MCC4-3DNS.

228 *Id.*

229 *Id.*

230 *Id.*

231 *Id.* at 3; Roll Call Vote 116th Congress - 2nd Session, U.S. SENATE (Aug. 16, 2024, 3:37 PM), https://perma.cc/9AU4-YGWV.

232 Docket of Dobbs v. Jackson Women's Health Organization, *supra* note 227.

233 Josh Blackman, *What is Going on With* Dobbs v. Jackson Women's Health Organization*? (Updated),* VOLOKH CONSPIRACY (Mar. 23, 2021, 6:03 PM), https://perma.cc/U5JH-P84U.

234 *See* Docket of Dobbs v. Jackson Women's Health Organization, *supra* note 227.

235 Elizabeth Dias & Lisa Lerer, *The Untold Story of the Network that Took Down* Roe v. Wade, N.Y. TIMES (May 18, 2024), https://perma.cc/VZF4-GR3M.

236 Docket of Dobbs v. Jackson Women's Health Organization, *supra* note 227.

237 Jodi Kantor & Adam Liptak, *Behind the Scenes at the Dismantling of* Roe v. Wade, N.Y. TIMES (Dec. 15, 2023), https://perma.cc/76F6-TN7P ("But instead of discussing whether to take the case, the court rescheduled the matter again and again, for an unusual nine times, through the end of the year. For at least some of that period, Justice Alito was doing the rescheduling, according to two people who observed the

that there were five votes to grant at the January 8, 2021, conference, but Justice Kavanaugh proposed that the case should be relisted for some time to kick the argument till the following term.[238] Again, had the case been granted on January 8 before the oral argument cutoff, it would have been heard during that term. Moreover, according to the *Times*, Justice Barrett issued an ultimatum: if the Court did not postpone the case till the following term, she would flip her vote to "deny."[239] What seems likely is that Kavanaugh and Barrett agreed to the same dilatory tactic, forcing the conservatives to go along with relisting the case. The article gives Kavanaugh credit for the delay strategy and suggests that Barrett followed along.[240]

At the time I wrote, "I've long suspected the Court manipulated the timing of the docket through relists, reschedules, and CVSGs."[241] I still think that happens. And I think that is what happened with *Students for Fair Admissions*, discussed in Section 3.1.3 above.[242] The Court, in my view, strategically uses relists and reschedules to postpone consideration of a case until the following term. And when the Justices strategically manipulate timing of the docket, the Court more closely resembles an active legislative body, than a passive judicial body that takes cases as they arrive. Proposal #4 would clamp down on this sort of strategic docket manipulation.

3.2.4. Rule on the petition or lose jurisdiction

Proposal #4 would address the time between when a petition for a writ of certiorari is fully briefed and when the petition is disposed. The existing timelines for the cert-stage briefing would remain the same, as would the existing timelines for merit-stage briefing and oral argument. The Court is fairly regimented with these two timelines, so legislation is unnecessary.

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process. To some at the court, he appeared to be waiting for his new colleague to get settled."); *see* Josh Blackman, *16 Disclosures from the* New York Times *Leak Report About* Dobbs, VOLOKH CONSPIRACY (Dec. 15, 2023, 3:17 PM), https://perma.cc/9FNQ-FLCG.

238 Kantor & Liptak, *supra* note 237.

239 *Id.*

240 *Id.*

241 Josh Blackman, *Ten Reflections on Justices Kavanaugh and Barrett's Votes in* Dobbs, VOLOKH CONSPIRACY (DEC. 16, 2023, 11:58 PM), https://perma.cc/RR7Y-22R4.

242 *See* discussion *supra* Section 3.1.3.

Rather, Proposal #4 would focus on the timelines between distribution and disposition.

Under Proposal #4, a petition for a writ of certiorari would have to be *granted* or *denied* within ninety days of when the petition is filed. This gap would provide ample time for consideration. First, if a petition is filed, and a brief in opposition is filed in the normal course, there would be ample time to grant or deny the petition. Second, if a petition is filed, and the response is waived, the petition can be denied within a month or so of filing. Third, if a petition is filed, and if a response is waived, and the Court calls for a response, the brief in opposition could be filed within a month or so and considered at conference a month later. But one way or the other, the petition must be ruled upon in ninety days.

This deadline would make it more difficult to write lengthy dissents from denial of certiorari. So be it. I think a Justice can effectively signal an interest in a case with a one-sentence order explaining why cert should be granted. Or a dissent with any opinion is just as effective—Justice Kavanaugh has recently noted dissents from denial on the orders list.[243] The Justices can also prepare these statements in advance and append them to a particular vehicle that raises that issue. These issues tend to recur.

This deadline could also make it more difficult to whip up four votes for a cert grant. I am skeptical how often this actually happens, at least on the current Court. I can only think of a few examples, which are discussed above.[244] My general sense is that when a case does not have four votes at the current conference, it will never get four votes. Whatever lobbying is going on inside the Court is not working. The Court's left-wing uses defensive denials to maintain favorable precedents. At the same time, the Court's right-wing is largely unsuccessful at persuading Justices Kavanaugh and Barrett to provide a grant on many hot-button cases. There are an inordinate number of cert-denials with signed dissents by Justices Thomas, Alito, and Gorsuch. The so-called "join three," in which a Justice would grant a courtesy

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243 Josh Blackman, *Justice Kavanaugh Wants to Hear More Cases,* VOLOKH CONSPIRACY (Apr. 24, 2023, 10:26 PM), https://perma.cc/68Y7-9MV6.

244 *See* discussion *supra* Section 3.2.2.

fourth vote when there were already three,[245] is dead.[246] Conversely, a ninety-day clock could create incentives for the Justices to vote to provide a fourth vote. As the saying goes, *grant or get off the pot*.

This deadline would probably make it more difficult to grant extensions in filing petitions for writs of certiorari and replies. So be it. Litigation before the Supreme Court should generally be prioritized over other matters. Moreover, some circuit justices are more parsimonious with extensions than others.[247] A uniform timeline would provide consistency among the circuits.

If Proposal #4 is adopted, in tandem with Proposal #3, a case could go from cert petition to cert grant to oral argument to decision in as little as six months. I see such expedited rulings as a vast improvement on the current timeline, in which nearly two years can span between a cert petition and a decision. Moreover, with this ninety-day clock, the Justices could not manipulate the docket by relisting a case indefinitely. No more cert pool purgatory. And if Proposals #5 and #9 are adopted, the Court's mandatory jurisdiction would be vastly increased, thus making discretionary cert grants far less important.

3.2.5. The usual emergency docket timeline

The timelines for filing cert-stage briefs are set by rule.[248] And the timelines for merit-stage briefing are fairly predictable.[249] But on the

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245 Joan Biskupic, *What Sandra Day O'Connor's Papers Reveal About a Landmark Supreme Court Decision–and Why it Could be Overturned Soon*, CNN (Apr. 9, 2024, 9:47 AM), https://perma.cc/YWY5-LA5X ("According to O'Connor's note from the first vote in the justices' private conference in mid-May, only Justices Byron White and William Rehnquist wanted to grant the case. O'Connor offered a 'join 3,' meaning she would provide the requisite fourth vote if three others wanted to hear the case. But there was no third vote at that point. Powell asked that they all wait at least another week so he could continue mulling the dispute, and when the nine again voted at the end of the month, he was ready to provide a third vote. So, with O'Connor's 'join three' the case was accepted.").

246 Blackman, *supra* note 177; *see also* Blackman, *supra* note 157.

247 *See* Howe, *supra* note 13 ("The late Justice Antonin Scalia, for example, virtually never granted [extensions], while now-retired Justice John Paul Stevens would generally grant not just one but two 30-day extensions as long as they were timely filed.").

248 *See* discussion *supra* Section 3.2.4.

249 *Id.*

emergency docket, all bets are off. The process begins when a party files an emergency application for a stay of a lower court ruling, or for an injunction.[250] At that point, the circuit justice has discretion over how to proceed.[251]

The circuit justice can deny the application outright.[252] If the case has some merit, the circuit justice will usually enter a temporary administrative stay that puts the lower court ruling on hold until the full Court disposes of the case.[253] The duration of the temporary administrative stay can be short or long.[254] In a recent case, Justice Barrett faulted the Fifth Circuit for issuing lengthy temporary administrative stays, in an appeal where the Supreme Court issued a lengthy temporary administrative stay.[255] At the same time as the administrative stay is issued, the circuit justice will issue a briefing schedule.[256] In some cases, the Respondent may have a few days to respond.[257] In other cases, the Respondent may have two weeks.[258] The compression of the schedule turns on how urgent the matter is.

Once the case is fully briefed, it enters something of a black box. The Court could promptly deny the application outright.[259] The Court could even extend an administrative stay.[260] The Court could decide to treat the emergency application as a petition for a writ of certiorari, grant the writ, and hear the case on an expedited timeline.[261] The Court could defer ruling on

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250 *See* PUB. INFO. OFF. SUP. CT. OF THE U.S., A REPORTER'S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES 2, https://perma.cc/W6SP-H53U.

251 *See id.* at 3.

252 *See id.* at 3–4.

253 *See* U.S. v. Texas, 144 S. Ct. 797 (2023) (on application to vacate stay) (Barrett, J., concurring).

254 *See* PUB. INFO. OFF. SUP. CT. OF THE U.S., *supra* note 250, at 3.

255 *See Texas*, 144 S. Ct. at 797.

256 *See* FDA v. All. for Hippocratic Med., 215 L. Ed. 2d 646 (2023).

257 *See id.*

258 *See No. 24A463*, SUP. CT., https://perma.cc/6DEA-7ZF7.

259 *See (Order List: 602 U.S.)*, Sup. Ct. 23A851 (June 3, 2024), https://perma.cc/FV6E-NSKJ.

260 *See* Josh Blackman, *Shadow Docket Delays*, VOLOKH CONSPIRACY (Aug. 6, 2023, 3:22 PM), https://perma.cc/28CQ-9D9D; Josh Blackman, *The Sequel to* Doe v. Mills*: Justice Barrett Tightens the Screws on the Shadow Docket,* VOLOKH CONSPIRACY (Mar. 19, 2024, 5:10 PM), https://perma.cc/G4TP-XE7J [hereinafter Blackman, *The Sequel to* Doe v. Mills]; Las Ams. Immigrant Advoc. Ctr. v. McCraw, 218 L. Ed. 2d 202 (2024).

261 *See (Order List: 601 U.S.)*, Sup. Ct. (Jan. 5, 2024), https://perma.cc/B6N4-4BTL.

the application, and schedule oral argument on the emergency application.[262] I've called this approach the *Rocket Docket*.[263] The Court can rule on the petition at any time, with no advance notice.[264] And when the Court does rule, there may be a per curiam opinion, with one or more separate writings.[265]

3.2.6. A standardized timeline for the emergency docket

Under my proposal above for the merits docket, if the Court fails to rule on a cert petition within ninety days, the petition will be denied as a matter of law, and the lower-court decision will stand. With regard to the emergency docket, the mechanics would be a bit different. For starters, under Proposal #8, injunctions of statutes from three-judge district courts are automatically stayed, while injunctions of statutes from three-judge district courts are not automatically stayed. This bifurcation will be discussed in detail in Section 4.3 below.[266] Here, I will discuss those cases for which an automatic stay is not granted, and the non-prevailing party will have to seek a stay.

The timeline will be quick. If the Court fails to rule on an emergency application within fourteen days, the application will be denied as a matter of law. Stated differently, after two weeks, the Supreme Court would lose appellate jurisdiction over the case. I imagine that the Court could require the response brief, and a reply, to be filed in a week, which would leave a week for deliberation. But in reality, the Justices will have had much more time to think about the matter. While the case was percolating in the lower court, the Justices can keep an eye on things. Perhaps the most favorite instance of such monitoring was in *Bush v. Gore*, when Circuit Justice Kennedy kept a close eye on the proceedings in the Florida Supreme Court.[267] In death

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262 *See* discussion *supra* Section 3.1.5 (discussing expedited oral argument).

263 Blackman, *supra* note 156.

264 William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 5 (2015).

265 *See generally* Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021).

266 *See* discussion *infra* Section 4.3.

267 *See* Linda Greenhouse, Bush v. Gore*, A Special Report.; Election Case a Test and a Trauma for Justices*, N.Y. TIMES (Feb. 20, 2001), https://perma.cc/P9Q4-TC3U ("As the federal case moved quickly up the judicial ladder, one justice who watched with

penalty cases, at least, counsel notifies the clerk's office that an emergency application will be coming soon. I imagine that in fast-moving cases, litigants can give the Court a heads up that a case is bound for the emergency docket. By the time an emergency application is filed, there will already be the benefit of a lower court decision and briefing. There are unlikely to be surprises at this juncture.

I think it would be impossible to issue a fully reasoned decision in a week or so. Likewise, it will be difficult to produce separate writings. I think this lack of opinions is a feature, rather than a bug. The Court does its worst work when it rushes. Emergency docket cases should not be treated as precedential. (I still think it significant that *Fulton v. City of Philadelphia* did not even cite any of the COVID emergency docket cases.[268]) The sole question at this preliminary stage is whether to grant or deny an emergency application.

If the Court denies the application, the lower court ruling remains in effect. If the Court grants the application, the lower-court ruling is paused. Eventually, a case with a granted application could come back to the Court through a writ of certiorari. (Although under Proposal #8, where a three-judge district court grants a preliminary injunction, and is divided, the appeal will be referred to the Supreme Court's mandatory jurisdiction, with mandatory oral argument.) If the Court is unable to resolve the case in such a short time frame, the Justices could choose to treat the application as a petition for a writ of certiorari and grant the case for expedited oral argument at the next available sitting. That grant would resolve the application. And if Proposal #3 is adopted, the Court would hold argument sessions year-round, so the delay will be at most a month.

However, if the Court takes no action, the emergency application will automatically be denied, and the action of the lower court will remain in effect. The Justices will have every incentive to give a thumbs-up or thumbs-down, and then proceed to decide the case in a more orderly fashion.

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particular interest was Justice Kennedy. As circuit justice for the United States Court of Appeals for the 11th Circuit, he has administrative responsibility for emergency cases reaching the court from federal and state courts in Georgia, Alabama and Florida.").

268 *See* Josh Blackman, *Justice Gorsuch Illustrates How* Smith-*post*-Fulton *Should Be Applied*, VOLOKH CONSPIRACY (Oct. 30, 2021, 3:18 PM), https://perma.cc/UY27-DR5V ("[In *John Does 1-3 v. Mills*] Justice Gorsuch, Thomas, and Alito think that *Tandon* is precedential. Yet, *Fulton* cited neither shadow docket case.").

3.2.7. The capital docket is a mess

Most challenges to capital sentences are brought under the Antiterrorism and Effective Death Penalty Act (AEDPA).[269] AEDPA, despite its name, does little to make the death penalty *effective*.[270] The "machinery of death," as Justice Blackmun called it,[271] moves fast and slow. Inmates can sit on death row for years or even decades without any new developments. But once a death warrant is issued, the pace picks up. Invariably, there is an eleventh-hour appeal to the Supreme Court, where the Justices are forced to resolve a case in a very compressed time. The capital docket is a mess.

The execution of Christopher Lee Price illustrates these dynamics.[272] A twenty-four hour death warrant was issued for Price's execution on Thursday, April 11, before midnight.[273] Early that day, a district court judge put the execution on hold for sixty days.[274] She found that Alabama's proposed execution protocol would likely be more painful than an alternative method, known as nitrogen hypoxia.[275] (In 2024, an Alabama inmate would be executed with nitrogen hypoxia, which abolitionists now claim is more painful than other methods.[276]) The state appealed the district court's stay of

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269 Paul J. Larkin, *The Reasonableness of the "Reasonableness" Standard of Habeas Corpus Review Under the Antiterrorism and Effective Death Penalty Act of 1996*, 72 CASE W. RES. L. REV. 669, 698 (2022), https://perma.cc/W652-JKJL (discussing how Supreme Court has frequently addressed issues in capital punishment cases involving AEDPA).

270 *See* Josh Blackman, *The Genius v. SCOTUS*, VOLOKH CONSPIRACY (Nov. 2, 2021, 2:49 PM), https://perma.cc/STR8-SQSE (I attempted to use this argument in my federal habeas class during law school but was not successful).

271 Callins v. Collins, 510 U.S. 1141, 1145 (1994) ("From this day forward, I no longer shall tinker with the machinery of death.").

272 *See* Josh Blackman, *Tensions on the Supreme Court Are Spilling Into View*, WASH. POST (Apr. 15, 2019, 2:25 PM), https://perma.cc/R4T5-M3UU (discussing how Price's case revealed the inner workings of the Court's "shadow docket").

273 *See* Price v. Dunn, 139 S. Ct. 1533, 1536 (2019) (Thomas, J., concurring) ("the warrant expired at midnight").

274 *Id.*

275 *See id.*

276 *See* Paul Hammel, *Opponents of Death Penalty Decry Proposal to Use Nitrogen Gas for Executions*, NEB. EXAMINER (Feb. 28, 2024, 7:21 PM), https://perma.cc/K2CT-S2BS.

execution.[277] Several hours later, the court of appeals declined to disturb the lower court's ruling, given the looming deadline.[278]

Around 9 P.M. Thursday,[279] the state filed an emergency motion for a stay with the Supreme Court.[280] In theory, at least, the Court could have ruled that evening before the death warrant expired. But that deadline would lapse. Early Friday morning, five Justices voted to authorize the execution: Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh.[281] In a single paragraph, the majority suggested that Price waited too long to pursue his claim.[282] This order allowed the Justices to quickly and quietly resolve a controversial matter. Or at least that was the plan.

In response, Justice Breyer wrote an impassioned dissent, joined by Justices Ginsburg, Sotomayor, and Kagan.[283] He shined a light on the Justices' late-night deliberations. Breyer "requested that the Court take no action" until its regularly scheduled conference on Friday.[284] He said the "delay was warranted" so the Justices could hash out the issue in person.[285] His conservative colleagues disagreed. They wouldn't wait a few more hours, even though Alabama had already called off the execution. Once midnight struck, the state's death warrant turned into a pumpkin, and expired.

Justice Breyer's decision to disclose the inner workings of the capital docket was rare. At the time, I wrote "Breyer and his colleagues must have made a calculated decision: Highlighting the method with which the court reviewed the appeal was worth the cost of diminishing collegiality on the court."[286]

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277 *Price*, 139 S. Ct. at 1536.

278 *Id.*

279 David G. Savage, *Alabama Execution Delayed After Divided Supreme Court Misses Deadline to Act*, L.A. TIMES (Apr. 12, 2019, 8:15 AM), https://perma.cc/FYJ7-JTHY (describing that "[s]hortly before 9 p.m. [sic] Thursday . . . Marshall filed an emergency appeal").

280 Emergency Motion to Vacate Stay of Execution, Price v. Dunn, 139 S. Ct. 1533 (2019) (No. 18-8766).

281 *See* Dunn v. Price, 139 S. Ct. 1312, 1312 (2019).

282 *See id.*

283 *See id.* at 1313 (Breyer, J., dissenting).

284 *Id.* at 1314.

285 *Id.*

286 Blackman, *supra* note 272.

About one month later, the case returned to the Court. On May 13, 2019, the Court denied review, allowing the execution to go forward.[287] There were no recorded dissents.[288] Justice Thomas wrote a concurrence, joined by Justices Alito and Gorsuch, to "set the record straight" on the case.[289] Thomas accused Price's lawyers of engaging in "dilatory litigation strategies that we have recently and repeatedly sought to discourage."[290]

Thomas also responded to Justice Breyer's earlier concurrence. Thomas wrote that "it should be obvious that *emergency* applications ordinarily cannot be scheduled for discussion at weekly (or sometimes more infrequent) Conferences."[291] It was only fortuitous that a conference was scheduled for the following day, since the Court only holds about thirty conferences per term. Had the application been filed in early July, there would be nearly a three-month gap before a conference would be held.

Thomas explained that requiring an immediate in-person conference "would only further incentivize prisoners to file dilatory challenges to their executions by rewarding them with *de facto* stays of execution."[292] Moreover, Justice Breyer's approach "would hamper the States' ability to carry out lawful judgments, while simultaneously flooding the courts with last-minute, meritless filings."[293]

Still, Thomas explained, Breyer and the dissenters "got [their] way by default."[294] Due to Breyer's request for a delay, "[t]he Court instead failed to issue an order before the expiration of the warrant at midnight, forcing the State to 'cal[l] off' the execution."[295] Thomas charged that, "To the extent the Court's failure to issue a timely order was attributable to our own dallying, such delay both rewards gamesmanship and threatens to make last-

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287 Price v. Dunn, 139 S. Ct. 1533, 1533 (2019).
288 *See id.*
289 *Id.* (Thomas, J., concurring)
290 *Id.* at 1538.
291 *Id.* at 1539.
292 *Id.*
293 *Id.* at 1539–40.
294 *Id.* at 1540.
295 *Id.*

minute stay applications the norm instead of the exception."[296] Price was executed on May 30, 2019.[297]

3.2.8. Regularize the capital docket

Even though I am generally unsympathetic to eleventh-hour appeals in capital cases, I was troubled by the disjointed fashion in which the Court resolved Price's case. At the time, I offered a proposal:

> As a matter of course, the court should automatically halt any executions for 72 hours — an "administrative stay." During this time, the Justices can circulate memorandums, or even convene by videoconference, to discuss the matter. If, after three days, a majority of the court still believes the execution should proceed, then the stay dissolves automatically. And any dissenting Justices can prepare a dissent under less-frenzied conditions.[298]

Five years later, I'm not sure that I still agree with my proposal. I heard legitimate complaints from lawyers who practice in this area. Since death penalty warrants generally only last for twenty-four hours, the effect of this proposal would be to make it impossible to carry out executions. Point taken. Instead, let me offer here a variant that is consistent with the broader thrust of this article.

First, states could modify their laws such that death warrants remain effective during a longer window—for example, one week or a period at the governor's discretion. Congress could not commandeer states to modify their death penalty laws, but I think that states that enforce the death penalty would have an interest in avoiding potential judicial roadblocks. In 2023, Alabama eliminated the twenty-four hour window for an execution and empowered the governor to determine the window of time for an execution.[299]

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296 *Id.*

297 *Alabama Executes Man Convicted of Killing Pastor with Sword and Knife Just Before Christmas*, CBS NEWS (May 31, 2019, 12:38 AM), https://perma.cc/8PBY-KNQ9.

298 Blackman, *supra* note 272.

299 ALA. R. APP. P. 8(d)(1) ("The supreme court shall at the appropriate time enter an order authorizing the Commissioner of the Department of Corrections to carry out the inmate's sentence of death within a time frame set by the governor, which time frame shall not begin less than 30 days from the date of the order, and it may make other

Other states can follow suit. Similar changes could be made for federal death warrants,[300] though federal executions are rare.[301]

Second, Congress would modify AEDPA to impose strict filing deadlines on last-minute challenges in capital cases. Challenges to an execution where there is an active death warrant must be filed in federal district court *at least* six days before the death warrant expires. (Again, this assumes that a death warrant lasts for at least that long.) Any petitions filed after this deadline would be denied as a matter of law. To avoid any potential problems under the Due Process or the Suspension Clause, perhaps there could be some safety-valve for *actual* newly discovered evidence that could not be introduced before the deadline. And the parties would have to meet an extremely high burden to satisfy the safety valve. Capital lawyers insist these last-minute legal challenges are unavoidable.[302] I am skeptical.[303] Make AEDPA effective again. Perhaps a harsh rule is in order. But the next step ameliorates those concerns.

Third, if a challenge to an execution is timely filed at least six days before an effective death warrant expires, an automatic stay is entered as a matter of law. Of course, challenges filed earlier than six days are allowed. But there is a deadline. And there are incentives for the lower courts to move

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appropriate orders upon disposition of the appeal or other review."); *see also* Kim Chandler, *Alabama Extends Time for Executions, Ends Automatic Review*, ASSOCIATED PRESS (Jan. 18, 2023, 5:44 PM), https://perma.cc/A2GT-WS5C.

300 *See* 28 C.F.R. § 26.3.

301 *See* Michael Tarm, *Fuller Picture Emerges of the 13 Federal Executions at the End of Trump's Presidency*, ASSOCIATED PRESS (Oct. 3, 2023, 10:52 AM), https://perma.cc/V2W7-6SZU (referencing the thirteen federal executions that occurred during Trump's term).

302 *See* Bucklew v. Precythe, 139 S. Ct. 1112, 1144–45 (Breyer, J., dissenting) (claiming majority's ruling "places unwarranted obstacles in the path of prisoners"); Kari Blakinger & Beth Schwartzapfel, *The 1990s Law That Keeps People in Prison on Technicalities*, MARSHALL PROJECT (May 26, 2022, 6:00 AM), https://perma.cc/3BLC-R96X (claiming that "[eighty] death row prisoners had missed the one-year deadline and their chance at an appeal in federal court . . . due to mailing or filing mishaps").

303 Price v. Dunn, 139 S. Ct. 1533, 1539–40 (2019) (Thomas, J., concurring) ("And any blame for decisions 'in the middle of the night,' . . . falls on petitioner, who filed the new preliminary injunction motion that resulted in the stays just *five hours* before his execution . . . . Petitioner's strategy is no secret, for it is the same strategy adopted by many death-row inmates with an impending execution: bring last-minute claims that will delay the execution, no matter how groundless.").

things along. That stay will remain in effect so long as the district court rules on the challenge at least five days before the death warrant expires, and so long as the court of appeals rules on the challenge at least four days before the death penalty expires.

These time periods may not give the lower courts oodles of time to prepare a fully reasoned opinion. So be it. What ultimately matters is how the Supreme Court resolves the matter. *Every* capital case goes to the Supreme Court and is almost always resolved in a one-sentence order. The lower courts may take pride and value in their work, but it seldom matters in the end. If the district court or the court of appeals take too long to rule, the automatic stay expires. The prisoner could still ask the Supreme Court for an emergency stay, but those applications will be rushed and hard to grant. I think district courts would realize the consequences for not ruling promptly and moving the case along quickly.

Fourth, if all goes to plan, the case would arrive to the Supreme Court *no less than* seventy-two hours before the death warrant expires. At that point, the Justices will have sufficient time to review the application, discuss it at an in-person or virtual conference, and rule on the case. If five Justices vote to vacate the stay, the execution would go forward. If five Justices vote to leave the stay in place, the execution cannot go forward. If the Justices take no action by twelve hours before the death warrant expires, the automatic stay expires, and the execution can go forward. Like with the emergency docket deadlines above, the Justices have an opportunity to rule on the emergency application, but if they do nothing, they lose their chance to act.

This process offers benefits and burdens for both sides. If death penalty lawyers bring their claims earlier, they can be rewarded by an automatic stay, with no need for frantic briefing. But if death penalty lawyers file eleventh-hour appeals, they may be barred from seeking judicial review altogether. The states and the lower courts also have a clear deadline of how to proceed in the face of an urgent deadline.

In the end, I still expect virtually all of these appeals to be denied. But at least the Justices would no longer be forced to rule on petitions in the span of a few hours, due in part to dilatory tactics by death penalty lawyers.

3.3. Proposal #5: Appeals in the Court's mandatory jurisdiction must be scheduled for oral argument.

Today, the bulk of the Supreme Court's docket is discretionary. That is, the Court has the choice of whether to grant petitions for writs of certiorari. There are small pockets of the Court's jurisdiction that are *mandatory*. For example, the Justices are required to review certain cases from three-judge district courts involving the Voting Rights Act and campaign finance law.[304] Justices Thomas and Alito have argued that cases arising in the Supreme Court's *original* jurisdiction are *mandatory*.[305] This argument, however, has not caught on.[306]

The Court receives a handful of these mandatory cases each year. By my count, nearly 40% of these mandatory cases are resolved by summary affirmance without the benefit of oral argument.[307] If Congress thought these cases were important enough to warrant mandatory jurisdiction, the Court could indulge to give each of these cases some oral argument time. Proposal #5 would mandate that appeals in the Court's mandatory jurisdiction must be scheduled for oral argument.

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304 *See* 28 U.S.C. § 2284(a) ("A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."); Richard Hasen, *Election Law's Path in the Roberts Court's First Decade*, 68 STAN. L. REV. 1597, 1621 (2016 ("Of the thirty election law cases from 2006 to 2015 in which the Roberts Court issued an opinion, fourteen of them came to the Court on mandatory appellate review.").

305 *See e.g.*, Texas v. California, 141 S. Ct. 1469, 1472 (2021) (Alito, J., dissenting) ("Since that time, the Court has repeatedly declined to exercise its exclusive original jurisdiction in state-versus-state cases, relying on the rationales provided in these earlier decisions."); Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (Alito, J., dissenting) ("In my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction."); Arizona v. California, 140 S. Ct. 684 (2020) ("The Constitution establishes our original jurisdiction in mandatory terms."); Nebraska v. Colorado, 577 U.S. 1211 (2016) (Thomas J., dissenting) ("Federal law does not, on its face, give this Court discretion to decline to decide cases within its original jurisdiction.").

306 Josh Blackman, *Can California and Texas Now Resolve Their Dispute "by Self-Help Measures"?*, VOLOKH CONSPIRACY (Apr. 26, 2021, 1:29 PM), https://perma.cc/ZVV3-DMD3.

307 See *infra* Section 3.3.1, 3.3.2.

3.3.1. Mandatory jurisdiction cases that are argued

By my count, since 2006, the Roberts Court has received approximately forty-five cases in its mandatory jurisdiction.[308] These cases involve election law or campaign finance law.[309] By my count, in twenty-eight of these cases, the Court noted probable jurisdiction, or alternatively, "postponed" the "question of jurisdiction," and then heard oral argument.[310] On average, the Court heard oral argument in one or two such cases each term.[311] It is not a significant percentage of the Court's ever-shrinking oral argument docket. (I will address the other 40% of the mandatory cases below.)

Still, Chief Justice Roberts apparently thinks the Court is forced to decide too many mandatory jurisdiction cases from three-judge district

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308 *See* cases cited *infra* note 310, 320.

309 *See* sources cited *supra* note 304.

310 Alexander v. S.C. State Conf. of the NAACP, 143 S. Ct. 2456 (2023) ("Probable jurisdiction noted."); Merrill v. Milligan, 142 S. Ct. 879 (2022); Fed. Election Comm'n v. Cruz, 142 S. Ct. 55 (2021); Trump v. New York, 141 S. Ct. 616 (2020); Rucho v. Common Cause, 139 S. Ct. 782 (2019); Lamone v. Benisek, 139 S. Ct. 783 (2019); Gill v. Whitford, 137 S. Ct. 2268 (2017); Benisek v. Lamone, 138 S. Ct. 543 (2017); Abbott v. Perez, 138 U.S. 735 (2018); Va. House of Delegates v. Golden Bethune-Hill, 139 S. Ct. 481 (2018); McCrory v. Harris, 136 U.S. 2512 (2016); Bethune-Hill v. Va. State Bd. of Elections, 136 U.S. 2406 (2016); Wittman v. Personhuballah, 577 U.S. 982 (2015); Evenwel v. Abbott, 575 U.S. 1024 (2015); Harris v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 1083 (2015); Ala. Democratic Conf. v. Alabama, 572 U.S. 1149 (2014); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 573 U.S. 990 (2014); McCutcheon v. Fed. Election Comm'n, 568 U.S. 1156 (2013); Ala. Legis. Black Caucus v. Alabama, 572 U.S. 1149 (2014); Perry v. Perez, 565 U.S. 1090 (2011); Schwarzenegger v. Plata, 560 U.S. 964 (2010) Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 555 U.S. 1091 (2009); Citizens United v. Fed. Election Comm'n, 555 U.S. 1028 (2008); Davis v. Fed. Election Comm'n, 552 U.S. 1135 (2008); Fed. Election Comm'n v. Wis. Right to Life, Inc., 549 U.S. 1177 (2007) ("On appeal from the United States District Court for the District of Columbia. Further consideration of the question of jurisdiction postponed to the hearing of the case on the merits."); Off. of Senator Mark Dayton v. Hanson, 549 U.S. 1177 (2007); Riley v. Kennedy, 552 U.S. 1035 (2007) ("Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits."); Wis. Right to Life, Inc. v. Fed. Election Comm'n, 545 U.S. 1164 (2005) (Probable jurisdiction was noted on September 27, 2005, two days before Chief Justice Roberts assumed office.)

311 *See* cases cited *supra* note 310.

courts. In 2009, Theodore Olson argued on behalf of *Citizens United v. FEC* in the landmark campaign finance case.[312] Challenges to the Bipartisan Campaign Finance Reform Act of 2003 (BCRA) would be appealed from a three-judge district court to the Supreme Court's mandatory jurisdiction.[313] Olson observed that in the span of six years, he "counted twenty-two separate opinions from the Justices of this Court attempting to . . . to figure out what this statute means."[314] Chief Justice Roberts interjected, "Well, that's because it's mandatory appellate jurisdiction. I mean, it's—you don't have a choice."[315] Laughter ensued. And in 2015, the Court heard oral argument in *Shapiro v. McManus*, a redistricting case.[316] Chief Justice Roberts lamented the Court's mandatory jurisdiction. He referred to appeals from the three-judge panels as "a serious problem because there are a lot of cases that come up" on mandatory jurisdiction "that would be the kind of case—I speak for myself, anyway—that we might deny cert in, to let the issue percolate."[317] But "with the three-judge district court, no, we have to decide it on the merits."[318] The Chief Justice saw Congress's judgment about which cases were important as a "serious problem."[319]

The Chief doth protest too much, methinks. One or two additional oral arguments per term does not seem unduly burdensome. And if that small increase in cases is problematic, then the Court should buckle up for the rest of my proposals.

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312 558 U.S. 310 (2010).

313 *See* Act of Mar. 27, 2002, Pub. L. No. 107-155, § 403, 116 Stat. 82, 114 ("The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code. . . . A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States.").

314 Transcript of Oral Argument at 14, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (No. 08-205).

315 *Id.*

316 577 U.S. 39 (2015).

317 Transcript of Oral Argument at 28, Shapiro v. McManus, 577 U.S. 39 (2015) (No. 14-990).

318 *Id.*

319 *Id.*

3.3.2. Mandatory jurisdiction cases that are not argued

Even with mandatory appellate jurisdiction, there are shortcuts. The Justices can largely duck a mandatory jurisdiction case through a summary affirmance. Indeed, there is no need for the Court to hear oral argument or take any action other than a one-sentence order. By my count, since 2006, the Roberts Court has issued about seventeen such summary affirmances with a one-sentence order: "judgement affirmed."[320] That total represents nearly 40% of the mandatory jurisdiction cases appealed to the Court during that time.[321] To be sure, the parties spent sufficient time briefing and preparing the cases. But the Justices could only be trifled with a two-word order.

Because these orders are unsigned, it is not clear how each Justice voted. In two related cases, Justices Stevens and Breyer would have reversed.[322] And in *RNC v. FEC*, Justices Scalia, Kennedy, and Thomas, "note[d] probable jurisdiction and [would have] set the case for oral argument."[323] It is not clear if it takes four votes or five votes to set a mandatory jurisdiction case for oral argument. Since it generally takes only four votes to grant certiorari, and hear oral argument, the rule of four probably applies. For all the unjustified outrage of "shadow docket" cases that are decided without an opinion or oral argument, it would seem even more problematic for the Court to give similar perfunctory treatment to cases that Congress deemed as really important.

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320 Harris v. Cooper, 138 S. Ct. 2711 (2018); North Carolina v. Covington, 581 U.S. 1015 (2017); Indep. Inst. v. Fed. Election Comm'n, 580 U.S. 1157 (2017); Kostick v. Nago, 571 U.S. 1161 (2014); Miss. State Conf. of N.A.A.C.P. v. Bryant, 569 U.S. 991 (2013); Standing Joint Legis. Comm. of Reapportionment of Miss. Legis. v. Miss. State Conf. of N.A.A.C.P., 569 U.S. 991 (2013); Backus v. South Carolina, 568 U.S. 801 (2012); Radogno v. Ill. State Bd. of Elections, 568 U.S. 801 (2012); Fletcher v. Lamone, 567 U.S. 930 (2012); League of Women Voters of Illinois v. Quinn, 566 U.S. 1007 (2012); Bluman v. Fed. Election Comm'n, 565 U.S. 1104 (2012); Miss. State Conf. of N.A.A.C.P. v. Barbour, 565 U.S. 972 (2011); Republican Nat. Comm. v. Fed. Election Comm'n, 561 U.S. 1040 (2010); Rabiee v. Dietz, 552 U.S. 1036 (2007); Soechting v. Perry, 548 U.S. 922 (2006); Henderson v. Perry, 548 U.S. 922 (2006); Nitke v. Gonzales, 547 U.S. 1015 (2006).

321 *Compare* cases cited *supra* note 310, *with* cases cited *supra* note 320.

322 *See* Soechting v. Perry, 548 U.S. 922 (2006); Henderson v. Perry, 548 U.S. 922 (2006).

323 561 U.S. 1040 (2010).

In earlier times, when the Supreme Court had mandatory jurisdiction over constitutional challenges to federal and state laws, the Justices would often use another one-sentence order to dispose of cases: "The appeal is dismissed for want of a substantial federal question."[324] This was not to say the Court lacked jurisdiction. Rather, this was a way of saying the case was not worth the Justices' time. But, since jurisdiction was mandatory, these summary rulings on the merits had precedential weight.[325] One such noteworthy dismissal was *Baker v. Nelson*.[326] The Minnesota Supreme Court rejected a claim that the federal Constitution protected a right to same-sex marriage.[327] The United States Supreme Court dismissed the appeal "for want of a substantial federal question."[328] However, four decades later in *Obergefell v. Hodges*, the Supreme Court would dismiss the relevance of *Baker*.[329]

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324 *See* Pamela R. Winnick, *The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of* Hicks v. Miranda, 76 COLUM. L. REV. 508, 509 (1976).

325 *See* Hicks v. Miranda, 422 U.S. 332, 343–44 (1975) ("We agree with appellants that the District Court was in error in holding that it would disregard the decision in Miller II. That case was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under 28 U.S.C. § 1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We are not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one. The three-judge court was not free to disregard this pronouncement.").

326 *See generally* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

327 *Id.*

328 Baker v. Nelson, 409 U.S. 810 (1972).

329 *See generally* Obergefell v. Hodges, 576 U.S. 644, 665 (2015) ("It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in Baker v. Nelson, 409 U.S. 810, 93 S.Ct. 37, 34 L. Ed. 2d 65, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question. Still, there are other, more instructive precedents.").

3.3.3. "Mandatory" jurisdiction cases must be set for oral argument

Under Proposal #5, cases in the Supreme Court's mandatory jurisdiction must be scheduled for oral argument. The purpose here is to ensure that cases which Congress thought important are not simply disregarded. I do not think that Congress could mandate *how* these cases are decided. For example, it would probably intrude on judicial independence to prohibit summary affirmances and force the issuance of a written opinion. But this proposal would at least allow the parties to be heard by the high court.

To save time, the Court could consolidate related cases for a single session, to avoid redundant arguments. The Court could even set these cases for less argument time—-thirty minutes could suffice. There is nothing sacrosanct about sixty minutes. And after the case is heard, the Justices could still summarily affirm with a one-sentence order—though in reality, I think that is unlikely. Being forced to work through a case at oral argument would raise intricate and nuanced issues that can be teased out in a published opinion. I see this deliberative process as a virtue of requiring more oral argument in cases that Congress thought important.

The Court could also dismiss such cases for lack of a substantial federal question—though this path seems unlikely since the few current heads of mandatory jurisdiction involve important questions of federal election and campaign finance law. If Congress thought enough of these cases to mandate jurisdiction, the Court should respect the cases enough to hear the parties out. The Justices could remand a case for so-called "vehicle problems," for example, where the record is unclear or if an issue is waived. But the Court would have to identify what those problems were. It could not simply dismiss the writ as improvidently granted, as certiorari was never granted in the first place. The Court could of course dismiss cases for lack of subject matter jurisdiction. But the Justices would have to entertain oral argument before disposing of the matter. This session would ensure the issue is given a full public airing that is warranted when Congress designates a case as "mandatory." Also, by virtue of arguing the case, the Justices may see fit to augment what the lower court explained, and perhaps provide some clarity on complex areas of the law.

3.3.4. Would requiring oral arguments be constitutional?

Can Congress mandate that the Supreme Court hear oral argument? Would such a bill intrude on judicial independence? Once again, I think a relevant precedent is circuit riding. The Judiciary Act of 1789 imposed circuit riding duties on the Supreme Court Justices.[330] And *Stuart v. Laird* upheld those obligations.[331] Section 5 of that law established very precise timelines when sessions of those circuit courts would commence.[332] And what did it mean to ride circuit? That did not entail deciding cases solely on the papers. That role could have been performed without a physical presence in court. Rather, the Justices were required to travel to far-flung localities and hold circuit.[333] Local attorneys of the bar would present argument directly to the

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330 Judiciary Act of 1789, 1 Stat. 73

331 *See* 5 U.S. 299, 309 (1803).

332 1 Stat. at 75 ("That the first session of the said circuit court in the several districts shall commence at the times following, to wit: in New Jersey on the second, in New York on the fourth, in Pennsylvania on the eleventh, in Connecticut on the twenty-second, and in Delaware on the twenty-seventh, days of April next; in Massachusetts on the third, in Maryland on the seventh, in South Carolina on the twelfth, in New Hampshire on the twentieth, in Virginia on the twenty-second, and in Georgia on the twenty-eighth, days of May next, and the subsequent sessions in the respective districts on the like days of every sixth calendar month afterwards, except in South Carolina, where the session of the said court shall commence on the first, and in Georgia where it shall commence on the seventeenth day of October, and except when any of those days shall happen on a Sunday, and then the session shall commence on the next day following. And the sessions of the said circuit court shall be held in the district of New Hampshire, at Portsmouth and Exeter alternately, beginning at the first; in the district of Massachusetts, at Boston; in the district of Connecticut, alternately at Hartford and New Haven, beginning at the last; in the district of New York, alternately at New York and Albany, beginning at the first; in the district of New Jersey, at Trenton; in the district of Pennsylvania, alternately at Philadelphia and Yorktown, beginning at the first; in the district of Delaware, alternately at New Castle and Dover, beginning at the first; in the district of Maryland, alternately at Annapolis and Easton, beginning at the first; in the district of Virginia, alternately at Charlottesville and Williamsburgh, beginning at the first; in the district of South Carolina, alternately at Columbia and Charleston, beginning at the first; and in the district of Georgia, alternately at Savannah and Augusta, beginning at the first. And the circuit courts shall have power to hold special sessions for the trial of criminal causes at any other time at their discretion, or at the discretion of the Supreme Court.").

333 *Id.*

circuit justice. Those responsibilities entailed holding criminal and civil trials and resolving other motions.[334] All of these roles would seem to resemble the modern-day oral argument. The circuit justices had to hear those cases, whether they wanted to or not.

A recent bill, the Shadow Docket Sunlight Act, would require the Justices to issue a "written explanation of reasons supporting" any "order granting, denying, or vacating injunctive relief or granting, denying, or vacating a stay of such relief."[335] I think requiring oral arguments does not affect the substance of deliberations and the ultimate decision. But the Sunlight Act may cross "the line between Congress' exceptions-and-regulations power and the 'judicial power'*/Klein/*dictating case outcomes principle."[336]

As a pragmatic matter, I am somewhat sympathetic to the constraints on the Justices' time. Indeed, one of the primary reasons why the Court's mandatory jurisdiction was curtailed was to limit the number of mandatory jurisdiction cases. Still, at present, there are only a handful of these cases each year, and it would not break the docket to put all of them up for argument. Indeed, the very fact that these cases involve an issue that Congress has designated for mandatory jurisdiction should be *prima facie* evidence that a substantial federal question is presented.

I table another proposal: for cases in the Supreme Court's mandatory jurisdiction, the Court cannot rewrite the question presented. In other words, the Court must take the case as the parties present it.[337] Of course, the Court could decide not to decide certain issues, but it cannot artificially narrow the case based on its docket control. I do not know if this statute would be constitutional.

Proposal #5 would become a much bigger deal if Proposal #8 is adopted, and some preliminary injunctions of federal and state laws are appealed to the Supreme Court's mandatory jurisdiction. *Then*, the Court would get busy.

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334 *The Supreme Court of the United States and the Federal Judiciary*, FED. JUD. CTR., https://perma.cc/X4E3-FAQW.

335 Shadow Docket Sunlight Act of 2024, S. 4388, 118th Cong. (2024).

336 Howard Wasserman, *Shadow Docket Sunlight Act of 2024,* PRAWFSBLAWG (May 22, 2024, 4:42 PM), https://perma.cc/FAA2-SJTP.

337 Ben Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793 (2022).

4. Reforms About Litigation in the Lower Courts

The third grouping of proposals focuses on reforms in the lower courts. We should not forget that all of the emergency litigation before the Supreme Court begins in the lower courts. And how the inferior courts handle these matters will invariably dictate how and when the Justices will rule. Because Congress creates the inferior courts, and has far-broader power over their jurisdiction, I am more confident that these proposals would pass constitutional muster.

Proposal #6 will make TROs restrained again. Going forward, any relief granted by a temporary restraining order would be limited to the named parties. No more universal, non-party TROs. Class-action certifications would not be permitted at the TRO stage. And because the relief would be so limited, it will be less likely that parties file an emergency mandamus petition to halt these restrained orders. Moreover, TROs would be limited in duration to seven days. Again, a party-and-time limited TRO is less likely to justify an emergency appeal. Any relief longer than a week would require some sort of preliminary injunction, which can be appealed in the normal course.

Proposal #7 would cause a substantial change in how preliminary injunctions are litigated. Motions for a preliminary injunction, or the equivalent under the Administrative Procedure Act, would no longer be decided in the first instance by a single district court judge, followed by an appeal to the circuit court. Instead, those cases would be referred to a three-judge district court. And unlike the current process, in which the chief judge of the circuit unilaterally selects two district court judges and one circuit judge, under Proposal #7, the full en banc court would randomly select two circuit judges who would join the district court judge to whom the complaint was initially assigned. The case would be litigated in that district judge's court, so the plaintiffs' choice of venue would be respected. Further unlike the current process, appeals from these three-judge district courts would *not necessarily* be appealed to the Supreme Court's mandatory jurisdiction.

Proposal #8 would bifurcate appeals from a three-judge district court to the Supreme Court. First, injunctions against federal and state *statutes* would automatically be stayed pending review by the Supreme Court. There would be no need for the parties to seek an emergency stay from the

Supreme Court. Second, injunctions against federal and state *executive actions* would not automatically be stayed. The parties would still have to seek an emergency stay from the Supreme Court, albeit on the timeline in Proposal #4. When the three-judge district court is unanimous, the case can be appealed to the Supreme Court's discretionary docket. But a divided three-judge panel that splits 2-1 will submit a "certificate of division," which will trigger the Supreme Court's mandatory jurisdiction. Cases with a certificate of division on the mandatory jurisdiction docket case will be set for oral argument at the next session and resolved on the emergency docket timeline. (If this all sounds confusing, don't worry, I include a flowchart below.) Proposals #4 and #8 would regularize the process by which emergency docket cases are litigated. There's more.

Proposal #9 would give the inferior courts the power to control the Supreme Court's docket. The en banc circuit courts, as well as the state courts of last resort, would be able to refer specific classes of cases to the Supreme Court's mandatory jurisdiction. First, these courts can submit a "certificate of split," in which a case presents an actual split of authority on a question of federal law. As things stand now, petitioners routinely exaggerate the depth and width of circuit splits, as respondents routinely downplay those splits. That puffery and anti-puffery would be a thing of the past. Now, the courts could candidly determine which splits that the Supreme Court should promptly settle. It is well known that the Court is granting fewer petitions, and letting splits linger. I would invert that pyramid. Second, these courts can submit a "certificate of importance," for a case that presents an exceedingly important, and unresolved question of federal law. These latter certificates can be submitted in advance of any splits forming, but where there is some novel and important issue that would benefit from prompt Supreme Court review. Both types of certificates can be submitted at any juncture—after the three-judge panel rules, before an en banc poll is taken, after a case is argued before the en banc court, or after the en banc court decides the case. This proposal, I think, would be very popular with lower-court judges, but not with the nine Justices.

Proposal #10 will *not* be popular with the lower-court judges. At present, federal judges can take senior status at any time after they reach the

so-called "Rule of 80" date.[338] Judges must be at least sixty-five years old, and their years of service and age must total eighty.[339] Judges have been known to strategically time their taking of senior status, so their preferred President can make the replacement.[340] Some judges have been known to condition their taking senior status on a particular person replacing them.[341] Several judges have publicly withdrawn their taking of senior status when the wrong replacement was selected.[342] All of these backroom machinations would cease with Proposal #10. As soon as a circuit judge reaches the "Rule of 80" date, a new statutory judgeship is automatically created that the President can fill. At that same instant, the circuit judge remains on active status but can no longer vote on the en banc court. These judges can still elect to take senior status at any time, but they lose the primary benefit of holding onto active status—participation in the en banc court. This approach would allow the en banc courts to turn over more quickly and would regularize circuit court appointments. I told you lower court judges would not like this approach.

4.1. Proposal #6: Cases seeking a temporary restraining order can be decided by a single district court judge but can only yield relief to the named parties and are limited to no more than seven days in duration.

Debates about universal preliminary injunctions are common enough. But federal courts have also issued universal temporary restraining orders. These short-term orders can force the federal government to provide relief to unnamed parties and are issued with little notice and even less reasoning. Proposal #6 would address this problem by limiting relief in TRO cases to named parties and would only last seven days in duration.

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338 28 U.S.C. § 371

339 *Id.*

340 *See* Xiao Wang, *The Old Hand Problem*, 107 MINN. L. REV. 971, 974 (2023).

341 *See* Nate Raymond, *4th Circuit Judge to Maintain Active Status, Eliminating Vacancy for Biden*, REUTERS (Nov. 24, 2021, 6:37 PM), https://perma.cc/2MY3-6SNN[hereinafter Raymond, *4th Circuit Judge to Maintain Active Status*]; Nate Raymond, *9th Circuit Judge Urges Biden, Nevada Senators to Pick State AG's Wife as Successor*, REUTERS (April 14, 2022, 12:48 PM), https://perma.cc/CY34-GBTH.

342 *See, e.g.*, Raymond, *4th Circuit Judge to Maintain Active Status*, *supra* note 341.

4.1.1. TRO v. PI

Federal Rule of Civil Procedure 65 recognizes two primary types of expedited rulings.[343] First, a temporary restraining order (TRO) can be issued quickly and ex parte to prevent "immediate and irreparable injury, loss, or damage."[344] These rulings order a defendant to immediately do, or refrain from doing, something. The duration of a TRO is generally time-limited to fourteen days.[345] However, a TRO cannot be appealed as an interlocutory order.[346] Rather, the defendant could only seek emergency relief through the extraordinary writ of mandamus.[347]

The second type of expedited relief is a preliminary injunction (PI). A PI, like a TRO, orders a party to do, or refrain from doing, something.[348] However, a PI cannot be issued ex parte, but must be issued "on notice to the adverse party."[349] While not quite as fast as a TRO, a PI "must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character."[350] And a PI can last for quite some time, even until a final judgment is entered months or even years later.[351] The grant or denial of a PI is an interlocutory order that can be

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343 *See* FED. R. CIV. P. 65.

344 FED. R. CIV. P. 65(b)(1)(A).

345 FED. R. CIV. P. 65(b)(2).

346 28 U.S.C. § 1292(a); *see also* Bennett v. Medtronic, Inc., 285 F.3d 801, 804 (9th Cir. 2002) (finding that a TRO is not generally appealable*);* Washington v. Trump, 847 F.3d 1151, 1158 (9th Cir. 2017).

347 *In re* Abbott, 954 F.3d 772, 794 (5th Cir. 2020), *vacated sub nom.* Planned Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261, 209 L. Ed. 2d 5 (2021) ("Given the surging tide of COVID-19 cases and deaths, Petitioners have made this showing. In mill-run cases, it might be a sufficient remedy to simply wait until the expiration of the TRO, and then appeal an adverse preliminary injunction. *See* 28 U.S.C. § 1292(a)(1). In other cases, a surety bond may ensure that a party wrongfully enjoined can be compensated for any injury caused. *See* FED. R. CIV. P. 65(c). Those methods would be woefully inadequate here.").

348 *See* FED. R. CIV. P. 65(a).

349 FED. R. CIV. P. 65(a)(1).

350 FED. R. CIV. P. 65(b)(3).

351 *See* Allied Mktg. Grp., Inc. v. CDL Mktg., Inc., 787 F.2d 806, 815 (5th Cir. 1989).

appealed.[352] In some cases, failing to timely rule on a PI is treated as an effective denial, which can also be appealed.[353]

Most so-called "nationwide" injunctions are in fact non-party preliminary injunctions.[354] These preliminary injunctions apply universally, in that they apply beyond the named parties in the case.[355] Under this practice, if a single plaintiff successfully asserts a claim, the court will bar the federal or state governments[356] from enforcing the policy against *everyone* who might be similarly situated to the plaintiff. It is possible to certify a class of plaintiffs under F.R.C.P. 23, but these processes are time-consuming and are usually not completed before the issuance of a preliminary injunction.[357]

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352 *See* 28 U.S.C. § 1292(a)–(c).

353 *See* Clarke v. Commodity Futures Trading Comm'n, 74 F.4th 627, 635 (5th Cir. 2023) ("[We] may review a district court's order that, while not explicitly denying a preliminary injunction, 'nonetheless ha[s] the practical effect of doing so' and might cause irreparable harm absent immediate appeal." (second alteration in original) (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981))).

354 Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("The real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them. Whether framed as injunctions of "nationwide," "universal," or "cosmic" scope, these orders share the same basic flaw—they direct how the defendant must act toward persons who are not parties to the case. Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit. When a district court orders the government not to enforce a rule against the plaintiffs in the case before it, the court redresses the injury that gives rise to its jurisdiction in the first place. But when a court goes further than that, ordering the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies. Injunctions like these thus raise serious questions about the scope of courts' equitable powers under Article III.").

355 *See* FED. R. CIV. P. 65.

356 Yes, state courts issue universal injunctions as well. Josh Blackman, *Ohio AG Asks State Supreme Court to Bar Universal Injunction*, VOLOKH CONSPIRACY (Apr. 22, 2024, 12:15 PM), https://perma.cc/6BGD-9XGF.

357 *See* Labrador v. Poe, 144 S. Ct. 921, 927 (2024) (Gorsuch, J., concurring) (If they seek relief for a larger group of persons, they must join those individuals to the suit or win class certification. In universal-injunction practice, none of that is necessary. Just do a little forum shopping for a willing judge and, at the outset of the case, you can win a decree barring the enforcement of a duly enacted law against anyone."); *id.* at 932 (Kavanaugh, J., concurring) ("Even if a district court enjoins a new federal statute or

Rarer is the universal temporary restraining order. These orders, which can be issued *ex parte*, apply broadly to virtually anyone the federal government comes into contact with.[358] And because they are issued as TROs, rather than PIs, they are not subject to the normal appellate review, but can be halted only by mandamus.[359] Federal district court judges have a virtually unreviewable power to immediately alter the federal government's policies for two weeks. During the early days of the travel ban litigation, several courts issued universal TROs.

4.1.2. The *Airport Cases*

On January 27, 2017, President Trump issued the first iteration of the travel ban, which denied entry to aliens from certain nations.[360] People who were already in transit when the order went into effect were detained at airports nationwide.[361] About a day after the order was signed,[362] a federal judge in Brooklyn issued what was in affect a nationwide temporary restraining order, that ordered the government to release certain named plaintiffs and unnamed others who were being detained under the executive order.[363]

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state law only as to the particular plaintiffs, that injunction could still have widespread effect. For example, the plaintiff might be a State, or the plaintiff might be an association that has many members, or the plaintiffs might file a class action for classwide injunctive relief under Rule 23(b) of the Federal Rules of Civil Procedure."); FED. R. CIV. P. 23.

358 *See* FED R. CIV. P. 65(d)(2).

359 *Id.*

360 Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017.

361 Matt Stevens, *First Travel Ban Order Left Officials Confused, Documents Show*, N.Y. Times (Oct. 2, 2017), https://perma.cc/3KL2-5BHB.

362 *Nationwide Injunction (Stay, Really) Issued in* Darweesh v. Trump, JOSH BLACKMAN (Jan. 28, 2017), https://perma.cc/JJT5-T46S.

363 Darweesh v. Trump, No. 1:17-CV-00480 (AMD), 2017 WL 388504, at *1 (E.D.N.Y. Jan. 28, 2017) ("WHEREFORE, IT IS HEREBY ORDERED that the respondents, their officers, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, from the date of this Order, are ENJOINED AND RESTRAINED from, in any manner or by any means, removing individuals with refugee applications approved by U.S. Citizenship and Immigration Services as part of the U.S. Refugee Admissions Program, holders of valid immigrant and non-immigrant visas, and other individuals from Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen legally authorized to enter the United States. IT IS FURTHER ORDERED that to assure

Indeed, the Brooklyn judge, following the ACLU's request,[364] effectively granted class-wide relief to a class that had not yet been ascertained, let alone certified. At the time, I wrote, "Without certifying a class–even under the 2nd Circuit's habeas protocol–this order was ultra vires with respect to individuals other than [the named plaintiffs] Darweesh and Alshawi. In other words, absent a class-action certification, courts cannot grant relief to unnamed and unknown parties."[365] Other courts followed suit.[366] I called these orders the *Airport Cases*.[367]

There was some authority suggesting that a court could issue class-wide injunctive relief, even where a class was not yet certified.[368] Other courts have rejected this approach.[369] One court limited this doctrine to a *permanent* injunction, not to a *preliminary* injunction.[370] But I was skeptical of the procedural mechanisms. It seemed highly problematic that a court

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compliance with the Court's order, the Court directs service of this Order upon the United States Marshal for the Eastern District of New York, and further directs the United States Marshals Service to take those actions deemed necessary to enforce the provisions and prohibitions set forth in this Order.").

364 *See* Petitioner's Emergency Motion for Stay of Removal, Darweesh v. Trump, No. 1:17-CV-00480 (E.D.N.Y. Jan. 28, 2017).

365 Josh Blackman, *Procedural Aspects of "The Airport Cases"*, JOSH BLACKMAN (Jan. 29, 2017), https://perma.cc/394K-GJED.

366 *See, e.g.*, Mohammed v. U.S., Case 2:17-cv-00786-AB-PLA (C.D. Cal. Jan. 31, 2017); City & Cnty. of San Francisco v. Trump, No. 3:17–CV–00485–WHO (N.D. Cal. Jan. 31, 2017); Tootkaboni & Loughalam v. Trump, No. 17-CV-10154, 2017 WL 386550, at *1 (D. Mass. Jan. 29, 2017); *John Doe 1 v. Trump*, 2:17-126, C17–126 (W.D. Wa. Jan. 28, 2017); Aziz v. Trump, 1:17-cv-116 (E.D. Vir. Jan. 28, 2017).

367 *The Procedural Aspects of "The Airport Cases"*, *supra* note 365.

368 *See* Lavan v. City of Los Angeles, 797 F. Supp. 2d 1005, 1019 (C.D. Cal. 2011) ("Although this lawsuit is stylized as a class-action, the equivalent of class-wide relief may still be appropriate despite the fact that a class has not yet been certified.").

369 *See, e.g.*, Zelotes v. Adams, 363 B.R. 660, 667 (D. Conn. 2007), *rev'd sub nom.* Adams v. Zenas Zelotes, Esq., 606 F.3d 34 (2d Cir. 2010) ("Injunctive relief generally should be limited to apply only to named plaintiffs where no class has been certified.").

370 Lee v. City of Columbus, No. 2:07-CV-1230, 2008 WL 2557255, at *4 (S.D. Ohio June 24, 2008) ("The posture of today's decision is a preliminary injunction order and not a final decision on the merits resulting in permanent injunctive relief as in *Easyriders*. That latter case's rationale is not applicable here to permit Best and Bowman to pursue Division-wide relief; unlike in *Easyriders*, extending the benefit of any preliminary injunction so broadly is not necessary to afford the two moving plaintiffs the relief to which they are entitled.").

could issue a universal TRO, even without any meaningful proceedings, that protected people who were not parties to the litigation. Really, the order applied to unknown travelers around the globe who could not even be identified! Judges do not have magic wands to erase an executive order—especially in less than twenty-four hours when it isn't even clear who might be subject to the order.[371]

4.1.3. *Washington v. Trump*

The next phase in the travel ban litigation began on January 30.[372] The Washington Attorney General sought a temporary restraining order to halt the enforcement of the executive order globally.[373] After an hour of oral argument,[374] U.S. District Judge James L. Robart ruled from the bench that the federal government must immediately cease enforcing the Executive Order everywhere.[375] This order was a universal TRO.[376]

On February 4, the Department of Justice sought an emergency stay from the Ninth Circuit.[377] The federal government argued that even though

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371 *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018).

372 *See* Josh Blackman, *The 9th Circuit's Contrived Comedy of Errors in* Washington v. Trump, 95 TEX. L. REV. 221 (2017).

373 Motion for TRO, Washington v. Trump, No. 2:17-cv-00141-JLR (W.D. Wash. Jan. 30, 2017); *Washington Seeks Nationwide Injunction of Immigration Order, Relying on Argument It Opposed U.S. v. Texas*, JOSH BLACKMAN (Feb. 1, 2017), https://perma.cc/3B7G-CL7P.

374 GeekWire, *Full Hearing:* Washington State vs. Trump, YOUTUBE (Feb. 4, 2017), https://perma.cc/4WSA-JYPK.

375 Washington v. Trump, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) ("This TRO is granted on a nationwide basis and prohibits enforcement of Sections 3(c), 5(a), 5(b), 5(c), and 5(e) of the Executive Order (as described in the above paragraph) at all United States borders and ports of entry pending further orders from this court.").

376 *Id.*

377 Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal, Washington v. Trump, No. 17-35105 (9th Cir. Feb. 4, 2017); Josh Blackman, *Breaking: DOJ Filed Emergency Motion for Administrative Stay in* Washington v. Trump, JOSH BLACKMAN (Feb. 5, 2017), https://perma.cc/5KUJ-DN65 [hereinafter *DOJ Filed Emergency Motion*]; Josh Blackman, *DOJ Files Reply in Support of Emergency Motion for Stay Pending Appeal*, JOSH BLACKMAN (Feb. 6, 2017), https://perma.cc/8XAB-HL49.

the order was styled as a TRO, it was in effect an appealable PI.[378] The Washington AG countered that, "Defendants have pursued the wrong remedy by seeking a stay in this court, rather than mandamus."[379] The Ninth Circuit agreed to construe the order as a PI.[380] The panel observed, "We may nonetheless review an order styled as a TRO if it 'possesses the qualities of a preliminary injunction.'"[381] The Trump Administration got lucky. Had the Ninth Circuit agreed with Washington, the ruling would not even have been subject to regular appellate review. Of course, the Ninth Circuit denied the stay,[382] so the procedural victory was fleeting, but it was a close call.

4.1.4. Make TROs restrained again

Proposal #6 addresses the dynamics at issue in the travel ban litigation. As things stand now, F.R.C.P. 65(d) provides that a TRO "binds . . . the parties [and] the parties' officers, agents, servants, employees, and attorneys."[383] But "binds" is far too nebulous, especially in the era of cosmic injunctions. Proposal #6 would have three elements.

First, TROs would be expressly limited to named parties. This proposal would adopt, with modifications, language that appears in the SHOP Act.[384] This bill was introduced by Senator Mitch McConnell to eliminate

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378 *See DOJ Files Emergency Motion*, *supra* note 377.

379 Oral Argument at 30:29, Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105), https://perma.cc/8MA2-WDKX.

380 Washington v. Trump, 847 F.3d 1151, 1158 (9th Cir. 2017) ("Although the district court has recently scheduled briefing on the States' motion for a preliminary injunction, it is apparent from the district court's scheduling order that the TRO will remain in effect for longer than fourteen days. In light of the unusual circumstances of this case, in which the Government has argued that emergency relief is necessary to support its efforts to prevent terrorism, we believe that this period is long enough that the TRO should be considered to have the qualities of a reviewable preliminary injunction.").

381 *Id*. (quoting Serv. Employees Int'l Union v. Nat'l Union of Healthcare Workers, 598 F.3d 1061, 1067 (9th Cir. 2010)).

382 *See* Josh Blackman, *Instant Analysis of* Washington v. Trump, JOSH BLACKMAN (Feb. 09, 2017), https://perma.cc/22HS-V3M6.

383 FED. R. CIV. P. 65(d)(2).

384 *See* S. 4095, 118th Cong. (2024); Josh Blackman, *McConnell and Schumer Offer Dueling Approaches to Judicial Reform*, VOLOKH CONSPIRACY (Apr. 10, 2024), https://perma.cc/B6PY-A2S8.

nationwide injunctions.[385] The text for Proposal #6 would read, "Notwithstanding any other provision of law, a district court may not issue any Temporary Restraining Order unless such order is applicable *only to the parties to the case before the court*." Short and simple. And indeed, such limited relief may be exactly what Article III equitable principles require.[386] This revision can be added to the Federal Rules of Civil Procedure, or to Title 28. Moreover, F.R.C.P. 23, and class action certifications, would not apply to a TRO proceeding. The purpose of a temporary restraining order is to prevent irreparable harm to named parties, not to change global policy in an instant.

Second, TROs against the federal or state governments would be limited to seven days, rather than fourteen days. Given that the relief is limited to the named parties, the district court can move more quickly to a fully briefed preliminary injunction hearing where necessary. And the shorter window would still allow appellate review. The travel ban litigation made it to the Ninth Circuit in a few days.

Third, TROs against the federal or state governments would be appealable in the normal course, without the need to seek mandamus. This proposal eliminates the need to fight over whether a universal TRO is actually a non-appealable TRO or an appealable PI. When the effect is universal, the traditional factors (how long it lasts, whether the proceedings were adversarial, etc.), are less important. There is too much of a risk in having a circuit court determine whether a TRO is more akin to a PI. Had the Ninth Circuit come out the other way, the court would have lacked appellate jurisdiction until a PI was entered two weeks later. A universal injunction against the federal government, in particular, is extremely disruptive. It is hard to change policies globally in an instant. It is even worse if federal courts issue "dueling" injunctions.[387]

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385 *See* sources cited *supra* note 384.

386 *See* Labrador v. Poe, 144 S. Ct. 921, 927 (2024) (Gorsuch, J., concurring) ("Retiring the universal injunction may not be the answer to everything that ails us. But it will lead federal courts to become a little truer to the historic limits of their office"); *id.* at 931 (Kavanaugh, J., concurring) ("As I see it, prohibiting nationwide or statewide injunctions may turn out to be the right rule as a matter of law regardless of its impact on this Court's emergency docket.").

387 Josh Blackman, *Dueling Cosmic Injunctions, DACA and Departmentalism*, LAWFARE (May 22, 2018), https://perma.cc/8E4P-DUDD.

Proposal #8 below automatically stays a preliminary injunction from a three-judge district court. I would not automatically stay the TRO, since it will be expressly limited to the named parties. It is easy enough for the government to do, or refrain from doing, something to a few individuals. The insurmountable challenge arises when a global policy must be immediately changed. And given that TROs are limited to only seven days, prompt appellate review is available if a district court judge abuses his or her discretion.

Proposal #7 below would assign cases seeking preliminary injunctions to a three-judge district court. But here, I do not propose requiring TROs to be adjudicated by a three-judge panel. These issues are too fast-moving to assemble the three members of the court in a time crunch. Sometimes, same day relief is needed—even if *ex parte*. A single judge can move with dispatch. As Hamilton explained in *Federalist* No. *70*, the "ingredients which constitute energy in the Executive are, first, unity…"[388] For preliminary injunctions that will last for significantly longer, a three-judge panel is better suited. Now onto Proposal #7.

4.2. Proposal #7: Cases seeking a preliminary injunction or equivalent relief against the federal government or a state government are referred to the en banc court, which appoints a randomly-drawn three-judge panel with two circuit court judges and one district court judge.

In recent years, litigation has followed a predictable model. Plaintiffs challenge a federal or state law in a favorable forum and obtain a universal preliminary injunction. There is then a race to the court of appeals to obtain an emergency stay. There may even be an attempt to ask the en banc court to rule on the emergency motion. Then, the non-prevailing party races to the Supreme Court to seek more emergency relief. What happens at the high court is a crapshoot. This pattern has played out over and over again and has caused far too many frantic trips to the Supreme Court.

Proposal #7 would mitigate this problem. Litigants who seek preliminary injunctive relief against a federal or state law would proceed to a three-judge district court with two circuit judges and one district court judge. This

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[388] THE FEDERALIST NO. 70, (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

proposal would also reply to equivalent injunctive relief sought under the Administrative Procedure Act. The panel would be randomly appointed by the circuit court, rather than by the chief judge. There would be a prompt ruling on the question of law, and whether a preliminary injunction should issue. But not every ruling from this court would be appealable to the Supreme Court's mandatory jurisdiction. (More on the appeal with Proposal #8.) Finally, this proposal would not consolidate cases brought in different circuits before a single three-judge panel in a single court.

4.2.1. How three-judge district courts work

During parts of the twentieth century, constitutional challenges to federal and state laws were heard by three-judge district courts, which generally included two district court judges and one circuit court judge.[389] And decisions from those three-judge panels were appealed directly to the Supreme Court's mandatory jurisdiction, bypassing the courts of appeals.[390] In modern times, as discussed above, these three judge panels are quite rare.[391]

28 U.S.C. § 2284(b) provides the procedure for establishing these courts.[392] First, Congress has designated certain types of cases as eligible for a three-judge district court.[393] Second, after such a case is filed, the plaintiff can request the appointment of a three-judge district court.[394] Third, "unless [the district court judge] determines that three judges are not required, [the district court judge shall] immediately notify the chief judge of the circuit."[395] Fourth, the chief judge designates two other judges, usually one other district judge and one circuit judge.[396] That troika will serve as the three-judge district court. Fifth, a single judge "may conduct all proceedings," including granting a TRO to prevent "specified irreparable damage."[397] The TRO would

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389 *See* Michael E. Solimine & James L. Walker, *Three-Judge District Court: Federalism and Civil Rights*, 1954–76, 72 CASE W. RES. L. REV. 909, 912 (2022).

390 *Id*.

391 *See id*. at 924–25.

392 28 U.S.C. § 2284(b).

393 *Id*. at § 2284(a).

394 *See id.* at § 2284(b)(1).

395 *Id*.

396 *Id*.

397 *Id*. at § 2284(b)(3).

remain in effect until the three-judge court can resolve an application for a preliminary injunction. "Any action of a single judge may be reviewed by the full court at any time before final judgment."[398] But only the three-judge court can conduct the trial.

Proposal #7 would change this process in four important regards. First, plaintiffs seeking injunctive relief against the federal *and* state governments could request a three-judge panel. Cases that merely seek summary judgment, or some other non-injunctive relief, could be decided in the normal course by a single district court judge. Second, the three-judge panels would have two circuit judges and one district judge. In modern practice, these cases are primarily pre-enforcement challenges and are often decided without much of a record on an expedited basis.[399] Questions of law will predominate over questions of fact. And third, the three-judge panel would be appointed randomly by the en banc court, and not unilaterally by the circuit chief judge. There is no reason why one person should have such unilateral authority in cases of such significance. Fourth, however, decisions by these three-judge district courts would not *always* be appealed to the Supreme Court's mandatory jurisdiction—Proposal #8 addresses this final point.

4.2.2. Cases seeking preliminary injunctive relief against the federal and state governments must be heard by three-judge panels

Under the prior regime, constitutional challenges to federal and state laws could be heard by three-judge district courts.[400] Proposal #7 would not require three-judge district courts in *all* of these cases. Rather, the three-judge district courts would only be required for a particular proceeding:

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398 *Id*.

399 *See e.g.*, Labrador v. Poe, 144 S. Ct. 921, 928 (2024) (Kavanaugh, J., concurring).

400 *See*, Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 484–85 (1955) ("This suit was instituted in the District Court to have an Oklahoma law . . . declared unconstitutional and to enjoin state officials from enforcing it, 28 U.S.C. §§ 2201, 2202, 2281, for the reason that it allegedly violated various provisions of the Federal Constitution. The matter was heard by a District Court of three judges, as required by 28 U.S.C. § 2281. That court held certain provisions of the law unconstitutional. 120 F. Supp. 128. The case is here by appeal, 28 U.S.C. § 1253.").

where the case seeks preliminary injunctive relief against the federal government or a state government. Cases that will orderly proceed to summary judgment and a trial can continue to be litigated through the normal process, with a single district court judge and an appeal to the circuit court. And under Proposal #6 above, motions for temporary restraining orders can still be decided by a single district court judge—though those rulings are limited to the named parties for only seven days. But where preliminary injunctive relief is sought, a three-judge district court would be established.

Under Proposal #7, most of the cases would be constitutional challenges—that is, a federal or state law violates the federal constitution. But this process would also apply to challenges brought under APA Section 706, asserting that some federal policy is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[401] The bulk of cases seeking nationwide injunctions against the federal government are actually APA cases, rather than constitutional challenges.[402]

These fast-moving cases are destined for a higher court. Bringing in a three-judge panel at the outset, and potentially bypassing the court of appeals and en banc process, would serve to provide an expeditious resolution. And, if the circumstances are right, a mandatory appeal to the Supreme Court will lie.

4.2.3. Two circuit judges and one district judge

Traditionally, three-judge district courts included two district court judges and one circuit judge.[403] I propose switching up the ratio. There would still be one district court judge—the same district court judge to whom the case was originally assigned. And venue would continue in the forum the plaintiffs chose. TBD whether proceedings can be held over Zoom to cut down on travel time for circuit judges in distant locations.

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401 5 U.S.C. § 706(2)(A).

402 *See Labrador*, 144 S. Ct. at 931–32 (2024) (Kavanaugh, J., concurring) ("That said, a rule prohibiting nationwide or statewide injunctions would not eliminate the need for this Court to assess the merits of some emergency applications involving new laws. For one, there is ongoing debate about whether any such rule would apply to Administrative Procedure Act cases involving new federal regulations, given the text of the APA.").

403 *See* Solimine & Walker, *supra* note 389, at 912.

Rounding out the panel would be two *active* members of the en banc court. With preliminary injunctions, the questions of law predominate over questions of fact. Generally, these facial pre-enforcement challenges lack any extensive factual records. Circuit judges are well equipped to apply precedent to pure questions of law. And the judges must be in active status. Senior circuit judges, who often have reduced course loads, and other priorities, would not be tapped for these urgent matters.

Critically, the two circuit judges should be randomly drawn from the en banc court. I have yet to figure out how courts perform "random" draws. Random does not necessarily mean random.[404] Perhaps an old-school wheel-of-fortune could work well. For reasons I discuss below, it is problematic to give the chief judge so much discretion to appoint members of these courts. Given that two judges can sway the outcome of any opinion, these members should be chosen randomly.

The draw should happen as soon as the three-judge court is constituted. And this case must take priority over all other matters. Language similar to F.R.C.P. 65(b) should be adopted: the proceedings "must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character."[405] Thus, there would be no need to accommodate around schedules or other particularities. Other dates can shift when a preliminary injunction is on the docket.

It may also be prudent that when a state law is challenged, the two circuit judges should be drawn from that particular state. In theory, at least, federal judges from a given state are likely more familiar with the laws of that state. Then again, this proposal will have some practical difficulties for states with only one circuit court judge. For example, the First Circuit has six active judgeships, and only one from Maine and Rhode Island,

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404 *See* Marin K. Levy & Adam S. Chilton, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, CORNELL L. REV. 1, 50–51 (2015).

405 *See* Fed. R. Civ. P. 65(b)(3).

respectively.[406] Ditto for the Ninth Circuit, in which there is only one circuit judge from Idaho, Montana, Alaska.[407] Similar examples exist elsewhere.[408]

I recognize that selecting two circuit judges to work on a fast-moving preliminary injunction matter on short notice may create complexities. These judges already have full dockets and have monthly sittings in the court of appeals. Judges, like everyone else, have other personal commitments that make fast-moving cases hard to manage. I am somewhat sympathetic to concerns about scheduling—to an extent. District court judges are on call 24x7, while circuit judges live a far more cloistered existence. When an urgent case comes to a federal district court, it must be decided as soon as possible. By contrast, most circuit court decisions can be resolved at a leisurely pace. Circuit judges at designated times do serve on "emergency motion" or "capital" panels, where they are expected to rule promptly on exigent cases.[409] But when circuit judges are not on call, they can largely control their own schedule, other than sittings which are set a year in advance. This proposal would help spread the workload across the levels of the federal judiciary to reach a prompt, and more efficacious ruling, on a pressing matter.

In any event, this proposal would only apply to active judges. Circuit judges who do not wish to undertake these duties, and are eligible, can take senior status. Even more so than with Supreme Court Justices, lower court judges have life tenure, rather than a life sentence. If judges took senior status earlier in their careers, rather than holding out to maintain a seat on the en banc court, there would be more judges on the court to further spread the work.

The alternative, and the present practice, is not ideal. As a practical matter, virtually every preliminary injunction issued or denied against the federal or state governments is appealed urgently to the courts of appeals—

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406 *See William J. Kayatta, Jr.*, U.S. CT. OF APP. FOR THE FIRST CIR.,, https://perma.cc/9F52-9LML; *O. Rogeriee Thompson*, U.S. CT. OF APP. FOR THE FIRST CIR., https://perma.cc/BJ47-DZ2V.

407 *The Judges of This Court in Order of Seniority*, U.S. CTS. FOR THE NINTH CIR. (2023), https://perma.cc/7MFE-N8LR.

408 *See, e.g.*, *Active and Senior Judges*, U.S. CT. OF APP. FOR THE EIGHTH CIR., https://perma.cc/GWA8-KTH6 (showing there is one active judge from North Dakota and one active judge from South Dakota).

409 *See Rules and Internal Operating Procedures*, FIFTH CIR. 2 (Oct. 2024), https://perma.cc/S6GJ-G369.

usually in the context of an emergency stay or an administrative stay. (Justice Barrett recently criticized the length of administrative stays.[410]) Circuit judges are already hustling to decide these issues quickly. The issue will get to the court of appeals soon enough. My proposal cuts to the chase and allows the circuit court to have a say in the matter at a much earlier juncture.

4.2.4. Decisions from these three-judge district courts will not necessarily be appealed to the Supreme Court's mandatory jurisdiction

Under the traditional rule, *any* decision from a three-judge panel was appealed to the Supreme Court's mandatory jurisdiction.[411] The Supreme Court, in turn, would not take all of those cases seriously. Rather, the Court would summarily affirm cases without the benefit of oral argument.[412] Under my proposal, the Supreme Court's mandatory jurisdiction would not be invoked in *all* appeals from three-judge panels. Proposal #8 below will explain when the appeal is mandatory and when it is discretionary.[413]

4.2.5. Neutrally address allegations of judge shopping

Many critics, and even some federal judges, argue that seeking universal injunctions in single-judge divisions is problematic.[414] Other judges

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410 United States v. Texas, 144 S. Ct. 797, 799 (2024) ("So far as I know, this Court has never reviewed the decision of a court of appeals to enter—or not enter—an administrative stay. I would not get into the business. When entered, an administrative stay is supposed to be a short-lived prelude to the main event: a ruling on the motion for a stay pending appeal. I think it unwise to invite emergency litigation in this Court about whether a court of appeals abused its discretion at this preliminary step—for example, by misjudging whether an administrative stay is the best way to minimize harm while the court deliberates."). *See also* Blackman, *The Sequel to* Doe v. Mills, *supra* note 260; Josh Blackman, *Justice Barrett's Concurrence in* McCraw *Will Increase the Number of Emergency Appeals on the Shadow Docket*, VOLOKH CONSPIRACY (Mar. 20, 2024, 10:57 AM), https://perma.cc/RYL9-G297.

411 Solimine & Walker, *supra* note 389, at 912.

412 *See* cases cited *supra* note 320.

413 *See infra* Section 4.3.

414 Josh Blackman, *Judge James C. Ho's Remarks to the Midland County Bar Association*, VOLOKH CONSPIRACY (Apr. 15, 2024), https://perma.cc/9T9M-BX7N.

disagree that this is even a problem.[415] Regardless of where you come down on this debate, Proposal #7 would make it *impossible* for a judge in a single-judge division to unilaterally issue a universal injunction. Two of the members of the panel are *randomly* drawn. And it would take the votes of 2/3 members of the panel to issue such injunctive relief. (Here I presume that a universal injunction is consistent with a federal court's equitable powers—a presumption that the Supreme Court should address sooner rather than later.[416]) And that ruling may *automatically* be stayed (per Proposal #8) to facilitate an orderly review. This proposal is a neutral way to address alleged judge-shopping without unilaterally punishing certain districts or curtailing injunctive relief that has not yet been foreclosed by the Supreme Court.[417]

4.2.6. Reduce the power of the chief judge of the circuit to appoint three-judge district courts

Chief judges of the circuit courts of appeal wield substantial authority. They can oversee the administration of their circuits,[418] appoint three-judge district courts,[419] oversee the assignment of panels,[420] exercise control over

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415 *See id.*

416 *See supra* Section 4.1.1.

417 *See* Josh Blackman, *A Numbers Game: Who Would the Judicial Conference's New Policy Help and Who Would It Hurt*, VOLOKH CONSPIRACY (Mar. 16, 2024), https://perma.cc/6BEK-NHT2; Blackman, *supra* note 384.

418 *See* 28 U.S.C. § 332(a)(1).

419 28 U.S.C. § 2284(b).

420 *See* Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1, 5 (2015) ("First, we have examined deviations from strict randomness in panel composition to report a statistical phenomenon, not to suggest any improper motive by the chief judges, circuit executives, or clerks of court who perform the immensely challenging task of creating a court calendar for sometimes as many as dozens of judges, often six months or a year in advance.").

en banc polls,[421] preside at en banc oral arguments,[422] impose emergency measures,[423] and serve on the Judicial Conference of the United States.[424] But chief judges are not appointed based on their capability, reputation, or wisdom. Rather they serve solely because they have the most seniority but are not too senior. Like Goldilocks's porridge, they are *just right*! To be appointed, a judge must have the most seniority on the court, but still be under the age of sixty-five.[425] The expected term is seven years, but a chief judge will age out at seventy.[426] On the United States Supreme Court and on many state supreme courts, the executive selects the judge who will be chief.[427] And on some state supreme courts, the members themselves select their own

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421 *See* Grutter v. Bollinger, 288 F.3d 732, 810–14 (6th Cir. 2002) (Boggs, J., dissenting), *aff'd*, 539 U.S. 306 (2003) (including procedural appendix); *see also* Tracey E. George & Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 VAND. L. REV. 1 (2008) ("Judge Danny Boggs included with his dissenting opinion a five-page procedural appendix detailing intracourt machinations and accusing the Chief Judge [Martin] of manipulating procedures to affect the outcome. Boggs alleged that Martin violated circuit rules by assigning himself, rather than a randomly selected judge, to the three-judge panel. This assertion alone does not seem very significant—the case was decided, after all, by the en banc court. Boggs's more pointed accusation was that Martin engineered the en banc voting process to ensure a court balanced in favor of the law school. When the white student petitioned for an en banc hearing, eleven active judges sat on the Sixth Circuit; two of those judges had expressed their intent to take senior status. Martin circulated the petition after both judges had taken senior status, making them ineligible to participate. Judge Alice Batchelder responded by writing an internal memo to her colleagues contending that Martin delayed the vote on the white student's request for a hearing en banc until judges opposed to affirmative action took senior status."). I proudly clerked for Judge Boggs in 2011-12.

422 28 U.S.C. § 45(b).

423 *See, e.g.*, General Order No. 51, Supplemental Requirements to Enter Court Facilities (11th Cir. 2021), https://perma.cc/HN5M-VKTY.

424 28 U.S.C. § 331.

425 28 U.S.C. § 45(a)(1) ("The chief judge of the circuit shall be the circuit judge in regular active service who is senior in commission of those judges who—(A) are sixty-four years of age or under; (B) have served for one year or more as a circuit judge; and (C) have not served previously as chief judge.").

426 28 U.S.C. § 45(a)(3)(A), (C).

427 U.S. CONST. art. II, § 2; *How State Supreme Court Justices Are Selected*, DEMOCRACY DOCKET (Mar. 21, 2023), https://perma.cc/7RT2-FUAX.

presiding officer—a gesture of respect and admiration.[428] But on the federal courts, selecting the chief circuit judge is not a meritocracy, but a gerontocracy.

There is a bigger problem with consolidating this power in a position based on age and seniority. As presently constituted, the line for circuit judges on the courts of appeals can lean in one direction or the other for a very long time. It is problematic for judges of a similar judicial philosophy to have a monopoly over appointing three-judge panels for decades. But that is exactly what we have. By my rough count, on the Fifth and Sixth Circuits, there will likely be a string of Republican-appointed chief judges through the late 2040s. The next Democratic-appointed chief judge of these circuits may not have even graduated from law school yet. And given how judicial nominees keep getting younger and younger, this chief judge may not even be born yet—which might create Rule against Perpetuities problems. Meanwhile, on the Ninth Circuit, there will likely be a string of Democratic-appointed chief judges until the early 2040s. The D.C. Circuit, with some balance, will likely see Democratic-appointed chief judges through the early 2030s, Republican-appointed chief judges through the late 2040s, followed by a recent nominee who will probably be the Democratic-appointed chief judge in the 2050s.

These estimates are rough. I assume that chief judges will step down when they turn seventy, or when they complete seven years of service, whichever comes first. But judges do retain the ability to step down as chief early in order to rejigger the timeline. Indeed, a chief judge may even choose his successor, or his successor's successor in this fashion.[429] Also, judges who

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428 *E.g.*, WIS. CONST. art. VII § 4(2) ("The chief justice of the supreme court shall be elected for a term of 2 years by a majority of the justices then serving on the court."); UTAH CODE ANN. § 78A-3-101(3)(a) ("The justices of the Supreme Court shall elect a chief justice from among the members of the court by a majority vote of all justices.").

429 George & Yoon, *supra* note 421, at 37 ("A chief judge will be more likely to step down early if her replacement has the same ideology or policy preferences. A rational judge will take the course of action likely to increase the probability that the court will follow her policy preferences. If the chief does not serve her entire term, she should leave voluntarily only if the person who will take over her seat holds the same or similar policy views."). Judge Boggs stepped down as Chief Judge one year early, on August 14, 2009, the day Judge Alice Batchelder turned sixty-five. *See Batchelder, Alice Moore*, FED. JUD. CTR., https://perma.cc/2CNH-ZCCE; *Boggs, Danny Julian*, FED. JUD. CTR.,

retire, die, abdicate from the chiefdom, or are elevated to the Supreme Court, will throw off my math. This risk is particularly acute in the Fifth Circuit, which has several SCOTUS short-listers. So please take these calculations with a mountain of salt.

This is not one of my primary proposals, but it would make sense to eliminate this gerontocracy, in which a person can never become chief because he is on the wrong side of sixty-five. I would favor a meritocracy: allow active members of the en banc court to vote for their chief every five years. Judges would also lose the incentive to time their stepping down to help select their successor. This approach seems far more fair and would reward competence over youthfulness.

4.2.7. Cases would not be consolidated to a single court

I raise one possibility, but do not favor it: consolidating all challenges into a single three-judge panel. The model here would be a bill that (thankfully) never passed. The 1993 Health Security Act—better known as HillaryCare—included a specific section for "facial constitutional challenges."[430] Section 5241 provided that "[t]he United States District Court for the District of Columbia shall have original and exclusive jurisdiction of any civil action brought to invalidate this Act or a provision of this Act on the ground of its being repugnant to the Constitution of the United States on its face and for

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https://perma.cc/PZP7-JSZD. Doing so allowed Batchelder to be eligible to serve a term as Chief Judge. Had Boggs served his full seven-year term, Judge Karen Nelson Moore would have become the Chief Judge. But by the time Batchelder finished her term in August 2014, Moore had aged out. *See* Josh Blackman, *From Being One L to Teaching One L*, *in* BEYOND ONE L, 165, 178 (Carolina Academic Press, 2019), https://perma.cc/T766-E54P ("I called Judge Boggs's chambers on Wednesday morning at 9:00 a.m. Surprised, the judge got on the phone. He told me, in no uncertain terms, that he had three clerkship spots open (he had previously had four, but recently [and early] concluded his term as Chief Judge). He had filled the first two spots, but the third was open. The person to whom he made the offer had not yet accepted. . . . Finally, it was 5:00. I called chambers. Judge Boggs told me that the person accepted the position. Judge Boggs strongly encouraged me to apply again next year (that would be my third time applying to him). I told him I would. I was devastated, but not lost.").

[430] Health Security Act, H.R. 3600, 103d Cong. § 5241 (1st Sess. 1993).

every purpose."[431] Specifically, the action would be "be heard and determined by a district court of three judges in accordance."[432]

Most relevant here, if several "actions . . . involving a common question of law or fact are pending before a district court, the court shall order all the actions consolidated."[433] In other words, the same-three judge panel would hear all facial constitutional challenges to the bill. After that court rules, "an appeal may be taken directly to the Supreme Court of the United States from any final judgment, decree, or order in which the district court (1) holds this Act or any provision of this Act invalid; and (2) makes a determination that its holding will materially undermine the application of the Act as whole."[434] The focus here is on "*final*" judgments. The bill prohibits temporary relief: "In any action described in this subsection, the district court may not grant any temporary order or preliminary injunction restraining the enforcement, operation, or execution of this Act or any provision of this Act."[435] But the parties could "petition the Supreme Court for review of any holding of a district court by writ of certiorari at any time before the rendition of judgment in a court of appeals."[436]

When the Affordable Care Act was being debated, Congress chose not to include a similar provision. As a result, constitutional challenges to the law were filed throughout the country.[437] After the Eleventh Circuit declared the individual mandate unconstitutional, thus creating a circuit split,[438] Supreme Court review became essential. But had the case been channeled to the D.C. Circuit, the issue would have percolated to the Supreme Court much more rapidly.

Congress has used this, and similar approaches, in a few other laws. For the bill which would force the divestiture of TikTok, Congress channeled

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431 *Id.* at § 5241(a).

432 *Id.* at § 5241(c).

433 *Id.* at § 5241(d).

434 *Id.* at § 5241(e).

435 *Id.* at § 5241(a).

436 *Id.* at § 5241(f).

437 JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 79 (2013).

438 *See* Florida v. U.S. Dep't of Health & Hum. Servs., 648 F.3d 1235, 1328 (11th Cir. 2011).

all challenges to the D.C. Circuit.[439] Likewise, the 2005 Detainee Treatment Act directed all challenges to the D.C. Circuit.[440]

I would not favor consolidation. As a matter of real-politick, channeling cases to the D.C. Circuit, as it is presently constituted, and will be constituted for several decades, invariably favors the left-side of the aisle.[441] For *bilateral* judicial reform, this proposal is a non-starter. (Curiously, however, when HillaryCare was drafted, the D.C. Circuit—stocked with Reagan and Bush appointees—leaned to the right.) Second, I think it sends a negative signal for Congress to privilege one court over all others. The D.C. Circuit may be viewed as the second highest court in the land,[442] but it is an inferior court, just like all others. Finally, plaintiffs are the masters of their complaint and should be able to litigate close to home.

4.3. Proposal #8: Injunctions of statutes from three-judge district courts are automatically stayed, and if the panel submits a "certificate of division," the case is appealed to the Supreme Court's mandatory jurisdiction, with oral argument and decision based on emergency docket timeline.

Proposal #8 would streamline appeals from three-judge district courts to the Supreme Court's emergency docket. To be precise, this proposal would clarify when and how stays of injunctions should be entered. As a threshold matter, with a pre-enforcement challenge, the three-judge panel must grant or deny the preliminary injunction at least sixty days before

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439 Protecting Americans from Foreign Adversary Controlled Applications Act, H.R. 7521, 118th Cong. § 3(a) (2024); *see also* Allison Frankel, *No Judge Shopping for TikTok*, REUTERS (May 8, 2024, 3:30 PM), https://perma.cc/V6EM-9BUH.

440 Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739, § 1005 ("(A) In general.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.").

441 *See* Josh Blackman, *The D.C. Circuit Will Tilt Even Further to the Left*, VOLOKH CONSPIRACY (Feb. 11, 2021, 11:06 PM), https://perma.cc/NX4K-TTES.

442 Aaron Nielson, *D.C. Circuit Review–Reviewed: The Second Most Important Court?*, YALE J. ON REGUL. (Sept. 4, 2015), https://perma.cc/MQ9J-YRWE.

policy goes into effect. This timeline would ensure there is ample time for Supreme Court review before any potential harms become irreparable.

Under Proposal #8, it matters whether the three-judge panel is unanimous, or if it submits a "certificate of division." If the preliminary injunction is denied, and the panel is unanimous, the case would proceed to the emergency docket on the conventional, discretionary timeline, followed by the conventional certiorari process. If the preliminary injunction is denied, and the panel is divided, the case would proceed to the emergency docket on the conventional, discretionary timeline, but the case would be added to the Supreme Court's mandatory jurisdiction.

However, if the panel issues a preliminary injunction, the rules would be more complex. And these rules would turn on a democracy-focused conception of the status quo. Proposal #8 bifurcates challenges to democratically-enacted statutes and unliteral executive actions. The former enjoy a presumption of democracy, such that the status quo is defined as the period *after* the statute goes into effect. The latter lacks a presumption of democracy, and the status quo is defined as the period *before* the executive action goes into effect. This bifurcation divides how stays are treated. Preliminary injunctions against statutes should be *automatically* stayed. Preliminary injunctions against executive actions should not be automatically stayed, but the three-judge district court should *sua sponte* decide whether to grant the stay. And if the district court denies the stay, then the Supreme Court would have to resolve a stay application on a two week clock.

In short, if the three-judge panel issues an injunction of a statute, the injunction is automatically stayed. If the three-judge panel issues an injunction of an executive action, the injunction is not automatically stayed, and the Supreme Court would have to rule in two weeks on whether to grant the stay. In either of these two cases, if the panel is divided, the case is added to the Supreme Court's mandatory jurisdiction, with oral argument to be scheduled at the next sitting. But if the panel was unanimous, the case will be subject to the traditional certiorari process. If a preliminary injunction is denied, the non-prevailing party can seek an injunction on the Supreme Court's conventional emergency docket. But even with a denial of a preliminary injunction, if the panel is divided, the case would be added to the Supreme

Court's mandatory jurisdiction, with oral argument scheduled at the next sitting. A flowchart appears *infra* in Section 4.3.8 to illustrate this process.[443]

4.3.1. What is the status quo?

In (one of many cases called) *United States v. Texas*, Justice Barrett observed that the status quo is a "tricky metric, because there is no settled way of defining 'the status quo.'"[444] In *Labrador v. Poe*, Justice Kavanaugh expanded on this issue.[445] He wrote, "There is no good blanket answer to the question of what the status quo is."[446] He observed, "Each conception of the status quo is defensible, but there is no sound or principled reason to pick one over another as a rule to apply in all cases involving new laws."[447] Worse still, Kavanaugh wrote, maintaining the status quo could "lead to very troubling results."[448] If the status quo is defined as the status before the law was enacted, "some plainly constitutional and democratically enacted laws would effectively be blocked for several years pending the final decision on the merits."[449] If the status quo is defined as the status after the law was enacted, an unconstitutional law "would nonetheless remain in effect and be enforced against individuals and businesses for several years."[450] This approach is "inequitable and scattershot."[451]

I agree with Justices Kavanaugh and Barrett that defining the status quo is tricky. But I think there is one insight that informs Proposal #8. Justice Kavanaugh is exactly right that it is problematic to block "plainly constitutional and democratically enacted *laws*."[452] The key word there is "laws." In the federal context, laws pass through the crucible of bicameralism and presentment. Moreover, statutes were publicly debated and deliberated for extensive periods, where members of the legislative and executive branch, as

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443 *See infra* Section 4.3.8.

444 144 S. Ct. 797, 799 n.2 (2024).

445 *See generally* Labrador v. Poe, 144 S. Ct. 921 (2024).

446 *Id.* at 930 (Kavanaugh, J., concurring).

447 *Id.*

448 *Id.*

449 *Id.* at 930–31.

450 *Id.* at 931.

451 *Id.*

452 *Id.* at 930 (emphasis added).

well as the public, had an opportunity to assess the bill. That process entitles laws to a presumption of democracy, if not a presumption of constitutionality. The same can be said of state laws that go through the legislative process. Presentment and bicameralism (unicameralism in Nebraska) are the norm for state laws. Such measures should be entitled to the same presumption of democracy, if not a presumption of constitutionality. Ditto for state constitutional amendments and referenda, which have a much stronger degree of democratic accountability than a mere statute.

Statutes must be distinguished from executive actions. I would define this category broadly to include executive actions, executive memoranda, subregulatory guidance, administrative utterances, and any other diktat that can be issued without the benefit of public notice, comment, or input. They are simply announced on high from Olympus. Regulations that go through the formal notice-and-comment process at least have some measure of democratic accountability. If nothing else, these rules have orderly implementation schedules and are more susceptible to pre-enforcement challenges. By contrast, executive actions that go into effect immediately, or at least very soon, require breakneck speed litigation that is difficult to unwind. And these actions are usually challenged under APA Section 706.[453]

What about executive actions issued by governors and state executive branches? The states have very different separation of powers structures. Moreover, some states may permit broader delegations of power to executives than does the federal system.[454] And some states have in fact empowered the governor to effectively legislate by decree during emergencies. Such authority was employed during the pandemic to shutter houses of worship, restrict access to abortion, ban purchasing of firearms, and impose vaccine mandates.[455] And states lack a unitary executive, as heads of various agencies are elected directly by the people. Though the line is not clear, I would be inclined to treat actions signed by a governor, or other state executive

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453 *See* 5 U.S.C. § 706.

454 *See* Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 492–93 (2016); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 177 n.15 (2018).

455 Josh Blackman, *The "Essential" Second Amendment*, 26 TEX. REV. L. & POL. 159, 163–200 (2022); Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637, 637–644 (2021) (discussing lockdown measures and restricted constitutional rights).

official, in the same fashion I would treat an order signed by the President or a cabinet secretary. Though I admit, my thoughts here are tentative.

4.3.2. How to maintain the status quo?

This dichotomy between democratically-enacted laws and unilaterally-acted actions should inform the determination of the status quo. The injunction of a democratically-enacted statute should be automatically stayed pending Supreme Court review. By contrast, when a unilateral action is taken by the federal government or a state government, it lacks that democratic imprimatur. An injunction of those policies should not be automatically stayed. The Supreme Court, of course, could choose to stay that injunction with five votes, but that would have to be done on a case-by-case basis.

We can use a few examples to illustrate how these dynamics would play out. First, following *United States v. Windsor*, many federal district courts enjoined state marriage laws as a violation of the Fourteenth Amendment.[456] Some of these courts declined to grant stays.[457] As a result, thousands of marriage licenses were issued in short order.[458] Since time immemorial, marriage was limited to opposite-sex couples. But in an instant, the status quo was radically altered.[459] A federal judge in Utah in fact explained that the status quo *was* the issuance of marriage license to same-sex couples.[460] This argument got things exactly backwards.[461] A democratically-

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456 *See* Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 245 (2016); Marie v. Moser, 65 F. Supp. 3d 1175, 1185, 1203, 1206 (D. Kan. 2014); Strawser v. Strange, 105 F. Supp. 3d 1323, 1324, 1330–31 (S.D. Ala. 2015); Caspar v. Snyder, 77 F. Supp. 3d 616, 620, 646 (E.D. Mich. 2015).

457 Latta v. Otter, 771 F.3d 496, 498, 501 (9th Cir. 2014).

458 Blackman & Wasserman, *supra* note 456, at 245 ("the altered status quo meant issuance of hundreds or thousands of marriage licenses.").

459 *Id.* ("Following *Windsor*, federal district courts in more than two dozen states enjoined enforcement of bans on same-sex marriage. Judges then had to decide whether to stay those injunctions pending review. An injunction alters the status quo. A stay of an injunction suspends that alteration, while refusing to grant a stay allows that altered status quo to take immediate, and perhaps irreparable, effect.").

460 *See id.* at 289; Kitchen v. Herbert, No. 2:13-cv-217, 2013 WL 6834634, at *3 (D. Utah Dec. 23, 2013).

461 Blackman & Wasserman, *supra* note 456, at 289 ("Part of the problem with Judge Shelby's reasoning was a strange understanding of the status quo. On Friday morning,

enacted law, such as the Utah marriage law, is entitled to a presumption of democracy.[462] Worse still, the United States Supreme Court refused to stay this ruling and others.[463] At that point, the writing was on the wall, and *Obergefell* was a foregone conclusion.[464] Moreover, the prospect of clawing back marriage licenses evoked comparison to Nazi Germany, so were never likely to happen.[465] My proposal would have *required* a stay of these injunctions of state laws.

Let's use another example: the travel ban. This policy was announced by President Trump and went into effect *immediately*.[466] This rollout caused

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the status quo was what it had been for a century—Utah would not issue marriage licenses to same-sex couples. Judge Shelby's order, without a stay, immediately and perhaps irreparably altered the status quo. It now became the new normal that same-sex couples were allowed to marry, as the Clerk of Salt Lake County recognized. Thus, Judge Shelby reasoned, a stay would amount to an injunction preventing county clerks from issuing marriage licenses to same-sex couples. In other words, an alteration of the status quo. But this misunderstands the nature of injunctions and stays and their respective effects on the status quo. The stay would alter the status quo on Monday only because the court had already altered the status quo on Friday with its injunction. The point of a stay would be to suspend that alteration. Had Judge Shelby issued the stay on Friday, the practical status quo would have remained unchanged.").

462 Amul R. Thapar & Joe Masterman, *Fidelity and Construction*, 129 YALE L.J. 774, 778, 800 (2020) ("Our research lends support to the idea that judges should apply a presumption of liberty in cases about federal power but a presumption of democracy in cases about state power.").

463 Herbert v. Kitchen, 574 U.S. 874 (2014).

464 Blackman & Wasserman, *supra* note 456, at 279.

465 Andrew Koppelman, *Too Much for Hitler: Why Same-Sex Marriage Is Irreversible*, BALKINIZATION (Oct. 8, 2014), https://perma.cc/F3RS-MZWA ("As I said, it is technically possible to invalidate those marriages at a later date. But it is morally impossible. . . . The only precedent for such invalidation of which I am aware is the Nuremberg laws of Nazi Germany, which nullified some existing marriages between Aryans and Jews. . . . In short, wholesale invalidation was too radical a step even for Adolf Hitler. The confusion of property and other rights claims that would arise out of such retroactive invalidation would be staggering. The Court understands this very well. Even if the next few Supreme Court Justices are appointed by Republicans and have no sympathy for same-sex marriage, this a line they are unlikely to be willing to cross. This ketchup can't be put back into this bottle. Once there are hundreds of same-sex marriages in places like Utah, that fact is irreversible. If undoing them en masse was too much for Hitler, it is too much for the Court.").

466 Exec. Order No. 13,769, 82 Fed. Reg. 8,977, at 8,977-79 (Jan. 27, 2017).

some chaos at airports nationwide.[467] I noted above that several courts issued what were in effect universal TROs.[468] These short-fuse rulings would be subject to Proposal #6.[469] But as the travel ban litigation proceeded, several courts issued preliminary injunctions barring the enforcement of these policies.[470] Under Proposal #8, these rulings would *not* be automatically stayed. The travel ban, in every sense, altered the status quo of how people from certain nations could enter the United States. That policy lacks the sort of democratic legitimacy of a statute. The federal government could seek a stay from the Supreme Court—as the Solicitor General in fact did[471]—but the stay in that case should not be automatic.

The position can be stated plainly. First, a democratically-enacted statute defines the status quo, an injunction of a statute disrupts the status quo, so there should be an automatic stay of that injunction to maintain status quo. Second, a unilateral executive action executive action disrupts the status quo, and an injunction maintains the status quo, so the injunction should not be automatically stayed.

Some may argue that all rulings against the federal or state governments should be automatically stayed. For example, in Texas, when a lower court issues an injunction against the state, and Attorney General files an appeal, the ruling is automatically stayed.[472] I can see the virtues of this approach, as it favors a broader presumption of constitutionality, but I would favor bifurcating actions based on democratic accountability.

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467 *See* Stevens, *supra* note 361.

468 *See supra* Parts 4.1.1–4.1.3.

469 *See supra* Section 4.1.

470 Aziz v. Trump, 234 F. Supp. 3d 724, 727, 739 (E.D. Va. 2017) (mem.); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 543–44, 566 (D. Md. 2017) (mem.); Mohammed v. United States, No. CV 17-00786 AB (PLAx), 2017 WL 438750, at *1 (C.D. Cal. Jan. 31, 2017).

471 Trump v. Hawaii, 585 U.S. 667, 672 (2018); Trump v. Hawaii, 583 U.S. 1009 (2017).

472 TEX. R. APP. P. 24.2(a)(3).

4.3.3. With a pre-enforcement challenge, the three-judge panel must grant or deny preliminary injunction at least sixty days before policy goes into effect

Under Proposal #7, cases seeking a preliminary injunction or equivalent relief against the federal government, or a state government, are referred to the en banc court.[473] And that panel would include two circuit court judges and one district court judge.[474] Proposal #8 addresses the timing of those rulings. The purpose of this timeline is to ensure there is adequate space for Supreme Court review.

This proposal would not apply to challenges of unilateral executive actions. For these policies, a pre-enforcement challenge is not possible. The travel ban, for example, went into effect immediately.[475] There was no way to contest a policy that took everyone by surprise. Setting a fixed timeline would be impossible for such orders.

These timelines would apply to pre-enforcement challenges. Federal statutes generally become effective as soon as they are signed into law.[476] Even so, large statutes are often implemented over a period of time. For example, the Affordable Care Act was approved in March 2010, but the law's individual mandate went into effect in 2014.[477] By contrast, a regulatory policy or a state statute will generally go into effect in the future on a date certain.[478] These rules permit something of an orderly litigation process, which permits review before the law goes into effect. Specifically, I propose that a preliminary injunction should be resolved *at least* sixty days before the statute goes into effect.

This deadline has several implications. First, it creates incentives for plaintiffs to bring pre-enforcement challenges at the earliest possible

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473 *See supra* Section 4.2.

474 *Id.*

475 Exec. Order No. 13,769, 82 Fed. Reg. 8,977, at 8,977-79 (Jan. 27, 2017), https://perma.cc/62UA-T8FS.

476 *Enactment of a Law,* CONGRESS.GOV, https://perma.cc/4GNR-6YRZ.

477 I.R.C. § 5000A(a)-(b)(1) ("An applicable individual shall for each month beginning after 2013 ensure that the individual . . . is covered under minimum essential coverage for such month.").

478 Methamphetamine Response Act of 2021 Pub. L. No. 117-99, 136 Stat. 43 (2021), 21 U.S.C. § 1708(d) (2022).

convenience. Lawyers have been known to dilly-dally and delay bringing suits, in the hope that confusion and chaos of the deadline urges judges to lean into granting an injunction.[479] Second, it forces the three-judge panels to move with alacrity in granting or denying a preliminary injunction. These suits should predominate over whatever else is on their docket. Third, a sixty-day clock would ensure that the Supreme Court has at least two months to decide the emergency docket case. Proposal #4 would require resolution of these emergency case within sixty days.[480]

The sixty-day clock has another implication. In recent times, major federal statutes and executive actions have been challenged nearly-simultaneously in different federal courts. The purpose behind these multi-pronged attacks is to increase the chances for success. Indeed, if any one court issues a universal injunction, that ruling would halt the law or policy. The government needs to run the table and defeat all challenges. With this proposal, as soon as one three-judge panel grants a preliminary injunction, it's off to the races, and the issue is bound for the Supreme Court.

4.3.4. The three-judge panel can, at its discretion, render opinion granting or denying preliminary injunction, or simply issue a judgment, but any injunction of statute is automatically stayed

All too often, a federal district court labors for weeks to produce a sophisticated opinion granting or denying a motion for a preliminary injunction. And a few hours later, the court of appeals issues a one-sentence administrative stay without any reasoning. And a few days after that, the Supreme Court grants another one-sentence stay without any reasoning. If and when the Supreme Court gets to the case, the district court's opinion will not have much weight. At best, it functions like an amicus brief to give them one

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479 For example, Texas S.B. 8, the so-called fetal heartbeat bill was passed on May 19, 2021, and would go into effect on September 1, 2021. *Bill: SB 8*, TEX. LEGIS. ONLINE, https://perma.cc/5WMV-RKVD. Though the bill had been extensively debated in the legislature, plaintiffs did not file suit for nearly two months, on July 13, 2021. Whole Women's Health v. Jackson, 556 F. Supp. 3d 595, 602 (W.D. Tex. 2021), *aff'd in part*, *rev'd in part*, 595 U.S. 30 (2021).

480 *See supra* Section 3.2.

more way of resolving the case. It is rare that in an emergency docket case, the Supreme Court discusses a district court's reasoning, let alone adopts it. Legal questions, especially at the Supreme Court, are resolved *de novo*.

I realize this narrative may be dispiriting to diligent district court judges and their staff who work under the gun to produce careful work product. But in our judiciary, the most important role a district court judge can play with a case bound for the emergency docket is to move things along quickly. Indeed, district court judges will often announce on the record that a given case is bound for a much higher court. We all know which cases those are. And I think that simple predictive judgment should inform how Proposal #8 operates: a pre-enforcement challenge must be decided at least sixty days before the policy goes into effect.

One possible objection is that it would be impracticable to have the case fully briefed, hear oral argument, and write a careful opinion in such a short window. My response is that for these emergency cases, the district court should spend less time crafting the legal analysis. The most value a district court can provide in these fast-moving cases is a careful factual record (where there are facts to be found), and a brief legal analysis to indicate whether the motion will be granted or denied. The facts are important, since the Supreme Court, as a court of last resort, should not be in the business of figuring out facts on a tight timeline. And the legal analysis can be brief because, well, it probably will not matter much what the district court judge says. I sometimes wonder whether a plaintiff who draws an unfavorable bench can simply stipulate to a defeat to move the case along. As grotesque as it stands, that approach would promote judicial economy and save a lot of frivolous briefing.

I can even see a situation where a district court concludes that a legal issue is unclear and denies the motion for a preliminary injunction so the Supreme Court can provide some clarity in the law. That can be done in a few sentences. A thumbs-up or thumbs-down would be sufficient. Such a quick opinion would give them more time to handle the not-quite-so-fast moving case. This disposition would suggest that all three judges are in agreement. But it may be possible, indeed likely, that there is a division. I'll discuss panel-splits next.

4.3.5. A divided three-judge panel must submit a "certificate of division" to trigger the Supreme Court's mandatory jurisdiction

On the federal courts of appeals, more than ninety percent of three-judge panels decide cases unanimously.[481] That statistic does not get nearly enough attention because most people care about the other ten percent. Yes, the high-profile cases on hot-button issues are more likely to divide judges of different philosophical approaches. A decision from a unanimous three-judge panel is less likely to demand the Supreme Court's urgent attention. But a decision with a 2-1 split is more likely to be divisive and warrant quick review. At a minimum, a divided-panel suggests that reasonable minds can disagree. By contrast, a unanimous panel more likely suggests that one side is more clearly right than the other.

These heuristics turn, in part, on the numbers: any three-judge panel, drawn randomly in any circuit, will likely have at least some heterogeneity. Stated crassly, there would likely be two judges appointed by the President of one party, and one judge appointed by the President of the opposite party. These metrics are crude proxies for judicial philosophy, but they do work. If judges from across the spectrum can agree on a case, that is not likely something that warrants the Supreme Court's urgent review. But if the left-and-right flanks of an inferior court disagree, that will likely be something divisive that warrants Supreme Court review.

With Proposal #8, if a three-judge panel is divided, it would submit a "certificate of division," which would trigger the Supreme Court's mandatory jurisdiction. Indeed, the panel would not need to even produce a written opinion. It could take a vote at conference, realize the panel is divided, and submit a certificate of division. At that point, the Supreme Court would automatically decide the case. To ensure the Supreme Court would have appellate jurisdiction, the Supreme Court must sit in judgment of an actual case, and not an abstract issue.[482] I think the submission of a certificate of division would be construed as a judgment denying the motion for preliminary

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[481] Burton M. Atkins & Justin J. Green, *Consensus on the United States Courts of Appeals: Illusion or Reality?*, 20 AM. J. POL. SCI. 735, 735–736 (1976).

[482] *See* Brief of Professor Aditya Bamzai as Amicus Curiae Supporting Neither Party, Dalmazzi v. United States, 582 U.S. 966 (2017) (Nos. 16-961, 16-1017, 16-1423).

injunction, thus maintaining the status quo, and ensure the Supreme Court does in fact have a judgment to review.

This proposal is not new. Indeed, during the nineteenth century, the certificate of division was a path to appeal a case to the federal courts.[483] Consider the *Case of Jefferson Davis*, the treason prosecution of the former President of the Confederacy.[484] Chief Justice Salmon Chase, while riding circuit, presided over the case with a district court judge.[485] Under the rule in effect at the time, if the two judges submitted a certificate of division, the criminal case would be appealed to the Supreme Court.[486] But if both judges agreed on a disposition, the case could not be appealed to the Supreme Court.[487] Moreover, a case decided by a single district court judge may not have been appealable to the Supreme Court.[488] Indeed, in "January 1869, Chase wrote to Underwood, asking him to wait till Chase arrived in Richmond, rather than proceeding to decide the cases solely by himself," which would have eliminated a possible certificate of division.[489]

In the *Case of Jefferson Davis*, Chase and Underwood ultimately submitted a certificate of division to the Supreme Court, without issuing a written opinion.[490] Chase never stated on the contemporaneous record how he would have voted in this case.[491] But his vote would ensure the case could

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483 Jonathan Remy Nash & Michael G. Collins, *The Certificate of Division and the Early Supreme Court*, 94 S. CAL. L. REV. 733, 740–42 (2021).

484 Case of Davis, 7 F. Cas. 63, 63 (C.C.D. Va. 1871).

485 *Id.* at 76.

486 *See* Nash & Collins, *supra* note 483, at 740–41.

487 *Id.* at 742.

488 Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 TEX. REV. L. & POL. 350, 474 (2024).

489 *Id.* at 483.

490 United States v. Jefferson Davis, 3 AM. L. REV. 368, 372 (1868). A copy of the full issue can be found in the National Archives. Case of Davis, 7 F. Cas. 63 (C.C.D. Va. 1871), https://perma.cc/K7QC-4YZJ. Appellate Jurisdiction Case Files in Record Group 267, United States v. Davis, No. 328, Records of the Supreme Court of the United States, at the National Archives (Dec. 5, 1868), https://perma.cc/FFK7-GHQD.

491 Blackman & Tillman, *supra* note 488, at 488–89 ("The certificate does not say how each of the Judges voted. Nor does it say why the judges cast their votes. What we do know is that Chase voted one way, and Underwood the other. We do not know that Chase would have voted the same way and for the same reasons had he been the lone decision-maker where his vote was both determinative and precedent setting.").

be heard by the full Supreme Court.[492] (Ultimately, President Johnson pardoned Davis, and many others, so the Supreme Court never opined on the issue.[493]) There is some circumstantial evidence that in *United States v. Cruikshank*,[494] Circuit Justice Joseph Bradley intentionally registered disagreement with the District Judge (and future Justice) William Wood, even though he agreed with Wood on the merits, for the purpose of allowing the Supreme Court to hear the case.[495]

Back to the present. I could imagine a three-judge panel opting to issue a certificate of division to trigger prompt Supreme Court review, rather than toiling for weeks on a majority opinion and a dissent that respond to each other. It might also be possible for the judges to promptly submit a certificate of division to trigger Supreme Court review, then release a published opinion later, as the case is being briefed upstairs. I realize this sort of late-filed opinion would truly resemble an amicus brief. But at least the Supreme Court would not be forced to wait on the sidelines as the lower court tries to cobble together an opinion that will not likely matter upstairs.

4.3.6. If there is no automatic stay, Supreme Court required to rule on stay in two weeks

Let's review the sequencing. If the three-judge court enjoins a statute, there is an automatic stay. If the three-judge court enjoins an executive action, there is not a mandatory stay. This proposal, however, would require that the three-judge panel *sua sponte* decide whether to issue a stay at the same time the preliminary injunction is issued. That would obviate what is usually a pointless round of briefing to determine whether an order that was just issued should be stayed or not. There was just such a futile request for briefing in the Utah same-sex marriage request, which was promptly denied.[496] Indeed, to save time, it would make sense for the parties to brief the stay factors in the same brief seeking a preliminary injunction. Under this proposal, the judges can grant a preliminary injunction, and in the same

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492 *Id.* at 488.

493 *Id.* at 489.

494 United States v. Cruikshank, 92 U.S. 542, 546 (1875).

495 *Id.*

496 Blackman & Wasserman, *supra* note 456, at 287–88.

order, stay or not stay the order. That way there is no need to ask for further relief from the three-judge panel and proceed directly to the Supreme Court.

Let's assume the panel *sua sponte* denies a stay. That doesn't mean the issue can linger indefinitely. Rather, in the latter case, the Supreme Court would be required to rule on the stay request in two weeks. This timing would allow about one-week for briefing, and one week for a resolution. For the most part, the brief seeking a stay will be a copy-and-paste of the lower-court briefing, perhaps with some sprinkled-in references to the district-court decision, where there is one. As a practical matter, the Supreme Court routinely gives parties a few days to file briefs on the emergency docket, so this turnaround time has become par for the course. Indeed, Solicitor General Prelogar has indicated that the demands of the emergency docket have influenced how her office conducts hiring.[497]

The Supreme Court has little concern for the work-life balance of the bar. But the Justices do care very much about their own scheduling. And I think this concern arises on several levels. First, the emergency docket cases are often rather difficult, and it is not clear right away if there is a majority for any one position. In some cases, there may need to be negotiations and compromises to get to five. Compressing that process to one week, or some other period, would create an artificial deadline that inhibits collaboration. Second, when the Justices write opinions under the gun, their work product suffers. With less time to review and ponder, the Court may miss some of the implications of their work, and not realize what questions have been left unanswered. Third, and less substantively, the Justices seem annoyed by the frequent submissions to the emergency docket. Justice Sotomayor has said she is "tired" from all the applications.[498] If you've read this far, you should know I am not particularly sympathetic to this complaint, but I have no doubt it would factor into the Justices' willingness to adhere to deadlines.

There are many pros to a clear timeline. On issues of national importance, a clear resolution is often more important than a finely tuned decision. The best case scenario is the one that gives the critics the most angst:

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497 Suzanne Monyak & Kimberly Strawbridge Robinson, *Biden Top Supreme Court Lawyer Laments Shadow Docket Effect (1)*, BLOOMBERG LAW (May 2, 2024, 10:59 AM), https://perma.cc/U8BE-N5HH.

498 Daelan Deese, *Sotomayor Calls Supreme Court Workload Demanding: 'I'm Tired'*, WASH. EXAM'R (Jan. 30, 2024, 2:04 PM), https://perma.cc/6M9E-8C2E.

a simple one-sentence order granting or denying a stay. But unlike the current regime, there would likely be a second sentence: setting oral argument for the next available session. After that hearing, the Court can issue a more fulsome decision.

4.3.7. This proposal would not affect injunctions pending appeal

Much of the debate about the Supreme Court's emergency docket focuses on whether the Supreme Court should *stay* lower court injunctions.[499] That is, a lower court enjoins some statute of executive action, and the government asks the Supreme Court to put that lower-court injunction on hold.[500] But in rarer cases, the lower court *declines* to enjoin a statute or executive action, and the government asks the Supreme Court to issue an emergency injunction.[501] This extraordinary relief is called an injunction pending appeal.[502]

These emergency injunctions are not issued often, but they do arise—often enough—at the present moment in cases from the Fifth Circuit.[503] Nothing in Proposal #8 would affect the Court's ability to issue emergency injunctions. If the three-judge district court *denies* a preliminary injunction, the government can still ask the Court for this extraordinary relief on the usual timelines. But if the denial of a preliminary injunction is divided, the case would still be added to the Supreme Court's mandatory jurisdiction, with oral argument to follow.

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499 *See* Labrador v. Poe, 144 S. Ct. 921, 928–29 (2024) (Kavanaugh, J., concurring) (discussing the Supreme Court's approach to resolving emergency applications).

500 *See, e.g.*, Alexander v. S.C. State Conf. of the NAACP, 219 L. Ed. 2d 1252 (2024) (denying an emergency stay for district court's injunction); Robinson v. Ardoin, 217 L. Ed. 2d 177 (2023) (same).

501 *See, e.g.*, Students for Fair Admissions v. U.S. Mil. Acad. at W. Point, 217 L. Ed. 2d 434 (2024) (declining to enjoin a U.S. Military Academy from using race as a factor in admissions); Mills v. Hamm, 219 L. Ed. 2d 1521 (2024) (denying an emergency injunction against a death row inmate's execution); Gonzales v. Texas, 219 L. Ed. 2d 1311 (2024) (same).

502 *Students for Fair Admissions*, 217 L. Ed. 2d at 434.

503 Josh Blackman, *Justice Barret"s Shadow Docket Policy: Do the Opposite of Whatever the Fifth Circuit Did (Updated)*, VOLOKH CONSPIRACY (Aug. 9, 2023, 12:05 AM), https://perma.cc/99JS-ZKDB.

4.3.8. Cases with certificate of division on mandatory jurisdiction docket case set for oral argument at next session, resolved on emergency docket timeline

Whatever difficulties may attain in ruling on a stay application in two weeks would be mitigated by expedited oral argument, with a decision to follow shortly. Simply put, if a three-judge panel granted a preliminary injunction, and there was a dissent, that would indicate this is an issue on which reasonable minds can differ. The certificate of division would trigger the Supreme Court's mandatory jurisdiction, with oral argument at the next available setting. However, if the panel is unanimous, the parties can litigate the case on the traditional, discretionary, emergency docket.

This model compresses the timeline. At present, the process has as many as six potential layers: (1) ask the district court to issue a PI; (2) ask the district court to stay its ruling; (3) ask the circuit court to grant a stay or an injunction; (4) ask the en banc circuit court to grant a stay or an injunction; (5) ask the Supreme Court to grant a stay or an injunction; (6) petition the Supreme Court for certiorari.[504] But with Proposal #8, a lot of redundant steps are eliminated. Where a divided three-judge panel enjoins a statute, the injunction is automatically placed on hold, and there will be Supreme Court review. But where a unanimous three-judge panel declines to enjoin a statute, the case will be subject to the traditional discretionary review timeline. Only those important, divisive cases, will rocket up to the Supreme Court. The other less-urgent cases will simmer and percolate. An important attribute of this proposal is that the parties will less frequently have to fight about a stay at multiple courts, knowing that the urgent matters will reach the Supreme Court in a timely fashion.

The process can be illustrated in this flow-chart:

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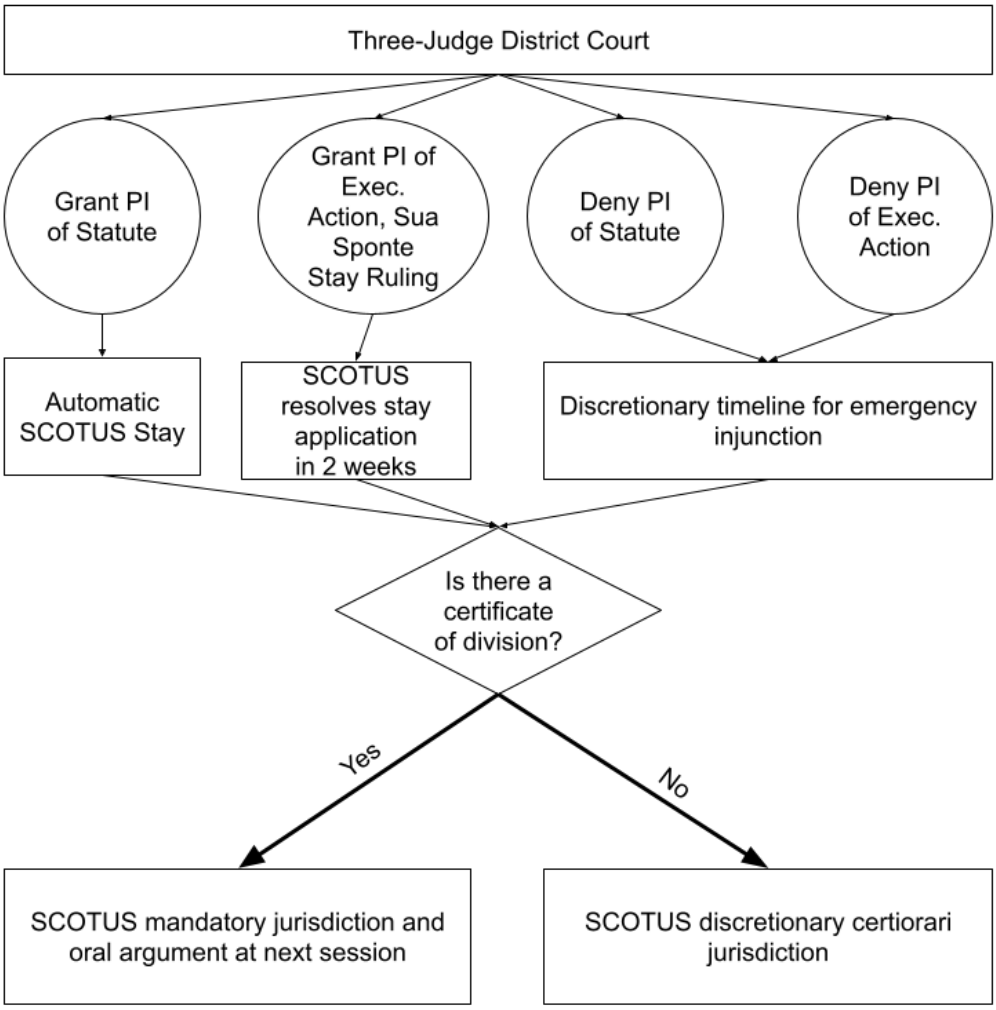
[504] *The Certiorari Process: Seeking Supreme Court Review*, SCOTUSBLOG, https://perma.cc/KQ72-Q8JB; *see also* Note, *The Role of Certiorari in Emergency Relief*, 137 HARV. L. REV. 1951 (2024).



Litigation will generally follow six separate paths.

- **Path #1**: (i) District court grants PI of statute; (ii) there is an automatic Supreme Court stay; (iii) there is a certificate of division; (iv) the case is added to the Court's mandatory jurisdiction; (v) the case is set for oral argument at the next session.
- **Path #2**: (i) District court grants PI of statute; (ii) there is an automatic Supreme Court stay; (iii) there is no certificate of division; (iv) the case is subject to the Supreme Court's discretionary certiorari jurisdiction.
- **Path #3**: (i) District Court grants PI of executive action; (ii) there is no automatic stay; (iii) the panel is required to *sua sponte* decide

whether to grant a stay; (iv) if the *sua sponte* stay is denied, the Supreme Court has to resolve the stay application in two weeks; (v) there is a certificate of division; (vi) the case is added to the Court's mandatory jurisdiction; (vii) the case is set for oral argument at the next session.

- **Path #4**: (i) District Court grants PI of executive action; (ii) there is no automatic stay; (iii) the panel is required to *sua sponte* decide whether to grant a stay; (iv) if the *sua sponte* stay is denied, the Supreme Court has to resolve the stay application in two weeks; (v) there is no certificate of division; (vi) the case is subject to the Supreme Court's discretionary certiorari jurisdiction.
- **Path #5**: (i) District Court denies preliminary injunction of statute or executive action; (ii) the non-prevailing party can ask the Supreme Court for an emergency injunction on the discretionary timeline; (iii) there is a certificate of division; (iv) the case is added to the Court's mandatory jurisdiction and set for oral argument at the next session.
- **Path #6**: (i) District Court denies preliminary injunction of statute or executive action; (ii) the non-prevailing party can ask the Supreme Court for an emergency injunction on the discretionary timeline; (iii) there is no certificate of division; (iv) the case is subject to the Supreme Court's discretionary certiorari jurisdiction.

4.4. Proposal #9: En banc circuit courts and state courts of last resort can refer cases to Supreme Court's mandatory jurisdiction with a "certificate of split" (actual split of authority on question of federal law) or a "certificate of importance" (case presents an exceedingly important, and unresolved question of federal law).

Proposals #6, #7, and #8 relate to suits that seek temporary restraining orders, preliminary injunctions, or other emergency relief.[505] These cases usually attract the most attention. But most of the work of the federal courts follows more of a glacial pace: a complaint, a motion to dismiss, a motion for summary judgment, maybe even a trial, followed by an appeal to a three-judge panel, and perhaps a petition for rehearing en banc, and in rare cases,

[505] *See supra* Section 4.1, 4.2, 4.3.

a cert petition. Urgent cases can go from complaint to the Supreme Court's emergency docket in a few months. Run-of-the-mill cases may take years before a cert petition is filed, if ever. But these cases are often just as important as the high-profile emergency docket matters. Proposal #9 focuses on the most important of these cases, where there is a genuine circuit split, or where there is a question of exceptional significance. In such cases, Supreme Court review is often urgently needed, though in reality, it is often not granted.

With Proposal #9, en banc circuit courts and state courts of last resort could refer a case to the Supreme Court's mandatory jurisdiction by issuing two types of certificates. First, a certificate of split can be issued when there is a split of authorities between two or more federal courts of appeals, or state courts of last resort, on a question of federal law. Second, a certificate of importance can be issued where a case presents an exceedingly important, but unresolved question of federal law. These two certificates would track the standards in Supreme Court Rule 10.[506] These certificates could be issued by the en banc court before hearing oral argument, before a decision is issued, or after a decision is issued. Under this proposal, circuit splits would not fester, and important questions would not linger. Instead, the Supreme Court would perform its quintessential role by unifying federal law across the circuits, as well as the state courts, in a timely fashion as requested by those courts.

4.4.1. Supreme Court Rule 10 and Certiorari

The Supreme Court has identified several "considerations" concerning discretionary grants of certiorari. Rule 10 explains that a "petition for a writ of certiorari will be granted only for compelling reasons."[507] The Court has listed two primary categories of cases that may warrant certiorari. First, where there is a split of authorities between federal courts of appeals, as well as splits with state courts of last resort.[508] And second, where a case presents

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506 SUPREME COURT OF THE UNITED STATES, RULES OF THE SUPREME COURT OF THE UNITED STATES 5–6 (2024).

507 *Id.* at 5.

508 *Id*. at 5–6.

an important, and unresolved question of federal law.[509] Often, these two factors overlap, as questions of exceptional importance tend to divide the courts.

Rule 10(a) concerns splits caused by a federal court of appeals:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;[510]

Rule 10(b) concerns splits caused by a state court of last resort:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;[511]

And Rule 10(c) concerns cases that present important questions of federal law:

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.[512]

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509 *Id.*
510 *Id.*
511 *Id.*
512 *Id.*

The Supreme Court stresses that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[513]

4.4.2. Petitioners rationally exaggerate cert-worthiness and respondents rationally downplay cert-worthiness

Petitions for writs of certiorari will invariably highlight the two categories of factors in Rule 10. Petitioners will generally find a way to characterize the division of authorities as a *deep* and *wide* circuit split. And petitioners will insist that their case presents a *critical* question of importance. I doubt that hyperbole is effective, but it doesn't stop top-side lawyers from trying to sell their petitions. It is rational to make a case appear cert-worthy.

By contrast, bottom-side lawyers rationally downplay the cert-worthiness of the case. Briefs in opposition to certiorari are often ghost-written by frequent players to avoid drawing attention to it.[514] They will insist that a circuit split is not real, or is manufactured, or is shallow. Or they may claim that a split is premature, and more time is needed for *percolation*. Like Maxwell House Coffee, circuit splits are good to the last drop. Respondents can also insist that the question presented is not really that important, or that it could benefit from further *percolation*. Respondents have also made an art form of identifying "vehicle" problems in a case that could counsel against a cert grant, such as disputes about facts, jurisdiction, and waiver. Anything to gum up the works and nudge a clerk in the cert pool to recommend a "deny." The Solicitor General's Office is expertly skilled at crafting such opposition briefs.

Again, this sort of litigation is rational. Petitioners want to get to the Court, and Respondents want to stay away. But the upshot is that the Justices seldom get an objective sense of how cert-worthy a case is. And, in recent years as the cert grant rate has dropped, the cert pool may be getting more

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513 *Id*.

514 Lydia Wheeler, *Ghostwriters Try Steering Supreme Court Justices Away from Cases*, U.S. L. Wk. (May 16, 2024, 6:04 AM), https://perma.cc/AZ6T-TLBR.

gun-shy about pulling the trigger and recommending a grant. I've questioned whether cert-worthiness is even a useful standard anymore.[515]

Proposal #9 would address the dual problems of petition-puffery and docket-decline. Indeed, like much of my article, this proposal would require the Justices to review far more cases than they would otherwise want to. With this proposal, the Court would no longer have to rely on the parties to attest whether there is a circuit split, or an important question of federal law presented. More importantly, the Justices could not let circuit splits fester or important questions linger. Percolation is overrated. Rather, the Court would be obligated to hear those cases promptly. Federal courts of appeals and state courts of last resort could certify such cases directly to the Supreme Court's mandatory jurisdiction.

4.4.3. En banc courts would file certificates of split and certificates of importance

Under federal habeas law, federal judges can issue so-called certificates of appealability, which allow a petitioner to appeal certain rulings.[516] Proposal #9 introduces two new types of certificates: the *certificate of split* and the *certificate of importance*. (I'm open to changing the names; the labels are less important than the substance.[517]) First, if a case satisfies Rule 10(a), a majority of the en banc court could vote to issue a certificate of split. Additionally, state courts of last resort would have the discretion to issue a certificate of split if Rule 10(b) is satisfied. I do not think Congress could commandeer the state courts to refer a case to the Supreme Court.[518]

This certificate is modeled on a practice from Florida. Certain cases can be appealed to the Florida Supreme Court if one court of appeals certifies

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515 Josh Blackman, *Justice Kavanaugh's Concurrence in* Labrador v. Poe, VOLOKH CONSPIRACY (Apr. 18, 2024, 5:44 PM), https://perma.cc/R4AW-X3HR; Josh Blackman, *Justice Kavanaugh Speaks at the Fifth Circuit Judicial Conference*, VOLOKH CONSPIRACY (May 5, 2024, 5:53 PM), https://perma.cc/H75N-QNUV; Josh Blackman, *Justice Barrett and Kavanaugh Cut the Fuse on the Shadown Docket (Updated)*, VOLOKH CONSPIRACY (Oct. 10, 2023, 12:25 PM), https://perma.cc/FRS2-566W.

516 FED. R. APP. P. 22(B); 28 U.S.C. § 2253(c).

517 Lindke v. Freed, 601 U.S. 187, 197 (2024) ("The distinction between private conduct and state action turns on substance, not labels").

518 Josh Blackman, *State Judicial Sovereignty*, 2016 ILL. L. REV. 2033, 2128 (2016).

there is a "express[] and direct[] conflict" with another court of appeals.[519] Rather than adopting this difficult-to-satisfy standard, I would simply track the text of Rule 10(a) and (b). Or maybe a more exacting standard would be warranted since review is mandatory. I could be persuaded either way. It may also make sense to require a super-majority of the en banc court to certify a case—perhaps by a 2/3 or 3/4 vote. I would prefer to keep the threshold lower, but others may disagree.

Second, the certificate of importance would track Rule 10(c). If a case satisfies Rule 10(c), and a case presents an "important question of federal law" that should be settled by the Supreme Court, a majority of the en banc court could vote to issue a certificate of importance. Under Rule 10(c), the en banc court could also certify a case that involves "important federal question in a way that conflicts with relevant decisions of this Court." This rule would be especially useful where more recent Supreme Court caselaw may appear to abrogate older doctrine. For example, it would have been very useful to figure out when exactly the *Lemon* test was "abandoned."[520] State courts of last resort would also have the discretion to certify if Rule 10(c) is satisfied.

Under current law, the federal courts of appeals can certify "any question of law in any civil or criminal case" to the Supreme Court.[521] This provision is not well known. In a recent habeas case, in which Supreme Court review was difficult, Justice Sotomayor noted that, "The Government also suggests that a court of appeals seeking clarity could certify the question to this Court."[522] But certifications from courts of appeals to the Supreme Court are discretionary. I would change that.

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519 FLA. CONST. art. V, § 3(b)(3).

520 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2414 (2022); Josh Blackman, *Red Flag June Continues As* Lemon *Is Finally Interred*, VOLOKH CONSPIRACY (June 27, 2022, 10:43 AM), https://perma.cc/762F-R2KT.

521 28 U.S.C. § 1254(2).

522 *In re* Bowe, 144 S. Ct. 1170, 1171 (2024), *reh'g denied*, 144 S. Ct. 1386 (2024).

4.4.4. The Supreme Court would be required to hear cases with certificates of split or importance

If either of these certificates is issued, a case would be appealed to the Supreme Court's mandatory jurisdiction. All things considered, circuit courts would be more neutral arbiters of whether a circuit split exists, or whether important federal questions are presented. Judges are less likely to engage in Rule 10 puffery. En banc majority opinions, or separate writings, often flag these issues for the Supreme Court's review. Likewise, dissents from denial of certiorari can likewise flag these issues. Allowing the full en banc court to issue these certificates provides a constructive outlet for circuit courts judges who seek clarity on the state of federal law.

If Proposal #1 is adopted, the circuit justice would preside over the en banc court.[523] In that case, the circuit justice would have to vote to certify an appropriate case. This vote would signal that the certificate was warranted. In theory, at least, the circuit justice could help screen out cases with clear vehicle problems, such as factual disputes, standing issues, or jurisdiction problems. Then again, the circuit justice would have one vote—an important vote, but one vote, nonetheless.

To echo a point made above, a Justice who sits on an en banc court while riding circuit would not have to recuse from deciding the same case before the Supreme Court.[524] Likewise, a circuit justice who certifies a case could then hear the same matter on the Supreme Court. Indeed, a circuit justice may decide a case one way on the lower court, and another way on the Supreme Court. The en banc court would not be bound by any circuit precedent, but it would be bound by Supreme Court precedent. The Supreme Court, however, can always revisit its own precedents.

Finally, cases with certificates are not likely to be cases that warrant a summary affirmance or summary reversal. It should be clear enough whether there is subject matter and personal jurisdiction. And, by definition, a case that satisfied Rule 10 cannot be "dismissed for want of a substantial

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523 *See supra* Section 2.1.

524 *See supra* Section 2.1.

federal question."[525] The certificate reflects a timely dispute that cannot be tossed away. The Supreme Court would perform its quintessential role by unifying federal law across the circuits, as well as the state courts.

4.4.5. En banc courts can file certificates before hearing oral argument, before a decision is issued, or after a decision is issued

A certificate could be filed at three junctures. First, after a three-judge panel rules, it may become obvious that there is a clear split of authorities, or an exceptionally important question of federal law that has not yet been resolved. The three-judge panel could indicate that a particular case meets those lofty thresholds. Indeed, the three-judge panel may have created the split. Alternatively, the circuit split may have *preceded* the three-judge panel's deliberations. Further proceedings by the full en banc court would not be a good use of judicial resources. At that point, the active members of the en banc court could *sua sponte* vote to certify a case to the Supreme Court. That act can be done before a petition for rehearing en banc is even filed.

Indeed, members of the panel could circulate the case to the en banc court in advance of publication to put everyone on notice that a certificate-worthy case may be coming down the pike. Several courts of appeals, including the Second Circuit, have similar practices for en-banc-able issues.[526] For example, under the D.C. Circuit's *Irons* procedure,[527] a "panel of the court, under certain circumstances, [can] seek the entire D.C. Circuit's approval to publish an opinion that overrules existing circuit precedent without

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525 Pamela R. Winnick, *The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of* Hicks v. Miranda, 76 COLUM. L. REV. 508, 517 (1976).

526 GERARD N. MAGLIOCCA, WASHINGTON'S HEIR: THE LIFE OF JUSTICE BUSHROD WASHINGTON 88 n.82 (2022); *see* Blackman & Tillman, *supra* note 488, at 469–70.

527 Irons v. Diamond, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981); *See* D.C. Cir. Ct. of Appeals, *Policy Statement on En Banc Endorsement of Panel Decisions* (1996), https://perma.cc/86UC-M6GM.

convening a formal en banc hearing."[528] An *Irons* procedure may be a useful and timely approach to issuing a certificate.

This first approach bypasses many steps: (1) the non-prevailing party petitioning for rehearing en banc; (2) the call for a response to the petition; (3) the en banc vote; (4) if the petition is denied, release concurrences and dissents; (5) if the petition is granted, scheduling and holding en banc oral argument; (6) crafting a majority opinion for the en banc court, with concurrences and dissents; (7) a petition for a writ of certiorari; (8) a call for a response from the Supreme Court; (9) a brief in opposition to certiorari; (10) a conference to decide whether to grant cert; (11) if cert is denied, release concurrences or dissents; (12) grant cert, and schedule oral argument. In short, *all* these steps are obviated, and the case goes directly from the three-judge panel to the Supreme Court's mandatory jurisdiction. This shortcut can save two or three years. To be precise, a majority of the en banc court may not agree *how* the case ought to be resolved, but a majority would be willing to kick the case upstairs for the Supreme Court to decide. This approach eliminates many rounds of potentially divisive en banc proceedings, to say nothing of conserving resources by the parties.

The certificates may be issued at a second juncture: the en banc court decides to grant rehearing, and after oral argument, it becomes apparent that there is *already* a split of authorities or an important question of federal law that is unresolved. The en banc court could proceed to craft a detailed majority opinion, which would simply deepen any split. But that endeavor would not be a good use of judicial resources. Instead, the en banc court could simply vacate the grant of rehearing en banc and certify the three-judge panel's decision directly to the Supreme Court for review. This approach would eliminate steps 6 through 12 listed above.

The third, and final opportunity, for the en banc court to certify a case would come after issuing an en banc opinion. Indeed, a circuit split may not have formed until that decision is issued, so this time would be the earliest possible juncture. In any event, once the certificate is issued, there would be no need for the parties to petition for certiorari. The case would be added to the Court's mandatory jurisdiction and would be set for oral argument.

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[528] Jonathan M. Cohen & Daniel S. Cohen, Iron-*ing out Circuit Splits: A Proposal for the Use of the* Irons *Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CAL. L. REV. 989, 991 (2020).

State courts of last resort would also have the opportunity to certify cases to the Supreme Court at any of these three junctures, or others that may arise under state court proceedings.

I am uncertain of whether the votes to issue a certificate should be revealed, or whether dissents from the denial of a certificate can be published. There is some virtue in a clean up-or-down vote, without indicating how each member voted. It can be accomplished quickly, and judges would not need to worry about how their vote is publicly perceived. Judges who disagree on the merits could agree that the case should be clarified by the Supreme Court. On the other hand, if a vote falls short, but is very close, it could signal to the Justices that this case is worth taking. Perhaps this vote should be treated like a Supreme Court vote for certiorari: if there are enough votes to grant, opposition votes are not released.[529] But if the certificate is not issued, the votes are listed—with or without separate writings.

If the en banc court, or state court of last resort, declines to issue a certificate, the non-prevailing party can still file a petition for a writ of certiorari. But any argument that Rule 10 is satisfied must be weighed against the lower court's refusal to issue a certificate. Any cert petition claiming a circuit split would bear a heavy burden to demonstrate why the en banc court was wrong. In this regard, Proposal #9 would eliminate a lot of petition puffery, and make the job of the cert pool more straightforward. Then again, the en banc courts would exercise vast control over the Supreme Court's docket.

4.4.6. Invert the pyramid

The federal courts are often depicted as a pyramid, with the lowly federal district courts along the base, the trifling circuit courts of appeal in the middle, and the august Supreme Court at the apex. Generally, cases trickle up to the top of the pyramid, but the law gushes down the slope. Proposal #9 inverts the pyramid. The en banc circuit courts would exercise vast power to control the Supreme Court's docket.

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[529] Am. Tradition P'ship, Inc. v. Bullock, 567 U.S. 516, 516–17 (2012). Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented from the grant of certiorari. *Id.* at 518; *See* Josh Blackman, *Why the Rule of Four Doesn't Work when You Have Five Fingers?*, JOSH BLACKMAN (June 25, 2012), https://perma.cc/9W52-8TAQ.

At present, en banc decisions are quite rare—less than 1% of appellate decisions.[530] One rationale for the low-rate of en banc review is that the Supreme Court exists to resolve splits of authority and important questions of law. Judge Sutton articulated this philosophy in *Mitts v. Bagley*: "Skepticism about the value of merits-based en banc review reflects one other thing: We are not the only Article III judges concerned with deciding cases correctly. Sometimes there is nothing wrong with letting the United States Supreme Court decide whether a decision is correct and, if not, whether it is worthy of correction."[531] In this case, at least, Judge Sutton was correct, as the Supreme Court summarily reversed the Sixth Circuit.[532] Then again, with fewer and fewer cert grants, this philosophy may make less sense. Ditto for fast-moving cases where orderly proceedings may decide the matter.[533]

Proposal #9 would rejigger the calculus. En banc courts would no longer have to sit in judgment of their colleagues when there is a pressing issue for the Supreme Court to decide. Instead, a simple certificate could obviate what is often a frustrating and complicated en banc process. If courts of appeals know that triggering en banc review could mandate Supreme Court review, they may be more likely to go en banc. Or, to save the hassle, en banc courts could issue the certificates before hearing the case, to more promptly bring clarity to an issue.

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530 Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1376 (2021).

531 Mitts v. Bagley, 626 F.3d 366, 370–71 (6th Cir. 2010) (en banc) (Sutton, J., concurring).

532 Bobby v. Mitts, 563 U.S. 395, 400 (2011).

533 *See also In re* MCP No. 165, Occupational Safety & Health Admin., Interim Final Rule: COVID-19 Vaccination & Testing, 20 F.4th 264, 271 (6th Cir. 2021) (Sutton, J., dissenting from denial of initial en banc) ("Given the unusual setting of these consolidated cases . . . there is something to be said for putting all hands on deck, particularly when it comes to handling the stay motion, which could turn out to be the key decision point in all of these petitions for review. . . . We likely will not be the final decisionmakers in this case, given the prospect of review by the U.S. Supreme Court.").

4.5. Proposal #10: When circuit judge reaches "Rule of 80," he is no longer able to vote on en banc court, and new judgeship is automatically created.

An Article III circuit judgeship is a cushy gig. Circuit judges exercise vast power, are venerated in their communities, and can select the crème de la crème for law clerks. Other than regularly scheduled sittings, and some emergency docket matters, circuit judges can set their own calendars, and decide when, where, and how to complete their work. And that's just the start. There is the magical "Rule of 80."[534] If a judge is at least sixty-five years old, and their years of service and age total eighty, they can retire with a 100% pension for life.[535] They can also elect for "senior status," in which they keep the same salary, but get to work less.[536] Indeed, judges can choose to take senior status at any time, and can choose which President appoints their replacement.[537] Indeed, judges can leverage their taking of senior status to select who their replacement might be. It's a cushy gig! I would make the gig less cushy.

With Proposal #10, two things would happen when a circuit judge becomes eligible for senior status. First, they would no longer be eligible to participate in en banc proceedings. Second, by statute, a new judgeship is created, which can be immediately filled. With this approach, judges who reach the "Rule of 80" date would no longer have any leverage over which President fills their vacancy, and over who will replace them. Circuit court positions would regularly turn over, and Presidents could fill vacancies at predictable intervals. Proposal #10 would bring some order to what is now a very disorderly process. Circuit judges could still elect for senior status and receive a reduced caseload. But even before that election, they would lose their seat on the en banc court.

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534 *See About Federal Judges*, U.S. Cts., https://perma.cc/83XJ-L9NZ.

535 *Id.*

536 *Id.*

537 *Id.*

4.5.1. The Rule of 80

Under Article III of the Constitution, federal judges can continue to serve "during good Behaviour"—effectively life tenure—without any reduction in salary.[538] Judges who reach the age of 65 have the option of retiring with a 100 percent pension for the rest of their lives.[539] Alternatively, these judges can stay on the bench through "senior status," so long as they satisfy the *Rule of 80*.[540] Judges must be "at least 65 years old and have served at least 15 years on the bench, or any combination of age and years of service thereafter that equals 80."[541] Moreover, "[r]egardless of age, judges must serve at least 10 years to qualify for senior status."[542]

Consider a few examples to illustrate the math. Judge Alpha, who was appointed to the federal bench at the age of 50, would be eligible for senior status at the age of 65. This judge served at least 10 years—15 to be precise—and 15+65=80. But Judge Beta, who was appointed to the federal bench at the age of 55, would not be eligible under the age of 70. When Judge Beta hits 65, she has accrued 10 years of service, but 10+65=75, still five years short of hitting the Rule of 80. And Judge Gamma, who was appointed at the age of 35 (quite common nowadays), will hit ten years of service at the age of 45, but 45+10=55. Judge Gamma would not be eligible for senior status until the age of 65, at which point he will have had three decades of service.

Senior judges who maintain a minimum caseload still receive their guaranteed salary, and can maintain their chambers, staff, and law clerks.[543] But once a judge announces that he will take senior status, the President can nominate, and the Senate can confirm, a replacement.[544] Indeed, those steps can happen before the position even becomes vacant. President Biden signed

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538 *Id.*; U.S. CONST. art. III, § 1.

539 *See About Federal Judges*, *supra* note 534.

540 *Id.*

541 *Id.*

542 *Id.*

543 Hon. Frederic Block, *Senior Status: An "Active" Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533, 536, 539–40 (2007).

544 *Id.* at 543–44.

Ketanji Brown Jackson's commission to the Supreme Court before Justice Breyer even stepped down![545]

When a district court judge takes senior status, and a reduced caseload, he can accept a reduced caseload, or even select which cases he accepts.[546] But for circuit court judges, senior status judges no longer sit and vote on the en banc court.[547] If a senior status judge sat on a three-judge panel for a case that is reheard en banc, that judge can sit on the en banc court.[548] Some senior status judges issue statements when the circuit court denies a petition for rehearing en banc,[549] but these statements have no legal effect.

4.5.2. Senior Status Statistics

When a federal judge is confirmed, there is a certain date on which he or she will become eligible for senior status. No one should know the time of their own death, but once confirmed, a federal judge will know to the millisecond when they will be eligible for senior status. Judges may not meet that date due to death, disability, or resignation. But we can still measure how long judges who were eligible for senior status waited until they took senior status. For now, I've compiled a spreadsheet with Professor James Phillips that calculates when circuit judges became eligible for senior status, and when they in fact took senior status. And in this section, I will walk through when the circuit judges appointed by Presidents Carter, Reagan, H.W. Bush, Clinton, W. Bush, Obama, and Trump were eligible for senior

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545 Authority of the President to Prospectively Appoint a Supreme Court Justice, 46 Op. O.L.C. 1, 5 (2022).

546 Josh Blackman, *Austin Judges Shop for Cases with "Mutual Consent"*, VOLOKH CONSPIRACY (May 16, 2024), https://perma.cc/T72U-4ZDJ.

547 28 U.S.C. § 46(c).

548 *Id.*

549 Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 930 n.1 (9th Cir. 2021) (en banc) (O'Scannlain, J., dissenting) ("As a judge of this court in senior status, I no longer have the power to vote on calls for rehearing cases en banc or formally to join a dissent from failure to rehear en banc. See 28 U.S.C. § 46(c); Fed. R. App. P. 35(a). Following our court's general orders, however, I may participate in discussions of en banc proceedings. *See* Ninth Circuit General Order 5.5(a).").

status and when they actually took senior status. If you find this listing tedious, you can skip to the next section for some observations.

4.5.2.1. Carter Appointees

Fifteen Carter appointees became or would have become eligible for senior status during the Reagan administration. I write "became or would have become" because some judges would resign or die prior to their senior status date. Four of those fifteen judges took senior status during the Reagan administration (Bailey Brown, Albert John Henderson, Otto Richard Skopil Jr., Warren J. Ferguson).[550] Two of them had their service terminated before taking senior status (Judge Albert Tate Jr. died and Robert Boochever retired due to disability).[551] Five took senior status during the H.W. Bush administration (Alvin Benjamin Rubin, Hugh H. Bownes, Thomas Morrow Reavley, Samuel D. Johnson Jr., Frank Minis Johnson Jr.).[552] Three took senior status during the Clinton administration (Damon Keith, Cecil F. Poole, Cornelia Groefsema Kennedy).[553] Zero took senior status during the W. Bush administration. And during the Obama Administration, one took senior status (Harry Pregerson).[554]

Ten Carter appointees became or would have become eligible for senior status during the H.W. Bush Administration. Four took senior status during the H.W. Bush administration (Jerre Stockton Williams, Thomas Alonzo

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550 *Brown, Bailey*, FED. JUD. CTR., https://perma.cc/8HUG-KUCQ; *Henderson, Albert John*, FED. JUD. CTR., perma.cc/AF32-HJ55; *Skopil, Otto Richard, Jr.*, FED. JUD. CTR., perma.cc/7R39-2Z9D; *Ferguson, Warren John*, FED. JUD. CTR., perma.cc/27CK-QXQV.

551 *Tate, Albert, Jr.*, FED. JUD. CTR., https://perma.cc/X88E-FQ8A; *Boochever, Robert*, FED. JUD. CTR., perma.cc/D842-HPPN.

552 *Rubin, Alvin Benjamin*, FED. JUD. CTR., https://perma.cc/442Q-WYSM; *Bownes, Hugh Henry*, FED. JUD. CTR., https://perma.cc/3LER-XMJM; *Reavley, Thomas Morrow*, FED. JUD. CTR., perma.cc/FL5N-DUC9; *Johnson, Samuel D., Jr.*, FED. JUD. CTR., https://perma.cc/VF74-QD9T; *Johnson, Frank Minis, Jr.*, FED. JUD. CTR., https://perma.cc/82GZ-597M.

553 *Keith, Damon Jerome*, FED. JUD. CTR., https://perma.cc/99NG-KEUN; *Poole, Cecil F.*, FED. JUD. CTR., https://perma.cc/E7AY-CQE6; *Kennedy, Cornelia Groefsema*, FED. JUD. CTR., https://perma.cc/X838-A5Y2.

554 *Pregerson, Harry*, FED. JUD. CTR., https://perma.cc/Q3V4-AYUX.

Clark, James Marshall Sprouse, Arthur Lawrence Alarcón).[555] Four took senior status during the Clinton administration (Thomas Tang, James Dickson Phillips Jr., Phyllis A. Kravitch, Betty Binns Fletcher).[556] One judge died (Francis Dominic Murnaghan Jr.).[557] One Carter appointee who was eligible for senior status during the H.W. Bush administration took senior status during the W. Bush Administration (Theodore McMillian).[558]

Twenty Carter appointees became or would have become eligible for senior status during the Clinton Administration. If we exclude Ruth Bader Ginsburg, who was elevated to the Supreme Court, fourteen took senior status, resigned, or became inactive during the Clinton Administration (Monroe G. McKay, William Albert Norris, Richard Dickson Cudahy, James Kenneth Logan, Abner Mikva, Dorothy Wright Nelson, Joseph Jerome Farris, Nathaniel R. Jones, William Canby, Jon O. Newman, Joseph Woodrow Hatchett, Henry Anthony Politz, Samuel James Ervin III, and Patricia Wald).[559] Two took senior status during the W. Bush Administration (Gilbert S. Merritt Jr.

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555 *Williams, Jerre Stockton*, FED. JUD. CTR., https://perma.cc/3NEM-HG5M; *Clark, Thomas Alonzo*, FED. JUD. CTR., https://perma.cc/5V5D-SFEP; *Sprouse, James Marshall*, FED. JUD. CTR., https://perma.cc/3TCT-FCC8; *Alarcón, Arthur Lawrence*, FED. JUD. CTR., https://perma.cc/RJG8-C6TW.

556 *Tang, Thomas*, FED. JUD. CTR., https://perma.cc/NS9J-HSXJ; *Phillips, James Dickson, Jr.*, FED. JUD. CTR., https://perma.cc/C7TH-MH9S; *Kravitch, Phyllis A.*, FED. JUD. CTR., https://perma.cc/V949-6XSH; *Fletcher, Betty Binns*, FED. JUD. CTR., https://perma.cc/C6JV-F29N.

557 *Murnaghan, Francis Dominic, Jr.*, FED. JUD. CTR., https://perma.cc/2D4B-8QFB.

558 *McMillian, Theodore*, FED. JUD. CTR., https://perma.cc/F5JF-YKM2.

559 *McKay, Monroe G.*, FED. JUD. CTR., https://perma.cc/S59F-W4ZV; *Norris, William Albert*, FED. JUD. CTR., https://perma.cc/U95H-8QV7; *Cudahy, Richard Dickson*, FED. JUD. CTR., https://perma.cc/XC9W-K94X; *Logan, James Kenneth*, FED. JUD. CTR., https://perma.cc/F4EK-9WEY; *Mikva, Abner Joseph*, FED. JUD. CTR., https://perma.cc/BFL6-3WLR; *Nelson, Dorothy Wright*, FED. JUD. CTR., https://perma.cc/QP5A-RBYH; *Farris, Joseph Jerome*, FED. JUD. CTR., https://perma.cc/A2ZA-QZC3; *Jones, Nathaniel Raphael*, FED. JUD. CTR., https://perma.cc/N9G9-C4VW; *Canby, William Cameron, Jr.*, FED. JUD. CTR., https://perma.cc/B39L-QBGK; *Newman, Jon Ormond*, FED. JUD. CTR., https://perma.cc/E6HT-833L; *Hatchett, Joseph Woodrow*, FED. JUD. CTR., https://perma.cc/69BA-SY3N; *Politz, Henry Anthony*, FED. JUD. CTR., https://perma.cc/VC3G-JGK5; *Ervin, Samuel James III*, FED. JUD. CTR., https://perma.cc/466T-LMUS; *Wald, Patricia McGowan*, FED. JUD. CTR., https://perma.cc/NHT9-5P9D.

and Procter Ralph Hug Jr.).[560] Two took senior status during the Obama administration, Dolores Sloviter, and Boyce F. Martin Jr.,[561] however the latter seat was filled by President Trump.[562] The last Carter appointee on the court of appeals, Stephen Reinhardt, could wait no longer, died in 2018, and was replaced by a Trump nominee.[563] Yet he somehow continued to issue opinions after he died![564] Thankfully, "federal judges are appointed for life, not for eternity."[565]

Eight Carter appointees became or would have become eligible for senior status during the W. Bush administration. If we excluded Stephen Breyer, who was elevated to the Supreme Court, four, in fact, took senior status during the W. Bush administration (Richard S. Arnold, Amalya Lyle Kearse, Stephanie Kulp Seymour, Harry T. Edwards).[566] The remaining three took senior status during the Obama Administration (R. Lanier Anderson III, Mary M. Schroeder, Carolyn Dineen King).[567]

4.5.2.2. Reagan Appointees

Two Reagan appointees became or would have become eligible for senior status during the Reagan administration, and took senior status during the Reagan Administration: Jesse E. Eschbach and Leroy John Contie Jr., who were both appointed to the court of appeals at the age of 61.[568] (They

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560 *Merritt, Gilbert Stroud, Jr.*, FED. JUD. CTR., https://perma.cc/2K8Y-HBUB; *Hug, Proctor Ralph, Jr.*, FED. JUD. CTR., https://perma.cc/2U9X-U5MN.

561 *Sloviter, Dolores Korman*, FED. JUD. CTR., https://perma.cc/ZMU2-RDJ2; *Martin, Boyce Ficklen, Jr.*, FED. JUD. CTR., https://perma.cc/BQ4U-54EG.

562 *Thapar, Amul Roger*, FED. JUD. CTR., https://perma.cc/RNE6-T25N.

563 *Reinhardt, Stephen Roy*, FED. JUD. CTR., https://perma.cc/H4KY-8R42.

564 Yovino v. Rizo, 586 U.S. 181, 182 (2019) (per curiam).

565 *Id.* at 186.

566 *Arnold, Richard Sheppard*, FED. JUD. CTR., https://perma.cc/BL3J-VHU; *Kearse, Amalya Lyle*, FED. JUD. CTR., https://perma.cc/9SF6-3H5W; *Seymour, Stephanie Kulp,* FED. JUD. CTR., https://perma.cc/T9JQ-XUBQ; *Edwards, Harry Thomas*, FED. JUD. CTR., https://perma.cc/KR5R-LTH2.

567 *Anderson, R[obert] Lanier III*, FED. JUD. CTR., https://perma.cc/YY42-UKM4; *Schroeder, Mary Murphy*, FED. JUD. CTR., https://perma.cc/6WVU-RSRU; *King, Carolyn Dineen*, FED. JUD. CTR., https://perma.cc/5SRA-EV6U.

568 *Eschbach, Jesse Ernest*, FED. JUD. CTR., https://perma.cc/C26J-PAV2; *Contie, Loroy John, Jr.*, FED. JUD. CTR., https://perma.cc/NA6H-K7D8.

both had previously served on the district courts—that time counts towards the Rule of 80).[569] Three Reagan appointees ended active status early during the Reagan administration: Emory M. Sneeden (health) and Robert Madden Hill (death) and Robert Bork (resigned after being Borked).[570]

Five Reagan appointees became or would have become eligible for senior status during the H.W. Bush Administration. Four of them in fact took senior status during the H.W. Bush Administration (Robert B. Krupansky, Harry W. Wellford, Robert F. Chapman, Lawrence W. Pierce).[571] Zero took senior status during the Clinton administration. One took senior status during the W. Bush Administration (John Louis Coffey).[572] One Reagan appointee, Kenneth W. Starr, resigned during the H.W. Bush Administration to become Solicitor General.[573]

Thirty-nine Reagan circuit appointees became or would have become eligible for senior status during the Clinton Administration. Twenty-nine of them in fact took senior status during the Clinton Administration (George C. Pratt, Richard J. Cardamone, John R. Gibson, Ralph B. Guy Jr., Frank X. Altimari, Robert R. Beezer, James L. Buckley, J. Daniel Mahoney, John T. Noonan Jr., Charles E. Wiggins, William Lockhart Garwood, Frank J. Magill, Edward Leavy, Cynthia Holcomb Hall, Glenn Leroy Archer Jr., Robert Cowen, David R. Thompson, John Malcolm Duhe Jr., George Gardner Fagg, Walter King Stapleton, David Aldrich Nelson, John Carbone Porfilio, Melvin T. Brunetti, Stephen Hale Anderson, James L. Ryan, Morton Ira Greenberg, Ralph K. Winter Jr., Laurence Silberman, and Emmett Ripley Cox).[574] Four of the

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569 28 U.S.C. § 371(e)(1)(A).

570 *Sneeden, Emory Marlin*, FED. JUD. CTR., https://perma.cc/S36U-SZU6; *Hill, Robert Madden*, FED. JUD. CTR., https://perma.cc/2Z5E-BWVC; *Bork, Robert Heron*, FED. JUD. CTR., https://perma.cc/A6S7-86TW.

571 *Krupansky, Robert B.*, FED. JUD. CTR., https://perma.cc/KC3Q-GE9B; *Wellford, Harry Walker*, FED. JUD. CTR., https://perma.cc/9R5D-ZYS6; *Chapman, Robert Foster*, FED. JUD. CTR., https://perma.cc/6L6G-3U66; *Pierce, Lawrence Warren*, FED. JUD. CTR., https://perma.cc/BVV2-E4GA.

572 *Coffey, John Louis*, FED. JUD. CTR., https://perma.cc/W53R-VP3N.

573 *Starr, Kenneth Winston*, FED. JUD. CTR., https://perma.cc/F3LD-ZDQ9.

574 *Pratt, George Cheney*, FED. JUD. CTR., https://perma.cc/RX8E-BCYH; *Cardamone, Richard J.*, FED. JUD. CTR., https://perma.cc/6FT6-NH4U; *Gibson, John R.*, FED. JUD. CTR., https://perma.cc/BY95-97NQ; *Guy, Ralph B., Jr.*, FED. JUD. CTR., https://perma.cc/2SKJ-QMJV; *Altimari, Frank X.*, FED. JUD. CTR., https://perma.cc/5G3K-DYCJ; *Beezer, Robert R.*, FED. JUD. CTR.,

Reagan appointees who were eligible for senior status during the Clinton Administration took senior status during the W. Bush Administration (C. Arlen Beam, Edward Roy Becker, Pasco Bowman II, and Bruce M. Selya).[575] One Reagan appointee who was eligible for senior status during the Clinton Administration took senior status during Trump (Roger Leland Wollman).[576] One Reagan appointee who was eligible for senior status during the Clinton Administration died during the tail-end of the Trump Administration 10/26/20 (Juan R. Torruella),[577] but his seat was filled by President Biden.[578] Three Reagan appointees ended their status early during the

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https://perma.cc/W4TL-ZS7D; *Buckley, James Lane*, FED. JUD. CTR., https://perma.cc/3DYF-NCMF; *Mahoney, John Daniel*, FED. JUD. CTR., https://perma.cc/N4BQ-4X7U; *Noonan, John T., Jr.*, FED. JUD. CTR., https://perma.cc/P3DT-5NA6; *Wiggins, Charles Edward*, FED. JUD. CTR., https://perma.cc/YG9R-VWRZ; *Garwood, William Lockhart*, FED. JUD. CTR., https://perma.cc/E49U-Q4SH; *Magill, Frank J.*, FED. JUD. CTR., https://perma.cc/ZP8Y-WUS6; *Leavy, Edward*, FED. JUD. CTR., https://perma.cc/4YMK-LDEP; *Hall, Cynthia Holcomb*, FED. JUD. CTR., https://perma.cc/KQ8Z-P7MD; *Archer, Glenn Leroy, Jr.*, FED. JUD. CTR., https://perma.cc/V3LF-WYJT; *Cowen, Robert E.*, FED. JUD. CTR., https://perma.cc/N2PG-KXCH; *Thompson, David R.*, FED. JUD. CTR., https://perma.cc/F6XY-DJ7N; *Duhe, John Malcolm, Jr.*, FED. JUD. CTR., https://perma.cc/3W9T-9RKJ; *Fagg, George Gardner*, FED. JUD. CTR., https://perma.cc/H4NG-28GC; *Stapleton, Walter King*, FED. JUD. CTR., https://perma.cc/8DD5-J34F; *Nelson, David Aldrich*, FED. JUD. CTR., https://perma.cc/YNM5-ZGVA; *Porfilio, John Carbone*, FED. JUD. CTR., https://perma.cc/6ZTE-8CSB; *Brunetti, Melvin T.*, FED. JUD. CTR., https://perma.cc/LK38-B2YQ; *Anderson, Stephen Hale*, FED. JUD. CTR., https://perma.cc/3JYU-NYPX; *Ryan, James Leo*, FED. JUD. CTR., https://perma.cc/8RH2-5KM6; *Greenberg, Morton Ira*, FED. JUD. CTR., https://perma.cc/29NN-JEGT; *Winter, Ralph K., Jr.*, FED. JUD. CTR., https://perma.cc/8LPX-N5MQ; *Silberman, Laurence Hirsch*, FED. JUD. CTR., https://perma.cc/YA24-NFPA; *Cox, Emmett Ripley*, FED. JUD. CTR., https://perma.cc/6LP8-B9ZC.

575 *Beam, C[larence] Allen*, FED. JUD. CTR., https://perma.cc/LS59-3EAM; *Becker, Edward Roy*, FED. JUD. CTR., https://perma.cc/RL8W-RSU9; *Bowman, Pasco Middleton II*, FED. JUD. CTR., https://perma.cc/A9TC-LFT6; *Selya, Bruce Marshall*, FED. JUD. CTR., https://perma.cc/DUG7-QDLX.

576 *Wollman, Roger Leland*, FED. JUD. CTR., https://perma.cc/FLJ6-996T.

577 *Torruella, Juan R.*, FED. JUD. CTR., https://perma.cc/6UZE-CRFJ.

578 *Gelpí, Gustavo Antonio, Jr.,* FED. JUD. CTR., https://perma.cc/Y62S-3TMW.

Clinton administration: William D. Hutchinson (death), Herbert Theodore Milburn (disability), and Roger Miner (disability).[579] Pauline Newman, a Reagan appointee who was eligible for senior status during the Clinton administration, still has not taken senior status, though her court is stealthily impeaching her.[580]

Twenty-three Reagan circuit appointees became or would have become eligible for senior status during the W. Bush Administration. (Here I excluded Antonin Scalia, who, if he had stayed on the D.C. Circuit, would have been eligible for senior status in 2001.)[581] Eleven Reagan circuit appointees who were eligible for senior status during the W. Bush Administration in fact took senior status during the W. Bush Administration (Bobby Ray Baldock, Wade Brorby, Alan Eugene Norris, Stephen F. Williams, Stephen S. Trott, Richard Lowell Nygaard, David M. Ebel, Patrick Higginbotham, William Walter Wilkins, Daniel Anthony Manion, and Kenneth Francis Ripple).[582] Four took senior status during the Obama Administration (Paul Redmond Michel, Robert Mayer, David B. Sentelle, and Anthony Joseph Scirica).[583] Three Reagan appointees took senior status during the Trump

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579 *Hutchinson, William D.*, FED. JUD. CTR., https://perma.cc/ES55-NS7R; *Milburn, Herbert Theodore*, FED. JUD. CTR., https://perma.cc/6L7D-C8BW; *Miner, Roger Jeffrey*, FED. JUD. CTR., https://perma.cc/H6LS-54B5.

580 Josh Blackman, *The Stealth Impeachment of Judge Newman in the Federal Circuit*, VOLOKH CONSPIRACY (Apr. 22, 2023, 4:23 PM), https://perma.cc/HS8Z-3FZU.

581 *Justice Antonin Scalia*, JUSTIA, https://perma.cc/M2CJ-7SHG.

582 *Baldock, Bobby Ray*, FED. JUD. CTR., https://perma.cc/BG9C-ZD35; *Brorby, Wade*, FED. JUD. CTR., https://perma.cc/2937-PN3M; *Norris, Allan Eugene*, FED. JUD. CTR., https://perma.cc/JQK7-56XR; *Williams, Stephen Fain*, FED. JUD. CTR., https://perma.cc/T7NV-2QQB; *Trott, Stephen S.*, FED. JUD. CTR., https://perma.cc/WBG7-TZ5R; *Nygaard, Richard Lowell*, FED. JUD. CTR., https://perma.cc/BBB7-PRTC; *Ebel, David M.*, FED. JUD. CTR., https://perma.cc/RX8E-BCYH; *Higginbotham, Patrick Errol*, FED. JUD. CTR., https://perma.cc/U5KE-ZRLG; *Wilkins, William Walter*, FED. JUD. CTR., https://perma.cc/LS7F-8T3B; *Manion, Daniel Anthony*, FED. JUD. CTR., https://perma.cc/FEX3-RUUW; *Ripple, Kenneth Francis*, FED. JUD. CTR., https://perma.cc/9K7G-UGAL.

583 *Michel, Paul Redmond*, FED. JUD. CTR., https://perma.cc/FZW9-A8K4; *Mayer, Haldane Robert*, FED. JUD. CTR., https://perma.cc/2EC8-9NB5; *Sentelle, David Bryan*, FED. JUD. CTR., https://perma.cc/AC87-3XAD; *Scirica, Anthony Joseph*, FED. JUD. CTR., https://perma.cc/EU8C-WGL2.

Administration (W. Eugene Davis, Diarmuid O'Scannlain, and E. Grady Jolly).[584] One Reagan appointee resigned (Richard Posner).[585] President Biden appointed replacements for two Reagan appointees who became eligible for senior status during the W. Bush administration: Michael Stephen Kanne (died on 6/16/22) and Joel Flaum (took senior status on 11/30/2020).[586] Two Reagan circuit appointees who would have become eligible for senior status during the W. Bush Administration, but ended active service early: Jean Galloway Bissell (died on 2/4/1990) and Carol Los Mansmann (died on 3/9/2002).[587]

Nine Reagan appointees became or would have become eligible for senior status during the Obama Administration. Three of them took senior status (Deanell Reece Tacha, Douglas H. Ginsburg, and James Larry Edmondson).[588] One took senior status during the Trump Administration (Danny J. Boggs).[589] Another resigned during the Trump Administration (Alex Kozinski).[590] Four Reagan appointees who were eligible for senior status during the Obama Administration still have not yet taken senior status, (J. Harvie Wilkinson III, Jerry Edwin Smith, Frank H. Easterbrook, and Edith Jones).[591]

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584 *Davis, Eugene W.*, FED. JUD. CTR., https://perma.cc/8KKK-K3E3; *O'Scannlain, Diarmuid Fionntain,* FED. JUD. CTR., https://perma.cc/ASX5-5FQ8; *Jolly, E. Grady*, FED. JUD. CTR., https://perma.cc/U68R-GXQ5.

585 *Posner, Richard Allen*, FED. JUD. CTR., https://perma.cc/JU3V-KG2K.

586 *Kanne, Michael Stephen*, FED. JUD. CTR., https://perma.cc/L5ZW-QMB4; *Flaum, Joel Martin,* FED. JUD. CTR., https://perma.cc/9U8T-6YQE.

587 *Bissell, Jean Galloway*, FED. JUD. CTR., https://perma.cc/7ZK2-C89W; *Mansmann, Carol Los,* FED. JUD. CTR., https://perma.cc/8VSZ-T2ZK.

588 *Tacha, Deanell Reece*, FED. JUD. CTR., https://perma.cc/DM7L-LGZW; *Ginsburg, Douglas Howard*, FED. JUD. CTR., https://perma.cc/Q2DU-BPD9; *Edmondson, James Larry*, FED. JUD. CTR., https://perma.cc/WP8B-X3MK.

589 *Boggs, Danny Julian*, FED. JUD. CTR., https://perma.cc/G6TE-YGL4.

590 *Kozinski, Alex*, FED. JUD. CTR., https://perma.cc/C3UD-3Y92.

591 *Wilkinson, James Harvie III*, FED. JUD. CTR., https://perma.cc/6TDD-KJFE; *Smith, Jerry Edwin*, FED. JUD. CTR., https://perma.cc/HGC9-6LKD; *Easterbrook, Frank Hoover*, FED. JUD. CTR., https://perma.cc/2KZV-NBUK; *Jones, Edith Hollan*, FED. JUD. CTR., https://perma.cc/HBY5-GB88.

4.5.2.3. H.W. Bush Appointees

None of President George H.W. Bush's circuit court appointees became eligible for senior status during his single term in office. Five of George H.W. Bush's circuit court appointees became or would have become eligible for senior status during the Clinton Administration. And four of those judges in fact took senior status during the Clinton Administration (Conrad K. Cyr, Joseph M. McLaughlin, Clyde H. Hamilton, and S. Jay Plager).[592] Only one H.W. Bush appointee who was eligible to take senior status during the Clinton Administration waited until the W. Bush Administration (Jane Richards Roth).[593]

Nineteen of President George H.W. Bush's circuit court appointees became or would have become eligible to take senior status during George W. Bush Administration. Eleven of them took senior status during the W. Bush Administration (Norman H. Stahl, Richard Fred Suhrheinrich, Eugene Edward Siler Jr., Ferdinand Fernandez, David Rasmussen Hansen, Thomas G. Nelson, Raymond Charles Clevenger III, John M. Walker Jr., Morris S. Arnold, Harold R. DeMoss Jr., and Arthur Raymond Randolph).[594] Three of them ended active service during the Obama Administration: Susan H. Black and Michael Boudin took senior status, and Pamela Ann Rymer died. One (Paul Joseph Kelly Jr.) was replaced by President Trump. Another (Ilana

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592 *Cyr, Conrad Keefe*, FED. JUD. CTR., https://perma.cc/KQG6-SLJA; *McLaughlin, Joseph Michael*, FED. JUD. CTR., https://perma.cc/9PTB-33VP; *Hamilton, Clyde H.*, FED. JUD. CTR., https://perma.cc/MQ8J-XKCH; *Plager, S. Jay*, FED. JUD. CTR., https://perma.cc/3VTU-SUWD.

593 *Roth, Jane Richards*, FED. JUD. CTR., https://perma.cc/EQ5F-PRZS.

594 *Stahl, Norman H.*, FED. JUD. CTR., https://perma.cc/37FJ-QEWN; *Suhrheinrich, Richard Fred*, FED. JUD. CTR., https://perma.cc/5MTH-78TL; *Siler, Eugene Edward, Jr.*, FED. JUD. CTR., https://perma.cc/FC8B-AEFM; *Fernandez, Ferdinand Francis*, FED. JUD. CTR., https://perma.cc/DD5D-AKQ2; *Hansen, David Rasmussen*, FED. JUD. CTR., https://perma.cc/D7XQ-RYHT; *Nelson, Thomas G.*, FED. JUD. CTR., https://perma.cc/4SR5-6T3J; *Clevenger, Raymond Charles III*, FED. JUD. CTR., https://perma.cc/DNF9-A6GY; *Walker, John Mercer, Jr.*, FED. JUD. CTR., https://perma.cc/J48F-7FKG; *Arnold, Morris Sheppard*, FED. JUD. CTR., https://perma.cc/BG7H-384Y; *DeMoss, Harold R., Jr.*, FED. JUD. CTR., https://perma.cc/Y4FZ-UZ9D; *Randolph, Arthur Raymond*, FED. JUD. CTR., https://perma.cc/W72B-A8BQ.

Rovner) will soon be replaced by President Biden.[595] Three H.W. Bush appointees who were eligible to take senior status during the W. Bush Administration, still have not taken senior status: Alan David Lourie, James B. Loken, and Paul V. Niemeyer.[596]

Fourteen H.W. Bush appointees became or would have become eligible for senior status during the Obama Administration. (I exclude Justice Samuel Alito, who was appointed in 1990 and would have become eligible for senior status in 2015.)[597] Eight of them took senior status during the Obama Administration (Rhesa Hawkins Barksdale, Alvin Anthony Schall, Andrew Kleinfeld, Stanley F. Birch Jr., Jacques L. Wiener Jr., Emilio M. Garza, Joel Fredrick Dubina, and Randall Ray Rader).[598] One judge (Karen J. Williams), ended active service early on July 8, 2009 due to disability.[599] Karen L. Henderson became eligible for senior status during the Obama Administration, but still has not taken it.[600]

Three H.W. Bush appointees became or would have become eligible for senior status during the Trump Administration. All three took it (Alice M. Batchelder, Dennis G. Jacobs, Edward Earl Carnes).[601] Timothy K. Lewis, who would have been eligible for senior status during the Trump Administration, resigned early in June 1999.[602] One H.W. Bush circuit appointee, J. Michael

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595 *Rovner, Ilana Kara Diamond*, FED. JUD. CTR., https://perma.cc/G2QJ-G5VJ.

596 *Lourie, Alan David*, FED. JUD. CTR., https://perma.cc/B5F3-FLMD; *Loken, James B.*, FED. JUD. CTR., https://perma.cc/X47P-6EYS; *Niemeyer, Paul Victor*, FED. JUD. CTR., https://perma.cc/P4JS-PNKY.

597 *Alito, Samuel A., Jr.*, FED. JUD. CTR., https://perma.cc/QH4X-8D4G.

598 *Barksdale, Rhesa Hawkins*, FED. JUD. CTR., https://perma.cc/SL5N-8QT9; *Schall, Alvin Anthony*, FED. JUD. CTR., https://perma.cc/386K-NY9B; *Kleinfeld, Andrew Jay*, FED. JUD. CTR., https://perma.cc/4A7C-5XYK; *Birch, Stanley F., Jr.*, FED. JUD. CTR., https://perma.cc/4RZN-LB8C; *Wiener, Jacques Loeb, Jr.*, FED. JUD. CTR., https://perma.cc/FG7W-F9X6; *Garza, Emilio M.*, FED. JUD. CTR., https://perma.cc/5GTK-ZL3X; *Dubina, Joel Frederick*, FED. JUD. CTR., https://perma.cc/72N9-QJ7U; *Rader, Randall Ray*, FED. JUD. CTR., https://perma.cc/RY3U-ER5C.

599 *Williams, Karen J.*, FED. JUD. CTR., https://perma.cc/R2CQ-ZPBP.

600 *Henderson, Karen LeCraft*, FED. JUD. CTR., https://perma.cc/AE9G-ZENT.

601 *Batchelder, Alice Moore*, FED. JUD. CTR., https://perma.cc/KX5S-ZSEW; *Jacobs, Dennis G.*, FED. JUD. CTR., https://perma.cc/5SHN-JM6G; *Carnes, Edward Earl*, FED. JUD. CTR., https://perma.cc/BS94-ZJEH.

602 *Lewis, Timothy K.*, FED. JUD. CTR., https://perma.cc/K42R-Y2VR.

Luttig would have been eligible for senior status in 2019 during the Trump Administration, but resigned in 2006 to become the General Counsel of Boeing.[603]

4.5.2.4. Clinton Appointees

Three of President Clinton's circuit nominees became or would have become eligible for senior status during the Clinton Administration. One took it during the Clinton Administration (H. Lee Sarokin).[604] One took it during the W. Bush Administration (A. Wallace Tashima).[605] And one took it at the tail-end of the Obama Administration (Diana E. Murphy).[606]

Sixteen of President Clinton's circuit nominees became or would have become eligible for senior status during the W. Bush Administration. Three of them in fact took senior status during the W. Bush Administration (Pierre N. Leval, Robert Manley Parker, and Chester J. Straub).[607] Five waited until the Obama Administration (Maryanne Trump Barry, Guido Calabresi, Terence T. Evans, Rosemary Barkett, and Martha Craig Daughtrey).[608] Zero Clinton appointees who were eligible for senior status during the Trump administration took it. The remaining six Clinton appointees who were eligible during the W. Bush Administration all took it during the Biden Administration (James L. Dennis, Judith Ann Wilson Rogers, Rosemary S. Pooler, José A. Cabranes, Carlos F. Lucero, and David S. Tatel).[609] One (John David Kelly)

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603 *J. Michael Luttig to Retire from Boeing at Year End*, BOEING (Dec. 26, 2019), https://perma.cc/Q8F5-R442.

604 *Sarokin, H. Lee*, FED. JUD. CTR., https://perma.cc/SK2C-BAF7.

605 *Tashima, Atsushi Wallace*, FED. JUD. CTR., https://perma.cc/K98Z-2993.

606 *Murphy, Diana E.*, FED. JUD. CTR., https://perma.cc/RBU8-GD64.

607 *Leval, Pierre Nelson*, FED. JUD. CTR., https://perma.cc/ZN38-FFV8; *Parker, Robert Manley*, FED. JUD. CTR., https://perma.cc/7CYW-HEWF; *Straub, Chester J.*, FED. JUD. CTR., https://perma.cc/9YPN-XYDF.

608 *Barry, Maryanne Trump*, FED. JUD. CTR., https://perma.cc/P24Y-FWSX; *Calabresi, Guido*, FED. JUD. CTR., https://perma.cc/6C6M-GMXK; *Evans, Terence Thomas*, FED. CTR., https://perma.cc/5XRE-W5PK; *Barkett, Rosemary*, FED. JUD. CTR., https://perma.cc/54KP-L8K7; *Daughtrey, Martha Craig*, FED. JUD. CTR., https://perma.cc/KUU3-Z4T3.

609 *Dennis, James L.*, FED. JUD. CTR., https://perma.cc/SGD8-MLA7; *Rogers, Judith Ann Wilson*, FED. JUD. CTR., https://perma.cc/HUP2-Z45G; *Pooler, Rosemary S.*, FED. JUD. CTR., https://perma.cc/FZL9-N4QY; *Cabranes, José Alberto*, FED. JUD. CTR.,

died early in October 1998.[610] Another (Fred I. Parker) died early in August 2003.[611]

Thirty-eight Clinton appointees became or would have become eligible for senior status during the Obama Administration. Fourteen of them in fact took senior status during the Obama Administration (Robert D. Sack, Arthur J. Gajarsa, Raymond C. Fisher, Michael Daly Hawkins, Kermit Edward Bye, Kermit Lipez, William Curtis Bryson, Ronald Lee Gilman, Fortunato Benavides, Richard Linn, Michael R. Murphy, Marjorie Rendell, Julio M. Fuentes, and Barry G. Silverman).[612] Four took senior status during the Trump Administration (Stanley Marcus, William Byrd Traxler Jr., Frank M. Hull, and Ann Claire Williams).[613] Thirteen waited until the Biden Administration (Diana Gribbon Motz, Robert Bruce King, Sandra Lynch, Mary Beck Briscoe, Theodore McKee, Richard Paez, William A. Fletcher, Marsha S. Berzon, Susan P. Graber, Thomas L. Ambro, Diane Wood, M. Margaret McKeown, and R. Guy Cole Jr.).[614] Five who were eligible during the Obama

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https://perma.cc/K3WL-PKVD; *Lucero, Carlos F.*, FED. JUD. CTR., https://perma.cc/7Z4T-K3AT; *Tatel, David S.*, FED. JUD. CTR., https://perma.cc/BA9W-M7LB.

610 *Kelly, John David*, FED. JUD. CTR., https://perma.cc/3HR7-6W92.

611 *Parker, Fred I.*, FED. JUD. CTR., https://perma.cc/3UA3-4Q4D.

612 *Sack, Robert D.*, FED. JUD. CTR., https://perma.cc/QN65-Y57T; *Gajarsa, Arthur J.*, FED. JUD. CTR., https://perma.cc/F5Y9-XGQK; *Fisher, Raymond C.*, FED. JUD. CTR., https://perma.cc/2VJ7-3TL7; *Daly, Michael Hawkins*, FED. JUD. CTR., https://perma.cc/9PNT-GBYF; *Bye, Kermit Edward*, FED. JUD. CTR., https://perma.cc/F64P-DWAX; *Lipez, Kermit Victor*, FED. JUD. CTR., https://perma.cc/765A-W6FD; *Bryson, William Curtis*, FED. JUD. CTR., https://perma.cc/YAQ7-AQHL; *Gilman, Ronald Lee*, FED. JUD. CTR.; https://perma.cc/PMW2-YHD8; *Benavides, Fortunato*, FED. JUD. CTR., https://perma.cc/2QKQ-2ETB; *Linn, Richard*, FED. JUD. CTR., https://perma.cc/G6EQ-EYTT; *Murphy, Michael R.*, FED. JUD. CTR., https://perma.cc/6CKA-ER5W; *Rendell, Marjorie*, FED. JUD. CTR., https://perma.cc/Q498-HAFY; *Fuentes, Julio M.*, FED. JUD. CTR., https://perma.cc/GG6P-T2VS; *Silverman, Barry G.*, FED. JUD. CTR., https://perma.cc/RL8X-W2A2.

613 *Marcus, Stanley*, FED. JUD. CTR., https://perma.cc/LLM6-7DSL; Traxler, William Byrd, Jr., FED. JUD. CTR., https://perma.cc/9CDQ-PWQQ; *Hull, Frank M.*, FED. JUD. CTR., https://perma.cc/Z2MX-8RPW; *Williams, Ann Claire*, FED. JUD. CTR., https://perma.cc/ZAZ8-MVCX;

614 *Motz, Diana Gribbon*, FED. JUD. CTR., https://perma.cc/W885-S564; *King, Robert Bruce*, FED. JUD. CTR., https://perma.cc/KX62-DS4W; *Lynch, Sandra*, FED. JUD. CTR.,

Administration still have not taken senior status (Timothy B. Dyk, Karen Nelson Moore, Eric L. Clay, Ronald M. Gould, and Carl E. Stewart).[615] One died early during the Obama Administration (M. Blane Michael).[616] One resigned early during the Obama Administration (Robert Harlan Henry).[617]

Six Clinton appointees became eligible for senior status during the Trump administration. (I exclude Justice Sotomayor, who, counting backwards to her district court appointment in 1992, became eligible for senior status in 2019.)[618] Only one took it: Richard Tallman.[619] Three stepped down during the Biden Administration: Robert Katzmann and Sidney R. Thomas took senior status.[620] Merrick Garland resigned to become Attorney General.[621] Two Clinton appointees who were eligible for senior status during the Trump administration remain active: Johnnie B. Rawlinson and Kim McLane Wardlaw.[622]

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https://perma.cc/FH56-4TQT; *Briscoe, Mary Beck*, FED. JUD. CTR., https://perma.cc/U3RF-TNRJ; *McKee, Theodore*, FED. JUD. CTR., https://perma.cc/FBZ5-2BAR; *Paez, Richard*, FED. JUD. CTR., https://perma.cc/4MHT-JSXG; *Fletcher, William A.*, FED. JUD. CTR., https://perma.cc/R5MY-GNKG; *Berzon, Marsha S.*, FED. JUD. CTR., https://perma.cc/A2XN-HJ93; *Graber, Susan P.*, FED. JUD. CTR., https://perma.cc/DGC5-UWUU; *Ambro, Thomas L.*, FED. JUD. CTR., https://perma.cc/E7HQ-GZ5P; *Wood, Diane*, FED. JUD. CTR., https://perma.cc/UC34-SDTU; *McKeown, Margaret M.*, FED. JUD. CTR., https://perma.cc/VW4X-PP2F; *Cole, Ransey Guy, Jr.*, FED. JUD. CTR., https://perma.cc/3ERQ-QGCW.

615 *Dyk, Timothy B.*, FED. JUD. CTR., https://perma.cc/EF5X-RE2T; *Moore, Karen Nelson*, FED. JUD. CTR., https://perma.cc/KS6F-U8QP; *Clay, Eric L.*, FED. JUD. CTR., https://perma.cc/JH4U-PP63; *Gould, Ronald Murray*, FED. JUD. CTR., https://perma.cc/X9K6-7LA4; *Stewart, Carl E.*, FED. JUD. CTR., https://perma.cc/KD2L-T5BF.

616 *Michael, M. Blane*, FED. JUD. CTR., https://perma.cc/V4ES-CXRN.

617 *Henry, Robert Harlan*, FED. JUD. CTR., https://perma.cc/Q6ET-NJUQ.

618 *Sotomayor, Sonia*, FED. JUD. CTR., https://perma.cc/EFA9-5K8R.

619 *Tallman, Richard*, FED. JUD. CTR., https://perma.cc/3QME-LE98.

620 *Katzmann, Robert*, FED. JUD. CTR., https://perma.cc/3V2G-BVU8; *Thomas, Sidney R.*, FED. JUD. CTR., https://perma.cc/TYB3-T54J.

621 *Garland, Merrick B.*, FED. JUD. CTR., https://perma.cc/99DS-U5JC.

622 *Rawlinson, Johnnie B.*, FED. JUD. CTR., https://perma.cc/2ZFG-NGLG; *Wardlaw, Kim McLane*, FED. JUD. CTR., https://perma.cc/WJ24-D64K.

4.5.2.5. W. Bush Appointees

One W. Bush appointee became eligible for senior status during the W. Bush Administration, and he took it: Franklin Van Antwerpen, who was appointed to the Third Circuit at the age of 64 after seventeen years on the District Court.[623]

Twenty W. Bush appointees became or would have become eligible for senior status during the Obama Administration. Six in fact took senior status during the Obama Administration (Michael Joseph Melloy, Terrence L. O' Brien, John Daniel Tinder, Richard C. Wesley, Barrington Daniels Parker Jr., and Richard Clifton).[624] Eight waited for the Trump Administration (D. Michael Fisher, William J. Riley, David McKeague, Edward C. Prado, Edith Brown Clement, John M. Rogers, Reena Raggi, and Carlos Bea).[625] Three W. Bush appointees who were eligible for senior status during the Obama Administration still have not taken senior status (Harris Hartz, Milan Dale Smith Jr., and Sharon Prost).[626] Two took senior status during the Biden Administration (D. Brooks Smith and Julia Smith Gibbons).[627] Peter W. Hall, who could have taken senior status during the Obama administration, died during President Biden's term.[628]

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623 *Van Antwerpen, Franklin Stuart*, FED. JUD. CTR., https://perma.cc/YU28-8TML.

624 *Melloy, Michael Joseph*, FED. JUD. CTR., https://perma.cc/S24B-6Z5J; *O'Brien, Terrence L.*, FED. JUD. CTR., https://perma.cc/6WT8-FBRZ; *Tinder, John Daniel*, FED. JUD. CTR., https://perma.cc/9D7D-LHCV; *Wesley, Richard C.*, FED. JUD. CTR., https://perma.cc/C8JJ-FN2B; *Parker, Barrington Daniels, Jr.*, FED. JUD. CTR., https://perma.cc/EG7G-YKEJ; *Clifton, Richard R.*, FED. JUD. CTR., https://perma.cc/3EGN-U6F8.

625 *Fisher, D. Michael*, FED. JUD. CTR., https://perma.cc/V3Z7-EDK5; *Riley, William Jay*, FED. JUD. CTR., https://perma.cc/AS7R-5L5E; *McKeague, David William*, FED. JUD. CTR., https://perma.cc/554R-DVA9; *Prado, Edward Charles*, FED. JUD. CTR., https://perma.cc/L5RV-9YQ8; *Clement, Edith Brown*, FED. JUD. CTR., https://perma.cc/XQ5C-23T5; *Rogers, John M.*, FED. JUD. CTR., https://perma.cc/P72N-L658; *Raggi, Reena*, FED. JUD. CTR., https://perma.cc/VEG3-6TNH; *Bea, Carlos T.*, FED. JUD. CTR., https://perma.cc/HHA2-UTQM.

626 *Hartz, Harris L.*, FED. JUD. CTR., https://perma.cc/VUF7-3H5E; *Smith, Milan Dale, Jr.*, FED. JUD. CTR., https://perma.cc/Z7RZ-SFH8; *Prost, Sharon*, FED. JUD. CTR., https://perma.cc/PV4R-DG8N.

627 *Smith, David Brooks*, FED. JUD. CTR., https://perma.cc/9CAY-CHPR; *Gibbons, Julia Smith*, FED. JUD. CTR., https://perma.cc/7QCE-9TRS.

628 *Hall, Peter W.*, FED. JUD. CTR., https://perma.cc/7UT6-RTQU.

Twenty-one W. Bush appointees became or would have become eligible for senior status during the Trump Administration. Five took senior status (Dennis Shedd, N. Randy Smith, Deborah L. Cook, Allyson Kay Duncan, Jay Bybee).[629] Two W. Bush appointees who became eligible for senior status during the Trump Administration resigned: Janice Rogers Brown and Thomas B. Griffith.[630] One (Michael Chertoff) resigned early in February 2005 to become Secretary of Homeland Security.[631] Another (Michael McConnell) resigned early to return to academia in August 2009, and President Obama filled his seat.[632] One (Jeffrey R. Howard) took senior status during the Biden Administration.[633] Nine W. appointees who became eligible for senior status during the Trump administration remain on active status (Consuelo Callahan, William Duane Benton, Roger Gregory, Leslie H. Southwick, Richard Allen Griffin, Bobby Shepherd, Priscilla Owen, Sandra Segal Ikuta, and G. Steven Agee).[634] One W. Bush appointee (Susan Bieke Neilson), who would have become eligible for senior status in 2021, died in 2006, and was replaced by President W. Bush.[635] Chief Justice Roberts, who was appointed to the D.C. Circuit in 2003, became eligible for senior status in

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629 *Shedd, Dennis W.*, FED. JUD. CTR., https://perma.cc/B95N-GRKR; *Smith, Norman Randy*, FED. JUD. CTR., https://perma.cc/JDC7-XKZV; *Cook, Deborah L.*, FED. JUD. CTR., https://perma.cc/EWB2-QQV9; *Duncan, Allyson Kay*, FED. JUD. CTR., https://perma.cc/8HVS-CDMK; *Bybee, Jay S.*, FED. JUD. CTR., https://perma.cc/HSA2-VTRA.

630 *Brown, Janice Rogers*, FED. JUD. CTR., https://perma.cc/XWR8-Z65G; *Griffith, Thomas Beall*, FED. JUD. CTR., https://perma.cc/AZ6Q-WGL5.

631 *Chertoff, Michael*, FED. JUD. CTR., https://perma.cc/4WRE-QT4R.

632 *McConnell, Michael W.*, FED. JUD. CTR., https://perma.cc/2QV4-CG4W.

633 *Howard, Jeffrey R.*, FED. JUD. CTR., https://perma.cc/XSB5-563B.

634 *Callahan, Consuelo Maria*, FED. JUD. CTR., https://perma.cc/Q5YW-JFCG; *Benton, William Duane*, FED. JUD. CTR., https://perma.cc/L3HZ-SRL7; *Gregory, Roger L.*, FED. JUD. CTR., https://perma.cc/8YMB-NEEF; *Southwick, Leslie*, FED. JUD. CTR., https://perma.cc/J6LR-52GM; *Griffin, Richard Allen*, FED. JUD. CTR., https://perma.cc/AYL2-RLYH; *Shepherd, Bobby E.*, FED. JUD. CTR., https://perma.cc/5NJB-G7AQ; *Richman, Priscilla*, FED. JUD. CTR., https://perma.cc/YAY6-SHVA; *Ikuta, Sandra Segal*, FED. JUD. CTR., https://perma.cc/2BUS-CFHE; *Agee, G. Steven*, FED. JUD. CTR., https://perma.cc/JH6B-BX4A.

635 *Neilson, Susan Bieke*, FED. JUD. CTR., https://perma.cc/6D4R-Q8C6.

2020—right around the time I urged him to resign![636] Justice Brett Kavanaugh will be eligible for senior status in 2030, and Justice Neil Gorsuch in 2032.[637]

Six W. Bush appointees became eligible for senior status during the Biden administration. Two took senior status (Helene White and Kent A. Jordan).[638] The other four remain on active status (Timothy Tymkovich, Diane S. Sykes, Lavenski Smith, Debra Ann Livingston).[639]

The remaining eleven W. Bush appointees will become eligible for senior status between 2025 and 2033 (Jeffrey Sutton, Jerome Holmes, William H. Pryor Jr., Michael Chagares, Steven Colloton, Raymond Gruender, Catharina Haynes, Thomas Hardiman, Jennifer Elrod, Raymond Kethledge, and Kimberly Ann Moore).

4.5.2.6. Obama Appointees

Six Obama nominees became or would have become eligible for senior status during the Obama Administration. Two took senior status during the Obama Administration (Andre M. Davis and Gerard E. Lynch).[640] One took it during the Trump Administration (Julie E. Carnes). Three took it during the Biden Administration (Evan Wallach, Henry Franklin Floyd, and Bernice B. Donald).[641]

Five Obama nominees became or would have become eligible for senior status during the Trump Administration. Two took it (Thomas I. Vanaskie

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636 Josh Blackman, *A Supreme Court Divided Cannot Stand. John Roberts Must Step up or Step Off*, NEWSWEEK (Aug. 3, 2020, 7:00 AM), https://perma.cc/T65Q-K7K9.

637 *Kavanaugh, Brett M.*, FED. JUD. CTR., https://perma.cc/NA9P-KKZA; *Gorsuch, Neil M.*, FED. JUD. CTR., https://perma.cc/FC7X-QX69.

638 *White, Helene N.*, FED. JUD. CTR., https://perma.cc/FGC9-TSGH; *Jordan, Kent A.*, FED. JUD. CTR., https://perma.cc/89DT-AF4Z.

639 *Tymkovich, Timothy M.*, FED. JUD. CTR., https://perma.cc/278K-B99Y; *Sykes, Diane S.*, FED. JUD. CTR., https://perma.cc/8Y3U-M3AW; *Smith, Lavenski*, FED. JUD. CTR., https://perma.cc/NJT5-HX8L; *Livingston, Debra Ann*, FED. JUD. CTR., https://perma.cc/B869-SSQ4.

640 *Davis, Andre Maurice*, FED. JUD. CTR., https://perma.cc/WAM8-BAST; *Lynch, Gerard E.*, FED. JUD. CTR., https://perma.cc/B4F5-V4MD.

641 *Wallach, Evan Jonathan*, FED. JUD. CTR., https://perma.cc/4NTX-Y4PM; *Floyd, Henry Franklin*, FED. JUD. CTR., https://perma.cc/3ZAA-ZNM6; *Donald, Bernice Bouie*, FED. JUD. CTR., https://perma.cc/M2NW-SKU4.

and Christopher F. Droney).[642] Three waited for the Biden Administration (Denny Chin, Barbara Milano Keenan, and Beverly B. Martin).[643]

Twelve Obama nominees became eligible for senior status during the Biden Administration. Nine took senior status during the Biden Administration (O. Rogeriee Thompson, Susan L. Carney, David Hamilton, James A. Wynn Jr., Andrew D. Hurwitz, William J. Kayatta Jr., Joseph A. Greenaway Jr., and Kathleen M. O'Malley).[644] Three remain in active status (Jimmie V. Reyna, Scott Matheson Jr., and James E. Graves Jr.).[645] Two Obama appointees who were not yet eligible for senior status resigned, and their seats were filled by President Biden: Paul J. Watford and Gregg Costa.[646]

Thirty Obama nominees will become available for senior status between 2025 and 2037 (Richard G. Taranto, Albert Diaz, Mary H. Murguia, Carolyn B. McHugh, Robert E. Bacharach, Stephen A. Higginson, Luis Felipe Restrepo, Morgan Christen, Gregory A. Phillips, Patty Shwartz, Nancy Moritz, Adalberto Jordan, Cornelia Pillard, Pamela Harris, Robert L. Wilkins, Patricia Millett, Jill A. Pryor, Jane L. Kelly, Jacqueline Nguyen, Stephanie Thacker, Raymond Lohier, Robin S. Rosenbaum, Todd M. Hughes, Sri Srinivasan, David Jeremiah Barron, Cheryl Ann Krause, Raymond T. Chen, Kara Farnandez Stoll, John B. Owens, and Michelle Friedland).[647]

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642 *Vanaskie, Thomas Ignatius*, FED. JUD. CTR., https://perma.cc/6N4R-QXFS; *Droney, Christopher Fitzgerald*, FED. JUD. CTR., https://perma.cc/TR59-2XBA.

643 *Chin, Denny*, FED. JUD. CTR., https://perma.cc/9433-XNN7; *Keenan, Barbara Milano*, FED. JUD. CTR., https://perma.cc/3VTS-6CTN; *Martin, Beverly Baldwin*, FED. JUD. CTR., https://perma.cc/3CQ6-4EG5.

644 *Thompson, Ojetta Rogeriee*, FED. JUD. CTR., https://perma.cc/L25P-JRVK; *Carney, Susan Laura*, FED. JUD. CTR., https://perma.cc/ML3W-33R2; *Hamilton, David*, FED. JUD. CTR., https://perma.cc/C3WU-QBXC; *Wynn, James Andrew, Jr.*, FED. JUD. CTR., https://perma.cc/PZ8F-7SJJ; *Hurwitz, Andrew David*, FED. JUD. CTR., https://perma.cc/RCK5-JH8Z; *Kayatta, William Joseph, Jr.*, FED. JUD. CTR., https://perma.cc/P4YG-2D62; *Greenaway, Joseph A., Jr.*, FED. JUD. CTR., https://perma.cc/C35Q-6B9L; *O'Malley, Kathleen McDonald*, FED. JUD. CTR., https://perma.cc/ANX4-YXTS.

645 *Reyna, Jimmie V.*, FED. JUD. CTR., https://perma.cc/Y46F-Y2KW; *Matheson, Scott Milne, Jr.*, FED. JUD. CTR., https://perma.cc/BD9Y-BK92; *Graves, James Earl, Jr.*, FED. JUD. CTR., https://perma.cc/A2FT-C32D.

646 *Watford, Paul Jeffrey*, FED. JUD. CTR., https://perma.cc/97AB-BXNW; *Costa, Gregg Jeffrey*, FED. JUD. CTR., https://perma.cc/Y9J3-HVJK.

647 *Taranto, Richard Gary*, FED. JUD. CTR., https://perma.cc/N7MV-ZHRM; *Diaz, Albert*, FED. JUD. CTR., https://perma.cc/RJ8E-PFRV; *Murguia, Mary Helen*, FED. JUD. CTR.,

4.5.2.7. Trump Appointees

Only one Trump appointee became eligible for senior status during the Biden Administration (Ralph R. Erickson) but he did not take it and remains active.[648] The remainder of the Trump Appointees will become eligible for senior status between 2025 and 2047.[649] Justice Amy Coney Barrett will be eligible for senior status in 2037.[650]

I have not compiled numbers for the Biden Administration yet.

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https://perma.cc/NB7P-4SAT; *McHugh, Carolyn Baldwin*, FED. JUD. CTR., https://perma.cc/7UAU-XVKQ; *Bacharach, Robert Edwin*, FED. JUD. CTR., https://perma.cc/W986-Z347; *Higginson, Stephen Andrew*, FED. JUD. CTR., https://perma.cc/Y6L7-3HUU; *Restrepo, Luis Felipe*, FED. JUD. CTR., https://perma.cc/9WGS-X3YQ; *Christen, Morgan*, FED. JUD. CTR., https://perma.cc/2XCX-HEZ6; *Phillips, Gregory Alan*, FED. JUD. CTR., https://perma.cc/U838-RNCC; *Shwartz, Patty*, FED. JUD. CTR., https://perma.cc/QFY9-EFMB; *Moritz, Nancy Louise*, FED. JUD. CTR., https://perma.cc/SQ92-YTZB; *Jordon, Adalberto Jose*, FED. JUD. CTR., https://perma.cc/NK2N-UZVV; *Pillard, Cornelia Thayer Livingston*, FED. JUD. CTR., https://perma.cc/T999-8R6Y; *Harris, Pamela Ann*, https://perma.cc/ZEG7-ZUWX; *Wilkins, Robert Leon*, FED. JUD. CTR., https://perma.cc/ATB8-FWQ4; *Millett, Patricia Ann*, FED. JUD. CTR., https://perma.cc/RJ4A-8HL5; *Pryor, Jill Anne*, FED. JUD. CTR., https://perma.cc/QJ6E-2625; *Kelley, Jane Louise*, FED. JUD. CTR., https://perma.cc/3VCH-E9AL; *Nguyen, Jacqueline Hong-Ngoc*, FED. JUD. CTR., https://perma.cc/7GFR-3QBW; *Thacker, Stephanie Dawn*, FED. JUD. CTR., https://perma.cc/53WQ-CEN9; *Lohier, Raymond Joseph, Jr.*, FED. JUD. CTR., https://perma.cc/MJ62-WACC; *Rosenbaum, Robin Stacie*, FED. JUD. CTR., https://perma.cc/LAD5-JV2U; *Hughes, Todd Michael*, FED. JUD. CTR., https://perma.cc/H6MW-U2EK; *Srinivasan, Srikanth*, FED. JUD. CTR., https://perma.cc/D3NZ-F6X6; *Barron, David Jeremiah*, FED. JUD. CTR., https://perma.cc/RMY5-XWW8; *Krause, Cheryl Ann*, FED. JUD. CTR., https://perma.cc/9DER-5KXL; *Chen, Raymond T.*, FED. JUD. CTR., https://perma.cc/BD9A-NBBE; *Stoll, Kara Farnandez*, FED. JUD. CTR., https://perma.cc/E6G3-GK5K; *Owens, John Byron*, FED. JUD. CTR., https://perma.cc/NDD7-XUJB; *Friedland, Michelle Taryn*, FED. JUD. CTR., https://perma.cc/3ENZ-MTH9.

[648] *Erickson, Ralph R.*, FED. JUD. CTR., https://perma.cc/S8DV-2SC5.

[649] *See Biographical Directory of Article III Federal Judges, 1789-Present*, FED. JUD. CTR., https://perma.cc/FHQ4-EAWL.

[650] *Barrett, Amy Coney*, FED. JUD. CTR., https://perma.cc/9XWA-YNWF.

4.5.3. Do judges strategically time taking senior status?

The section above provided some nitty-gritty details about when federal judges became eligible for senior status and when they in fact took senior status. How many judges strategically timed their taking of senior status? Answering this question with any precision is exceptionally difficult because every judge is unique. A judge's decision to take senior status is quite personal and is likely based on many factors that are simply unknowable to the public. It is possible to survey judges to ask *why* they took senior status when they did, but I suspect that would not be a productive endeavor. Indeed, many, if not most judges, would probably say that politics played no role in their decision to take senior status, and they continued the job until they were no longer able to do so at full steam.

Perhaps the most practical way to address this question is to measure objective factors about a judge's decision to take senior status. Consider several primary questions:

- How long after a circuit judge became eligible for senior status did the judge take senior status? (a) right away; (b) within 0–2 years; (c) within 2–4 years; (d) within 4–8 years; (3) more than 8 years.
- Is there some neutral reason why the judge delayed taking senior status, for example, to finish a tenure as chief judge?
- Who was the President when the judge became eligible for senior status? Who was the President when the judge in fact took senior status? (a) a President of the same political party as the President who appointed that judge; (b) a President of the opposite political party as the President who appointed that judge; (c) the judge was a "compromise" candidate, so should not necessarily be affiliated with the President who appointed that judge; (d) the judge may have started his career at one end of the spectrum but over time drifted to the other end of the spectrum.
- Which party had control of the Senate when the judge became eligible for senior status, and took senior status? (a) the same party as the President who appointed that judge; (b) the opposite party of the President who appointed that judge.
- Before the elimination of the blue slip for circuit judges, who were the home-state senators of the circuit judge who was eligible for senior status? (a) both senators were members of the same party as the President who appointed that judge; (b) one senator was a member

of the same party as the President who appointed that judge; (c) neither senator was a member of the same party as the President who appointed that judge.

- Was the judge replaced by a former clerk or someone close to the judge's chambers?[651] (It is no mystery that Justices Kennedy and Breyer were replaced by their former clerks.) Did the judge request to be replaced by someone, and when that person was not picked, did the judge withdraw their senior status election?[652]
- Did the judge receive some other executive-branch appointment after taking senior status?[653] Inducements work.
- Did the judge make their senior status take effect *immediately*, or did the judge condition the senior status on the confirmation of their successor?[654]

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651 Josh Blackman, *Judge Gibbons's Replacement by Her Former Clerk Would "Flip" The Sixth Circuit*, VOLOKH CONSPIRACY (Apr. 4, 2024, 3:39 PM), https://perma.cc/27T3-FFMN; Nate Raymond, *9th Circuit Judge Urges Biden, Nevada Senators to Pick State AG's Wife as Successor*, REUTERS (April 14, 2022, 12:48 PM), https://perma.cc/32FS-9JJT; Josh Blackman, *A Family Affair for President Bide"s Nominees to First and Sixth Circuits*, VOLOKH CONSPIRACY (May 23, 2024, 1:41 PM), https://perma.cc/RX9D-2M3V; Austin Horn, *Longtime Ky. Federal Judge to Vacate Seat, Paving Way for Biden Conservative Pick*, LEXINGTON HERALD LEADER (July 1, 2022, 11:11 AM), https://perma.cc/9BFB-ZZ7G; *Assistant United States Attorney Ryan W. Bounds Nominated to Fill Ninth Circuit Vacancy*, U.S. ATT'YS OFF. DIST. OF OR., https://perma.cc/4M8Y-WJDS; *President Donald J. Trump Announces Judicial Nominees and United States Marshal Nominee*, AM. PRESIDENCY PROJECT (Aug. 28, 2019), https://perma.cc/8K24-4V4W.

652 Chris Dickerson, *King Steps Back from Moving to Senior Status, Might Have Been Unhappy with Replacement Plan*, W. VA. RECORD (Nov. 30, 2021), https://perma.cc/7PGJ-EZEL; David Lat, *Judicial Notice (11.27.21): 'The System Works'*, ORIGINAL JURISDICTION (Nov. 28, 2021), https://perma.cc/9GLD-B4QC; Laurie Lin & David Lat, *Federal Courts Aren't Royal Ones*, WALL ST. J. (Dec. 8, 2021, 4:54 PM), https://perma.cc/8TFZ-AW8C; Eliana Johnson, *Why Pence Spiked a Trump Judge*, POLITICO (July 12, 2019, 5:03 AM), https://perma.cc/2ZVL-36WN; Josh Blackman, *Judges Who Rescind Their Senior Status Announcement Because They Don't Like Their Replacements*, VOLOKH CONSPIRACY (Nov. 28, 2021, 10:05 AM), https://perma.cc/39NB-5R4B.

653 *President Donald J. Trump Announces Intent to Nominate Edward C. Prado to Be Ambassador to the Argentine Republic*, TRUMP WHITE HOUSE ARCHIVES (Jan. 17, 2018), https://perma.cc/3DC8-GPGL.

654 Allison A. Luczak, *A Delicate Balance of Life Tenure and Independence: Conditional Resignations from the Federal Bench*, 93 MARQ. L. REV. 309 (2009); Harsh Voruganti, *Senior Status Upon Confirmation: The Way of the Future?*, VETTING ROOM (Dec 29, 2020),

There is some anecdotal evidence. Judge Christopher Droney, an Obama nominee to the Second Circuit, acknowledged that politics "play some role" in a judge's decision to step down, and he acknowledged "at least one" colleague who "held off for a while" and then took senior status as soon as her preferred president was "sworn in."[655] I think Droney described a fairly common phenomenon, though his candor was a pleasant surprise. After the 2020 election, several Ninth Circuit judges told the *Los Angeles Times* they were waiting for a democratic President to take senior status.[656] Several more judges expressed a similar sentiment to *Buzzfeed*.[657] During the start of the Biden Administration, I observed quite a few judges, who had been eligible for senior status for some time, promptly announce they would take senior status.[658] Judge Tatel of the D.C. Circuit took senior status early in the Biden Administration.[659] He later said that he did not want to risk having his replacement picked during a second Trump presidency.[660] His thinking is rational. In 2017, I urged Republican-appointed judges who were eligible to take senior status to take it![661] At least one Republican appointee who remains on active status graciously took my meddling in stride.[662]

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https://perma.cc/8EDJ-AVNP; Josh Blackman (@JoshMBlackman), X (Sep. 28, 2017, 1:40 PM), https://perma.cc/7GHW-H8Q2.

655 Josh Blackman, *Judge Droney Explains Politics "Plays Some Role" in Senior Status Decision*, VOLOKH CONSPIRACY (Feb. 12, 2021, 4:10 PM), https://perma.cc/GDE3-LZNZ.

656 Josh Blackman, *Which Ninth Circuit Judges Were Waiting for a Democratic President to Take Senior Status?*, VOLOKH CONSPIRACY (Nov. 30, 2020, 1:38 PM), https://perma.cc/5NAF-N6XU.

657 Josh Blackman, *More Judges Talk to the Press About Timing of Taking Senior Status*, VOLOKH CONSPIRACY (Dec. 17, 2020, 5:46 PM), https://perma.cc/X32Z-S2K6.

658 Josh Blackman, *Democratic-Appointed Judges Begin to Take Senior Status*, VOLOKH CONSPIRACY (Jan. 27, 2021, 6:07 PM), https://perma.cc/7X5P-RARN; Josh Blackman, *More Judges Take Senior Status in the Week After Inauguration*, VOLOKH CONSPIRACY (Jan. 28, 2021, 11:18 PM), https://perma.cc/MU45-ZDTB.

659 Josh Blackman, *The D.C. Circuit Will Tilt Even Further to the Left*, VOLOKH CONSPIRACY (Feb. 11, 2021, 11:06 PM), https://perma.cc/9TQL-K5J2.

660 Joan Biskupic, *Former Federal Judge Blasts John Roberts in New Book and Says Ruth Bader Ginsburg Was Annoyed by Pressure to Retire*, CNN (May 29, 2024, 5:00 AM), https://perma.cc/RHT5-CTN3.

661 Josh Blackman, *A Better Way to Give Trump More Judgeships to Fill*, NAT'L REV. (Dec. 18, 2017, 9:00 AM), https://perma.cc/2CF3-4QYW.

662 Leslie H. Southwick, *A Survivor's Perspective: Federal Judicial Selection from George Bush to Donald Trump*, 95 NOTRE DAME L. REV. 1847, 1918 (2020).

Determining why a judge may or may not take senior status at any given point is extremely complicated, and probably requires a case-by-case basis to unpack all of the various compromises that go into judicial selection. My tentative observation is that judges are more likely to strategically time their senior status than take it at random, but the specifics will have to wait for a future project.[663]

Here, it is enough to say that at least some judges will time their taking of senior status to coincide with a President and Senate of their liking. What can be done about it? I will first offer a proposal that is perfectly constitutional that I do not endorse. Then, I turn to Proposal #10, which is probably constitutional, and would be far more effective.

4.5.4. Use it or lose it: judges can *only* elect for senior status on the day they reach the Rule of 80

Article III does not require that judges be offered "senior status" as a form of semi-retirement.[664] Indeed, judges are not constitutionally entitled to a pension. Life tenure means you have to work for life. But as things stand now, judges can elect to take senior status at any time after they are eligible. The process could easily be changed without offending the Constitution. Judges would have one, and only one opportunity to take senior status: on the day they reach the Rule of 80. Judges could notify the President, the Senate, and the Administrative Office in advance of that date that they plan to take senior status. That way, the President can make a nomination, and the Senate can confirm a replacement. But that election would not take effect until the Rule of 80 day. At that point, they will become senior status judges. They can keep a full caseload, with a full complement of staff. Or they can gradually reduce their caseload and maintain their judicial position. But they would no longer be able to participate in the en banc court.

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663 There was recently an article published on the issue of strategic senior status timing, but due to a significant mischaracterization of my own work, I caution others who might cite it. Josh Blackman, *Professor Xiao Wang in the Minnesota Law Review Refutes a Position I Do Not Hold*, VOLOKH CONSPIRACY (Feb. 8, 2023, 12:21 PM), https://perma.cc/93WC-SLDB.

664 *See* U.S. CONST. art. III.

What happens if judges do not elect for senior status at that time? They will never be able to. Use it or lose it. The judges would never be able to request a reduced caseload. They could choose to continue serving at a full level or resign with a full pension for life.

This proposal is straightforward, but I do not favor it. Judges may not be ready to retire at the age of 65, so would likely not opt to accept senior status. But if several years later the full caseload becomes too much to handle, their sole option is resignation. The federal judiciary would lose many ready, willing, and able judges. Conversely, there are many judges who might be inclined to eventually take senior status, and have a reduced caseload, but would fear missing their one chance to elect for senior status and will take it prematurely. Again, the federal judiciary would lose far too many judges who have much to offer. There is also another risk: cunning chief judges could finagle with setting cases for en banc rehearing in light of a particular judge's anticipated senior-status date.[665]

Proposal #10, which is introduced below, is more complicated, but more flexible.

4.5.5. When a judge hits the rule of 80, a new judgeship is automatically created

With the exception of death and disability, judges have near-complete discretion over when their seat becomes vacant. (Impeachment of judges is beyond rare.)[666] And judges can use that discretion to exert considerable sway over who replaces them. Judges can wait till their preferred President is in the White House, and their preferred political party has a majority in the Senate. Judges can lobby home-state senators to pick their preferred successor. Judges can even accept executive-branch appointments as an inducement to step down. I find all of these backroom dealings unseemly. Proposal #10 would end these machinations.

Under this proposal, a circuit judgeship will be created by statute such that it can only be held by one person. When that person dies, retires, or reaches the Rule of 80, a new statutory judgeship is automatically created. The President and the Senate will know the Rule of 80 date and can

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665 *See* George & Yoon, *supra* note 421.

666 *Impeachment of Federal Judges*, FED. JUD. CTR., https://perma.cc/K5WR-ULZN.

nominate and confirm a replacement well in advance. This proposal would ensure that the circuit courts routinely turn over with new nominees who might bring fresh perspectives on the law.

Presidents who are nominating circuit judges can calculate with a degree of accuracy how many years they could serve on the en banc court and choose accordingly. This proposal would probably skew nominees to be younger, but that is already the norm. Above, I identified several circuit judges who were nominated in the early to mid-60s. That sort of pick would be unfathomable today. Nowadays, judges are being picked in their 30s, with plenty of run-way before hitting the Rule of 80 at the earliest possible juncture—the age of 65.

Of course, this proposal will only work if the judge who reaches the rule of 80 can no longer serve on the en banc court—otherwise the en banc court would grow larger and larger. That element comes next.

4.5.6. Judges who meet the Rule of 80 can no longer participate in the en banc court

Senior status, as it presently operates, is entirely voluntary.[667] But Proposal #10 would not be voluntary. Judges could still assume senior status when they hit the "Rule of 80" date. But if they do not elect for senior status, they would remain in "active" status, and still be expected to keep a full caseload. However, they would no longer be part of the en banc court. They could not vote on petitions for rehearing en banc, and would not sit on the en banc court, unless they happened to sit on the panel of a case that will be reheard en banc. Proposal #10 does not eliminate en banc review altogether. Rather, this proposal simply provides that certain older Article III judges, through no election of their own, are disqualified from participating in the en banc process.

To make up for the missing en banc proceedings, circuit judges who meet the Rule of 80 would be required to visit on other courts of appeals. Currently, judges, and senior judges in particular, will sit by designation on other courts.[668] I think this practice is salutary, as it helps judges learn how courts operate in other jurisdictions. Moreover, insights and knowledge can

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667 28 U.S.C. § 46(c).

668 28 U.S.C. § 294(b).

be more effectively diffused when judges sit with new colleagues. If Congress can require the Supreme Court Justices to ride circuit, I think Congress can require inferior court judges to ride circuit. The visiting circuit responsibilities could be picked by a lottery, to ensure that judges from across the circuit travel widely, and do not repeat a court till they've done all others. This approach would breed comity, and perhaps find a way to resolve other internal circuit splits.

Requiring older circuit judges to travel to different locations for travel could be burdensome. In which case, they may seek senior status, which would obviate that requirement and allow them to hear fewer cases. A common thread in my writing is to nudge judges to retirement when they are no longer able to fully complete their responsibilities. I think this sort of end game is far more desirable than judges who stay past their prime or try to leverage their retirement to pick their successor.

4.5.7. Can Congress remove judges eligible for senior status from the en banc court?

Is this proposal constitutional? Specifically, does this rule prevent certain judges from "hold[ing] their offices during good Behaviour"? Does the office of an Article III circuit judge necessarily include hearing the *same* kind of cases as other Article III circuit court judges?

As a threshold matter, Congress has no obligation to provide for a process of rehearing en banc. Congress could provide that appeals from three-judge panels go directly to the Supreme Court. Or, depending on your view about jurisdiction stripping, Congress could make a three-judge panel the end of the road.

Once again, the starting point should be *Stuart v. Laird*.[669] As discussed above, that early decision upheld the constitutionality of requiring the Justices to ride circuit.[670] But the Court's primary holding is relevant to Proposal #10. The facts of this case are complicated, but to grossly oversimplify, Congress purported to abolish a circuit court and transferred the cases

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669 Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803).

670 *Id.* at 309.

from that court to another court.[671] Charles Lee (who also represented William Marbury) argued, "the [Judiciary] act of 1802 strikes off sixteen judges at a stroke, drives them from their offices, and assigns their duties to others."[672] Did the abolition of the court violate Article III? The Court, per Justice Paterson, found no Article III violation with this practice.[673] This aspect of *Stuart*'s holding is more controversial than the ruling on circuit riding. I'm not sure it is correct. Bruce Ackerman, for example, speculated that Chief Justice Marshall recused from this case because he could not bear writing something that was so in tension with *Marbury v. Madison*.[674]

But if this is a precedent, it provides a footing for Proposal #10. If the position of a circuit judge can be abolished, then I think it would be far less problematic to simply restrict the types of cases that certain judges on the court can hear. Indeed, Lee "admitted that congress [has] the power to modify, increase or diminish the power of the courts and the judges."[675]

For those squeamish about relying on *Stuart*, there are far more recent precedents to rely on in the context of judicial ethics. Federal law permits a judicial council to prohibit a federal judge from hearing cases. In certain cases, the council may "order[] that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint[.]"[676] This sanction is totally separate and apart from impeachment. A judge, who has not been removed from office, can be denied the ability to hear *any* cases while ethical proceedings are ongoing. Is this power consistent with Article III? The courts have held that Congress gave "the judiciary the power to 'keep its own house in order.'"[677] Indeed, the courts have prevented judges from being assigned new cases when they fall behind their docket, even in the absence of any judicial misconduct

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671 *Id.* ("Congress has constitutional authority to establish from time to time such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another. In this last particular, there are no words in the constitution to prohibit or restrain the exercise of legislative power.").

672 *Id.* at 308.

673 *Id.* at 308–09.

674 BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS 187–88 (2005).

675 *Stuart*, 5 U.S. at 304.

676 28 U.S.C § 354(2)(A)(i).

677 McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S., 264 F.3d 52, 61 (D.C. Cir. 2001) (citing S. Rep. No. 96-362, at 11, 1980).

complaints.[678] The Supreme Court observed, under this power, "when a judge has a given number of cases under submission, he will not be assigned more cases until opinions and orders issue on his 'backlog.'"[679] And the Court upheld these protocols as "reasonable, proper, and necessary rules, and the need for enforcement cannot reasonably be doubted."[680] The Court explained that "the extraordinary machinery of impeachment" is not the "only recourse" "if one judge in any system refuses to abide by such reasonable procedures."[681]

A few recent examples demonstrate the sweep of this power. The Judicial Council of the Federal Circuit has prevented any new cases from being assigned to Judge Pauline Newman because she refuses to undergo a medical evaluation with the court's preferred doctor.[682] And a federal judge in D.C. upheld this practice.[683] I've written that this conduct amounts to a stealth impeachment.[684] The Ninth Circuit Judicial Council disciplined a senior federal district court judge by prohibiting him from hearing criminal law cases for three years.[685] Presumably, the Council thought it would not violate

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678 Chandler v. Jud. Council of Tenth Cir. of U.S., 398 U.S. 74, 85 (1970).

679 *Id.*

680 *Id.*

681 *Id.*

682 Alanna Durkin Richer, *A 96-Year-Old Federal Judge is Barred from Hearing Cases in a Bitter Fight over Her Mental Fitness*, ASSOCIATED PRESS (Sep. 20, 2023, 8:01 PM), https://perma.cc/EE7S-S2JJ.

683 Newman v. Moore, No. 23-CV-01334 (CRC), 2024 WL 551836, at *2–*3 (D.D.C. Feb. 12, 2024) ("The judicial council, in turn, may conduct an additional investigation, dismiss the complaint, or 'take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit.' Id. § 354(a)(1)(C). One possible action is to 'order[ ] that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint.' Id. § 354(a)(2)(A)(i)."); *Id.* at *1 ("The Constitution provides for judicial independence through the 'great bulwarks' of life tenure and undiminished salary during good behavior. McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S., 264 F.3d 52, 64 (D.C. Cir. 2001); U.S. CONST. Art. III, § 1. But with this independence comes the risk that, should judges falter in performing their duties, there is no means for sanctioning them short of impeachment.").

684 Josh Blackman, *The Stealth Impeachment of Judge Newman in the Federal Circuit*, VOLOKH CONSPIRACY (Apr. 22, 2023, 4:23 PM), https://perma.cc/9DCQ-H6XM.

685 Sam Ribakoff, *Ninth Circuit Reprimands San Diego Federal Judge for Ordering Handcuffing of Teenage Girl*, COURTHOUSE NEWS SERV. (May 2, 2024),

Article III to remove these cases from the judge's docket. However, this issue is a bit more complex since the judge had already taken senior status and had elected not to receive more criminal cases.

As a matter of first principles, I have doubts about the court's power to take cases away from a life-tenured judge absent impeachment, even to enforce a congressional ethics regime. A judge without cases is like a day without sunshine. Judges can only decide cases or controversies. But without cases or controversies, there is no way for a judge to exercise her judicial power. Apparently, the federal courts, acting under congressional authority, can take cases away from federal judges in the interest of judicial economy. I also have doubts about Congress's power to simply eliminate federal courts. But this is our law. And we can rely on it.

I think Congress could rely on these precedents to take away en banc votes from circuit judges who reach the Rule of 80, in the interests of judicial economy. They can keep all of their cases but would simply lose the ability to vote on petitions for rehearing en banc, which yields a handful of en banc cases per year in the circuits. If the courts think this power violates Article III, then they can reconsider how a judicial council can prohibit a judge from hearing cases due to a backlog.

Proposal #10 could be drafted with something of a backup option. Should the courts declare unconstitutional Proposal #10, the "use it or lose it" plan would go into effect. That option is plainly constitutional, in that judges would have one, and only one opportunity to elect for senior status. Perhaps given the choice between "use it or lose it" and losing senior status, the judges would prefer the latter option.

4.5.8. Could this rule be applied to the Supreme Court?

I realize this proposal could be attractive for those who seek to impose term limits on Supreme Court Justices. (I am not one of them.) Justices who

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https://perma.cc/SH5X-BAST; Judicial Council of the Ninth Circuit, *In re* Complaint of Judicial Misconduct, Nos. 23-90037 & 23-90041, at 24 (May 1, 2024), https://perma.cc/5CS8-PTDZ ("[T]he Judicial Council approves and confirms this arrangement pursuant to 28 U.S.C. § 294(c) by limiting Judge Benitez's designation of approved judicial duties as to newly-assigned cases to non-criminal civil matters for three years.").

reach the Rule of 80 date would no longer be able to hear *any* cases, unless, perhaps, there is a recusal, and a senior judge could be the ninth vote. This proposal, as applied to the Supreme Court, would have to overcome an additional constitutional hurdle. Article III begins, "The judicial Power of the United States shall be vested in one supreme Court," emphasis on *one*.[686] Would there still be one Supreme Court if not all members of the Court sat together? During the Court Packing debate, Chief Justice Charles Evans Hughes wrote to Congress that separating the Court into panels would not be constitutional.[687] He explained, "The Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate courts."[688]

If Proposal #10 operates in a gray zone with respect to inferior circuit court judges, it is a much harder sell for Supreme Court Justices. I do not advance it here, though I suspect others will.

4.5.9. Would this rule be applied prospectively and retroactively?

Could this rule be applied prospectively to circuit judges who have not yet been confirmed? If applied prospectively, I do not think circuit judges would have any expectation to hear a particular type of case. It would be a harder question of whether this rule could be applied retroactively. Indeed, based on my statistics above, a significant number of federal judges would *immediately* become ineligible to sit on the en banc courts. Moreover, that surplus of vacancies would give a single President a windfall. I'm not sure if there is a fair way to phase in this proposal, without picking and choosing which Rule-of-80 judges could remain on the circuit courts. It may be most salutary to simply apply this rule prospectively. As a result, the benefits may not be felt for three decades, or more. That is a feature, rather than a bug. These sorts of changes should be gradual, where it isn't clear ex ante who will benefit and who will hurt.

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686 U.S. CONST. art. III, § 1.

687 *See* Text of Hughes Letter, N.Y. TIMES (Mar. 23, 1937), at 1, https://perma.cc/4PG7-59ZK.

688 *Id.*

5. CONCLUSION

The project of bilateral judicial reform is equal parts ambitious and naïve. I fully appreciate that of these ten proposals, zero are ever likely to go into effect. Moreover, I realize this Article has a bit of a Festivus vibe—I air a lot of grievances. It's not the first time I've done it.[689] And I don't pretend that I've worked out all the kinks, or that these proposals are entirely practicable here. My hope is that through some outside-the-box thinking, I can put ideas into the ether that eventually coalesce into tangible proposals.

These proposals will likely have foreseeable consequences. With the expansion of mandatory jurisdiction and mandatory oral argument sessions, the Court's docket would increase significantly. When Chief Justice Roberts clerked, the Court decided about 200 cases per year.[690] That is probably a floor of what would be decided. Perhaps a conciliatory measure would be to add additional law clerks to spread the workload. But if the Burger Court could handle that caseload in the 1980s without modern technology, the present court could learn to manage.

I suspect some critics will see the expanded caseload as a justification for Court expansion. I think this concern would be mitigated by the Justices reducing their extracurricular activities. The Justices could also reduce the length of oral argument time—they should do that immediately! The Justices might also avoid the gratuitous and often unnecessary separate writings that make opinions far too long to actually read. And, if the work is too tough, the Justices can step down. Congress could make it more enticing by increasing the pension that Justices receive upon retirement by several multiples. It is life tenure, not a life sentence.

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689 Columbus School of Law Student Chapter, *Feddie Night Festivus: Blackman vs. Everybody!*, FEDERALIST SOC. (Dec. 23, 2021, 8:00 PM), https://perma.cc/6A2F-PA3J.

690 *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1229 (2012).