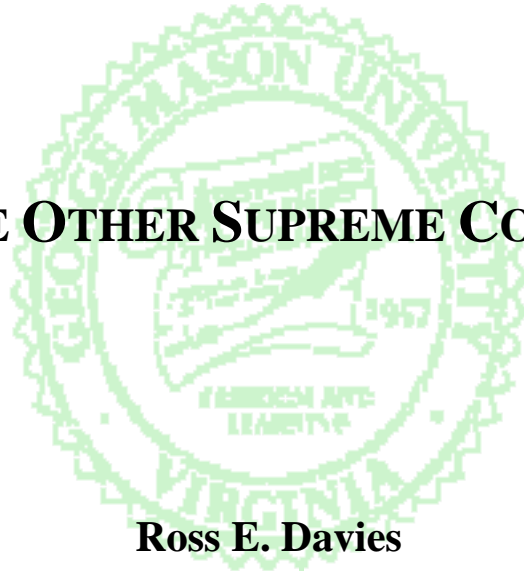


GEORGE MASON UNIVERSITY SCHOOL OF LAW

THE OTHER SUPREME COURT



Ross E. Davies

06-34

Forthcoming, *Journal of Supreme Court History* 2006

GEORGE MASON UNIVERSITY LAW AND
ECONOMICS RESEARCH PAPER SERIES

This paper can be downloaded without charge from the Social Science
Research Network at http://ssrn.com/abstract_id=920928

The Other Supreme Court

Ross E. Davies[†]

“The judicial Power of the United States, shall be vested in *one* supreme Court.”

—U.S. CONST. art. III, § 1 (emphasis added)

Despite the Constitution’s “one supreme Court” language, the Supreme Court came in two flavors for 37 years. From 1802 to 1838, the members of the Court gathered in Washington every winter for a conventional *en banc* February Term,¹ but then in the summer a single Justice would return to the nation’s capital to sit alone as a rump Supreme Court for a short August Term.

This odd one-Justice rump Court does not fit the long-standing and widely-accepted understanding that the words “one supreme Court” mean “one [indivisible] supreme Court”—a single *en banc* body consisting of all of its available and qualified members to conduct its business. The framers of the Constitution thought that was what they said when they chose those words, as the records of the

[†] Associate Professor of Law, George Mason University School of Law; Editor-in-Chief, the *Green Bag*. This essay is based on one part of a longer article in volume 90 of the *Minnesota Law Review*. Thanks to the editors of the *Law Review*, especially Deborah Broderson and Aaron Chapin, many of whose improvements to the longer article appear in the essay printed here, and to Vikram Amar, Michelle Boardman, Ofemi Cadmus, Lloyd Cohen, Mike Davies, Susan Davies, Steven Duffield, Robert Ellis, Patricia Evans, Andrew Finch, Curtis Gannon, Gregory Jacob, Bruce Johnsen, Bruce Kobayashi, Eugene Kontorovich, Montgomery Kosma, Michael Krauss, Craig Lerner, Nelson Lund, Ira Brad Matetsky, Stephen McAllister, Suzanna Sherry, Ilya Somin, Amy Steacy, Mark Tushnet, participants in a Robert A. Levy Fellow Workshop, the George Mason Law & Economics Center, and the Critical Infrastructure Protection Program at the George Mason University School of Law. Copyright 2005 Ross E. Davies.

¹ Changed to January beginning in 1826. Act of May 4, 1826, 4 Stat. 160.

constitutional convention of 1787 show.² Gouverneur Morris, an influential figure in the drafting of the Constitution, recalled this point on the floor of the Senate in 1802: “The constitution says, the judicial power shall be vested in *one* supreme court, and in inferior courts. The legislature can therefore only organize *one* supreme court, but they may establish as many inferior courts as they shall think proper.”³ A couple of generations later, Chief Justice Morrison R. Waite was even more emphatic about the indivisibility of the “one” Supreme Court. Addressing a banquet in Philadelphia during a celebration of the centennial of the Constitution, while Congress in Washington debated proposals to enlarge and panelize the Court,⁴ he said,

I beg you to note this language: “ONE SUPREME COURT and such inferior courts as Congress MAY, FROM TIME TO TIME, ordain and establish.” Not a Supreme Court or Supreme Courts, but “ONE,” and ONLY ONE. This *one* Supreme Court Congress cannot abolish, neither can it create another. Upon this the Constitution has no doubtful meaning. There must be one, and but one. Certainly such a provision, in such pointed language, carries with it the strongest implication that when this court acts, it must act as an entirety, and that its judgments shall be the judgments of the court sitting judicially as one court and not as several courts.⁵

In the same vein, Waite’s colleague Justice Stephen J. Field reported that theory and practice were in accord on the Court: “No case in the Supreme Court is ever referred to any one Justice, or to several of the Justices, to decide and report to the others.”⁶ And Chief Justice

² 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21, 95, 104-05, 226, 244 (Max Farrand ed., 1911); 2 *id.* at 38, 44-45, 429-30, 432-33 & n.17; Luther Martin, Md. Att’y Gen., Genuine Information, Address Before the Legislature of the State of Maryland (Nov. 29, 1787), reprinted in 3 *id.* at app. A, CLVIII, at 172, 220.

³ DEBATES IN THE CONGRESS OF THE UNITED STATES, ON THE BILL FOR REPEALING THE LAW “FOR THE MORE CONVENIENT ORGANIZATION OF THE COURT OF THE UNITED STATES” 104 (1802).

⁴ CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88, PART TWO 770 (1987).

⁵ Morrison R. Waite, Chief Justice, United States Supreme Court, Speech of Chief-Justice Waite (Sept. 15, 1887), in BREAKFAST TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 18, 19 (1888).

⁶ Stephen J. Field, Associate Justice, United States Supreme Court, The Centenary of the Supreme Court (Feb. 4, 1890), in HAMPTON L. CARSON, THE SUPREME COURT OF THE UNITED STATES: ITS HISTORY AND ITS CENTENNIAL CELEBRATION 698, 713 (1891).

Charles Evans Hughes wrote to Congress in 1937, at the height of the controversy over President Franklin Roosevelt’s Court-packing plan: “I may also call attention to the provisions of article III, section 1, of the Constitution that the judicial power of the United States shall be vested ‘in one Supreme Court’ 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.”⁷ Finally, retired Chief Justice Earl Warren attacked a proposal for the creation of a National Court of Appeals in part on indivisibility grounds, rhetorically asking, “[w]hen the jurisdiction of the Supreme Court is exercised by two courts, have we not created two Supreme Courts in contravention of this constitutional limitation?”⁸ Nothing has changed, then, since the Constitution was written and ratified. It is and always has been understood that Congress’s implementation of the “one supreme Court” language of Article III has not involved and could not involve a reorganization of the Court under which some Justice or Justices conducted the Court’s business while others qualified to serve were compelled to watch from the sidelines.⁹

⁷ Letter from Chief Justice Charles E. Hughes to Senator Burton K. Wheeler (Mar. 21, 1937), in S. COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 75-711, app. C, at 40 (1937).

⁸ *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group’s Composition and Proposal*, 59 A.B.A. J. 721, 729–30 (1973).

⁹ See, e.g., Caleb Cushing, *Analysis of the Existing Constitution of the Judicial System of the United States, and Suggestion of Desirable Modifications Thereof*, 6 U.S. OPS. ATT’Y GEN. 271, 277 (1856); *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 583 (1973); Paul A. Freund, *Why We Need the National Court of Appeals*, 59 A.B.A. J. 247, 249–50 (1973); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 44 n.222 (1990); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1614–19 (1990); Continuity of Gov’t Comm’n, Hearing on Potential Reforms to the Presidential Succession System 66–67, 70–71 (Oct. 27, 2002), <http://www.continuityofgovernment.org/pdfs/1027AEItranscript.pdf>. But see Tony Mauro, *Profs Pitch Plan for Limits on Supreme Court Service*, LEGAL TIMES, Jan. 3, 2005, at 1. Byron R. White and Akhil Amar have suggested that the Court could hear cases in panels, but both leave the door open to review by the *en banc* Court, thus retaining an ultimate presumption of “one [indivisible] supreme Court” of last resort. Byron R. White, *Challenges for the U.S. Supreme Court and the Bar*, 51 ANTITRUST L.J. 275 (1982); Akhil Reed Amar, *A Neo-Federalist View of Article III*, 65 B.U. L. REV. 205, 268 n.213 (1985); cf. FELIX FRANKFURTER & JAMES M. LANDIS,

But this historical belief in perfect congressional perpetuation of the “one [indivisible] supreme Court” is mistaken. Early Congresses did not always treat the constitutional commitment to “one supreme Court” as an absolute bar to all subdivision of the structure and business of the Court. And the Supreme Court itself went along with the legislature in the 1802 creation of the one-Justice rump Supreme Court that sat every year on the first Monday of August until 1839.

FROM “MIDNIGHT JUDGES” TO “MONGREL COURT”

The rump Court was a byproduct of what President Thomas Jefferson called “the Revolution of 1800”—that year’s presidential and congressional elections in which he and his Republican partisans defeated the Federalists in.¹⁰

President John Adams and the outgoing Federalist Congress took advantage of the subsequent lame-duck legislative session to create several new judgeships in the “Midnight Judges Act,” and then fill them with Federalists.¹¹ The new denizens of this enlarged judiciary were the “Midnight Judges” whose commissions Adams was diligently signing, and his Secretary of State John Marshall was somewhat ineptly distributing, in the hours before the last Federalist President’s term ended.¹² Jefferson and the Republicans were unhappy with this maneuver, and set about undoing it shortly after they took office.¹³ The result was the Repeal Act of March 8, 1802.¹⁴ It was followed a few weeks later by the “Act to amend the Judicial System of the United States” (the “April Act”), which—in the course of insulat-

THE BUSINESS OF THE SUPREME COURT 287–89 (1928); Eugene Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A. J. 253, 255 (1973).

¹⁰ Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 10 THE WRITINGS OF THOMAS JEFFERSON 140 (Paul Leicester Ford ed., 1899); DANIEL SISSON, *THE AMERICAN REVOLUTION OF 1800* (1974).

¹¹ Act of Feb. 13, 1801, ch. 4, 2 Stat. 89; 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 188 (rev. ed. 1926).

¹² See, e.g., *Marbury v. Madison*, 5 U.S. 137 (1803); WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 57 (2000).

¹³ 11 ANNALS OF CONG. 15–16 (1801) (President’s Message); *id.* at 23 (repeal bill introduced by Sen. Breckenridge); WILLIAM S. CARPENTER, *JUDICIAL TENURE IN THE UNITED STATES* 55–63 (1918); FRANKFURTER & LANDIS, *supra* note ____, at 26–28.

¹⁴ Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

ing the Repeal Act from effective judicial review by the Supreme Court—created the one-Justice rump Court that was to outlive not only the Midnight Judges controversy, but all of the major participants in it.¹⁵

Debates on the floors of the House and Senate, and private correspondence among the Justices, highlighted constitutional objections to key provisions in the Repeal Act and the April Act, but the section of the Repeal Act creating the one-Justice rump Court was not one of them. While there were a few objections on policy grounds, it was constitutionally unobjectionable in Congress and the Court. Based on the course of legislation—from the Midnight Judges Act to the Repeal Act to the April Act—the rump Court was, to all appearances, accepted as either a pragmatic (if one was a Republican) or a cosmetic (if one was a Federalist) compromise between abolition and preservation of one of the Court’s two annual terms.

The Midnight Judges Act of 1801 “combined thoughtful concern for the federal judiciary with selfish concern for the Federalist party.”¹⁶ It was designed to serve two functions: (1) to repair several defects in the Judiciary Acts of 1789 and 1793,¹⁷ most importantly by relieving members of the Supreme Court of the circuit-riding duties they had borne since 1789;¹⁸ and (2) to embed as many Federalists as possible in the judicial branch as a bulwark against the incoming Republican Congress and President, by creating sixteen new circuit court judgeships for the lame duck Federalists to fill before they left office.¹⁹ As Jefferson not entirely unfairly characterized the intentions of the Federalists, “[T]hey have retired into the Judiciary as a stronghold. There the remains of federalism are to be preserved and fed from the treasury, and from that battery all the works of republican-

¹⁵ Act of Apr. 29, 1802, ch. 31, § 2, 2 Stat. 156, 156, *repealed by* Act of Feb. 28, 1839, ch. 36, § 7, 5 Stat. 321, 322.

¹⁶ DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801–1829*, at 11–12 (2001); FRANKFURTER & LANDIS, *supra* note ____, at 24–25.

¹⁷ Act of Sept. 24, 1789, ch. 20, 1 Stat. 73; Act of Mar. 2, 1793, ch. 22, 1 Stat. 333.

¹⁸ Act of Feb. 13, 1801, ch. 4, § 27, 2 Stat. 89, 98 (repealed 1802).

¹⁹ Act of Feb. 13, 1801 §§ 6–7.

ism are to be beaten down and erased.”²⁰

The Repeal Act of 1802 was the Republicans’ straightforward response: It declared that the Midnight Judges Act “is hereby repealed.”²¹ Alas, repeal raised troubling constitutional problems, the most significant being the abolition of the sixteen new judgeships, all of which were already occupied.²² The Constitution provides that “Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour,”²³ and no one of consequence was claiming that any of the new judges had engaged in impeachably bad behavior. Nor was there any doubt that the Federalists had complied with the constitutional requirements of presidential nomination, senatorial advice and consent, presidential appointment and commissioning, and judicial oath-taking.²⁴ So there was no way for the Republicans to remove or ignore the new judges on constitutional grounds. Nor was there any sentiment for the delayed gratification of a statute under which the new judgeships would expire with the incumbents.²⁵

The Republican revolution required a prompt return to the status quo ante the Midnight Judges Act. And thus the only acceptable solution was to torpedo the new judgeships with the Midnight Judges still on board, notwithstanding the apparent Article III prohibition on the removal of well-behaved judges. The Republicans justified the judicial abolitions on the ground that the Constitution merely protected a judge’s office-holding so long as the office existed, but that nothing prevented Congress and the President from abolishing the office itself, and once the office was gone, the judge no longer had any con-

²⁰ Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), *in* 10 WRITINGS OF THOMAS JEFFERSON 301, 302 (Andrew A. Lipscomb ed., 1904).

²¹ Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132; *see also* GEORGE LEE HASKINS & HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER 163–68 (1981); RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS 36–68 (1971).

²² FRANKFURTER & LANDIS, *supra* note ____, at 21 n.56.

²³ U.S. CONST. art. III, § 1.

²⁴ U.S. CONST. art. II, § 2, cl. 2, art. II, § 3, art. VI, cl. 3; Act of Sept. 24, 1789, ch. 20, § 8, 1 Stat. 73, 76.

²⁵ *Cf.* S. COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 75-711, at 12 (1937).

stitutionally-protected right to hold it.²⁶ (This proposition may seem outrageous today, but it had some legal support at the time.²⁷) The Federalist minority sensibly pointed out that this would make a nullity of judicial independence under Article III.²⁸ Both sides invoked the Constitution’s “one supreme Court” mandate. The Republicans cited it to contrast Congress’s constitutional inability to destroy the Supreme Court with its constitutional authority to destroy inferior courts,²⁹ while the Federalists used the same language to justify the Midnight Judges Act,³⁰ suggesting that circuit-riding improperly hampered the capacity of the Justices to sit as a Court.³¹ Although the Federalists probably had the better constitutional argument, the Republicans had the votes in Congress, and a President who approved.³²

It was not at all clear, however, that the Republicans had the votes on the Supreme Court to uphold the constitutionality of the Repeal Act. The Court was populated entirely by Federalists, and by judges who hated to ride circuit. In fact, private correspondence among the Justices reveals that Chief Justice John Marshall and Justice Samuel Chase were decidedly for overturning the Repeal Act, while Justices William Cushing, William Paterson, and Bushrod Washington were unwilling to take that step.³³

Anticipating trouble at the Supreme Court, the Republican Congress passed the April Act—a transparent and ultimately successful

²⁶ See, e.g., 11 ANNALS OF CONG. 27–30 (1802) (statement of Sen. Breckenridge); *id.* at 59–62 (statement of Sen. Mason).

²⁷ See, e.g., 5 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 155 (Samuel Rose ed., 4th ed. 1800); 3 WILLIAM CRUISE, A DIGEST OF THE LAWS OF ENGLAND RESPECTING REAL PROPERTY 165 (1804).

²⁸ See, e.g., 11 ANNALS OF CONG. 33–34 (1802) (statement of Sen. Mason); *id.* at 56–57 (statement of Sen. Tracy); *id.* at 126–32 (statement of Sen. Chipman).

²⁹ See, e.g., *id.* at 48 (statement of Sen. Jackson); *id.* at 27–28 (statement of Sen. Breckenridge).

³⁰ See, e.g., *id.* at 86 (statement of Sen. Morris).

³¹ See, e.g., *id.* at 125 (statement of Sen. Chipman); *see also id.* at 53 (statement of Sen. Tracy).

³² See DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST ONE HUNDRED YEARS 75 (1985); CHARLES GROVE HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789–1835, at 227–35 (1960).

³³ See generally 6 THE PAPERS OF JOHN MARSHALL 104–21 (Charles F. Hobson ed., 1990).

attempt to insulate the Repeal Act from review by the Supreme Court until after the Justices had ridden circuit in the upcoming summer and fall of 1802. By then, the operation of the Repeal Act would be well-established, and the Justices' circuit riding would displace the Midnight Judges, thus implicitly conceding the force of the Repeal Act. The April Act achieved this end by extending the Republican repeal movement to include a provision of the original Judiciary Act of 1789: "so much of the [1789 Act] as provides for the holding a session of the supreme court of the United States on the first Monday of August, annually, is hereby repealed."³⁴ As a result, the Supreme Court could not sit to hear a challenge to the Repeal Act until its next sitting, in February 1803.³⁵ Eventually, after caving in and riding circuit (political reality and the arguments of Cushing, Paterson, and Washington having prevailed over the pique of Marshall and Chase), the Court upheld the constitutionality of some of the Repeal Act's provisions and dodged review of the rest,³⁶ to the disappointment of Federalist pols.³⁷

But the Republicans' hostility toward federal judges in general and the Supreme Court Justices in particular (at least so long as they were Federalists) did not manifest itself in an unrealistic plan to do away with the national judiciary entirely.³⁸ There were a couple of hotheaded exceptions, but, lacking Jefferson's support, their calls for abolition of the Federalist judiciary went nowhere.³⁹ The Republicans abolished the August *en banc* sitting of the Court, but they preserved the February sitting.⁴⁰ And, in an effort to keep the wheels of justice turning at the Court—and perhaps take the edge off Federalist claims that the abolition of the August Term created by the Judiciary Act of

³⁴ Act of April 29, 1802, ch. 31, §1, 2 Stat. 156, 156.

³⁵ See HAINES, *supra* note ____, at 243.

³⁶ *Stuart v. Laird*, 5 U.S. 299 (1803); see also CARPENTER, *supra* note ____, at 76–78; BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 163–98 (2005).

³⁷ See, e.g., WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE 1803–1807, at 103 (Everett S. Brown ed., 1923).

³⁸ See HAINES, *supra* note ____, at 224.

³⁹ See DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM, 1801–1805*, at 110–35 (1970).

⁴⁰ Act of Apr. 29, 1802, ch. 31, § 1, 2 Stat. 156, 156.

1789 was a scurrilous ploy to avoid judicial review of the Repeal Act—they created in the second section of the April Act a new kind of Supreme Court session, limited to procedural issues and conducted by one Justice:

And be it further enacted, That it shall be the duty of the associate justice resident in the fourth circuit formed by this act, to attend at the city of Washington on the first Monday of August next, and on the first Monday of August each and every year thereafter, who shall have power to make all necessary orders touching any suit, action, appeal, writ of error, process, pleadings or proceedings, returned to the said court or depending therein, preparatory to the hearing, trial or decision of such action, suit, appeal, writ of error, process, pleadings or proceedings: and that all writs and process may be returnable to the said court on the said first Monday in August, in the same manner as to the session of the said court, herein before directed to be holden on the first Monday in February, and may also bear teste on the said first Monday in August, as though a session of the said court was holden on that day, and it shall be the duty of the clerk of the supreme court to attend the said justice on the said first Monday of August, in each and every year, who shall make due entry of all such matters and things as shall or may be ordered as aforesaid by the said justice, and at each and every such August session, all actions, pleas, and other proceedings relative to any cause, civil or criminal, shall be continued over to the ensuing February session.⁴¹

Federalists in Congress were as outraged in April by the April Act as they had been in March by the Repeal Act, but almost none of their anger—and absolutely none of their constitutional objections—was directed at the new rump Court. They taunted the Republicans about the true purpose of the April Act: “Are the justices of the Supreme Court objects of terror to [Republican] gentlemen? . . . Are they afraid that they will pronounce the repealing law void?”⁴² The Republicans replied with the obvious reciprocal: “But we have as good a right to suppose [Federalist] gentlemen on the other side are as anxious for a session in June [or August], that this power may be exercised, as they have to suppose we wish to avoid it, to prevent the exercise.”⁴³ Congressman Lucas Elmendorf of New York even suggested a pecuniary motive for the Federalists’ hostility to the Act: “As to the opposition to this bill, do not gentlemen see who oppose it?”

⁴¹ *Id.* § 2.

⁴² 11 ANNALS OF CONG. 1229 (1802) (statement of Rep. Bayard).

⁴³ *Id.* at 1229 (statement of Rep. Nicholson).

They are those who reside in or near this place—gentlemen of the bar, who will monopolize the whole business of the courts, and who naturally think the more terms the better for them.”⁴⁴

Supplementing such barbs with plausible constitutional objections to the April Act was harder. James Bayard of Delaware, who led the Federalist opposition to the Repeal Act and the April Act in the House of Representatives, was reduced to spluttering, “The effect of the present bill will be, to have no court for fourteen months. Is this Constitutional?”⁴⁵ He had no answer for his own question, and the Republicans felt no need to provide one. Debate on policy grounds continued for a short while, with the Federalists complaining mightily that the abolition of the August sitting by the full Court would prolong litigation and encourage abusive delay tactics by defendants.⁴⁶

Federalists derided the August-Term rump Court, as “a certain mongrel court . . . to consist of one justice, vested with power to take preliminary steps without authority to take final ones.”⁴⁷ But that was as far as it went. The April Act passed without a single objection that the rump Court suffered from any constitutional defect involving the “one supreme Court” requirement, or, for that matter, any other provision of the Constitution.⁴⁸

The rump Court passed muster even more easily at the Supreme Court itself, where it was never questioned by Justices or litigants. The Justices, who were fulminating and debating in their internal correspondence about the constitutionality of the abolition of the circuit courts and the reinstatement of circuit-riding for themselves, were apparently perfectly unconcerned about the new rump August Term. Even Justice Chase, who wrote to Chief Justice Marshall on April 24, 1802, that he was prepared to lose his seat on the Court in the fight against the unconstitutional terms of the Repeal Act, placidly expressed in that same letter his hope for an early conference of the

⁴⁴ *Id.* at 1210-11 (statement of Rep. Elmendorf).

⁴⁵ 11 ANNALS OF CONG. 1229 (1802) (statement of Rep. Bayard).

⁴⁶ *See, e.g., id.* at 1205, 1210 (statement of Rep. Bayard); *id.* at 1207 (statement of Rep. Griswold); *id.* at 1207-08 (statement of Rep. Dennis).

⁴⁷ *Id.* at 1205 (statement of Rep. Bayard).

⁴⁸ *See id.* at 1205-11.

Court to discuss strategy, suggesting “that the Judges could meet me, at Washington, on the first Monday of August next, when I must be there to prepare the Cases for trial.”⁴⁹ Chase was the “associate justice resident in the fourth circuit formed by [the April] act” who was assigned the “duty of . . . attend[ing] at the city of Washington on the first Monday of August next . . . to make all necessary orders touching any suit, action, appeal, writ of error, process, pleadings or proceedings, returned to the said court or depending therein.”⁵⁰

Chase’s uncharacteristic equanimity in the face of the new rump Court assignment may have come as a disappointment to the Republicans. He was the Federalist judge most despised by the Republicans, having been, among other things, the most vigorous in adjudicating cases brought against Republican publishers under the Alien and Sedition Acts.⁵¹ So, there may have been some bear-baiting sentiment behind the selection of Chase to serve on the rump Court—Republicans perhaps hoping that he would refuse to serve in that capacity, thus providing additional fodder for the soon-to-be-commenced impeachment proceedings against him. After all, it would have been just as easy and geographically convenient to assign the rump-Court duties to the congenial and widely respected resident of Virginia in the fifth circuit—Chief Justice John Marshall—instead of Chase, the cantankerous and controversial resident of Maryland the fourth circuit. Moreover, assigning the rump Court to the Chief Justice—the only member of the Supreme Court explicitly specified by the Constitution⁵²—might have added just a bit more constitutional legitimacy to this oddball institution.

In any event, Marshall forwarded Chase’s invitation to Justice Paterson with similar complaisance: “he has requested . . . that we should meet in Washington . . . in August next when he is directed to

⁴⁹ Letter from Samuel Chase to John Marshall (Apr. 24, 1802), in *THE PAPERS OF JOHN MARSHALL*, *supra* note ___ at 109, 110.

⁵⁰ Act of Apr. 29, 1802, ch. 31, §2, 2 Stat. 156, 156, *repealed by* Act of Feb. 28, 1839, ch. 36, § 7, 5 Stat. 321, 322.

⁵¹ *See* JAMES HAW ET AL., *STORMY PATRIOT: THE LIFE OF SAMUEL CHASE* 216–25 (1980).

⁵² U.S. CONST. art. I, § 3, cl. 6.

hold a sort of a demi session at that place.”⁵³

Less than fifteen years after the ratification of the Constitution, with its “one supreme Court” mandate, nobody said “boo” about the constitutionality of the rumping of that Court. There were arguments between the contending political factions about the utility of transforming the Court’s August Term from a full-blown, *en banc*, case-or-controversy-deciding session into a purely procedural session, but that was as far as it went. The lack of any constitutional objection to the existence of the rump Court speaks even more loudly in light of the Constitution’s repeated invocation in the course of the debates over other provisions of the Repeal Act and the April Act. If there was ever a time when the constitutionality of legislative interference in Court operations was top of mind, it was in the winter and spring of 1802. And yet the rump Court passed through unchallenged.

Thus, at the beginning of the nineteenth century, all three branches of the federal government joined or acquiesced in the creation of the one-Justice rump Supreme Court of 1802, a long-lasting illustration of the flexibility of Article III’s “one [indivisible] supreme Court” requirement.

THE “DEMI SESSIONS” OF 1802 TO 1838

The Supreme Court—either in the form of Justice Chase sitting at the August Term or in the form of the *en banc* Court sitting at the February Term—might have resisted the perpetuation of the August Term as a division of the “one [indivisible] supreme Court,” but it did not. Instead the Court chose to treat both of its forms—*en banc* and rump—as versions of the same body, albeit with different ranges of authority depending on whether it was sitting by the authority of the first section of the April Act (*en banc*, with broad authority to decide cases and controversies), or the second (rump, with only limited procedural powers).

The opportunity to stymie the August Term rump Court, at least as an edition of the Supreme Court, arose from the muddy language

⁵³ Letter from John Marshall to William Paterson (May 3, 1802) in THE PAPERS OF JOHN MARSHALL, *supra* note ____, at 117, 118.

of the April Act. Its first section repealed the portion of the Judiciary Act of 1789 that “provides for the holding of a session of the supreme court . . . on the first Monday of August,” and its second section merely ordered that one Justice “attend at the city of Washington on the first Monday of August . . . to make all necessary orders . . . *as though* a session of the said court was holden on that day.”⁵⁴ But other language in the April Act made this less than an easy answer, because the Act was textually of two minds about the status of the August rump Court. The second section of the Act also referred to the rump session as “*such* August session,” and made provisions for the attendance of the Clerk of the Court and the treatment of August Term filings and orders that leave little doubt that the proceedings of the rump were to be treated as identical to proceedings of any other session of the Court.⁵⁵ In addition, it used exactly the same language to describe the scope of the powers of the Justice from the fourth circuit sitting at the August Term, and the scope of the powers of less than a quorum of Justices sitting at the February Term.⁵⁶ Furthermore, if the rump Court was not a Supreme Court, what could it be? The Constitution grants Congress wide latitude to vest the “judicial Power . . . in such inferior Courts as [it] may from time to time ordain and establish.”⁵⁷ Perhaps the rump Court was some sort of one-off inferior court, but if it was, it was an inferior court that performed only functions of the Supreme Court, and the decisions of which were not subject to any sort of review. In other words, it was an inferior national court of last resort conducting only unreviewable business of the Supreme Court and staffed only by a Justice and the Clerk of that Court. This would have been at most a distinction without a difference, and maybe not even that.

The bottom line is that neither the Supreme Court nor anyone else ever treated the August Term as anything other than a session of the Supreme Court. The behavior of the Justices, the Clerk of the Court, and counsel appearing at rump sessions all testify to the recognized legitimacy of the rump Term. None of which is to say that the

⁵⁴ Act of Apr. 29, 1802, ch. 31, 2 Stat. 156 (partially repealed 1839).

⁵⁵ *Id.* § 2, 2 Stat. at 156 (emphasis added).

⁵⁶ Compare *id.* § 1, with *id.* § 2.

⁵⁷ U.S. CONST. art. III, § 1.

August Term was of great substantive consequence,⁵⁸ at least until near the end of its existence.

At the outset, Samuel Chase, the Justice assigned to serve as the sole member of the rump Court,⁵⁹ dutifully came to Washington on the first Monday of August 1802. He met the Clerk of the Court, Elias B. Caldwell,⁶⁰ and, according to the minutes of the Supreme Court, opened Court as follows:

At a Session of the Supreme Court of the United States, begun and held at the City of Washington on Monday the 2d day of August in the year of our Lord 1802 agreeably to the Statute in such Case made and provided Samuel Chase one of the Associate Justices of the said Supreme Court and resident of the fourth Circuit was present and the Clerk of the said Supreme Court attending it is ordered by the said Judge that the following entries be made in the following actions to wit⁶¹

The first rump Term, like all but one or two of its successors, was short and dull. Chase ordered, and Caldwell recorded, a few routine joinder orders and the continuation (that is, preservation for hearing at the next Term) of all of the cases on the Court's docket.⁶² The very routineness with which the records of the first rump August Term are treated support its status as just another Term of the Supreme Court. The minutes for the Term are just like the minutes for any other Term of the Court. The opening paragraph quoted above follows the well-settled formula used by the Court for all sessions during the preceding years (other than the references to Chase and his residence), and the subsequent running head reads "August Term 1802."⁶³ The whole

⁵⁸ See, e.g., ST. GEORGE TUCKER, 4 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 30 (1803), *reprinted in* 4 THE FOUNDERS' CONSTITUTION 181, 187 (Philip B. Kurland & Ralph Lerner eds., 1987).

⁵⁹ Act of Apr. 29, 1802, ch. 31, §2, 2 Stat. 156, 156, *repealed by* Act of Feb. 28, 1839, ch. 36, § 7, 5 Stat. 321, 322.

⁶⁰ 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: PART ONE 163–64 (Maeva Marcus & James R. Perry, eds., 1985).

⁶¹ Minutes of the Supreme Court of the United States, Aug. 1802, at 127, *on* Roll 1, Microcopy No. 215 (February 1, 1790–August 4, 1828) (Nat'l Archives & Rec. Admin.) ("Minutes 1790–1828").

⁶² See *id.* at 127–28.

⁶³ *Id.* at 128.

business appears in the Court's minute book between the minutes for December Term 1801 and the minutes for February Term 1803. In other words, the only major differences between August Term 1802 and the Terms that occurred immediately before and after it were the date, the attendees, and the scope of the work. Justice Chase and Clerk Caldwell treated it as a Term, and when the Court met *en banc* in 1803, it treated the orders of the August Term as valid exercises of the Court's authority, taking up cases in which Chase had issued orders in August without remark.⁶⁴

The Court's minutes record equally uneventful August Term sittings by Chase from 1803 through 1807.⁶⁵ The purely routine nature of the August Term's docket is reflected in the 1807 minutes, which begin with a formulaic session-opening paragraph similar to the one quoted above, and then, without even bothering with the usual list of cases continued, report that "[i]t is ordered by the said Judge (no counsel attending) that the causes on the Docket be continued."⁶⁶

The full Court and counsel appearing before it also occasionally dealt with issues relating to or arising from the August Term Court. In 1806 the full Court issued a new rule governing assignment of errors on appeal, specifying that "[i]n cases not put to issue at the August Term, it shall be the duty of the Plaintiff in error, if errors shall not have been assigned in the Court below, to assign them in this Court at the commencement of the Term."⁶⁷ In *Blackwell v. Patten*, the full Court refused to quash a writ of error that was challenged on the ground that it had not been properly filed during the preceding August Term.⁶⁸ In other cases the Court heard arguments addressing the Au-

⁶⁴ See generally Minutes 1790–1828, Feb. 1803, *supra* note ____, at 128–36.

⁶⁵ See Minutes 1790–1828, Aug. 1803, Aug. 1804, Aug. 1805, *supra* note ____, at 136–37, 152, 167–68; *id.* Aug. 1806, Aug. 1807, at 29, 61.

⁶⁶ Minutes 1790–1828, Aug. 1807, *supra* note ____, at 61; see generally Records of the Supreme Court of the United States, Rough Dockets, 1791- (RG267, Box No. 1, Entry 5), Volume 1, 1803, 1806-8, 1810-27 (Nat'l Archives & Rec. Admin.); Records of the Supreme Court of the United States, Rough Dockets, 1803, 1806-8, 1810-1904, 1914-23 (RG267, Box No. 1, Entry 8), Aug. Term 1806, Feb. Terms 1812, 1818, 1819, 1821, 1822, 1826, Jan. Term 1828 (Nat'l Archives & Rec. Admin.).

⁶⁷ Minutes 1790–1828, Feb. 1806, *supra* note ____, at 28.

⁶⁸ 11 U.S. 277, 277–78 (1812).

gust Term or issued orders contemplating service or other performance in conjunction with the August Term.⁶⁹ Again, no one ever intimated that there was anything improper or constitutionally questionable about the existence or operation of the rump Court.

Following the August 1807 Term, there is an unexplained gap in entries of minutes for the August Terms, after which the routine picks up with Gabriel Duvall (Chase's successor as Justice resident in the fourth circuit) presiding in 1812.⁷⁰ Duvall, perhaps impatient with the mundane routine of the August Term, appears to have neglected his duties.⁷¹ For the 1820 rump sitting, the opening paragraph of the minutes has a blank space before the words "one of the associate Justices of the said Supreme Court and resident of the fourth Circuit in the state of Maryland was present."⁷² The same gap appears in the minutes for the 1821 through 1835 August Terms.⁷³ (On the other hand, William T. Carroll, the Clerk of the Court from 1827 to 1863, appears to have taken his August Term responsibilities quite seriously.⁷⁴) After Duvall's retirement in 1835, newly-commissioned Chief Justice Roger Taney, another resident of the fourth circuit, assumed responsibility for the August Term.⁷⁵ By the time Taney took over, a contemporary newspaper could accurately report that, "For many years past, the business of this court has been entirely *pro forma*, requiring

⁶⁹ See, e.g., *Ex parte Hennen*, 38 U.S. 225 (1839); *Rhode Island v. Massachusetts*, 38 U.S. 23, 23–24 (1839); *New Jersey v. New York*, 30 U.S. 284, 291 (1831) (Baldwin, J., concurring in part); see also *Rhode Island v. Massachusetts*, 37 U.S. 657, 676 (1838) (argument of counsel).

⁷⁰ LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 335–36 tbl.4-12 (3d ed. 2003).

⁷¹ See CARL B. SWISHER, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD* 276 (1974).

⁷² Minutes 1790–1828, Aug. 1820, *supra* note ____, at 132.

⁷³ Minutes 1790–1828, Aug. 1821, Aug. 1822, Aug. 1823, *supra* note ____, at 223, 319, 421; *id.*, Aug. 1824, Aug. 1825, Aug. 1826, Aug. 1827, Aug. 1828, at 531, 627, 735, 889, 1041; Minutes of the Supreme Court of the United States, Aug. 1829, Aug. 1830, Aug. 1831, at 1192, 1396, 1578, on Roll 2, Microcopy No. 215 (January 12, 1829–August 7, 1837) (Nat'l Archives & Rec. Admin.) ("Minutes 1829–1837"); *id.*, Aug. 1832, Aug. 1833, at 1788, 1956; *id.*, Aug. 1834, Aug. 1835, at 3103, 3255.

⁷⁴ See, e.g., Records of the Supreme Court of the United States, Rough Dockets, 1803, 1806–8, 1810–1904, 1914–23 (RG267, A1, Entry 8), Aug. Terms 1828, 1829, 1830 (Nat'l Archives & Rec. Admin.).

⁷⁵ See EPSTEIN, *supra* note ____, at 336 tbl.4-12.

neither argument by counsel, nor decision by the court; and the attendance of the judge has not always been deemed necessary.”⁷⁶ At the same time, however, the August Terms—and the rules governing them—were widely recognized by scholars and practitioners as genuine elements of the Court’s operations.⁷⁷

Taney was to serve as rump Justice for only three August Terms, from 1836 to 1838.⁷⁸ But it was during his relatively brief tenure that the August Term proceedings—two in particular—most clearly demonstrated that the rump Court was a division of the Supreme Court. First, there was Taney’s presentation of his own letters patent and evidence of oath-taking at the August 1836 Term. Second, there was his treatment of the case of *Ex parte Hennen* at the August 1838 Term, combined with his second opinion in that case, delivered at the sitting of the full Court in January 1839.

When Taney ordered that the minutes of the August 1836 Term include his presentation to the Court of his letters patent (his commission) and evidence that he had taken the constitutional and statutory oaths of office,⁷⁹ he was following a tradition that had begun on February 2, 1790, with the first member of the Court, Chief Justice John Jay.⁸⁰ Before taking a seat on the Court, every Justice was expected to present his paper qualifications to the Court. Every member of the Court had done so (or, in a few cases, was presumed to have done so),⁸¹ for more than 40 years. It is difficult to believe that Taney, or

⁷⁶ *The Suprmmme [sic] Court*, 54 NILES’ NAT’L REG. 354 (1838); CARL BRENT SWISHER, ROGER B. TANEY 354 (1935).

⁷⁷ *See, e.g.*, ALFRED CONKLING, A TREATISE ON THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 342–43 (1831); THOMAS F. GORDON, A DIGEST OF THE LAWS OF THE UNITED STATES 150, 152 (1827); THOMAS SERGEANT, CONSTITUTIONAL LAW: BEING A VIEW OF THE PRACTICE AND JURISDICTION OF THE COURTS OF THE UNITED STATES AND OF CONSTITUTIONAL POINTS DECIDED 78, 83–84 (1830).

⁷⁸ Minutes 1829–1837, Aug. 1836, Aug. 1837, *supra* note ____, at 3421, 3539; Minutes of the Supreme Court of the United States, Aug. 1838, at 3829, *on* Roll 3, Microcopy No. 215 (January 8, 1838–January 24, 1848) (Nat’l Archives & Rec. Admin.) (“Minutes 1838–1848”).

⁷⁹ Minutes 1829–1837, Aug. 1836, *supra* note ____, at 3421–35.

⁸⁰ *See* I DOCUMENTARY HISTORY, *supra* note ____, at 1–7.

⁸¹ *See* Ross E. Davies, *William Cushing, Chief Justice of the United States*, 37 U. TOL. L. REV. (forthcoming 2006) (manuscript at 17–22, on file with author).

the Clerk, could have viewed his presentation of his papers at the August Term as anything other than the traditional presentation of papers to the Court before taking a seat on it, an assumption that is only reinforced by Taney's failure to present his papers at the next sitting of the full Court in January 1837.⁸²

Second, and even more telling, was Taney's treatment of Duncan Hennen's request for a mandamus to the federal district judge for the Eastern District of Louisiana, or an order to show cause.⁸³ Hennen was seeking an order "requiring the said Judge to restore Duncan N. Hennen to the office of Clerk of said District Court."⁸⁴ Taney doubted that the April Act empowered the August rump Court to issue either the mandamus or an order to show cause.⁸⁵ Nevertheless, Taney took the extraordinary steps of hearing argument in the case at the August Term,⁸⁶ and then issuing the requested order to show cause.⁸⁷ As he explained in an opinion for the full Court in the same case at the next January Term, Taney had engaged in this maneuver because "the question was an important one, and might again occur; [and] I thought it proper that it should be settled by the judgment of the Court at its regular session, and not by a single judge."⁸⁸ (Taney's use of the word "judge" rather than "Justice" when describing the rump Court is of no moment. During his tenure the two terms were routinely bandied about as equivalents in arguments before the Court and in published opinions.⁸⁹) He then went on to explain that, "I therefore laid

⁸² *Ex parte Hennen*, 38 U.S. 225, 228 (1839); Minutes 1829–1837, Feb. 1837, *supra* note ___, at 3435–39.

⁸³ *Ex parte Hennen* (Aug. 6, 1838) (Taney, C.J., unpublished August Term opinion), reprinted *infra* appendix; Minutes 1838–1848, Aug. 1838, *supra* note ___, at 3829–50.

⁸⁴ *Ex parte Hennen*, *infra* app.

⁸⁵ *Id.*

⁸⁶ *The Supreme [sic] Court*, *supra* note ___, at 354; see also *Supreme Court of the U. States*, 54 NILES' NAT'L REG. 373 (1838).

⁸⁷ *Ex parte Hennen*, *infra* app.; *Supreme Court of the U. States*, *supra* note ___, at 373.

⁸⁸ *Ex parte Hennen*, 38 U.S. 225, 229 (1839).

⁸⁹ See, e.g., *United States v. Ferreira*, 54 U.S. 40, 50–51 (1852); see also, e.g., *Prigg v. Pennsylvania*, 41 U.S. 539, 565–67 (1842) (argument of counsel); *id.* at 631 (Taney, C.J., concurring and dissenting); *Kendall v. United States*, 37 U.S. 524, 653 (1838) (Taney, C.J., dissenting).

the rule [to show cause], because it was the only mode in which I could bring the subject before the Court for decision.”⁹⁰ There is only one reason why Taney would have seen issuing the order to show cause as the *only* way to bring the issue to the full Supreme Court: if he understood that the rump Court was also the Supreme Court. If the rump Court was an inferior court, Taney could have denied Hennen’s petition at the August Term and the *en banc* Court could have heard Hennen’s appeal from the denial at its following January Term.⁹¹ But if the rump Court was a Supreme Court, then there could be no appeal from the denial, the Supreme Court being the court of last resort. Therefore, the only way to keep the case alive from the August Term to the January Term for consideration by the full Court was to deny the petition for a mandamus, issue the order to show cause, and make it returnable during the January Term, at which time the full Court would have the opportunity to consider. Taney explained:

1. Whether the Supreme Court have the power to issue a writ of mandamus in such a case as that described in the petition. —

2. If the Supreme Court have the power is it also given to the Judge of the 4th Circuit, by the act of Congress of 1802 ch. 291 s.2. establishing the August term. — . . .

. . . [And i]f the Supreme Court shall be of opinion that I have not the power at this term to lay this rule, it will of course be discharged by the court at the January Term.⁹²

That is precisely what Taney did—issue an order when he was “strongly inclined to the opinion that [he] had no power to [issue], in any case, at the August Term”⁹³—because there was no appeal from the August Term, as it was the Supreme Court. Taney would only have approached *Ex parte Hennen* in this manner if he had been “strongly inclined to the opinion” that the August Term was a Term of the Supreme Court.

The dust-up over *Ex parte Hennen* did generate at least a little bit

⁹⁰ *Ex parte Hennen*, 38 U.S. at 229.

⁹¹ *See, e.g.*, *Decatur v. Paulding*, 39 U.S. 497, 513 (1840) (Taney, C.J.); *Mallard v. United States District Court*, 490 U.S. 296, 308–09 (1989).

⁹² *Ex parte Hennen*, *infra* app.

⁹³ *Ex parte Hennen*, 38 U.S. at 229.

of attention for the August Term, apparently the only public attention it ever enjoyed.⁹⁴ It is possible that Taney, a sophisticated politician as well as a sophisticated lawyer, deliberately made a mountain out of Hennen’s molehill in order to raise congressional awareness of the useless relic (and waste of Taney’s time for a few days every year) that the August Term had become. If so, it worked. The August Term provision of the April Act was repealed without fanfare in February 1839 on unelaborated grounds of “efficiency” as part of an omnibus act dealing with a variety of judicial business.⁹⁵

APPENDIX
CHIEF JUSTICE ROGER B. TANEY’S UNREPORTED AUGUST
TERM OPINION IN *EX PARTE HENNEN*⁹⁶

August 6, 1838

Supreme Court of the United States Aug. Term 1838 —

Ex parte: In the matter of)
Duncan N. Hennen, on petition)
for a mandamus to the Hon^{ble})
Philip K. Lawrence etc.)

On petition for a mandamus to the Hon^{ble} Philip K. Lawrence Judge of the District Court of the United States for the Eastern District of Louisiana requiring the said Judge to restore Duncan N. Hennen to the office of Clerk of said District Court —

Three questions arise on this motion —

1. Whether the Supreme Court have the power to issue a writ of mandamus in such a case as that described in the petition. —
2. If the Supreme Court have the power is it also given to the Judge of the 4th Circuit, by the act of Congress of 1802. ch. 291. s.2. establishing the August term. —

⁹⁴ See *The Suprmmme [sic] Court*, supra note ____, at 354; *Supreme Court of the U. States*, supra note ____, at 373.

⁹⁵ Act of Feb. 28, 1839, ch. 36, § 7, 5 Stat. 321, 322.

⁹⁶ RG 267, Entry 27, Opinions in Original Jurisdiction Cases, 1835, 1837–1839, Box 1 (Nat’l Archives & Rec. Admin.).

3. Assuming that the court has the power is the petitioner entitled to the office. —

The public interest requires that the questions in relation to this clerkship should be settled as speedily as possible, and they must be finally disposed of by the judgment of the Supreme Court. It is therefore my duty to adopt any measure in my power that will enable the parties to bring the question before that tribunal. —

The question whether I have the power sitting alone at this term to lay any rule upon this subject ought in a matter of so much interest to be decided by a full court, and not by a single Judge. I shall therefore grant a rule returnable etc. to show cause why a mandamus should not issue with leave to any person interested to move to discharge the rule on or before the return day, a copy of the rule to be served on the Judges and the adverse claimant of the office, on or before the first of November next. — If the Supreme Court shall be of opinion that I have not the power at this term to lay this rule, it will of course be discharged by the court at the January Term. It is nothing more than notice to the parties against whom it issues. It decides nothing and leaves all the questions open for the decision of that tribunal to which they more properly belong. —