

## THE CHIEF JUSTICE, THE APPOINTMENT OF INFERIOR OFFICERS, AND THE “COURT OF LAW” REQUIREMENT

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**ABSTRACT**—In addition to his judicial duties, the Chief Justice presides over a sprawling judicial bureaucracy. Each year, the Chief fills positions within that bureaucracy, designating Article III judges to various specialty courts and appointing such officers as the director of the Administrative Office of the U.S. Courts. Although critics worry that the Chief may use his appointment role to shape Third Branch policy unduly, scholars view the role as constitutionally benign.

This Article questions the Chief’s role. The Constitution authorizes Congress to vest the appointment of inferior officers in the “courts of law” but not the Chief Justice. History teaches that this was a deliberate choice (to curtail the corrupting influence of patronage powers) and one to which the nation’s first Chief, John Jay, scrupulously adhered. After tracing the decline of the early practice, the Article proposes the return to a court-based appointment model.

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INTRODUCTION

Each year, the Chief Justice of the United States makes a variety of appointments to offices in the Article III bureaucracy, filling positions high and low.<sup>1</sup> In 2011, for example, Chief Justice John G. Roberts participated

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<sup>1</sup> In recent years, the role of the Chief Justice as the judiciary’s administrator in chief has attracted growing scholarly attention. For a sense of the literature, see Todd E. Pettys, *Choosing a Chief Justice: Presidential Prerogative or a Job for the Court?*, 22 J.L. & POL. 231 (2006); Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575 (2006), exploring the Chief’s various powers and questioning whether they should vest in a single Justice or be shared; Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341 (2004) [hereinafter Ruger, *Appointment Power*], detailing the wide-ranging appointment power of the Chief; Theodore W. Ruger, *The Chief Justice’s Special Authority and the Norms of Judicial Power*, 154 U. PA. L. REV. 1551 (2006); Theodore W. Ruger, *Chief Justice Rehnquist’s Appointments to the FISA Court: An Empirical Perspective*, 101 NW. U. L. REV. 239 (2007) [hereinafter Ruger, *FISA*], analyzing the Chief’s appointments to the Foreign Intelligence Surveillance Act (FISA) Court; and Peter G. Fish, *The Office of Chief Justice of the United States: Into the Federal Judiciary’s Bicentennial Decade*, in THE WHITE BURKETT MILLER CTR. OF PUB. AFFAIRS, THE OFFICE OF CHIEF JUSTICE (1984) [hereinafter THE OFFICE OF CHIEF JUSTICE], tracing the growth of the Chief’s administrative authority during the twentieth century. A variety of factors contribute to the interest. For starters, scholars often view the judicial behavior of federal judges in general and the Chief in particular as an outgrowth of their political views. See JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993). Scholars devoted to the attitudinal model may find a political undertone to the exercise of the Chief’s appointment powers. Moreover, scholars have suggested that Justices may time their retirements to ensure that a president of their own party will choose their successor. See, e.g., Paul D. Carrington & Roger C. Cramton, *Reforming the Supreme Court: An Introduction*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 3, 7 (Roger C. Cramton & Paul D. Carrington eds., 2006) (raising the prospect of strategic retirement in support of term limits for Supreme Court Justices); cf. Stephen B. Burbank et al., *Leaving the Bench, 1970–2009: The Choices*

in the appointment of a new director of the Federal Judicial Center (FJC), the research and teaching arm of the federal judiciary.<sup>2</sup> And with the 2011 retirement of the head of the Administrative Office (AO) of the United States Courts, the Chief Justice bore sole responsibility for the appointment of a successor.<sup>3</sup> Apart from these bureaucratic figures, the Chief Justice also selects the Article III judges, magistrates, and bankruptcy judges who serve on the various committees of the Judicial Conference of the United States, the policymaking body of the federal judiciary over which he presides at biannual meetings. Finally, the Chief chooses sitting judges to staff specialty courts, such as the courts established in the Foreign Intelligence Surveillance Act (FISA). Whatever their influence on the resolution of the cases that come before specialized courts, the Chief's appointment powers may give him a significant hand in the development of Judicial Branch policy.<sup>4</sup>

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*Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1 (2012) (careful study casts doubt on strategic retirement theory); David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Golden Parachute,"* 83 WASH. U. L.Q. 1397, 1432–36 (2005) (collecting evidence that tends to refute the strategic retirement thesis). To the extent the strategic retirement thesis explains the behavior of Chief Justices, critics may worry that the Chief's administrative powers will remain in one party's hands for the foreseeable future.

<sup>2</sup> Created in 1967 as the research and training department of the federal judiciary, the Federal Judicial Center operates under the direction of a board of directors. See 28 U.S.C. §§ 620–629 (2006). The Judicial Conference elects the members of the board from federal judges serving in the circuit, district, bankruptcy, and magistrate ranks; the Chief Justice serves as the chair. See *id.* §§ 620–621. For a history of the FJC, see Tom C. Clark, *The Federal Judicial Center*, 1974 ARIZ. ST. L.J. 537. The FJC board selected Judge Jeremy D. Fogel as its director effective October 2011. *Judicial Administration and Organization*, FED. JUD. CENTER, [http://www.fjc.gov/history/home.nsf/page/admin\\_07\\_01.html](http://www.fjc.gov/history/home.nsf/page/admin_07_01.html) (last visited May 24, 2013).

<sup>3</sup> The Administrative Office of the United States Courts (AO) was established in 1939 as the administrative arm of the federal judiciary. For an account of the AO's origins, see Peter Graham Fish, *Crises, Politics, and Federal Judicial Reform: The Administrative Office Act of 1939*, 32 J. POL. 599 (1970). For a critique of the judicial bureaucracy, see Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000), questioning the bureaucratic role of life-tenured judges and their influence on the legislative process. Federal law assigns the power to appoint and remove the director of the AO to the Chief Justice. See § 601 (vesting in the Chief Justice the power to appoint and remove the director and deputy director of the AO, "after consulting with the Judicial Conference"). Chief Justice Roberts selected Thomas Hogan, a senior federal district judge from the District of Columbia, as the AO's new director, effective October 2011. See *New Director of AO Appointed*, THIRD BRANCH (Oct. 2011), [http://www.uscourts.gov/News/TheThirdBranch/11-10-01/New\\_Director\\_of\\_AO\\_Appointed.aspx](http://www.uscourts.gov/News/TheThirdBranch/11-10-01/New_Director_of_AO_Appointed.aspx).

<sup>4</sup> For accounts of the changing makeup of the civil rules advisory committee from one initially comprised of lawyers and law professors to one now dominated by judges, see Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1714–26 (2004), assessing scholarship that models the rulemaking process from a public choice perspective. For an evaluation of the Chief Justice's use of the appointment power to influence the politics of civil justice reform within the Article III judiciary, see Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 614–23 (2001), providing a case study of civil justice reform that highlights the Chief's influence on the process. On the way assignment power can be used as a lever to influence outcomes, see J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A*

Despite the familiarity of the practice, the power of Congress to vest the Chief with appointment authority poses a constitutional puzzle. After setting a default rule of presidential nomination and appointment, by and with the advice and consent of the Senate, Article II empowers Congress to vest the appointment of “inferior” officers in the President acting alone, in the heads of departments, and in the “Courts of Law.”<sup>5</sup> Notably, Article II makes no provision for the assignment of appointment authority to the Chief Justice, notwithstanding the fact that the Constitution elsewhere recognizes the existence of that official (in the provision that calls for the Chief to preside at the Senate’s trial of presidential impeachments).<sup>6</sup> So long as the Judicial Branch offices in question qualify as “inferior” within the meaning of Article II, the Constitution appears to foreclose the vesting of appointment authority in the Chief and to require its vesting in the Court instead.<sup>7</sup>

Although scholars have criticized modern appointment practices in the Judicial Branch, the scholarly consensus holds that the vesting of appointment authority in the Chief does not violate the Constitution. In the leading assessment of the Chief’s appointment power, Professor Theodore Ruger concludes that the practice is not “unconstitutional” in the modern sense that a federal court should invalidate legislation conveying such power.<sup>8</sup> He bases this conclusion on a variety of considerations, including the gradual growth in the powers of the Chief over time and the plausible textual case for treating the “court of law” as synonymous with the Chief Justice of that court. As Professor Ruger notes, district courts in the nineteenth century often employed a single district judge, making the

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*Comparative Approach*, 23 J. LEGAL STUD. 721, 724–28 (1994), examining the use of the assignment power to influence the way judges decide cases in Japan.

<sup>5</sup> U.S. CONST. art. II, § 2, cl. 2. For a selection of the vast literature on the separation of powers and the role of the Appointments Clause, see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008), tracing the exercise of presidential power over time to assess its consistency with the unitary executive thesis; Steven G. Calabresi & Joan E. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); and John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011), arguing against the use of presumptions in resolving disputes over the separation of powers.

<sup>6</sup> See U.S. CONST. art. I, § 3, cl. 6.

<sup>7</sup> As we shall see, early practice at the Supreme Court makes clear that court clerks are to be regarded as inferior officers within the meaning of this provision. See *infra* text accompanying notes 153–66; see also *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 243 (1839) (treating the district court clerk as an inferior officer). The Court itself has held that special judges appointed to serve on the Tax Court qualify as inferior officers rather than employees. See *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991).

<sup>8</sup> See Ruger, *Appointment Power*, *supra* note 1, at 351, 367–70.

“court” and the “judge” one and the same.<sup>9</sup> Ruger also points to *Freytag v. Commissioner*,<sup>10</sup> which upheld the power of the chief judge of the Tax Court to appoint inferior officers to serve as special judges on that court. Although the Court divided on one interpretive issue,<sup>11</sup> Ruger notes that the Court “had no trouble” with the exercise of the appointing authority by the chief judge of the Tax Court rather than by the court itself.<sup>12</sup> Professor Ruger’s analysis may have helped to persuade Professor Resnik that the Chief Justice’s appointment powers were, as she and Lane Dilg concluded, unwise, but not unconstitutional.<sup>13</sup>

In this Article, I explore the possibility that, notwithstanding scholarly consensus and entrenched practice, the text of the Constitution may well mean what it says in authorizing the Court, as a “court of law,” but not the Chief Justice to serve as an approved recipient of the power to appoint inferior officers. There are two reasons to believe this might be so, one historical and one structural. As for history, the evidence suggests that the decision to authorize the assignment of appointment power to the courts, instead of the judges who staff them, may have been part of a wide-ranging effort during the early republic to rethink the nature and perquisites of judicial office.<sup>14</sup> Throughout the eighteenth century, judicial officers earned income from salary, from fees paid by litigants who appeared before the court, and from the sale of inferior offices within the “gift” or patronage power of the judge.<sup>15</sup> Nonsalary perquisites grew controversial during the run-up to the Revolution, as the colonists chafed under the burden of

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<sup>9</sup> See *id.* at 369 (treating the reference to “Courts of Law” as a distinction without a difference in light of the practice of staffing district courts with a single judge); see also Fish, *supra* note 1 (noting the district court analogy).

<sup>10</sup> 501 U.S. 868 (1991).

<sup>11</sup> As Ruger observes, the debate in *Freytag* focused on the majority’s conclusion that Congress could invest the non-Article III Tax Court with the appointment power; the concurring opinion of Justice Scalia argued that Article III courts alone could be given such power. Nonetheless, Justice Scalia would have upheld the appointments by envisioning the Tax Court as the head of an executive department. See *id.* at 920 (Scalia, J., concurring in part). *But cf.* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3163 (2010) (concluding that a multimember board could act as a department “head” within the meaning of Article III).

<sup>12</sup> Ruger, *Appointment Power*, *supra* note 1, at 370. Perhaps the Justices’ awareness of their own Chief’s appointing role (and their reluctance to cast doubt on its propriety) helped to generate the unarticulated consensus.

<sup>13</sup> See Resnik & Dilg, *supra* note 1, at 1619 n.188.

<sup>14</sup> See James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 11 (2008) (finding that by 1787, frustration and criticisms of fee-based judicial compensation had resulted in state statutes and constitutional provisions addressing the matter).

<sup>15</sup> See Part III.A–B. For an account, see DANIEL DUMAN, *THE JUDICIAL BENCH IN ENGLAND 1727–1875: THE RESHAPING OF A PROFESSIONAL ELITE* (1982). A tabular presentation of the value of office sales in England, drawn from Duman’s work, appears below at Table 1.

multiple fee-paid offices.<sup>16</sup> Among the more colorful indictments in the Declaration of Independence was its claim that the Crown “has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.”<sup>17</sup>

Earlier work contends that Article III may have presumptively foreclosed the practice of allowing federal judges to collect fees from the litigants who appear before the federal courts.<sup>18</sup> Article II may complement the no-fees assumptions of Article III<sup>19</sup> by adding a no-office-sales proviso that prevents judges from securing additional compensation through the exercise of patronage power over appointments to inferior offices. By providing for Congress to vest the appointment power in courts, the Framers of Article II neatly clarified that the act of appointment was to be a transparent part of the public work of the court. By depriving the chief or any individual judge of the appointment power, moreover, the provision may have signaled a desire to foreclose the sale of inferior office for private gain. As was the case with the early implementation of the compensation provisions of Article III, which featured a move away from fee-paid compensation,<sup>20</sup> Congress implemented the Article II limitation in the Judiciary Act of 1789 by assigning appointment powers to courts rather than judges in keeping with this new conception of the judicial office as a public trust.<sup>21</sup> Early practice, overseen by the nation’s first Chief Justice, John Jay, confirms the perceived importance of court-based appointments.

The structural argument complements the historical evidence. Article III creates a single Supreme Court, places it atop the federal judicial hierarchy, and requires all other courts and tribunals erected or appointed by Congress to remain inferior to that Court. As noted elsewhere, the related requirements of unity, supremacy, and inferiority together suggest that the Court must retain the power to oversee the work of the judicial

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<sup>16</sup> In addition to salary, colonial governors could earn substantial, additional income from judicial and administrative fees. Lower officeholders often received fee payments as well from sources such as marriage fees and liquor license fees. See Pfander, *supra* note 14, at 8–9 & nn.34–37.

<sup>17</sup> THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776). For an account, see EDWARD DUMBAULD, *THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY* 115–17 (1950), detailing the British government’s creation of new courts of admiralty and commissioners of customs in the colonies, the fees they were paid, and the subsequent colonial protests that inspired the indictment.

<sup>18</sup> See Pfander, *supra* note 14, at 4, 14.

<sup>19</sup> See *id.* at 16–19 & nn.73–91 (offering textual and historical evidence that Article III precludes fee-based compensation and recounting an exchange between Gouverneur Morris and James Madison at the Constitutional Convention that appears to assume salary-based judicial compensation).

<sup>20</sup> See *id.* at 24–26 (describing federal law that allowed federal officials to collect fees at the same rate as state officials but specifically foreclosed payment of “fees to judges”).

<sup>21</sup> See Karen Orren, *The Work of Government: Recovering the Discourse of Office in Marbury v. Madison*, 8 *STUD. AM. POL. DEV.* 60 (1994) (recounting changes in the conception of office as property that began during the early republic).

system.<sup>22</sup> These powers of oversight may extend to state courts, when constituted as tribunals within the meaning of Article I,<sup>23</sup> to federal agencies exercising judicial power,<sup>24</sup> and to lower federal courts,<sup>25</sup> and may well encompass a power to review lower court decisions in the wake of congressional restrictions on the Court's as-of-right appellate jurisdiction.<sup>26</sup> Under Article III, the Court bears ultimate responsibility for the way in which the judicial department exercises the judicial power of the United States.<sup>27</sup>

The appointment provision of Article II underscores the Court's special role as the head of the federal judicial department by providing that Congress can assign the appointment of inferior officers to courts of law. An inferior officer must be inferior to a superior and Article III makes clear that the Court, rather than the Chief Justice, occupies the relevant position of superiority. The Court's departmental supremacy explains why one cannot defend current arrangements by regarding the Chief Justice as the "Head[] of [a] Department" within the meaning of Article II. Such a view would portray the FJC, the AO, and the other components of the Article III bureaucracy as separate administrative agencies over which the Chief exercises administrative oversight. But while Congress has the power to create department heads with appointment power, such officials must report to a superior official or body and ultimately to the President. For the Chief Justice, acting within the judicial department, the relevant reporting obligation runs not to the President but to the Supreme Court itself.

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<sup>22</sup> See JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES* (2009) (making a general argument that all federal tribunals must remain inferior to the Supreme Court and subject to its oversight and control); James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613 (2011) (exploring the Scottish antecedents to the hierarchical features of the Article III judiciary).

<sup>23</sup> See James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191 (2007) (arguing that the Court's supremacy operates in relation to state courts).

<sup>24</sup> See James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004) (arguing that Article I tribunals must remain inferior to the federal judiciary and ultimately to the Supreme Court).

<sup>25</sup> See James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433 (2000).

<sup>26</sup> See Pfander, *supra* note 23, at 237 (arguing that as a result of jurisdiction-stripping legislation that denies inferior federal courts jurisdiction over specific federal claims, state courts technically become federal tribunals with original jurisdiction subject to Supreme Court oversight); see also Pfander & Birk, *supra* note 22, at 1622–23 (exploring the growing view that Congress may alter the Court's as-of-right appellate jurisdiction but may not "deprive the Court of the *discretionary* oversight that inheres in its supremacy").

<sup>27</sup> The Court's own decisions offer important support for this conception of the Court as the final exponent of the judicial department's exercise of judicial power. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) ("Within that [judicial] hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole.").

This Article proceeds in three parts. Part I briefly sketches the Chief's appointment powers, explores some of the criticisms their exercise has attracted, and examines the defense of their constitutionality. Part II examines the origins and early implementation of Article II's provision for appointments by "courts of law," placing the provision in the context of post-revolutionary disdain for the corrupt office selling and fee-based compensation of the English and colonial judicial systems. Part II explores the history of the Court's early practice, which was consistently court centered, and links the provision for appointment by the courts to the hierarchical structure of the third branch of government, which calls for the Court to oversee the department's exercise of the judicial function. Part III returns to the constitutional puzzle, showing that the combined force of history and structure cast doubt on the Chief's role. After assessing some possible work-arounds and concluding that they fail to address the concerns, Part III concludes with some thoughts on how to make the transition from a Chief-based system of appointments to one in which the Court performs an oversight function.

#### I. THE APPOINTMENT POWERS OF THE CHIEF JUSTICE

Congress has given the Chief Justice of the United States power to fill a wide range of offices within the judicial bureaucracy. In addition to his power to appoint such figures as the director of the Administrative Office of the United States Courts, the Chief serves as the chair of the board of directors of the Federal Judicial Center and plays a role in selection of the FJC's director.<sup>28</sup> For help with various administrative chores, the Chief also appoints an administrative assistant who works at the Supreme Court.<sup>29</sup> Depending on the Chief, the administrative assistant can play a substantial role in the development of Judicial Branch policy.<sup>30</sup> Chief Justice Burger, in particular, was thought to have delegated significant authority to his administrative assistant, Mark Cannon.<sup>31</sup>

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<sup>28</sup> 28 U.S.C. § 621(a)(1) (2006) ("[T]he Chief Justice of the United States, who shall be the permanent Chairman of the Board . . ."); *id.* § 624 ("The Board is authorized . . . to appoint and fix the duties of the Director and the Deputy Director of the Federal Judicial Center, who shall serve at the pleasure of the board . . .").

<sup>29</sup> *See id.* § 677(a)-(b); Resnik & Dilg, *supra* note 1, at 1590 & nn.45-46 (discussing the creation of the administrative assistant position at Chief Justice Burger's request through § 677 (a)-(b)).

<sup>30</sup> While Chief Justice Burger's administrative assistant served from the creation of the position to the end of Burger's tenure, a period of fourteen years, Chief Justice Rehnquist limited the tenures of his administrative assistants to two- to five-year terms. Resnik & Dilg, *supra* note 1, at 1623-24 & n.211.

<sup>31</sup> *Id.* at 1623-24 & n.210 (citing concern with Cannon's authority as a factor in Justice Rehnquist's decision to impose term limits on his assistants). In Cannon's own description of his duties, *see* Mark W. Cannon, *Judicial Administration: Why Should We Care?*, 1974 ARIZ. ST. L.J. 521, 531-32, he lists: maintain relations with the bureaucracy, advise the Chief, brief the Chief on the literature, and relieve the Chief of "administrative detail."



In addition to the power to appoint officials within the judicial bureaucracy, the Chief exercises control over the appointment of the members of the committees that do much of the initial work in formulating policy for the Article III judiciary.<sup>32</sup> Formal policymaking responsibility falls to the Judicial Conference of the United States, which meets in March and September every year.<sup>33</sup> The Chief presides at meetings of the Judicial Conference but does not pick its members.<sup>34</sup> According to statute, the Conference consists of the chief judge of each circuit court of appeals, a district judge from each regional circuit (elected by a vote of her peers), and the chief judge of the Court of International Trade.<sup>35</sup> Between the March and September meetings, the Conference acts through an executive committee made up of seven members of the Conference, which the Chief appoints.<sup>36</sup>

The formulation of Judicial Conference policy begins at the committee level. The Conference consists of some two dozen committees, each of which has jurisdiction over a specific set of issues and each of which consists of a number of Article III judges who meet biannually.<sup>37</sup> Best known, the Standing Committee on Rules of Practice and Procedure presides over a variety of rulemaking committees, such as those that work up recommended amendments to the rules of civil procedure, appellate procedure, bankruptcy procedure, criminal procedure, and so forth.<sup>38</sup> Less

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<sup>32</sup> For a count of Judicial Conference committees, putting the number at twenty-five in 2009, see Burbank et al., *supra* note 1. See also Resnik & Dilg, *supra* note 1, at 1597 (finding that though statute only grants the Chief Justice authority to appoint members of the Standing Committee, the Chief Justice appoints the members of the various rules committees).

<sup>33</sup> See *Sessions*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/JudicialConference/Sessions.aspx> (last visited May 24, 2013).

<sup>34</sup> § 331 (“[The Chief Justice] shall preside at such conference which shall be known as the Judicial Conference . . .”).

<sup>35</sup> *Id.*

<sup>36</sup> See *Frequently Asked Questions*, U.S. CTS., <http://www.uscourts.gov/Common/FAQS.aspx> (last visited May 24, 2013) (“The seven-member Executive Committee of the Judicial Conference serves as the senior executive arm of the Conference . . .”). The director of the Administrative Office of the United States Courts serves as an ex-officio, nonvoting member of the Executive Committee and brings the roster total to eight. See *Organization*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/JudicialConference/Organization.aspx> (last visited May 24, 2013); see also *Two New Members Named to Judicial Conference’s Executive Committee*, U.S. CTS. (Dec. 28, 2010), [http://www.uscourts.gov/News/NewsView/10-12-28/Two\\_New\\_Members\\_Named\\_to\\_Judicial\\_Conference’s\\_Executive\\_Committee.aspx](http://www.uscourts.gov/News/NewsView/10-12-28/Two_New_Members_Named_to_Judicial_Conference’s_Executive_Committee.aspx) (listing the number of committee members as eight and including the AO director).

<sup>37</sup> See *Federal Court Governance and Administration: National*, FED. JUD. CENTER, <http://www.fjc.gov/federal/courts.nsf/FCGA1> (last visited May 24, 2013); see also Resnik & Dilg, *supra* note 1, at 1597 & n.81 (detailing the “more than two dozen” Judicial Conference committees as of 2006).

<sup>38</sup> See *Procedures for the Judicial Conference’s Committee on Rules of Practice and Procedure and Its Advisory Rules Committees*, GUIDE TO JUDICIARY POLICY, VOL. 1, § 440.10, available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Procedures\\_for\\_Rules\\_Cmtes.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Procedures_for_Rules_Cmtes.pdf) (requiring the Judicial Conference “to publish the procedures that govern the work of the Committee on Rules of Practice and Procedure (the ‘Standing Committee’) and its advisory committees on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and on the Evidence Rules”).

well-known committees oversee such matters as court administration, courthouse construction, federal–state jurisdiction, the federal defenders program, and magistrate judges.<sup>39</sup> Acting on recommendations from the director of the AO, the Chief appoints the chair and all of the members of these committees. Committee members serve for three-year terms with the prospect, often realized,<sup>40</sup> of reappointment to a second three-year term.<sup>41</sup> In a typical year, the Chief may make some ten to fifteen such appointments.<sup>42</sup>

The Chief also appoints the judges who sit on several specialty courts in the United States. Perhaps most visibly, the Chief appoints members of the two courts identified in the Foreign Intelligence Surveillance Act.<sup>43</sup> Such courts sit to review, in the first instance and on appeal, the government’s *ex parte* applications for warrants to conduct specified kinds of electronic surveillance.<sup>44</sup> The judges of these FISA courts, drawn from the ranks of active Article III judges, typically serve for a term of seven years.<sup>45</sup> They often meet at a secure location at the Department of Justice in Washington, D.C.<sup>46</sup> Other specialty courts to which the Chief makes term-limited appointments include the Judicial Panel on Multidistrict Litigation and the Alien Terrorist Removal Court.<sup>47</sup>

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<sup>39</sup> See, e.g., *Reports of the Proceedings of the Judicial Conference of the United States*, U.S. CTS. (Sept. 13, 2011), <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/2011-09.pdf> (recording the activities of several of these committees at the September 2011 meeting).

<sup>40</sup> In September of 2011, Chief Justice Roberts extended the terms of the chairs of the Committee on Defender Services, Committee on Information Technology, and Committee on Intercircuit Assignments. See, e.g., Carlyn Kolker, *Chief Justice Names Judges to Policy Group Posts*, THOMSON REUTERS (Sept. 21, 2011), [http://newsandinsight.thomsonreuters.com/Legal/News/2011/09\\_-\\_September/Chief\\_justice\\_names\\_judges\\_to\\_policy\\_group\\_posts](http://newsandinsight.thomsonreuters.com/Legal/News/2011/09_-_September/Chief_justice_names_judges_to_policy_group_posts).

<sup>41</sup> See *Committees*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/JudicialConference/Committees.aspx> (last visited May 24, 2013) (specifying term lengths and the option of reappointment).

<sup>42</sup> The Judicial Conference lists some seventeen committee members whose terms began in 2011. See *Committees of the Judicial Conference of the United States*, U.S. CTS. (Oct. 2011), [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2011\\_Rules\\_Comms.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2011_Rules_Comms.pdf); see also Kolker, *supra* note 40 (reporting the appointment of eight committee members and the renewal of three committee members’ terms in September 2011).

<sup>43</sup> 50 U.S.C. § 1803(a)–(b) (2006); see also Ruger, *FISA*, *supra* note 1, at 243–45 (describing the statutory history of the eleven-judge FISA court and the three judge FISA court of review).

<sup>44</sup> According to Ruger, the two FISA courts consider government requests for warrants under a specialized probable cause standard requiring a lesser showing of cause than that required under the Fourth Amendment standard. See Ruger, *FISA*, *supra* note 1, at 243–44 & nn.15–16.

<sup>45</sup> FISA court judges are limited to serving a single, staggered term. § 1803(d); Ruger, *FISA*, *supra* note 1, at 244.

<sup>46</sup> See § 1803(a) (“The Chief Justice . . . shall publicly designate 11 district court judges . . . of whom no fewer than 3 shall reside within 20 miles of the District of Columbia who shall constitute a court . . .”).

<sup>47</sup> See 28 U.S.C. § 1407(d) (2006) (“The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice . . .”). One can, of course, argue that the Judicial Panel exercises only a modest slice of Article III judicial power, passing on petitions for the transfer of civil actions with “one or more common questions of fact . . . pending in

Needless to say, the Chief today does not sell the offices over which he exercises appointment power. But critics have suggested that the Chief *might* use the appointment power to influence policy. Perhaps most significantly, critics argue that the Chief can staff specialty courts and Judicial Conference committees with an eye to selecting judges with an agreeable conception of sound judicial policy. Building on the attitudinal model of judicial behavior, some scholars believe that Chief Justice Rehnquist adopted a partisan approach to his judicial appointments.<sup>48</sup> Working on the assumption that the party of the nominating president reveals important information about the ideology of the judge, scholars have observed that Chief Justice Rehnquist appointed more Republicans than Democrats to fill crucial judicial offices,<sup>49</sup> particularly on the Special Division of the D.C. Circuit, which exercised control over the appointment of independent prosecutors.<sup>50</sup> Whatever the validity of the attitudinal model in this (or other) contexts, the specter of a politicized appointment process will linger as long as the Chief makes the appointments himself.<sup>51</sup>

Critics also worry that the Chief's administrative responsibilities may inform his views as a judge on a multimember judicial body. As Professor Resnik has observed, Chief Justice Burger urged Congress to deny bankruptcy judges Article III status in the 1978 legislation that expanded the jurisdiction of the bankruptcy courts.<sup>52</sup> Later, when parties to a breach of contract claim challenged the assignment of judicial power to bankruptcy judges with the non-Article III status he advocated, Chief Justice Burger defended the legislation from a constitutional challenge and

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different districts" to a single district for coordinated pretrial proceedings. *See id.* § 1407 (a)–(c). But it seems unlikely that Congress could assign the transfer function to a non-Article III tribunal. *See Pfander, supra* note 24, at 762–66 (highlighting a formalist strand of the Court's Article III jurisprudence that would call into question an assignment of the transfer power to Article I tribunals). For the appointment provisions of the Alien and Terrorist Removal Court, see 8 U.S.C. § 1532(a) (2006) ("The Chief Justice . . . shall publicly designate 5 district court judges from 5 of the United States judicial circuits . . .").

<sup>48</sup> In its strongest form, the attitudinal model holds that judges vote to advance their political ideology (or that of their appointing president) rather than to apply or refine the law. *See SEGAL & SPAETH, supra* note 1.

<sup>49</sup> *See Ruger, Appointment Power, supra* note 1, at 393, tbl.2 (listing Chief Justice Rehnquist's appointments by party).

<sup>50</sup> *See id.* at 344, 379 n.156 (discussing Chief Justice Rehnquist's appointment of Judge David Sentelle to lead the Special Division and the Division's subsequent appointment of Independent Counsel Kenneth Starr to investigate President Clinton).

<sup>51</sup> To be sure, vesting appointment power in the Court rather than the Chief would not necessarily eliminate the prospect of a politicized appointment process. Many regard the Court's work today as highly political. But the give and take associated with the deliberative process on a collegial Court could bring greater perceived balance to the selection process. *See infra* text accompanying notes 240–42.

<sup>52</sup> *See Resnik & Dilg, supra* note 1, at 1611–12 (tracing Chief Justice Burger's influence on Congress and the Administrative Office as the two entities negotiated the status of bankruptcy judges and their jurisdictional authority).

dissented from a decision invalidating the statute in part.<sup>53</sup> A similar blurring of roles has been said to have occurred under the stewardship of Chief Justice Rehnquist. The Chief worked within the judicial bureaucracy to articulate a policy of opposition to the expansion of federal criminal jurisdiction and then voted as a member of the Supreme Court to invalidate the Violence Against Women Act on the ground that it exceeded congressional power in criminalizing gender-based violence.<sup>54</sup> Professor Resnik contends that, in each instance, views that the Chief formed as chief court administrator may have influenced the exercise of the Chief's judicial function as a Justice of the Supreme Court.<sup>55</sup>

Despite these criticisms, the weight of scholarly opinion holds that the Chief's bureaucratic role should not be regarded as unconstitutional.<sup>56</sup> A variety of considerations inform this constitutional consensus. First, the Chief's powers have grown up over time, beginning in the nineteenth century, gaining momentum with the power Congress conferred on Chief Justice Taft to transfer judges between regions, and evolving into a practice so extensive that it could be difficult to uproot.<sup>57</sup> Second, in the most nearly analogous case, *Freytag*, the Court upheld the power of Congress to allow the chief judge of the Tax Court to appoint judges of that body.<sup>58</sup> While the Justices disagreed as to whether the non-Article III Tax Court would

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<sup>53</sup> See *id.* at 1612 (quoting Chief Justice Burger's dissent in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 92 (1982), where he insisted that "a radical restructuring of the present system of bankruptcy adjudication" was not a necessary congressional response to the plurality decision).

<sup>54</sup> See *id.* at 1613 (arguing that the creation of the new cause of action spurred action by the Judicial Conference, presided over by the Chief Justice, to create the Ad Hoc Committee on Gender-Based Violence to review the proposed legislation). For a full account, see Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2000).

<sup>55</sup> Professor Resnik suggests that rather than speaking of the "Rehnquist Court," scholars should refer to the period as the "Rehnquist Judiciary" in recognition of the Chief Justice's broad influence over judiciary matters extending beyond adjudication. Resnik & Dilg, *supra* note 1, at 1615. One can, of course, question the claim that Chief Justice Rehnquist formed his view of the Violence Against Women Act in the course of his administrative work. The Rehnquist Court inaugurated a series of federalism-based restraints on congressional power in such cases as *New York v. United States*, 505 U.S. 144 (1992), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The Chief Justice supported these restrictions and had long called on the Court to define limits on the commerce power. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 579–80 (1985) (Rehnquist, J., dissenting).

<sup>56</sup> See Resnik & Dilg, *supra* note 1; Ruger, *Appointment Power*, *supra* note 1, at 368–372.

<sup>57</sup> See Ruger, *Appointment Power*, *supra* note 1, at 350–51 (describing the Taft-era transfer authority as a precursor to the modern appointments to specialized courts). For an account of Chief Justice Taft's efforts—largely successful—to create a more bureaucratized and independent judiciary, see JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 199–212* (2012), describing Chief Justice Taft's success in securing passage of the Judicial Conference Act and the Judiciary Act of 1925, which helped to transform the federal judiciary into a more hierarchical, institutionally self-sufficient branch.

<sup>58</sup> See *infra* notes 209–15 and accompanying text.

qualify as a “court of law” within the meaning of Article II, they did not contest the power of the chief judge to act for the court in making the appointments. This tendency to equate the court with the chief may explain the general perception that the Framers could not have meant to draw a sharp line between the administrative work of a multimember tribunal and the work of its senior member.

Yet one can question each element of the constitutional consensus. While Chief Justice Taft certainly worked to expand the office of Chief Justice, likening it to the position of Lord Chancellor in England,<sup>59</sup> one can point to an earlier practice quite at odds with Chief Justice Taft’s approach. As we will see, the precedent-conscious Chief Justice Jay took pains to ensure that the Court as such would act as the appointing agency for all inferior officers and deliberately declined to assert control over appointments himself.<sup>60</sup> Chief Justice Jay’s early conduct in the office, moreover, appears to reflect a perception that the line between the Court, as the appointing agency, and the person holding the position of Chief Justice, was one of constitutional dimension.<sup>61</sup> By calling for the court to appoint, rather than the chief judge, the Framers may have meant to signal that official appointments were a public trust rather than a perquisite within the gift of the Justices that could be exploited for private gain. The next Part explores the origins and early implementation of the provision for appointment by the “courts of law.”

## II. THE ORIGIN AND IMPLEMENTATION OF THE COURTS OF LAW PROVISION

The provision authorizing Congress to vest appointment authority in courts of law emerged late in the work of the Philadelphia Convention and attracted little attention in the ratification debates. Yet we have reason to believe that the choice of the court as the appointing entity was part of a series of decisions that sought to eliminate corrupting features from judicial office. In this part of the Article, I sketch the nature of judicial office in

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<sup>59</sup> See CROWE, *supra* note 57, at 210 (describing England’s chancellor as Chief Justice Taft’s model judge).

<sup>60</sup> See *infra* text accompanying notes 147–59. For the view that early actions by the Supreme Court and other departments of the government set precedents that shape constitutional understanding, see Michael Bhargava, *The First Congress Canon and the Supreme Court’s Use of History*, 94 CALIF. L. REV. 1745, 1786–87 (2006), discussing the significance of early practice in defining the meaning of the Constitution and noting in particular Chief Justice Jay’s attitude toward the constitutionality of circuit riding, and Manning, *supra* note 5, at 2033–34 & n.469, describing the Jay Court’s refusal to issue advisory opinions as a foundational precedent. Manning describes the underlying logic as crediting an interpretation adopted soon after the enactment of a text in recognition that “[a]lterations in the legal and cultural landscape may make the meaning hard [for future generations] to recover.” *Id.* at 2033 (alterations in original) (quoting Atchison, Topeka & Santa Fe Ry. Co. v. Peña, 44 F.3d 437, 445 (7th Cir. 1994) (en banc) (Easterbrook, J., concurring)).

<sup>61</sup> See *infra* text accompanying notes 150–52.

eighteenth-century England and in the colonies, explaining why the reliance on fee-paid compensation and patronage-based appointments grew controversial among the members of the founding generation. I also explore the appointment provisions of the state constitutions, particularly those in New York, where the author of Article II (Gouverneur Morris) and the nation's first Chief Justice, John Jay, wrestled with the problem of how to structure appointments of inferior judicial officers. Finally, I sketch the development of Article II, concluding that the choice of the court as the approved recipient of appointment power may have been meant to further the Framers' decision to eliminate non-salary-based compensation for judges and to create a hierarchical judicial system with a single Supreme Court.<sup>62</sup>

#### A. *Judicial Office in England and the Colonies*

Judicial office in eighteenth-century England, at least for the lucky few who were appointed to serve on one of the three superior courts of common law or as chancellor, was a source of handsome financial reward.<sup>63</sup> Chief judges in particular earned at least three sources of income, all of which were regarded as a species of property attached to the judicial office itself.<sup>64</sup> First, the judges were paid a salary. This had been a matter of some controversy; the Stuarts had claimed the right to pay the salary of their appointed judges and to commission them during pleasure.<sup>65</sup> The Act of Settlement (1701) provided instead that the judges were to serve during good behavior (which meant they were not subject to at-will dismissal by the Crown) and that the salaries were to be paid by the Parliament.<sup>66</sup> While often associated with judicial independence, the Act of Settlement might be

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<sup>62</sup> The evidence collected here suggests that judges were among the first federal officials who were placed on salary and denied other perquisites of office. Nicholas Parrillo reports in a forthcoming book-length treatment of the subject that salarization generally came much later for executive enforcement officers (like state and local tax investigators, custom-house investigators, prosecutors, prison managers, and so forth) and for Executive Branch adjudicators (like officers deciding applications for naturalizations, homesteads, or pensions). See NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* (forthcoming 2013).

<sup>63</sup> The superior courts of common law, King's Bench, Common Pleas, and Exchequer, each employed four judges, one of whom was the chief judge (or justice) and the remainder of whom were associate (or puisne) judges. These twelve judges enjoyed tenure during good behavior under the Act of Settlement (1701). See James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1235 & n.37 (2007) (citing the Act of Settlement, 1701, 12 & 13 Will. 3, c. 2. (Eng.)).

<sup>64</sup> See DUMAN, *supra* note 15, at 111.

<sup>65</sup> See Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1063–64 (2007).

<sup>66</sup> Act of Settlement, 1701, 12 & 13 Will. 3, c. 2, § 3 (Eng.); see Pfander, *supra* note 14, at 8 n.30 (noting that the Act's establishment of judicial salary did not preclude litigant fees).

viewed as expressing a preference for judicial dependence on Parliament rather than on the Crown.<sup>67</sup>

Apart from salaries, superior court judges earned income in the form of fees, paid by litigants as part of the costs of litigation.<sup>68</sup> Fees varied from court to court in terms of their corrupting influence. In the superior courts, the fees were paid by the losing party (in keeping with the loser-pays system in England) and thus did not tend to influence the outcome of the dispute.<sup>69</sup> The judges were paid their fees no matter which way they ruled on the merits. In the court of admiralty, by contrast, judicial fees could depend on the outcome. Thus, admiralty judges earned substantial fees when they condemned a vessel as lawful prize but far less when they acquitted the vessel of wrongdoing.<sup>70</sup> This incentive to condemn would violate due process today;<sup>71</sup> it was no more popular in colonial America as the mode by which the vice-admiralty courts enforced various mercantile regulations.<sup>72</sup>

Judges supplemented fees and salaries by exercising control over the appointment of individuals to offices within their gift.<sup>73</sup> Judges with a

<sup>67</sup> See Martin Shapiro, *Judicial Independence: The English Experience*, 55 N.C. L. REV. 577, 621–22 (1977).

<sup>68</sup> Pfander, *supra* note 14, at 8 (discussing the different stages in the litigation process—including commencement, process, and jury empanelment—at which fees were incurred); see *infra* Table 1.

<sup>69</sup> Pfander, *supra* note 14, at 8 n.32 (discussing the origins of the loser pays system in England and contrasting the system to the “American” rule requiring that each party pay its own attorneys’ fees).

<sup>70</sup> See DUMAN, *supra* note 15, at 115 (noting the large disparities in British admiralty judges’ incomes during times of war and peace as a result of the cut judges received when granting an award in wartime prize cases; this led to an income increase of up to £5500 for the judges during wartime).

<sup>71</sup> See Pfander, *supra* note 14, at 10 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927), and *Connally v. Georgia*, 429 U.S. 245 (1977) (per curiam), Supreme Court cases that invalidated a conviction and a warrant because the judges received a fee only when they convicted the defendant or issued the warrant).

<sup>72</sup> On the controversial character of the admiralty courts during the run-up to independence, see CARL UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* (1960), and David S. Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764–1776*, 16 WM & MARY Q. 459 (1959).

<sup>73</sup> On the origins of office sales in early Norman history, linking office to a form of feudal property and describing its corrupting influence, see 1 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 246–51 (7th ed. rev. 1956). For criticisms of the sale of office, see G.E. AYLMER, *THE KING’S SERVANTS: THE CIVIL SERVICE OF CHARLES I 1625–1642*, at 225–30 (rev. ed. 1974), describing the impeachment of Buckingham in 1626 for corrupt sale of office and setting forth a series of contemporary criticisms of the practice including the concern that wealth, rather than merit, would determine advancement. Efforts to reform the sale of office did not succeed in the early modern period, in part due to the wide range of exceptions; thus, an English act of Parliament in 1552 expressly saved the rights of the several chief justices to retain the proceeds of office sales. See AYLMER, *supra*, at 228. Reform efforts finally took hold in the early nineteenth century under the influence of Jeremy Bentham. See HOLDSWORTH, *supra*, at 248, 262–64 (describing the reforms and attributing them to Bentham). By the time the reform efforts gained steam, several inferior officers of King’s Bench enjoyed absolute sinecures; they did no work at all (having delegated it all to deputies who were also paid through the fees they collected). See *id.* at 257–59 (reporting that, by 1810, fifteen offices in the Court of King’s

substantial patronage in offices could secure revenue in two ways.<sup>74</sup> They could sell the offices outright, bargaining with the purchaser in the expectation that the appointment to a sinecure would provide an annuity for the life of the individual installed.<sup>75</sup> Alternatively, they could appoint a member of their own immediate or extended family to the post, thus ensuring that the income flowed to objects of the judge's affection.<sup>76</sup> The value of patronage obviously depended on the length of the appointing judge's service; more offices would become vacant and require reappointment over the course of a long tenure on the bench. Like fees, this form of income was quite unevenly divided. While the Lord Chancellor and the two chief justices (those of King's Bench and Common Pleas) derived substantial income from official patronage, the nine puisne (or associate) justices of the common law courts derived considerably less income from litigant fees and the sale of offices.<sup>77</sup>

Historians have reckoned the value of these three sources of judicial income. According to Duman, at around the turn of the nineteenth century, the annual value of judicial office was as follows<sup>78</sup>:

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Bench were either absolute or partial sinecures). No wonder reformers complained of the law's expense and delay. For an engaging defense of fee-paid office, see DOUGLAS W. ALLEN, *THE INSTITUTIONAL REVOLUTION* (2012), arguing that the sale of office was a plausibly efficient adaptation to a premodern world in which the measurement of official performance was quite difficult.

<sup>74</sup> See DUMAN, *supra* note 15, at 116 (detailing the patronage received by the chancellor, the chief justice of King's Bench, and the chief justice of Common Pleas).

<sup>75</sup> If not sold outright, a judge might have chosen to keep the office for himself as a supplemental income. *See id.*

<sup>76</sup> Logically, the more prized offices were often gifted to close relatives or sons of the judges, while judges gave the less important offices to extended family and friends. *See id.* Even where the office was in the gift of a lower ranking figure, such as the Master of the Rolls in chancery, it was customary for the purchaser of an office to pay a *douceur* or brokerage fee to the chancellor. *See* AYLMER, *supra* note 73, at 227.

<sup>77</sup> *See infra* Table 1.

<sup>78</sup> *See* DUMAN, *supra* note 15, at 105.



TABLE 1: ANNUAL VALUE OF ENGLISH JUDICIAL OFFICES CIRCA 1790

Court	Office	Salary <sup>79</sup>	Fees	Patronage	Total
Chancery	Lord Chancellor	£5000	£5000 <sup>80</sup>	£15,000 <sup>81</sup>	£25,000
	Master of the Rolls	£4000	£2500 <sup>82</sup>	£6900* <sup>83</sup>	£13,400
King's Bench	Chief Justice	£4000	£3000 <sup>84</sup>	£23,000 <sup>85</sup>	£30,000
	Associate Justices	£2400	£500 <sup>86</sup>	–	£2900
Common Pleas	Chief Justice	£3500	£1100 <sup>87</sup>	£10,000 <sup>88</sup>	£14,600
	Associate Justices	£2400	–	–	£2400
Exchequer	Chief Baron	£3500	–	£4200 <sup>89</sup>	£7700
	Associate Barons	£2400	–	–	£2400

<sup>79</sup> See *id.* at 112–13 tbl.9. Salary figures are based on Duman's projections for the year 1790 for all offices except the Master of the Rolls, whose salary is unknown for that year. The salary of the Master of the Rolls is based on Duman's figure from 1799. The salaries for associate justices of the King's Bench, associate justices of the Court of Common Pleas, and the associate of the Exchequer are based on Duman's projections for puisne judges and barons in 1790.

<sup>80</sup> *Id.* at 111. The Lord Chancellor's remunerations were also augmented by income collected for serving as speaker of the house. In addition to the £5000 collected in fees, Lord Hardwicke received nearly £1100 per annum from 1736 and 1755 for officiating as speaker. *Id.* at 114.

<sup>81</sup> *Id.* at 116 (based on Duman's finding of an 1810 House of Commons committee report documenting that the Lord Chancellor received £6391 for offices in his gift and that relatives of former chancellors held offices worth an additional £8790 per year).

<sup>82</sup> *Id.* at 114. From 1751–1753, the Master of the Rolls received an annual fee between £2400–£2500 from the Hanaper Officer.

<sup>83</sup> *Id.* at 120. \*Represents patronage figure for the first half of the eighteenth century for a total of thirteen offices.

<sup>84</sup> *Id.* at 119.

<sup>85</sup> *Id.* The patronage figure for the chief justice of the King's Bench is based on Duman's annual projection for the first quarter of the nineteenth centuries, which represents a period prior to England's reformation of the patronage and sinecure system in England.

<sup>86</sup> *Id.* at 115 (based on an account by Sydney Stafford Smythe, a puisne judge during the reign of George I). The figure listed represents an average of fees from £426 in 1750 and £731 in 1754.

<sup>87</sup> *Id.* at 120.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (this figure is an estimate calculated by figuring the amount per office that the Master of Rolls received (£530) and multiplying this amount by the 8 officials the Chief Baron was able to appoint). For the Master of Rolls patronage figure, see *supra* note 83 and *supra* Table 1.

As these figures reveal, chief justices often earned more from fees and patronage than from straight salary. Not captured in these figures, though doubtless significant, royal pensions were often made available to judges after they retired.<sup>90</sup>

Eventually, a reform-minded Parliament in the nineteenth century conducted investigations of fees and patronage and made changes in the rules.<sup>91</sup> The general thrust of the reforms was to seek greater transparency and greater reliance on salary-based compensation. Viewing fees and patronage as sources of make-work and corruption that tended to delay and multiply the cost of judicial proceedings, Parliament attempted to wean the judges away from these sources of income.<sup>92</sup> Reform-minded Americans beat their English cousins to the punch; many of the post-revolutionary state constitutions had already attempted to regulate the collection of official fees and perquisites of office.<sup>93</sup>

### B. *Sale of Office in the Colonies and States*

The colonies of British North America had experience with fee-paid offices, with the use of the appointment power to influence political allegiance, and with the multiplication of offices aimed more at providing income to elites than services to the people. Governors earned a salary and a variety of fees, including fees for performing judicial functions.<sup>94</sup> In addition, governors earned an income and a measure of influence through the disposition of the many offices in their gift.<sup>95</sup> Some governors, in fact, never moved to America; they simply sold the office to a deputy and

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<sup>90</sup> In particular, the chancellor and the two chief justices often received “royal patents,” which provided their retirement pensions. It was not until 1799 that an official pension system provided an annual pension of £4000 for the chancellor, £3000 for the chief justices and Chief Baron, £2500 for the Master of the Rolls, and £2000 for all other judges. *See* DUMAN, *supra* note 15, at 121, 124 n.49. Obviously, a pension system that was subject to some royal discretion could influence the behavior of judges seeking to ensure pension eligibility after retirement.

<sup>91</sup> *See* HOLDSWORTH, *supra* note 73, at 262 (finding that salary reform and the elimination of many sinecure offices were the immediate result of the publication of such investigations).

<sup>92</sup> *Id.* at 647 (“Payment by fees, saleable offices, and sinecure places were the predominant characteristics of a bureaucracy which could not be defended even upon historical grounds.”).

<sup>93</sup> *See infra* text accompanying notes 108–10.

<sup>94</sup> *See* 2 COLONIAL RECORDS OF NORTH CAROLINA: 1713–1728, at 158–59 (William L. Saunders ed., 1886) [hereinafter RECORDS OF NORTH CAROLINA] (complaining that the governor is “by his Commission made Captain General, Chancellor, Chief Justice, and Admiral, which are great and different powers, and can never be justly executed by one person”); MICHAEL KAMMEN, COLONIAL NEW YORK: A HISTORY 201–02 (1975) (cataloging the range of salaries, fees, bribes and other perquisites collected by the colonial governor of New York).

<sup>95</sup> *See* 2 RECORDS OF NORTH CAROLINA, *supra* note 94, at 159 (complaining that a governor who has obtained the office through influence, rather than merit, would sell “his judgments and decrees to the highest bidder, and all places both Civill and Military without any regard to the fitness of the persons to execute them . . . . He protects the inferior Officers and others who pay him yearly pencions, in the neglect and breach of their duty; so that all complaints and prosecutions against them are in vain.”).

collected a portion of the salary while living in England. The same was true of customs officials, who often sold the post to a deputy and stayed at home.<sup>96</sup>

We lack a detailed history of the sale of office in British North America, but the evidence suggests that the practice was widespread and occasionally controversial. We have the following vivid set of grievances from the lower house of the Maryland assembly, which first criticized the governor for allowing excessive fees to be charged in connection with judicial proceedings and then added the following:

[W]e cannot omit mentioning . . . another practice lately crept in amongst us that of Buying and selling the Offices of the County Clerks and the very persons who receive the Profits of the Offices of Clerks & Registers Practising as Attorneys in the Courts to which these Offices belong[. T]hat such Sales are unlawful is too obvious to be denied . . .<sup>97</sup>

Similar complaints arose in North Carolina and Massachusetts, where the people complained about governors who chose officials on the basis of corrupt considerations (rather than merit) and then protected the officials in question when the people complained about their incompetence.<sup>98</sup>

Governors naturally objected to any intrusion on their powers of patronage. Historian Leonard Labaree recounts the story of one Massachusetts governor who was saddened to learn that London had appointed a naval officer for the province; the governor was forced to turn his own son-in-law out of the office and deny his children “so much bread.”<sup>99</sup> But more than bread was at stake; governors felt that the efficiency of the administration depended on their ability to insist that subordinates do their jobs. Officeholders who held patents directly from London, rather than through the colonial governor, felt no sense of

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<sup>96</sup> See LEONARD WOODS LABAREE, *ROYAL GOVERNMENT IN AMERICA: A STUDY OF THE BRITISH COLONIAL SYSTEM BEFORE 1783*, at 102–04 (1930). Occasionally, controversies arose over fee-paid office and reliance on deputies to perform essential government functions. For example, one office holder complained about his suspension from office on the ground that he had paid good money for the position. See Letter from Samuel Johnston to North Carolina Governor Martin (Nov. 16, 1775), in 10 *THE COLONIAL RECORDS OF NORTH CAROLINA: 1775–1776*, at 332–33 (William L. Saunders ed., 1890) (“[T]he Office which I have for some years past executed under the Deputation of Mr. Turner was an honest purchase for which I have punctually paid an annual sum . . .”).

<sup>97</sup> 40 *ARCHIVES OF MARYLAND: 1737–1740*, at 392–93 (Bernard Christian Steiner ed., 1921).

<sup>98</sup> See CARL RUSSELL FISH, *THE CIVIL SERVICE AND THE PATRONAGE I* (1905) (recording the complaint of John Adams that Governor Frances Hutchinson of Massachusetts had passed over proper candidates in order to advance members of his own family); 2 *RECORDS OF NORTH CAROLINA*, *supra* note 94, at 159 (criticizing the sale of offices “without any regard to the fitness of the persons to execute them” and noting that the governor protects inferior officers and others who pay yearly pensions “in the neglect and breach of their duty; so that all complaints and prosecutions against them are in vain”).

<sup>99</sup> LABAREE, *supra* note 96, at 105.

allegiance to, and little need to obey, the governor. Customs officials in particular were notably reluctant to follow gubernatorial advice.<sup>100</sup>

One can see growing popular resentment of colonial patronage practices in the provisions of the great state papers that attended the movement to independence from Great Britain. For starters, the Declaration of Independence included the following complaint against the King's patronage: "He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance."<sup>101</sup> Scholars agree that this vivid complaint attempts to convey popular discontent with the Crown's tendency to use offices as sinecures for the benefit of "placemen."<sup>102</sup> Discontent with the corrupting influence of the appointment power also shows up in the Articles of Confederation of the newly independent states, which articulated an early version of the Constitution's Incompatibility Clause: Article V prohibited delegates to the Continental Congress from "holding any office under the United States, for which he, or another for his benefit, receives any salary, fees or emolument of any kind."<sup>103</sup> Here one finds a reflection of two ideas: that office can corrupt the exercise of independent legislative judgment and that the corrupting influence of office can operate indirectly, by conferring valuable fees and emoluments on family members or others beholden to the delegate.

State constitutions addressed the problem of official corruption in the appointment process through a variety of approaches. Some states responded by relying on the popular election of state and local officials or by placing the appointment power in the legislative branch of government, thus depriving civil officers of the appointment power and any share of patronage that the power had previously conferred. Georgia followed this approach.<sup>104</sup> Some states authorized the executive and judicial branches of government to exercise some control over appointments but hemmed in those appointment powers in various ways. For example, Pennsylvania established an elected council to control the appointment of important

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<sup>100</sup> *Id.* at 105–06.

<sup>101</sup> THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776).

<sup>102</sup> See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 212 (1998 ed.) (quoting William Henry Drayton speaking of the placemen as "strangers destitute of property and natural alliance in the Colonies" who create laws for a country "in which they have *no interest but their commissions*"); see also Pfander, *supra* note 14, at 9 (discussing colonial anger at officeholders who did little work to justify the fees they collected). The highlighted passage from the Declaration may also take issue with the Crown's attempt to make the customs office more efficient by requiring the officials to move to North America to perform their office, rather than assigning the obligations to a do-nothing deputy.

<sup>103</sup> ARTICLES OF CONFEDERATION of 1781, art. V, para. 2.

<sup>104</sup> See GA. CONST. of 1777, art. LIII ("All civil officers in each county shall be annually elected on the day of the general election, except justices of the peace and registers of probates, who shall be appointed by the house of assembly.").

officers.<sup>105</sup> Some states were unwilling to rely entirely on the structure of the appointment power to deal with corruption and abuse. In these states, the constitution included provisions that barred the holding of multiple offices and the receipt of fees and emoluments.<sup>106</sup> These states were working out a new conception of judicial office in which the judge would receive a fixed or stated salary and would not be entitled to fees and perquisites of office.<sup>107</sup>

Maryland's constitution provides a good example of the shift from a fee-paid office to one in which the salary was meant to provide full compensation. After providing for the payment of salaries, "liberal, but not profuse," to the chancellor and other state judges, the Maryland constitution provided that "[n]o Chancellor or Judge ought to hold any other office civil or military, or receive fees or perquisites of any kind."<sup>108</sup> By barring fees and perquisites, the provision apparently clarifies that the judges were not to receive fees from the litigants who appeared before them or perquisites in any form. A similar provision appeared in the Pennsylvania constitution, which provided fixed salaries for judges and prohibited them from holding any other office or receiving "fees or perquisites of any kind."<sup>109</sup> In both of these states, then, the judges were entitled only to their salary and were barred from receiving other sources of income from their office. Although the two constitutions do not so provide in terms, they would apparently prohibit judges from selling any inferior offices within their power; income of that sort would presumably qualify as a prohibited perquisite of office.<sup>110</sup>

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<sup>105</sup> Under Pennsylvania's Constitution of 1776, the executive included both a president and council. The council was made up of twelve men elected by freemen, and members served one- to three-year terms as opposed to the president's annual election by the state's assembly and the council. SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER* 281–82 & n.67 (2011).

<sup>106</sup> Article 10 of Connecticut's 1818 Constitution explicitly prohibited judges from holding multiple offices. *See id.* at 154. Similarly, under Article 35 of the North Carolina Constitution of 1776, no "Judge of the Supreme Court of Law or Equity, or Judge of Admiralty" could hold an additional office. *Id.* at 203. For a discussion of Maryland's constitutional bar on fees and multiple office holding, see *infra* notes 108, 110.

<sup>107</sup> As a correspondent with those who framed the North Carolina Constitution, John Adams expressed his adamant views that the judiciary "[s]hould not have their Minds distracted with complicated jarring Interests . . . and . . . Salaries Should be fixed by Law." *See GERBER, supra* note 105, at 202.

<sup>108</sup> *See MD. CONST. of 1776, DECLARATION OF RIGHTS, art. 30.*

<sup>109</sup> *See PA. CONST. of 1776, ch. II, § 23* ("The judges of the supreme court of judicature shall have fixed salaries . . . ; they shall not be allowed . . . to hold any other office civil or military, nor to take or receive fees or perquisites of any kind.")

<sup>110</sup> The apparent ban on judicial sale of inferior office in Maryland appears to be confirmed by the restrictive nature of the provision that allows the "judges" of the superior courts to appoint their own clerks. The provision begins with a rather open-ended grant of authority, allowing "the judges of the general court and justices of the county courts" to "appoint the clerks of their respective courts." But this provision appears to contemplate that the appointments will occur during a regular session of the court. During vacation, the period between regularly scheduled sessions of court, or removal of the

As for the appointment of inferior judicial officers, a range of different approaches prevailed, some of surprising intricacy. In Delaware, for example, the appointment of the judges was vested in the president and general assembly. But the appointment of a variety of inferior judicial officers, including the registers in chancery, the clerks of the Court of Common Pleas and orphans' courts, and clerks of the peace, was vested in the president and privy council.<sup>111</sup> Meanwhile, the appointment of the clerk of the supreme court was vested in the chief justice of that court and the appointment of the recorders of deeds was vested in the "Justices" of the Court of Common Pleas.<sup>112</sup> At the same time, the Delaware constitution appears to have ruled out patronage-based appointments to inferior judicial office at least in part; it provided that the "Registers in Chancery and Clerks shall not be Justices of either of the said courts of which they are officers."<sup>113</sup>

Of all the constitutional experiments with the allocation of appointment power at the state level, perhaps the most significant occurred in New York. There, John Jay, Gouverneur Morris, and Robert Livingston collaborated in developing a provision that called for the creation of a general purpose council of appointment made up of four senators, one from each district, and the governor of the state.<sup>114</sup> In addition to this general purpose mechanism, the New York constitution specified a mode for the appointment of court clerks and other judicial personnel:

[T]he register and clerks in chancery be appointed by the chancellor; the clerks of the supreme court, by the judges of the said court; the clerk of the

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officer out of state, "the governor with the advice of the council may appoint and commission a fit and proper person to such vacant office respectively, to hold the same until the meeting of the next general court or county court, as the case may be." See MD. CONST. of 1776, art. 47.

<sup>111</sup> See DEL. CONST. of 1776, art. 12 ("The President and Privy Council shall appoint the Secretary, the Attorney General, Registers for the probate of wills and granting letters of administration, Registers in Chancery, Clerks of the Courts of Common Pleas and Orphans Courts, and Clerks of the Peace . . .").

<sup>112</sup> See *id.* art. 14 ("The Clerks of the Supreme Court shall be appointed by the Chief Justice thereof, and the Recordors of Deeds, by the Justices of the Courts of Common Pleas for each county severally . . .").

<sup>113</sup> *Id.* art. 12.

<sup>114</sup> See N.Y. CONST. of 1777, art. XXIII (council, made up of four senators and the governor, given power to nominate and, with advice and consent of the legislative council, appoint all officers other than those with modes of appointment otherwise specified). For an account of the collaboration of Jay, Morris, and Livingston, see 1 JARED SPARKS, *THE LIFE OF GOUVERNEUR MORRIS* 122–23 (Boston, Gray & Bowen 1832), describing a meeting in Livingston's rooms at which Jay presented a plan for the council and secured the support of Morris and Livingston. See also Arthur Paul Kaufman, *The Constitutional Views of Gouverneur Morris* 194–205 (June 30, 1992) (unpublished Ph.D. dissertation, Georgetown University) (recounting the development of the council and Jay's subsequent letter to Morris and Livingston). For an account of the subsequent history of the council of appointment, see FISH, *supra* note 98, at 86–91 (describing the way politicians used the council as a mechanism for patronage appointments, setting the stage for the spoils system).

court of probates, by the judge of the said court; and the register and marshal of the court of admiralty, by the judge of the admiralty.<sup>115</sup>

Jay objected to this provision and argued in a letter sent to Morris and Livingston in the immediate aftermath of the New York constitution's adoption that the judges were not a proper recipient of the power to appoint their own clerks. Taking a page from classic republican theory, Jay argued that the judges "will be *tempted* not only to give these appointments to their Children Brothers Relatives and Favorites, but to continue them in Office against the public Good."<sup>116</sup> Among other things, Jay worried that the judges would develop a "[p]artiality" to their appointees and would combine with them to "conceal[] . . . or excuse[] their mutual Defects or misdemeanours."<sup>117</sup> New York's experience with vesting appointment power in the judges may have informed later developments. Ten years later, Gouverneur Morris was to draft the court-based appointment provision of Article II and, as we shall see below, Jay himself was to institute the practice of court-based appointments when he became the nation's first Chief Justice.

### C. Framing the Courts of Law Provision in Article II

By the time of the framing, state experience with legislative control of the appointment process had persuaded many Federalists of the wisdom of

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<sup>115</sup> N.Y. CONST. of 1777, art. XXVII.

<sup>116</sup> Letter from John Jay to Robert Livingston and Gouverneur Morris (Apr. 29, 1777), in 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, pt. 2, at 683 n.1 (Maeva Marcus ed., 1985) [hereinafter DHSC]. Obviously, where courts employ but a single judge, it may not matter a great deal whether the Constitution assigns the appointment power to the court or the judge. Even with single-judge courts, however, a court-based mechanism may signal that the appointment was to be a public act, taken in open court. As we shall see, Chief Justice Jay implemented such a public-regarding approach to appointments early in his tenure. See *infra* notes 147–59 and accompanying text.

<sup>117</sup> 1 DHSC, pt. 2, *supra* note 116. The subsequent history of the office of clerk of the federal district courts certainly appears to bear out Jay's prediction. As described in Scott Messinger's intriguing history, federal court clerks came to behave just as the republican critics of fee-paid office would have predicted. See I. SCOTT MESSINGER, FED. JUDICIAL CTR., ORDER IN THE COURTS: A HISTORY OF THE FEDERAL COURT CLERK'S OFFICE (2002), available at [http://www.fjc.gov/public/pdf.nsf/lookup/ordcourt.pdf/\\$file/ordcourt.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ordcourt.pdf/$file/ordcourt.pdf). Over the course of the nineteenth century, Congress took a series of steps to regulate the affairs of the clerk's offices, fearing that their reliance on fees tended to encourage graft and corruption. See *id.* at 26 (quoting President Millard Fillmore's criticism of fee-paid clerks as the cause of "vexation, injustice, and complaint"). One important reform was to establish a uniform bill of fees in 1853, but problems continued. *Id.* at 27. Eventually, Congress installed oversight through the Department of Justice, in 1870, but judges often acted to protect their clerks and their entitlement to fees. In 1912, an investigation by the DOJ revealed clerical misconduct in some twenty-eight districts, leading to a series of indictments and convictions. *Id.* at 41. Recounting their opposition to reforms that would abolish the fee system and put clerks on salary, Justice Felix Frankfurter derided the clerks as "placemen whose clerical jobs were threatened." *Id.* at 40 (quoting FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 133 (1928)).

lodging responsibility in a single chief executive.<sup>118</sup> Alexander Hamilton, James Wilson, and Gouverneur Morris, in particular, shared the view that a multimember body was an inappropriate recipient of the appointment power.<sup>119</sup> During June discussions of the selection of federal judges, Wilson opposed appointment by the legislature on the ground that “[i]ntrigue, partiality, and concealment were the necessary consequences.”<sup>120</sup> James Madison said much the same thing, echoing the concern with intrigue and adding the point that members of the legislature were not good “judges of the requisite qualifications.”<sup>121</sup> Morris explained his similar view in a criticism of the August 1787 Committee of Detail draft, which assigned the appointment power to the Senate:

He considered the body as too numerous for the purpose; as subject to cabal; and as devoid of responsibility.—If judges were to be tried by the Senate . . . it was particularly wrong to let the Senate have the filling of vacancies which its own decrees were to create.<sup>122</sup>

Eventually, the Convention came part way around to the views of the Federalists, adopting the now familiar provision for an appointment power initiated by the President, who nominates and, by and with the advice and consent of the Senate, appoints judges and other high government officials.<sup>123</sup>

Having solved the problem of appointment to high office, the Convention addressed the question of how to appoint inferior officers. Here, Morris played a leading role, proposing a provision that would authorize Congress to vest the appointment of inferior officers “in the President alone, in the Courts of law, or in the heads of Departments.”<sup>124</sup>

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<sup>118</sup> For the classic account of the movement away from legislative and toward executive appointment, see WOOD, *supra* note 102, at 79, 143.

<sup>119</sup> See THE FEDERALIST NO. 77, at 460 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“Every mere council of appointment, however constituted, will be a conclave in which cabal and intrigue will have their full scope.”); see also JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENTS OF THE UNITED STATES OF AMERICA (1787), reprinted in THE POLITICAL WRITINGS OF JOHN ADAMS 105 (George A. Peek, Jr. ed., 1954) (describing the executive as capable of cautious and “responsible” appointments, whereas a representative assembly is “accountable to nobody”).

<sup>120</sup> See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 119 (Max Farrand ed., rev. ed. 1966) [hereinafter Farrand’s Records] (recording June 5, 1787 remarks of James Wilson).

<sup>121</sup> *Id.* at 120 (remarks of Madison).

<sup>122</sup> See 2 *id.* at 389 (recording Aug. 23, 1787 remarks of Gouverneur Morris).

<sup>123</sup> The decisive vote on the appointments power came on September 7, 1787, after the Convention had settled the mechanism by which the President was to be elected. See *id.* at 533. For a brief restatement of the principles underlying the Appointments Clause, see JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1524, at 376 (Bos., Hilliard, Gray & Co. 1833) (offices in a republican government “not as a means of corrupt influence, or individual profit; not for cringing favorites, or court sycophants; but for purposes of the highest public good; to give dignity, strength, purity, and energy to the administration of the laws”).

<sup>124</sup> 2 Farrand’s Records, *supra* note 120, at 627 (recording Sept. 15, 1787 remarks of Gouverneur Morris).



Notably, the provision authorizes the assignment of appointment power to a multimember body, the court, rather than to the judges or chief justices of the courts. The provision thus differs both from the New York constitution (which vested power in the judges of the several courts) and from the other provisions in Article II that appear to call for individuals (the President or the department heads) to exercise the appointment power.<sup>125</sup> As we have seen, Morris and his fellow Federalists generally opposed the assignment of appointment power to multimember bodies, worrying about corruption, intrigue, and concealment.<sup>126</sup> The Convention's choice of the courts as the only (obvious) multimember body to which Congress can assign the appointment power thus demands explanation.<sup>127</sup>

In seeking an explanation for the choice of the courts, we might begin by observing the difference, in formal terms, between the work of courts and the work of the judges who serve on those courts. Courts conducted judicial business on the record, on days officially designated for the conduct of such business, and the public was free to attend.<sup>128</sup> Judges, by contrast, were free to conduct business out of court, or in their chambers, and often did so in connection with chores they viewed as ministerial. The public, on-the-record quality of the actions of a court may have lessened the concern with cabal and intrigue that otherwise arose when

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<sup>125</sup> Cf. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3163 (2010) (concluding that the multimember Securities and Exchange Commission could be considered a department "head" for purposes of the Appointments Clause).

<sup>126</sup> See *supra* text accompanying notes 119–22. One might contend that a thoroughgoing commitment to the elimination of patronage and the sale of office makes it hard to explain why Article II empowers Congress to assign appointment power to such individuals as the heads of department and the President, acting alone. A variety of explanations come to mind, including the possibility that the move to salarization and a public-regarding conception of office came earlier to the judiciary than to the Executive Branch. See *supra* note 62 and accompanying text.

<sup>127</sup> The Court has now concluded that another, less obvious, multimember body can exercise the appointment power as a department "head." See *infra* note 225. One might argue that the Convention chose the courts as a generic placeholder in light of the fact that it was framing a constitution to govern a judicial system that had not yet been established. But it would have surely been just as easy to draft a placeholder reference to judges ("judges of the courts of law") had that been the intention of the Framers.

<sup>128</sup> On the public quality of court days in colonial and early statehood America, see, for example, A.G. Roeber, *Authority, Law, and Custom: The Rituals of Court Day in Tidewater Virginia, 1720 to 1750*, 37 WM. & MARY Q. 29 (1980). See also RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA, 1740–1790*, at 90 (2d ed. 1999) ("In the monthly concourse at the courthouse the male part of Virginia county society became visible to its members in a manner similar to that observed at the parish church."). On the distinction between the work of judges in chambers or during vacation, and the work of courts, see Letter from John Jay to William Cushing (Dec. 7, 1789), in 1 DHSC, pt. 2, *supra* note 116, at 682, regretting that the circuit courts cannot proceed for want of a seal, but observing that the statute "enables the sup. Court, and not the Judges of it to provide one," and concluding on that basis that "no order on the Subject by the Judges out of Court, would be regular." Cf. Draft Letter from the Justices of the Supreme Court to George Washington (Sept. 13, 1790), in 2 DHSC, *supra* note 116, at 89–92 (1988) (criticizing the assignment of circuit-riding duties to the Justices of the Supreme Court on the basis of the perceived difficulty of separating courts from the judges that serve them).

multimember bodies made appointments. Courts of law would presumably owe an obligation to make their appointments part of the public record, thus exposing the judges to criticism if they were to make patronage-based appointments that favored family members or other unqualified favorites. The choice of the courts as the approved recipient of the appointment power may thus reflect an attempt to clarify that the power of appointment was to be a public trust, rather than a private source of personal patronage or judicial emolument.

Judicial practice in the early republic frequently distinguished between the judge or judges of the court and the court itself. Courts, under the Judiciary Act of 1789, were to sit for periods of time specified in the Act, often less than the full year. Thus, the Supreme Court was to sit as such in February and August of each year, continuing until the business before the Court was complete.<sup>129</sup> During the remainder of the year, the Justices dispersed to hold circuit courts throughout the country.<sup>130</sup> Those courts, in turn, were directed to meet at specified times and places. Questions might arise as to what sort of relief a judge of the circuit or Supreme Court could provide during “vacation,” the times when the court itself was not sitting.<sup>131</sup> Vacation, and the distinction between court and judge, figured prominently in Justice John Rutledge’s reaction to a petition asking the circuit court for the district of North Carolina to remove an action brought by Robert Morris from the courts of that state by writ of certiorari. According to a contemporaneous letter from Morris’s attorney, Justice Rutledge thought the requested relief ought to be granted on the merits but doubted his power to act as a judge out of court.<sup>132</sup> District judges were free to act for their

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<sup>129</sup> Early terms of Court lasted but a few days; the Court had no business to conduct other than the ceremonial and formal business of admitting lawyers to practice before the Court. For an account, see 1 DHSC, pt. 1, *supra* note 116, at 175, reporting the Court’s first sessions as devoted to admission of counsel and other housekeeping work, and JULIUS GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 663 (1971), observing that “it was not until 1796 that a substantial amount of appellate business was ready for disposition.”

<sup>130</sup> For an account of the burdens of circuit riding and the Justices’ efforts to secure legislative relief, see Pfander, *supra* note 14, at 31–34.

<sup>131</sup> The existence of vacations helps to explain why the Judiciary Act invested the judges themselves with the power to issue writs of habeas corpus, recognizing the time-sensitive nature of inquiry into the legality of detention. See Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82 (providing, in addition to the power of federal courts to grant habeas, “that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment”); see also Pfander, *supra* note 25, at 1486–87 (observing that the limited terms of the early federal courts meant that federal judges were often riding circuit and needed power to oversee the legality of detention as judges, rather than as courts).

<sup>132</sup> See Letter from Richard Nichols Harison to Robert Morris (Sept. 24, 1790), in 2 DHSC, *supra* note 116, at 95, 98 (1988) (stating that Judge Rutledge “made no Objection to the Propriety of removing the Suit, or to granting the Injunction as far as the Merits of the Cause were concerned; but he was unwilling solely to take upon him, during the Vacation the Office of directing the Measures which are prayed by the Bill”). Similarly, when the invalid pension statute became controversial in the early 1790s, some Justices proposed to solve the problem by acting as commissioners out of court, although

own account during vacation; indeed, some continued to act as lawyers in state court proceedings until a federal statute forbade the practice.<sup>133</sup>

By making the court the appointing body, and countering the notion that judges were to exercise the power for their own account, Article II appears to have complemented other features of the Constitution that worked an important change in the nature of judicial office. Article III provides that the judges of both the Supreme and inferior courts are to receive, at stated times, a compensation for their services that shall not be diminished during their continuation in office.<sup>134</sup> For a variety of reasons, one can probably best interpret the provision as creating a regime of presumptively salary-based compensation. Certainly the delegates who debated the compensation provision at Philadelphia appear to have assumed that it called for the payment of a salary and ruled out the receipt of fees for judicial service.<sup>135</sup> In addition, when Congress implemented the Article III compensation provision, it did so by providing the judges with an annual salary, to be paid on a quarterly basis.<sup>136</sup> What's more, when Congress learned that a federal judge in South Carolina was collecting fees in admiralty cases, it promptly enacted legislation to govern such cases that ruled out the collection of judicial fees and thus curtailed the practice.<sup>137</sup> Just as the early practice under Article III appears to confirm the doubts some expressed about the propriety of fee-based judicial compensation, early steps taken by Congress and the Supreme Court to implement Article II similarly confirm that court-based appointments were aimed in part at foreclosing the favoritism, bias, and possible self-dealing inherent in the judicial appointment of inferior officers. To that evidence of early practice this Article now turns.

#### D. Implementing Article II

Early legislation erecting courts of the United States and empowering them to hire clerks, criers, and other personnel consistently assigned the appointment power to the courts, rather than to the judges staffing them. What's more, Chief Justice Jay's approach to the appointment of the first

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questions arose about that solution. See Pfander, *supra* note 14, at 35–38; see also David P. Currie, *The Constitution in Congress: The Second Congress, 1791–1793*, 90 NW. U. L. REV. 606, 640 (1996) (noting that Congress fixed the invalid pension act by separating the judge from the court and assigning the judge certain extrajudicial duties).

<sup>133</sup> See Pfander, *supra* note 14, at 23 n.118 (describing the federal statute that forbade federal judges from practicing law).

<sup>134</sup> U.S. CONST. art. III, § 1.

<sup>135</sup> See *supra* text accompanying note 18.

<sup>136</sup> See Pfander, *supra* note 14, at 24 & nn.122–23 (discussing the Compensation and Process Acts of 1789); see also *supra* text accompanying note 20.

<sup>137</sup> After the Act's passage, Thomas Bee, the district court judge for the District of South Carolina, acknowledged that the 1793 statute prohibited his practice of fee collection. See Pfander, *supra* note 14, at 25–26 & nn.133–34.

clerk of the Supreme Court, John Tucker, revealed that he took quite seriously the difference between court-based and Chief-based appointments. While the judges of many district courts were less punctilious than Chief Justice Jay about preserving the formal distinction between court-based and judge-based appointments,<sup>138</sup> it was not until the Court's 1839 decision in *Ex parte Hennen* that district court judicial control of the appointment and removal of clerks became an acknowledged part of the legal framework of office.<sup>139</sup>

The story of legislative implementation begins with Section 7 of the Judiciary Act of 1789, which specified the appointment of inferior judicial officers in the following terms:

That the Supreme Court, and the district courts shall have power to appoint clerks for their respective courts . . . and that the clerk for each district court shall be clerk also of the circuit court in such district . . . .<sup>140</sup>

The provision appears to have been quite consciously modeled on the language of Article II and seeks to vest the appointment power in the courts themselves rather than in the judges. Elsewhere, the legislation provided that the Supreme Court was to consist of a Chief Justice and five Associate Justices.<sup>141</sup> Clearly, Congress opted to place the appointment power in the Court itself, rather than in the Chief.

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<sup>138</sup> Congress provided for but a single judge to staff each of the federal district courts, thus creating an identity between court and judge that may have encouraged a sense of judicial entitlement. See Judiciary Act of 1789, ch. 20, § 3, 1 Stat. 73, 73 (establishing in each of thirteen districts a district court “to consist of one judge”). Whatever the reason, some district “courts” appointed the judge’s family members to serve as clerks. See, e.g., MESSINGER, *supra* note 117, at 2 (reporting that David Sewall, district judge for the District of Maine, appointed his nephew Henry as clerk).

<sup>139</sup> See 38 U.S. (13 Pet.) 225 (1839) (concluding that the district court judge had discretion to remove the court clerk, not for cause, but to make room for the appointment of the judge’s friend). Shortly after *Hennen* came down, Congress enacted a provision empowering the circuit court to hire its own clerk and specifying that in cases of disagreement (between the district and circuit judge), the presiding judge would have the appointment. See Act of Feb. 28, 1839, ch. 36, § 2, 5 Stat. 321, 322 (“[A]ll the circuit courts of the United States shall have the appointment of their own clerks . . .”).

<sup>140</sup> See Judiciary Act of 1789, ch. 20, § 7, 1 Stat. 73, 76. When Congress first conferred power on the federal courts to name commissioners (an early precursor to magistrates), it vested the appointment power in “any circuit court or either of the district courts of Maine or Kentucky” and thus continued the early practice of court-based appointment. See Act of March 2, 1793, ch. 22, § 4, 1 Stat. 333, 334. See generally Charles A. Lindquist, *The Origin and Development of the United States Commissioner System*, 14 AM. J. LEGAL HIST. 1 (1970) (describing the evolution from reliance on commissioners to reliance on magistrates). To be sure, section 2 of the nation’s first bankruptcy statute empowered district judges to appoint “commissioners” of the said bankrupt. See Act of April 4, 1800, ch. 19, 2 Stat. 19, 21–22. But it appears from the oath requirement in section 3 that such commissioners were to act for the bankrupt during the pendency of the proceeding and not as inferior officers of the United States. *Id.* § 3. The Act was repealed in 1803. See Act of December 19, 1803, ch. 6, 2 Stat. 248.

<sup>141</sup> See Judiciary Act of 1789, ch. 20, § 1, 1 Stat. at 73 (declaring that the Supreme Court shall consist of one Chief Justice and five Associate Justices, and specifying that the Court’s sessions would begin on the first Monday of February and August at the seat of government).

Some might argue that the provision for appointing marshals complicates the story of early implementation. Section 27 provides that a “marshal shall be appointed in and for each district for the term of four years, but shall be removable from office at pleasure, whose duty it shall be to attend the district and circuit courts when sitting therein, and also the Supreme Court in the district in which that court shall sit.”<sup>142</sup> The provision fails to identify an appointing and removing superior and certainly does not specify a court-based appointment mechanism. But neither does it contemplate appointment by the district court judge. The phrasing of the provision makes clear that marshals, although judicial servants in the sense that they were duty-bound to execute the “lawful precepts” of the courts they attended and perform other chores, were to be appointed by the President with the advice and consent of the Senate. And so they were.<sup>143</sup> As a consequence, the marshals’ office has long been viewed as a part of the Executive Branch of government and now operates within the Department of Justice.<sup>144</sup> Far from disproving a consistent practice of assigning judicial appointments to the court, rather than the judge, the marshal provision actually confirms the drafters’ careful attention to matters of form and structure.<sup>145</sup> In any case, later legislation carried on the pattern of vesting the power to appoint judicial officers in the courts.<sup>146</sup>

Chief Justice John Jay played a central role in implementing the practice of court-based, rather than Chief-based, appointment of inferior officers. In late 1789, shortly after it became generally known that he was to become the Chief Justice, Jay was inundated with requests for patronage appointments that proceeded on the assumption that he would make the

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<sup>142</sup> *Id.* § 27, 1 Stat. at 87. Deputy marshals were to be appointed by the marshal, subject to removal from office “by the judge of the district court.” *Id.* Interestingly, then, the statute gives the President removal power over the marshals and the district judge removal power over deputy marshals. Perhaps the drafters sought to give the judge some leverage over deputies in case the marshal were to leave the office in charge of a deputy that the judge deemed unfit to perform its duties. The choice of the judge as the party with the removal power, rather than the court, suggests that the drafters did not view Article II’s court-based appointment provision as a limit on the assignment of removal power.

<sup>143</sup> The marshal was expected to serve as the federal analog to the state sheriff, serving writs and precepts, handling court funds and federal prisoners, and overseeing the federal census operation in the district. For an account of the early history of the marshal’s office, featuring a discussion of President Washington’s appointments, see FREDERICK S. CALHOUN, *THE LAWYERS: UNITED STATES MARSHALS AND THEIR DEPUTIES, 1789–1989* (1989), and David S. Turk, *A Brief Primer on the History of the U.S. Marshals Service*, *FED. LAW.*, Aug. 2008, at 26.

<sup>144</sup> See 28 U.S.C. § 561(a) (2006) (“There is hereby established a United States Marshals Service as a bureau within the Department of Justice . . .”).

<sup>145</sup> The decision to assign the power to appoint (and remove) marshals to the President may have reflected the conclusion that the execution of judgments was a matter for the Executive Branch of government.

<sup>146</sup> See Act of Feb. 28, 1799, ch. 19, § 7, 1 Stat. 624, 626 (declaring the “respective courts of the United States shall appoint criers for their courts, to be allowed the sum of two dollars per day”); see also *supra* note 139 (quoting the provision in the Act of Feb. 28, 1839, ch. 36, 5 Stat. 321, for the circuit courts to appoint the court’s clerk).

appointments himself (in keeping with the English model). For example, in one such letter, Theodore Sedgwick (a member of the Massachusetts congressional delegation) apologized for soliciting Chief Justice Jay on behalf of a friend. But, Sedgwick explained, such applications must frequently come “to men [like Chief Justice Jay] who have the power to confer offices.”<sup>147</sup> Fisher Ames made the same assumption, writing in November 1789 to recommend an “eminently qualified” candidate “to your favour and patronage.”<sup>148</sup> Even fellow Justice William Cushing wrote Chief Justice Jay to press the case of an applicant for the clerk position.<sup>149</sup>

Chief Justice Jay’s response to these supplications was remarkable; he consistently rejected the notion that he had the power to make the appointment himself and insisted that the decision would be taken by the Court following consultation with the Justices in attendance. Consider his reply to Fisher Ames:

There are at present several candidates for the place in question, and probably the number will be increased before the appointment takes place. As it should be the result of mutual information and joint consultation between the judges, it appears to me proper that I should in the mean time remain free from engagements, express or implied, to or for any gentleman, however well recommended.<sup>150</sup>

Chief Justice Jay said much the same thing in his reply to Justice Cushing:

I have made it a Rule to keep myself free from Engagements, and at Liberty to vote as after mutual Consultation among the Judges shall appear most adviseable. . . . There are several matters which will demand early attention; and it would doubtless be useful to have some informal meetings before Court, in order to consider and mature such measures as will then become indispensable.<sup>151</sup>

Chief Justice Jay’s sharpest remarks were directed to an acquaintance, John DuMott, who had approached him for an office. Chief Justice Jay turned down the request, explaining:

[O]n these occasions it is best to be very explicit. [I]t would neither be friendly nor candid to excite delusory Expectations, or to make Promises without a good Prospect of performing them. There is not a single office in my Gift, nor do I recollect that there is more than one in the appointment of the

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<sup>147</sup> See Letter from Theodore Sedgwick to John Jay (Sept. 23, 1789), in 1 DHSC, pt. 2, *supra* note 116, at 665.

<sup>148</sup> See Letter from Fisher Ames to John Jay (Nov. 10, 1789), in 1 DHSC, pt. 2, *supra* note 116, at 676.

<sup>149</sup> See Letter from William Cushing to John Jay (Nov. 18, 1789), in 1 DHSC, pt. 2, *supra* note 116, at 678–79. Justice Cushing, Ames, and Sedgwick all supported the eventual appointee, John Tucker.

<sup>150</sup> Letter from John Jay to Fisher Ames (Nov. 27, 1789), in 1 DHSC, pt. 2, *supra* note 116, at 680.

<sup>151</sup> Letter from John Jay to William Cushing (Dec. 7, 1789), in 1 DHSC, pt. 2, *supra* note 116, at 682.

Court . . . [A]s to offices in the Gift of other Departments I think it my Duty not to interfere . . . .<sup>152</sup>

In each instance, then, Chief Justice Jay rejected the assumption that offices in the Judicial Branch were his to confer and apparently did so because the Court was the appointing agency and was to decide the matter after “joint consultation between the judges.”<sup>153</sup>

Looking to the official record of the actions taken by the Supreme Court when it convened at the nation’s capital (New York City) in February 1790, we find Chief Justice Jay was as good as his word. Although there was little judicial business to do,<sup>154</sup> the Court did manage to appoint two inferior officers (a crier and a clerk) and began to admit attorneys and counselors to practice before the bar of the Court. The official minutes of the Court’s first two sessions include the following entries:

Ordered, that Richard Wenman, be, and he is appointed Cryer of this Court.<sup>155</sup>

Ordered, that John Tucker Esq. of Boston, be the Clerk of this Court. That he reside, and keep his Office at the Seat of the National Government, and that he do not practice either as an Attorney or a Counsellor in this Court while he shall continue to be Clerk of the same.<sup>156</sup>

Although a matter of routine, these two appointments provide important insights into the Court’s own understanding of its appointment power. First, although the Justices had met in advance about the clerkship appointment and settled on Tucker, they nonetheless viewed themselves as duty bound to formalize the appointment by issuing an order in open court

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<sup>152</sup> See Letter from John Jay to John DuMont (Feb. 27, 1790), in 1 DHSC, pt. 2, *supra* note 116, at 696–97. Chief Justice Jay was slightly more forthcoming in a response to a request for office submitted by his sister-in-law on behalf of her husband. See Letter from John Jay to Catharine Ridley (Nov. 11, 1789), in 1 DHSC, pt. 2, *supra* note 116, at 677 (describing the position of clerk as unlikely to afford Mr. Ridley “a [l]iving”).

<sup>153</sup> Such a collegial approach to selection of officers would have the incidental effect of protecting individual judges both from the burden of dealing with office seekers and from the obligation to explain why favored candidates were rejected.

<sup>154</sup> Although the Court failed to muster a quorum on the first Monday of the month, a fourth Justice arrived and the Chief Justice proclaimed the Court open for business. Newspaper reports suggest that the event was well attended by the leading statesmen of the day, many of whom were already in town as members of Congress. 1 DHSC, pt. 1, *supra* note 116, at 171 & n.2 (reproducing the official minutes of the Court, which describe the absence of a quorum on February 1, 1790, and the need for deferral of business to the next day); *see also id.* at 165 n.4 (describing the temporary appointment of McKesson as clerk before Tucker was chosen to serve); *id.* pt. 2, at 686–87 (collecting newspaper coverage of the Court’s initial failure to muster a quorum). The Court would not docket its first case for several sessions and would not issue its first written opinion until 1792. See GOEBEL, *supra* note 129, at 554, 662–65.

<sup>155</sup> Fine Minutes of the Supreme Court, Feb. 2, 1790, in 1 DHSC, pt. 1, *supra* note 116, at 175.

<sup>156</sup> Fine Minutes of the Supreme Court, Feb. 3, 1790, in 1 DHSC, pt. 1, *supra* note 116, at 175.

that would become a part of the official record.<sup>157</sup> It was not enough simply to send Tucker a letter of engagement or enter into a handshake agreement. If the Court was to be the appointing agent, then the Court was obliged to take action in accordance with the forms of law. The Justices' decision to make an official appointment by court order helps to explain why they took no action the first day, when the absence of a quorum prevented the Court as such from conducting official business.<sup>158</sup> It also explains why the Justices arranged to have a temporary clerk record the minutes of the actions taken before the appointment of Tucker was formalized.<sup>159</sup> By preserving minutes, the Court would ensure that Tucker's position would be both formally lawful and part of the public record.

The Court's appointment of the crier may be even more revealing. At the time the Court acted, there was no statutory warrant for such an office. It had not been created in the Judiciary Act, and the Process and Compensation Acts similarly omitted any mention of the office.<sup>160</sup> Indeed, it was not until 1799 that Congress first authorized such a position, declaring that each court of the United States shall appoint a crier and pay two dollars a day for his services.<sup>161</sup> That the 1790 appointment anticipated the statute by nine years suggests that the Justices took the view that the Court enjoyed inherent power to hire personnel viewed as necessary to the conduct of judicial business.<sup>162</sup> Apart from power to hire needed employees, the appointment of the crier may shed additional light on the Court's understanding of the requirements of Article II. In appointing Tucker as clerk, after all, one might understand the Court to have been following the lead of the Judiciary Act, which defined the court as the appointing agency. In the absence of a statutory directive, the Court's formal action in appointing the crier may more clearly reflect the Justices' own view of the constitutional locus of the appointment power.

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<sup>157</sup> See Letter from John Jay to William Cushing, *supra* note 151.

<sup>158</sup> Fine Minutes of the Supreme Court, Feb. 1, 1790, in 1 DHSC, pt. 1, *supra* note 116, at 171.

<sup>159</sup> On the appointment of a temporary clerk, see 1 DHSC, pt. 1, *supra* note 116, at 175 n.9, noting that John McKesson acted as clerk on the first day the Court convened.

<sup>160</sup> See Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93 (declaring that in suits at common law, the circuit and district courts were to follow the writs, modes of execution, and rates of fees of the state courts in which they sat); *cf.* Act of Sept. 23, 1789, ch. 18, 1 Stat. 72 (setting the salary of all federal judges and the Attorney General of the United States but failing to address the payment to such judicial officials as the clerk or the crier).

<sup>161</sup> See Act of Feb. 28, 1799, ch. 19, § 7, 1 Stat. 624, 626.

<sup>162</sup> For a careful assessment of inherent judicial authority, see Robert J. Pushaw, Jr., *The Inherent Powers of the Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001). Pushaw does not address the inherent power of courts to hire personnel viewed as necessary to conduct judicial business, although he does acknowledge as a general matter that courts can take action without legislative authority that they find essential to carry out their judicial duties. *See id.* at 847–48; *see also* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1681 (2004) (distinguishing between weak inherent power to act without congressional authority and strong inherent power to act counter to congressional dictates).



Whatever the crier's significance for the debate over inherent powers, the two appointments reveal a consistent commitment to a court-based appointment process.<sup>163</sup> The Court followed the practice of court-based appointments for several years. Tucker resigned the clerk's post after two years, forcing the Court to find a replacement. The result of the search appears in an order published on August 1, 1791:

Ordered, that Samuel Bayard be the Clerk of this Court in the place of John Tucker Esquire of Boston resigned . . . .<sup>164</sup>

Bayard served for nine years, in part by appointing deputy clerks to perform the office in his absence, and then resigned in 1800.<sup>165</sup> Even though Jay had long since left the bench and the Chief Justiceship, the Court appointed Bayard's successor by entering an order to that effect in open court.<sup>166</sup> Even today, the power to appoint the Court's clerk, librarian, reporter, and marshal remains in the Court, rather than the Chief Justice.<sup>167</sup>

Efforts to switch to a Chief-based approach have not taken hold, at least with the Court's own clerk and marshal. Following his installation as Chief Justice in December 1864, Salmon Chase developed draft language

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<sup>163</sup> Chief Justice Jay's correspondence reveals that he viewed the appointments as matters for the court to settle through consultation and deliberation among the Justices. We cannot reconstruct the nature of the deliberative process, but we do know that other candidates had been put forward, that Tucker had strong support from Justice Cushing and from other leading figures in Massachusetts politics, and that Tucker had served effectively as the clerk of the Massachusetts Supreme Judicial Court. We also know that Chief Justice Jay had advised Justice Cushing that candidates for the office should plan to attend the Court's first session in New York. Letter from John Jay to William Cushing (Dec. 7, 1789), *supra* note 151. Tucker, accordingly, was present in the courtroom. Chief Justice Jay's correspondence does not reveal anything about the Court's internal deliberations. But however deferential he was to his colleagues in the selection of the clerk and crier, he was obviously quite influential in shaping the way the Court approached the appointment process. Rather than a judge-based appointment process, Chief Justice Jay ensured that the Court itself played the official role as the appointing agency.

<sup>164</sup> Fine Minutes of the Supreme Court, Aug. 1, 1791, in 1 DHSC, pt. 1, *supra* note 116, at 192 (footnote omitted).

<sup>165</sup> For an account of Bayard's service as clerk and his reliance on deputy clerks, see 1 DHSC, pt. 1, *supra* note 116, at 162–63.

<sup>166</sup> Fine Minutes of the Supreme Court, Aug. 15, 1800, in 1 DHSC, pt. 1, *supra* note 116, at 330–31 (“Samuel Bayard Esquire having resigned the Office of Clerk of this Court. It is Ordered that Elias B. Caldwell be appointed to the said Place . . . .” (footnote omitted)). Chief Justice Jay resigned in 1795 to become governor of New York. In 1800, Oliver Ellsworth was presiding as Chief Justice; as a senator from Connecticut, Ellsworth had played a lead role in drafting the Judiciary Act of 1789.

<sup>167</sup> See 28 U.S.C. §§ 671–674 (2006) (declaring that the Supreme Court may appoint officers to serve as clerk, marshal, reporter, and librarian, and setting out the duties of such officials). Congress first conferred power on the Court to appoint a reporter in 1817, vesting the appointment power in the “Supreme Court.” See Act of March 3, 1817, ch. 63, 3 Stat. 376. Power to appoint a marshal was first conferred on the Court in 1866. See CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–88, pt. 1, at 167 (1971) (describing the adoption of the marshal provision).

for inclusion in a bill to reorganize the federal judiciary.<sup>168</sup> Among his suggestions was one that provided: The “Chief Justice with the approval of the Court may appoint a Marshal . . . .”<sup>169</sup> When the issue came before the Senate, the proponent of the language urged it as something the “judges” had suggested.<sup>170</sup> Senator Reverdy Johnson countered that he had never heard from the “judges” any complaint about the existing practice of court-based appointment.<sup>171</sup> Others objected as well, and the provision was rejected. In the leading historical account of the episode, Charles Fairman recounts the court-based system that Chief Justice Chase had inherited and explains he proposed a switch to a Chief-based system because he “had his own man in mind” for a bit of “patronage.”<sup>172</sup> The Senate’s rejection of a switch thus represents a modest vindication of the constitutional principle that the appointments were to be the product of a consultative process with all of the Justices in an effort to end the patronage-based appointment practices of the past.

#### *E. The Drift to a Chief-Based Appointment Process*

However consistent the early Court’s practice in making court-based appointments of inferior judicial officers, such a practice did not necessarily prevent district court judges from treating clerkship appointments as a source of patronage. In an engaging history of the office of the district court clerk, Scott Messenger reveals that the first clerk appointed in the District of Maine was the nephew of the presiding judge.<sup>173</sup> Messenger also tells the story of *Ex parte Hennen*, litigation that grew out

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<sup>168</sup> Chase was confirmed as Chief Justice and took his seat in December 1864 as the Civil War was winding down, filling the post vacated by Chief Justice Roger Taney’s death. With him on the bench were a number of Justices appointed by Lincoln’s predecessors (Justice Wayne, from Georgia; Justice Catron, from Tennessee; Justice Nelson, from New York; Justice Grier, from Pennsylvania; and Justice Clifford, from Maine). In addition, Chief Justice Chase had four Republican colleagues who had, like him, been named to the bench by Lincoln (Justice Swaine, Ohio; Justice Miller, Iowa; Justice Davis, Illinois; and Justice Field, California). For an account, see FAIRMAN, *supra* note 167, at 1–4.

<sup>169</sup> See *id.* at 167 (quoting language of section 2 of the Chief Justice Chase draft).

<sup>170</sup> *Id.* at 168–69.

<sup>171</sup> *Id.* at 169.

<sup>172</sup> *Id.* at 167, 171; see also JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY 410 (1995) (confirming that Chief Justice Chase wanted to secure the position for his close friend and associate Richard Parsons).

<sup>173</sup> See MESSINGER, *supra* note 117, at 15 (noting that Henry Sewall, nephew of district court judge David Sewall, was appointed as the first clerk of the District of Maine and describing other patronage-based appointments in the nineteenth century culminating in an Act of Congress that forbade nepotism). Messenger reports that the early clerks were paid out of the fees they collected from litigants, thereby producing some of the same problems with fee-paid office and corruption that the Framers had elsewhere attempted to avoid. See *id.* at 8–12, 20 (describing the fee system and the discovery in 1818 that the district clerk in New York had embezzled over \$100,000, apparently with the connivance of the appointing judge). Eventually, in 1919, Congress placed the clerks on salary. *Id.* at 44–45. For a survey of early compensation practices, see THOMAS K. URDAHL, THE FEE SYSTEM IN THE UNITED STATES 122–33 (Madison, Wis., Democrat Printing Co. 1898).

of the decision of a newly appointed district judge in Louisiana to replace the incumbent clerk with a friend.<sup>174</sup> In making the appointment, the district judge admitted that he was acting, not out of concern with Hennen's abilities, but out of "feelings of kindness" for Winthrop, the new appointee.<sup>175</sup> Although the former clerk sought a mandamus to compel his continuation in office, at least as a circuit court clerk, the Court refused to issue the writ. The Court confirmed that the clerk was one of the inferior officers contemplated by the Appointments Clause of the Constitution, properly subject to appointment by the courts of law.<sup>176</sup> But in the absence of any statutory guidance, the Court simply presumed that clerks were removable at the will of the district court and could claim no vested right in the office.<sup>177</sup>

The judicial practice approved in *Hennen*, which reflects a close identification of the district judge with the district court over which he presided, may help to explain how judges rather than courts came to be seen as the appointing authority for inferior judicial officers. Another factor in the evolution away from a court-based appointment process may have been the need to empower an official to act with reasonable dispatch in performing certain administrative chores when the courts were unable to convene as such. In 1850, Congress adopted legislation to staff the district courts when, by virtue of illness or disability, the incumbent district judge was unable to do so. The mode chosen was to allow either the circuit judge for the relevant circuit or the Chief Justice to "designate and appoint" a district judge from an adjoining district to serve in the disabled judge's place.<sup>178</sup> A short time later, Congress broadened the authority of the circuit

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<sup>174</sup> See 38 U.S. (13 Pet.) 230 (1839). At the time, the Judiciary Act provided that the clerk of the district court was to be selected by that court and was also to serve as the clerk of the circuit court. See *supra* text accompanying note 140. The circuit judge preferred Hennen, the old clerk, and had blocked the new clerk, Winthrop, from taking up circuit clerk duties. The Court's rejection of the mandamus petition left the district court in charge of choosing and removing the clerk for both courts. Congress addressed the potential conflict by statute a short time later, vesting power in the circuit court to appoint its own clerk. See Act of Feb. 28, 1839, ch. 36, § 2, 5 Stat. 321, 322 (declaring that all "circuit courts of the United States shall have the appointment of their own clerks" and further providing in case of a division among the judges that the presiding judge shall make the selection).

<sup>175</sup> MESSINGER, *supra* note 117, at 17 (describing Judge Lawrence's decision to replace Hennen with Winthrop).

<sup>176</sup> See *Ex parte Hennen*, 38 U.S. (13 Pet.) at 258.

<sup>177</sup> See *id.* at 259.

<sup>178</sup> See Act of July 29, 1850, ch. 30, 9 Stat. 442 (amended 1852) (authorizing circuit judge or Chief Justice to "designate and appoint" a district judge from the same or an adjoining circuit to serve in the place of the disabled judge). An earlier statute had conferred a similar form of designation authority on circuit "court[s]." See Judiciary Act of 1801, ch. 4, § 25, 2 Stat. 89, 97 (repealed 1802) (authorizing circuit court, in case of district judge's disability, to assign a circuit judge to perform the duties of the district judge during the continuance of the disability). In a still later attempt to address the disabilities of district judges, Congress authorized the circuit court or its circuit justice to issue a writ of certiorari, removing actions from the docket of the district court to that of the circuit court for resolution there. See Act of March 2, 1809, ch. 27, 2 Stat. 534. Notably, to the extent the 1801 legislation called for an

judge and Chief Justice to allow them to designate adjoining district judges to address the “accumulation or urgency of judicial business in any district.”<sup>179</sup> At the time of the enactment, the Court’s term ran from the first Monday in December 1851 to May 27, 1852.<sup>180</sup> That left a substantial period of time when the Justices of the Supreme Court were riding circuit and unable to convene as a Court to make an official designation.<sup>181</sup>

Another decisive step was taken towards a Chief-based process during Reconstruction as part of the Republicans’ desire to ensure the patronage-based appointments of Republican office seekers. Thus, in the midst of Reconstruction debates in early 1867, Congress found time to adopt a new bankruptcy law that included a provision that called for the Chief to play a special role in the appointment of the bankruptcy registers to assist the district courts. The provision reads as follows:

That it shall be the duty of the judges of the district courts . . . to appoint in each Congressional district . . . , upon the nomination and recommendation of the Chief Justice of the Supreme Court of the United States, one or more registers in bankruptcy, to assist the judge of the district court . . . .<sup>182</sup>

According to a leading account, Congress consulted with Chief Justice Chase before adopting the provision and he failed to object, perhaps due in part to his interest in controlling the patronage and in part to his desire to maintain good relations with the Republican members of Congress.<sup>183</sup> But Chief Justice Chase was flooded with petitions and delayed taking action in his new executive capacity while he sought out the views of his brethren on the constitutionality of his new role.<sup>184</sup> Eventually, he agreed to perform the function, adopting something of a straddle: he would act, not as the appointing official, but would make nominations to the district judge on

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appointment, it placed the power in the circuit court. The 1809 legislation did not make an appointment, but simply treated disability as the trigger for removal.

<sup>179</sup> See Act of April 2, 1852, ch. 20, 10 Stat. 5.

<sup>180</sup> See CARL B. SWISHER, 5 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836–64, at 284 (1974) (as there were no statutory designations for term length or date, the Court took it upon itself to lengthen its term in an effort to cope with its growing docket).

<sup>181</sup> Prior to the 1850 and 1852 enactments, an 1848 legislative proposal to relieve the Justices of all circuit responsibilities for a one-year period was rejected by the Senate. The Acts of 1850, 9 Stat. 442, and 1852, 10 Stat. 5, served as a “[p]iecemeal attempt[.]” to maintain the circuit riding system while mollifying the overworked Justices, see SWISHER, *supra* note 180, at 282–84 & n.27.

<sup>182</sup> Bankruptcy Act of 1867, ch. 176, § 3, 14 Stat. 517, 518, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99.

<sup>183</sup> See FAIRMAN, *supra* note 167, at 355–65 (recounting the episode and the consultation with Chief Justice Chase and criticizing him for having failed to resist the imposition of the appointive role).

<sup>184</sup> In a letter to his Republican colleague, Justice Miller, Chief Justice Chase expressed a willingness to perform the duty, onerous as it was, so long as it was “not unconstitutional.” *Id.* at 357.

which that judge was expected to exercise an uncertain degree of independent judgment.<sup>185</sup>

Apparently, it was this straddle that persuaded both Chief Justice Chase and Congress that the Chief's role was consistent with the constitutional requirement of a Court-based appointment. Indeed, Senator Roscoe Conkling defended the provision as one that the House "very carefully" considered and had upheld on the ground that it entailed only nomination by the Chief rather than appointment.<sup>186</sup> It was true, as a formal matter, that the appointment was to be made by the district judge. But members of the Senate still raised questions. Senator Reverdy Johnson expressed the following constitutional doubts:

The Constitution provides . . . that Congress may . . . vest the appointment [of inferior officers] in a head of a Department or in a court. There is no authority to vest it in any individual member of a court; but this clause, so far from vesting the appointment in the [district] courts . . . , gives them merely a negative upon the nomination of the Chief Justice.<sup>187</sup>

Others expressed practical concerns; how was the Chief to learn the qualifications and reputation of local office seekers?<sup>188</sup> Thus, when Chief Justice Chase initially declined to make any nominations, members of the Senate unsuccessfully moved to repeal the provision in part on constitutional grounds.

Whatever one's view of the formal distinction between Chief Justice Chase as a nominating official and the district court as the appointing entity, it appears quite evident that Republicans designed the provision to ensure patronage-based appointments. Chase was a newly appointed Republican Justice, and known to harbor presidential aspirations.<sup>189</sup> Both of the alternatives—the Court, with several holdover Justices from previous

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<sup>185</sup> Thus, in correspondence with the district judges, Chief Justice Chase described the action of the district judge as "wholly independent of mine." *Id.* at 365 n.211. He also dissented from the doctrine that the district judges are "at all bound by the nomination of the Chief Justice." *Id.* But he also advised one recalcitrant district judge to reconsider his decision to reject two of his nominees. *Id.*

<sup>186</sup> *Id.* at 359.

<sup>187</sup> *Id.* at 358 (alterations in original) (quoting Sen. Reverdy Johnson). A Democrat from Maryland, Senator Johnson was among Congress's most knowledgeable students of the Constitution. See HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875, at 313 (1982). His dim view of Reconstruction was informed both by his national political ambitions and his perception that it threatened to "subject the white man to the absolute and unconditional dominion of an armed force of a colored race." ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876, at 52 (Fordham Univ. Press 2005) (1985).

<sup>188</sup> FAIRMAN, *supra* note 167, at 356 (quoting Sen. Thomas Hendricks of Indiana).

<sup>189</sup> Eventually, Chase did stand for the presidency, allowing his daughter Kate to manage his unsuccessful candidacy for the presidential nomination of the Democratic (!) party. See NIVEN, *supra* note 172, at 428–32.

administrations,<sup>190</sup> and the district courts—were conceivably less well disposed to Republican office seekers.<sup>191</sup> Assignment of a controlling role in the process to the Chief could help to ensure the appointment of loyal Republican bankruptcy registers in a way that a more decentralized or court-based process might not. A major supporter of the legislation, Roscoe Conkling, thus imagined that the Chief-based system would ensure a role for the party; the Chief would not necessarily choose registers himself but could simply rely on the House and Senate delegations from the relevant district to identify the designee, thus transferring the value of the appointment to the local party apparatus.<sup>192</sup>

Although the Chief's nominating power did not survive the repeal of the bankruptcy law,<sup>193</sup> the Chief's designation power took hold. Thus, the early designation statutes from the 1850s provided a precedent on which Congress could rely in creating the Commerce Court in 1910.<sup>194</sup> With President Taft in the White House, pressing for the bill, Congress adopted legislation that created a special court to test the legality and enforce the orders of the Interstate Commerce Commission. The law provided for the appointment of five Article III judges to staggered five-year terms. Upon the conclusion of their Commerce terms, the judges were to serve on regional circuit courts to which they were also appointed.<sup>195</sup> The controversy arose from a provision that called upon the Chief to appoint successor judges from other Article III courts to serve when the initial five-year terms ended.<sup>196</sup> Members of Congress criticized this vesting of

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<sup>190</sup> See *supra* note 168 (describing the ten-Justice Court of the day as including five Justices appointed by previous administrations and five appointed by Lincoln).

<sup>191</sup> See FAIRMAN, *supra* note 167, at 355–56 (quoting Sen. Fessenden for the proposition that members of Congress supported the assignment of the appointment power to whatever judge or court best aligned with “their way of thinking”). But as Fairman cogently observes, it makes little difference which court actually makes the formal appointment if the Chief has control of the nomination process. *Id.* at 356.

<sup>192</sup> One defender of the legislation matter-of-factly assumed that the Chief would simply follow the recommendations of the congressional delegation in making his nominations. See *id.* at 360 (quoting the comment of Sen. Conkling).

<sup>193</sup> The Act of 1867 was repealed in 1878; the next bankruptcy act, adopted in 1898, did not contain the same appointment mechanism but instead assigned the power to appoint referees in bankruptcy to the district courts they served. Bankruptcy Act of 1898, ch. 541, § 34, 30 Stat. 544, 555. For an account, see Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 25 (1995).

<sup>194</sup> See Mann–Elkins Act of 1910, ch. 309, 36 Stat. 539. For an account of the Commerce Court, describing its three-year history and its disbandment by a disgruntled Congress, see George E. Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM. J. LEGAL HIST. 238 (1964), and Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 965–67 (2011).

<sup>195</sup> See 36 Stat. at 540.

<sup>196</sup> See *id.*

appointment authority in a single person and argued that the Court should make the appointment instead.<sup>197</sup>

While Congress later disbanded the Commerce Court, the role of the Chief in designating current Article III judges to serve on specialty courts has remained very much alive. As Professor Ruger tells the story, Congress has created a series of special tribunals and directed the Chief to staff them with judges drawn from the ranks of current federal judges. These tribunals include the Emergency Court of Appeals (1942–1961), which heard appeals from the federal agency charged with setting prices during World War II; the Judicial Panel on Multidistrict Litigation (1968–present), which entertains motions to transfer related cases for consolidated pretrial proceedings before a single district court; the Special Division of the D.C. Circuit (1978–2000), which appointed independent counsels and defined the scope of their investigative authority under the terms of the Ethics in Government Act; and the Foreign Intelligence Surveillance Court and Court of Review (1978–present), which reviews Justice Department applications for national security investigative warrants.<sup>198</sup> As Professor Ruger aptly notes, Congress has apparently come to regard Taft’s once-controversial model of Chief designation as “relatively unexceptional.”<sup>199</sup> In the next Part, this Article will evaluate the constitutionality of Chief-based appointments.

### III. ASSESSING THE CONSTITUTIONALITY OF CHIEF-BASED APPOINTMENTS

As we have seen, scholars who have examined the question believe that the Chief’s appointment powers pass constitutional muster. For these scholars, two factors—the long history of Chief-centered appointments and the perception that the Chief acts for the Court in making appointments—cast doubt on the claim that Article II requires the Court to act.<sup>200</sup> In this Part, I first set out the elements of the affirmative case for a Court-based appointment requirement. The second section of this Part explores various elements of the defense of the Chief’s role. The third section offers a few preliminary thoughts about how the Congress and the Supreme Court could collaborate on a court-based appointment system with relatively modest dislocation to current practice.

This Article does not advance any particular claim about the theory of constitutional interpretation. Rather, drawing on the interpretive modalities of Professor Bobbitt,<sup>201</sup> the Article relies on evidence from the text,

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<sup>197</sup> See Ruger, *Appointment Power*, *supra* note 1, at 361 (quoting Sens. Robert LaFollette and Thomas Gore).

<sup>198</sup> *Id.* at 362–67.

<sup>199</sup> *Id.* at 367.

<sup>200</sup> See *id.* at 374 (citing *Freytag v. Comm’r*, 501 U.S. 868, 884 (1991)).

<sup>201</sup> See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 9–119 (1982) (elaborating six modalities of constitutional argument, including arguments from text, structure, history,

structure, and history of Article II, all of which point in much the same direction. Indeed, the historical evidence tends to confirm that the Framers of Article II were right to fear patronage in creating a court-based appointment process. Rather than selling offices for their personal account, the judges who have accepted a role in the appointment process have chosen patronage of a different stripe. Just as the district judge in Louisiana replaced his court's clerk, Mr. Hennen, with a personal friend, so too did Chief Justice Chase accept a congressionally conferred role in the appointment process in part to help advance a partisan agenda. Critics of the Chief's role in subsequent years have worried, with varying degrees of candor, that political considerations might inform the Chief's selections. The clarity of the text, coupled with the continuing relevance of the discipline such a process would impose, provide the basis for a strong argument in favor of a return to a court-based approach to the appointment of inferior judicial officers.

*A. Advancing a Court-Based Appointment Hypothesis*

The formal case in favor of restricting the power of Congress to invest the Chief with power to appoint inferior officers in the Judicial Branch flows directly from the language of Article II. It provides that Congress can vest the appointment of inferior officers in the President, in the heads of departments, or in the courts of law. Because the Chief Justice is none of these, one might argue that Congress cannot constitutionally vest the Chief with appointment powers. Such an account gains strength from the considerations that emerged in Part II. As the history explored there reveals, the Framers had reason to distinguish the Court from the Chief in thinking about how to structure a public-regarding appointment process. Moreover, the early practice of Congress and the Supreme Court appears to have respected the Court's appointing role. The case for a Court-centered appointment practice thus finds support in the text, in the early institutional practice, and in a functional account of the appointment process as a public trust.

The legislative precedents that led away from a Court-centered appointment process help to underscore the wisdom of placing the power in the courts of law, rather than the judges that staff them. To be sure, the motives that underlay the provision for Chief-based nomination of bankruptcy registers differed in important respects from the patronage concerns that animated the Framers of Article II. In the eighteenth century,

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precedent, prudence, and ethos); cf. Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 29–89 (2000) (setting out the elements of a “documentarian” approach to constitutional interpretation that nonetheless leaves considerable room for arguments based on history, structure, and precedent); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 750 n.9 (1999) (developing a distinctive brand of text-centered interpretation but nonetheless celebrating Bobbitt's interpretive modalities as a “brilliant” contribution to the field).



the Framers focused on the power of chief judges to line their own pockets through the sale of offices to underlings. Such sales tended to result in the multiplication of offices and an increase in the fees associated with litigation. By the nineteenth century, patronage under the spoils system provided the political parties with a way to reward loyal supporters with the financial security of an office. Less well known, patronage also provided the party with a source of funds to spend in the electoral process. Party loyalists who landed jobs through the spoils system were expected to work for the party and to pay over a portion of their salary to help underwrite the party machine.<sup>202</sup> The choice of Chief Justice Chase to nominate bankruptcy referees thus helped to ensure a new set of officers from which the Republicans could demand political support and payola. While Chief Justice Chase was not selling the office of bankruptcy register for his own account, his role surely enabled the Republican Party to extend its control over the offices for patronage purposes. A court-based appointment process, either lodged in the Supreme Court or in the district courts, would have been far less subject to single-party capture.

Court-centered appointments also make sense in light of the hierarchical nature of the federal judiciary and the vesting of the judicial power in courts rather than judges. Unlike Article II, which vests executive power in an individual (the President), Article III vests the judicial power in one Supreme Court and in such inferior courts as Congress may ordain and establish.<sup>203</sup> (No power is vested in the Chief Justice, other than that to preside in the Senate over impeachment trials of the President.) Apart from the vesting of power in the Court, Article III imposes requirements of unity, supremacy, and inferiority that place the Supreme Court alone atop a judicial pyramid, with a wide variety of inferior courts and tribunals at the base.<sup>204</sup> Recent scholarship suggests that such inferior courts and tribunals owe a duty of obedience to the Court's precedents and must remain subject to the Court's oversight and control.<sup>205</sup> Although it operates as a

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<sup>202</sup> See generally RONALD J. HREBENAR ET AL., *POLITICAL PARTIES, INTEREST GROUPS, AND POLITICAL CAMPAIGNS* (1999) (highlighting the importance of patronage in maintaining loyal party workers and in filling party coffers); A. JAMES REICHLEY, *THE LIFE OF THE PARTIES: A HISTORY OF AMERICAN POLITICAL PARTIES* (1992) (same). For an intriguing suggestion that patronage was relatively benign, reflecting a modest level of corruption, and played a crucial role in building the nascent American party system, see SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 66–69 (1968), arguing that patronage played a valuable role in stabilizing American democracy.

<sup>203</sup> See U.S. CONST. art. III, § 1.

<sup>204</sup> See generally PFANDER, *supra* note 22 (Supreme Court must retain the power to oversee and control all inferior courts and tribunals).

<sup>205</sup> It was precisely this pyramidal conception of the Article III judiciary that the Scottish-born jurist James Wilson put forward in his 1791 lectures on the structure of the federal judiciary. Recent scholarship, moreover, reveals that the Scottish judicial system on which Wilson may have relied in drafting Article III featured the elements of supremacy and inferiority that were included in the Constitution. Thus, the Scottish Court of Session was proclaimed the supreme court and all other

multimember body, the Supreme Court resembles the President in being constitutionally installed as the head of one branch of the federal government.

The provision for appointment of inferior officers by the courts of law complements this hierarchical structure by authorizing Congress to vest the appointment power in the courts, both Supreme and inferior, in which Article III vests the judicial power. Such a provision maintains the Article III hierarchy; the Supreme Court can make appointments of inferior officers and the lower courts can make similar appointments. The Court's decision in *Ex parte Hennen* suggests that, at least in the absence of a contrary statutory prescription, such officers will be subject to removal at the appointing court's will, thereby ensuring that they remain responsive to their appointing tribunal. While the Supreme Court cannot necessarily discharge officers appointed by the lower courts, it can oversee the work of those courts to ensure that they properly play their judicial role. The choice of the courts as the recipient of the appointment power thus ensures that the Court, declared supreme in Article III, will retain its role at the top of the judicial hierarchy and will be in a position to oversee the work of any inferior officers it appoints.

One can imagine at least three ways to defend the Chief as the depository of the appointment power. First, one might argue that *Freytag* treats the Chief and the Court as equivalent for purposes of the appointment power. Second, one might view the judicial bureaucracy as a separate department, with the Chief Justice serving as its head. Third, one might question whether at least some of the Chief's appointees should be regarded as inferior officers within the meaning of Article II. The next section explores these issues.

### B. Testing the Court-Based Appointment Hypothesis

Scholars defend the appointment role of the Chief Justice as one that enjoys the support of a lengthy pedigree, dating at least from the Progressive Era. But scholars advancing such an argument have thus far failed to take account of early practice. We have seen that the Framers of the Constitution likely provided for assignment of appointment powers to the Court, rather than the Chief, to ensure a more transparent, publicly accountable appointment process and to clarify that offices within the judicial bureaucracy were not for sale.<sup>206</sup> Chief Justice Jay took pains to honor the spirit of Article II by ensuring that the appointments of inferior officers were made in open court.<sup>207</sup> Today, by contrast, the power to

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tribunals were required to remain subordinate to the Session and to comply with its decisions. See Pfander & Birk, *supra* note 22, at 1674–77. Wilson served on the Committee of Detail and played a central role in the drafting of Article III. See *id.* at 1673.

<sup>206</sup> See *supra* Part II.C–D.

<sup>207</sup> See *supra* notes 147–53 and accompanying text.

appoint such officers as the director of the Administrative Office has been statutorily assigned to the Chief Justice alone.<sup>208</sup> The Court has no role to play, either in the appointment or removal decision. As a practical matter, then, it seems quite difficult to characterize the appointment practice as one in which the Chief acts for the Court in making appointments.

Nor does *Freytag v. Commissioner* support an argument that the Chief Justice should be deemed to act for the Supreme Court in making appointments.<sup>209</sup> To be sure, the statute in *Freytag* authorized the chief judge of the Tax Court to appoint special judges, and the Supreme Court upheld the statute after concluding that the Tax Court qualified as a court of law within the meaning of Article II. The conclusion has helped to persuade scholars to equate the appointment power of a court with that of its chief judge. But during oral argument in *Freytag*, the Court was told that the chief judge of the Tax Court was selected for the position by the other judges of the Tax Court acting in their collective capacity.<sup>210</sup> As a result, the Court decided *Freytag* on the assumption that the chief judge had been chosen by the court itself. While one can plausibly read *Freytag* to uphold the chief judge's power to act as the court's designee in appointing special judges, such a model differs in important respects from that which obtains at the Supreme Court. Appointed by the President, with the advice and consent of the Senate, the Chief does not owe his position as such to the Court.<sup>211</sup> The Chief acts neither as the Court's agent nor pursuant to the

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<sup>208</sup> See 28 U.S.C. § 601 (2006) (defining the powers of the AO's director and providing that the director shall be "appointed and subject to removal by the Chief Justice of the United States, after consulting with the Judicial Conference").

<sup>209</sup> See 501 U.S. 868 (1991).

<sup>210</sup> During oral argument, one Justice inquired about the manner in which the chief judge of the Tax Court was selected. Appearing for the Government, Deputy Solicitor General (and now Chief Justice) John Roberts explained that the "chief judge is elected by the regular judges" of the court. But that presented a problem; the Government had taken the position in its brief that the appointment in question should be upheld by treating the chief judge as the "head of a department" of the Executive Branch. But heads of departments must, according to the theory that animated the Government's brief, be appointed by and answer to the President, rather than to the members of a collegial body. The chief judge was not a presidentially selected head, but as Roberts acknowledged, was more like the "head of a collegial body" or "a chairman." Oral Argument at 57:29, *Freytag*, 501 U.S. 868 (No. 90-762), available at [http://www.oyez.org/cases/1990-1999/1990/1990\\_90\\_762](http://www.oyez.org/cases/1990-1999/1990/1990_90_762). That may explain why the Court was persuaded to treat the Tax Court as a court of law, as suggested in the amicus brief of Erwin Griswold. Justice Scalia's solution, rejected by the majority but later embraced in Chief Justice Roberts' opinion in *Free Enterprise Fund*, was to limit the courts of law to Article III courts and to regard the multimember Tax Court itself as a department head. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3164 (2010) (citing *Freytag*, 501 U.S. at 918 (Scalia, J., concurring in part)).

<sup>211</sup> Scholars have argued that the Constitution does not require that the President choose the Chief Justice and have suggested alternative selection modes, including election by the members of the Court or rotation in office. See Todd E. Pettys, *Choosing a Chief Justice: Presidential Prerogative or a Job for the Court?*, 22 J.L. & POL. 231 (2006).

Court's oversight in performing the appointment duties assigned to him by statute.<sup>212</sup>

Apart from providing little support for current appointment practices of the Chief Justice, *Freytag* may itself have been decisively reshaped by the Court's later decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.<sup>213</sup> In *Free Enterprise Fund*, the Court specifically adopted the view (advanced by Justice Scalia in his separate *Freytag* opinion) that a multimember commission could be regarded as a department head for purposes of being empowered to appoint inferior officers within the meaning of Article II.<sup>214</sup> The Court also maintained that the SEC's Chairman could be regarded as acting for the Commission in making appointments.<sup>215</sup> The Court based this conclusion not on a presumed identity between the Chairman and the Commission but on the nature of the Commission's oversight and control of the actions of its Chairman. The *Free Enterprise* Court thus suggests that the practical quality of the multimember body's oversight, rather than a dogmatic presumption of identity, will control the evaluation of when an officer acts for a board or commission in making an appointment. The Court lacks any comparable power over the Chief's appointments.

As an alternative to depicting the Chief as acting for the Court, one might defend the Chief's role by characterizing him as the head of a department. Congress has occasionally set up new institutions and housed them within the Judicial Branch even though they do not exercise the judicial power of the United States and play no direct role in the adjudication of cases and controversies. Both the AO and the FJC play supportive roles in the administration of justice and both lack any direct adjudicative role.<sup>216</sup> (Similarly, the U.S. Sentencing Commission operates within Article III in performing the quasi-legislative task of fashioning sentencing guidelines and does so without direct oversight by the Supreme Court.) One might depict such agencies as comprising a department of judicial administration over which Congress has installed the Chief as head. One might defend the Chief's appointment powers by drawing a distinction

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<sup>212</sup> Some scholars have suggested that Congress could alter the mode of the Chief's selection, proposing either a rotation based on seniority or a selection by the Court. See Edward T. Swaine, *Hail, No: Changing the Chief Justice*, 154 U. PA. L. REV. 1709 (2006) (suggesting alternative modes for choosing the Chief Justice). Obviously, in the wake of such a reconfiguration, the Chief Justice might be seen more as the Court's designee than as an independent actor.

<sup>213</sup> See *Free Enter. Fund*, 130 S. Ct. 3138.

<sup>214</sup> See *id.* at 3164 (quoting *Freytag*, 501 U.S. at 918 (Scalia, J., concurring in part)).

<sup>215</sup> So long as the Chairman made the appointments subject to the Commission's oversight, the Court agreed to treat the appointments as having been made by the Commission as the head of a department. See *id.* at 3163 n.13 (upholding the Chairman's appointments on the ground that they were made "subject to the approval of the Commission" (quoting Reorganization Plan No. 10 of 1950, § 1(b)(2), 15 Fed. Reg. 3175 (May 25, 1950), reprinted in 5 U.S.C. app. at 568 (2006))).

<sup>216</sup> See *supra* text accompanying notes 2–3.

between his judicial role (acting as a member of the Supreme Court) and his administrative responsibilities.<sup>217</sup> Congress has often assigned extrajudicial duties to the Chief; heading the judicial administration department could be regarded as such a duty.

Yet the depiction of the Chief as the head of a separate department of judicial administration runs into two related difficulties. For starters, as Professor Resnik's scholarship shows, the Chief may have difficulty in maintaining clean lines of separation between the two roles.<sup>218</sup> In a broader sense, one cannot easily separate the work done by the Article III bureaucracy from the fundamental judicial chore of resolving litigated disputes. Just as the AO lobbies Congress for new courthouses, new judgeships, and new support personnel,<sup>219</sup> so too does the FJC provide educational and statistical support to federal judges. The close connection of all this work to the judicial function raises doubts about whether one can really maintain a sharp distinction between what judges do and what their supporting administrators do. In the end, everyone in the Third Branch works to advance the administration of justice.

Second, structural constitutional considerations cast doubt on Congress's ability to create a department of judicial administration and place the Chief Justice at its head. Recent decisional law and scholarship tend to decry the prospect of a "headless 'fourth branch'" of government,<sup>220</sup> suggesting that any department of judicial bureaucracy should be regarded as housed within one of the three traditional branches. For reasons that Professor Resnik articulates, one has difficulty in seeing how the work of judicial administration could be regarded as an element of either the Legislative or Executive Branches of government (here, we should distinguish the executive work of the marshal's office from the work of judicial support and administration).<sup>221</sup> But even if one were to imagine a

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<sup>217</sup> See Ruger, *Appointment Power*, *supra* note 1, at 345 n.12 (referencing a thorough collection of scholarly work regarding the Chief's administrative duties).

<sup>218</sup> See *supra* text accompanying notes 52–55.

<sup>219</sup> In 2011, AO Director James C. Duff and Judge Julia Gibbons, Judicial Conference Budget Committee chair, testified in front of the House Appropriations Subcommittee on Financial Services and General Government in support of the judiciary's budget request of \$7.3 billion. In addition to his prepared testimony, Director Duff commented: "The one area where we could use additional help is in judgeships, particularly in areas of the country that are very overworked." See *Judiciary Warns of Impact of Deep Cuts in 2012*, THIRD BRANCH (Apr. 2011), [http://www.uscourts.gov/News/TheThirdBranch/11-04-01/Judiciary\\_Warns\\_of\\_Impact\\_of\\_Deep\\_Cuts\\_in\\_2012.aspx](http://www.uscourts.gov/News/TheThirdBranch/11-04-01/Judiciary_Warns_of_Impact_of_Deep_Cuts_in_2012.aspx). For a general introduction to the AO, see *supra* note 3.

<sup>220</sup> See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 525–26 (2009) (opinion of Scalia, J.) (describing "the separation-of-powers dilemma posed by the headless Fourth Branch"). On the origins of the term, during FDR's Administration, see PRESIDENT'S COMM. ON ADMIN. MGMT., 74TH CONG., REP. OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 40 (Comm. Print 1937).

<sup>221</sup> To be sure, the marshal's service has long been housed in the Executive Branch, indicating that nothing prevents Congress from making officers involved in the execution of judicial decrees

department of judicial administration within the Executive Branch, it's far from clear that Congress could place the Chief Justice at its head. Such a role would not conform to the hierarchical conception of the Executive Branch that animates the Court's recent decisions.

One finds a clear expression of these values of hierarchy and the chain of command in the Court's most recent application of the Appointments Clause of Article II, *Free Enterprise Fund*.<sup>222</sup> There, the Court invalidated a provision of Sarbanes–Oxley, which had doubly insulated members of the newly created Public Company Accounting Oversight Board from presidential oversight and removal from office.<sup>223</sup> More importantly for our purposes, *Free Enterprise Fund* teaches important lessons about the appointment implications of a hierarchical branch. On the Court's view, the President's executive supremacy demands that he retain a measure of control over government officers and thus invalidates restrictions that insulate such officers from removal. Such invalidation was said to preserve what Madison described as the proper “chain of dependence,” through which “the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.”<sup>224</sup>

This hierarchical conception of the Executive Branch, culminating in the President, helped to shape the *Free Enterprise* Court's definition of a “department head” for appointment purposes under Article II. In an intriguing feature of the opinion, the Court held that the Securities and Exchange Commission—a multimember body—could qualify as a department head in which the power to appoint inferior officers could be constitutionally vested.<sup>225</sup> As the *Free Enterprise* Court explained, “the

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responsive to the Executive Branch of government. But the officers in question answer through the chain of command that leads ultimately to the Department of Justice and to the President. See *supra* note 144. Prior to 1939, the budget process for the judiciary was handled by the Department of Justice, an awkward state of affairs that provided the impetus for the creation of the Administrative Office of the United States Courts *outside* the Executive Branch. See Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1174 (1996); Judith Resnik, Lecture, *Courts In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 788 n.48 (2008).

<sup>222</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).

<sup>223</sup> The provision in question vested power in the Securities and Exchange Commission, an independent regulatory agency, to appoint members of the Board to staggered five-year terms, subject to removal by the SEC for good cause. Ultimately, the Court held that the insulation of Board members from presidential removal from office violated the constitutional provision vesting executive power in the President. *Id.* at 3155. While the Court did not question the power of Congress to vest executive power in an independent agency, such as the SEC, whose members enjoy some insulation from presidential removal, the double layer of insulation accorded members of the Board was deemed unconstitutional. As the Court explained, the statute “not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists.” *Id.* at 3153.

<sup>224</sup> *Id.* at 3155 (quoting 1 ANNALS OF CONG. 499 (1789) (Joseph Gales ed., 1834)).

<sup>225</sup> In viewing the Commission as a department head for appointment purposes, the Court picked up a theme from Justice Scalia's concurrence in *Freytag*, which had similarly portrayed the

Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a ‘Department[t]’ for the purposes of the Appointments Clause.”<sup>226</sup> This definition makes clear that department heads must answer, not to other officers in the Article II hierarchy, but to the President as the chief executive.

Given this conception of department heads as answering to the President, it is not obvious how one could characterize the Chief Justice as a department head within the Executive Branch. The Chief, to state the obvious, holds his commission during good behavior. He does not report to, and cannot be removed from office by, the President. To the extent department heads must answer to a constitutional superior, the Chief plainly does not qualify.<sup>227</sup>

Alternatively, one might portray the Chief as the head of an administrative department *within* Article III, but such an argument poses problems of its own. Article III’s vesting clause plays a role similar to that in Article II, vesting all of the judicial power in the Supreme Court, and in lower federal courts, and requiring all courts and tribunals to remain inferior to the one Court. Just as Article III may well invalidate legislation

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multimember Tax Court as the head of a department within the meaning of Article II. *Freytag v. Comm’r*, 501 U.S. 868, 915 (1991). As the Court observed, there was nothing particularly anomalous about viewing a multimember body as the appointing agency; it specifically noted the example of “Courts of Law” in rejecting the notion that only an individual can make appointments under Article II. Completing the thought, the Court observed that the organic act vested the SEC’s powers, including the power to appoint Board members, in the Commission itself. On this view, the Chairman was not to be viewed as the department head. Other Commissioners did not report to the Chairman and, unlike the Chairman who was appointed by the President alone, Commissioners were installed in office through the usual mode of nomination and Senate confirmation, thus qualifying the Commission as an agency head within applicable law. In the end, the Court portrayed the Chairman as exercising executive functions “subject to the full Commission’s policies,” rather than as a department head, and upheld the Commission as the appointing department head on this basis. *Free Enter. Fund*, 130 S. Ct. at 3163–64.

<sup>226</sup> *Free Enter. Fund*, 130 S. Ct. at 3163 (alteration in original).

<sup>227</sup> One might divide the Chief’s judicial and administrative duties and argue that life tenure attaches only to the judicial work. Such an approach would map nicely onto the arguments of scholars who contend that Congress might restructure the office of Chief Justice in various ways, perhaps by assigning the appointment of the Chief to the Court, *see* Pettys, *supra* note 1, at 231, 281, or by imposing term limits on the Chief’s administrative role, *see* Resnik & Dilg, *supra* note 1, at 1642. Perhaps on the same theory, Congress could subject the Chief’s administrative duties to executive oversight and control and thus make the Chief a department head within the meaning of Article II. One might argue in support of such an approach that Congress gave the Chief a range of non-Article III duties in the early years. *See* Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123 (detailing among other activities Chief Justice Jay’s service on the board of the mint and his later appointment as ambassador to Great Britain). While the Chief can plausibly hold more than one office under the United States, I find it difficult to imagine a world in which Congress could empower the President to remove the Chief from his administrative duties as head of the judicial bureaucracy and replace him with a different department head (presumably one of the President’s own choosing). The threat to the separation of powers strikes me as fatal to the recognition of such a presidential role.

that purports to place a lower court beyond the oversight and control of its judicial superior,<sup>228</sup> so too must officers working for the Third Branch remain accountable to their judicial superiors. Article II's provision for appointment of inferior officers by the courts underscores this point. One has difficulty seeing how the Chief could be said to be accountable to or dependent on the Court in the exercise of his administrative duties. The Chief does not serve as the designee or elected representative of the Court itself, as in *Freytag*, and does not submit his appointments to the Court for review and ratification.

To be sure, not every government official involved in some way with the administration of justice must answer to the Court. From the early years of government, Congress placed the marshals outside the Article III hierarchy. Marshals obviously play a role in the execution of judgments, serving process, making arrests, and overseeing imprisonment and the execution of sentences. Whatever the wisdom of housing the marshals in the Executive Branch, the mechanism clearly complies with the "chain of dependence" conception articulated in *Free Enterprise Fund*, with dependence running to the President. The example of the marshals thus tells us little about Congress's power to set up a department within the judicial bureaucracy and place the Chief at its head.

One might defend the current arrangement as a functional adaptation to the growth and changing nature of the judicial bureaucracy or as a reflection of constitutional-moment-style legislation that embodies a fundamental change in the constitutional order.<sup>229</sup> Chief Justice John Jay presided over a Court that appointed two inferior officers, the crier and the clerk; court-based appointment did not impose a significant burden on the Court or interfere with the Court's primary function of deciding cases. Today, the AO employs more than 32,000 individuals at some 800 locations nationwide.<sup>230</sup> The sheer size of the bureaucracy might seem to defy effective court-based oversight, especially for Associate Justices who might prefer to avoid administrative chores. But the argument from size and complexity does not necessarily argue for sole oversight by the Chief;

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<sup>228</sup> See Pfander, *supra* note 23 (contending that the Court's supremacy entails a power, not subject to congressional exceptions, to oversee the work of judicial inferiors); see also PFANDER, *supra* note 22, at 145–52, 163–64 (same).

<sup>229</sup> The argument from functional adaptation recalls the familiar view that the Court should not insist on strict adherence to the separation of powers but should instead allow adjustments over time. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851, 857 (1986) (upholding an assignment of judicial power to the administrative agency and refusing to articulate "formalistic and unbending rules"). For an account of adaptation, see Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009), proposing that Congress may have power to work around certain inconvenient constitutional provisions, particularly where the purpose underlying the provision has little continuing relevance. Of course, the argument for the use of workarounds to facilitate adaptation has less force when the text in question seeks to achieve a goal that remains relevant.

<sup>230</sup> See *Administrative Office of the United States Courts*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice.aspx> (last visited May 24, 2013).



rather, it argues for delegation to a series of inferior officers who remain responsive to their superior in the chain of command. Today, the director of the AO serves as the chief administrative officer of the federal judicial bureaucracy and as the secretary to the Judicial Conference.<sup>231</sup> Court-based selection of the director would represent only a limited distraction for the Justices and would occur only once every several years.<sup>232</sup>

Constitutional-moment arguments owe much to the work of Bruce Ackerman and his conception of the New Deal as a moment of engaged lawmaking that effected a lasting change in the constitutional order, despite the absence of any written constitutional amendment.<sup>233</sup> Whatever the persuasiveness of Ackerman's account of the New Deal,<sup>234</sup> one cannot readily identify a moment in the growth of the judicial bureaucracy that would qualify as "constitutional" within the meaning of Ackerman's model. Much of initial growth in the judicial bureaucracy occurred during the Progressive Era, under the stewardship of Chief Justice Taft.<sup>235</sup> Further growth occurred in 1939 with the creation of the Administrative Office.<sup>236</sup> But even then, the director of the AO was to be appointed by the Court.<sup>237</sup> It was not until 1990 that Congress altered the appointment mechanism to vest the appointment power in the Chief.<sup>238</sup> Rather than a moment in which an aroused citizenry proclaimed a new era in judicial administration (if indeed one can imagine such a thing), we have the drip-by-drip accretion of

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<sup>231</sup> *See id.*

<sup>232</sup> Since its inception in 1939, eight individuals have served as director of the Administrative Office, with an average term of nine years. *See id.*; *Judicial Administration and Organization*, FED. JUD. CENTER, [http://www.fjc.gov/history/home.nsf/page/admin\\_06\\_01.html](http://www.fjc.gov/history/home.nsf/page/admin_06_01.html) (last visited May 24, 2013). In appointing the director of the Administrative Office, some Chiefs have played favorites. *See* Fish, *supra* note 1, at 106–08 (describing Warren's choice of a "loyal protégé" and Burger's choice of a former colleague and future real estate investment partner with whom he had a "close relationship").

<sup>233</sup> *See* 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (describing Reconstruction and the New Deal as periods of heightened citizen engagement and unconventional higher lawmaking); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

<sup>234</sup> For criticisms, see John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002), and Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 768 (1992) (book review), highlighting the problem of identifying when such a moment has occurred and what content to ascribe to it.

<sup>235</sup> *See* Ruger, *Appointment Power*, *supra* note 1, at 350 (describing the growth of the federal judicial bureaucracy and the Chief's appointment power).

<sup>236</sup> *See* Resnik, *supra* note 3, at 937–38 (recounting the legislative impetus behind the creation of the Administrative Office); *see also* PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* (1973).

<sup>237</sup> *See* Act of Aug. 7, 1939, Pub. L. No. 76-299, ch. 501, § 302, 53 Stat. 1223 (providing that the director and assistant director of the Administrative Office shall be "appointed by the Supreme Court of the United States and hold office at the pleasure of and be subject to removal by the aforesaid Court").

<sup>238</sup> *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 307, 104 Stat. 5089, 5112 (codified as amended at 28 U.S.C. § 601 (2006)).

authority that occurs when the relevant actors no longer attend to constitutional limits.

*C. Toward a Court-Based Appointment Process*

Assuming that Congress cannot vest the Chief with power to appoint inferior officers, but must vest the power in the Court instead, this section explores how Congress and the Court might work together to implement a model of court-based appointment. Obviously, the most straightforward way to make the transition would be to amend the relevant statutes and provide for the vesting of appointment authority in the Court, rather than the Chief. Alternatively, the Court could institute an internal practice of treating statutes that vest appointment power in the Chief as if they meant to confer that power on the Chief as the Court's agent. In other words, the Chief and the Court could institute a practice of overseeing the Chief's appointments such that they could be properly regarded as the Court's work. In *Free Enterprise Fund*, the Court noted that appointments by the Chairman of the SEC could pass muster as appointments by the Commission itself so long as the appointment is "made 'subject to the approval of the Commission.'"<sup>239</sup> Similar approval by the Court could help to address any constitutional objection.

Such a modified appointment practice should not prove particularly disruptive, and it could nonetheless considerably improve the process. As Professor Ruger has noted, judicial norms call for deliberation, consultation, and reason giving.<sup>240</sup> It appears that the decision of the Framers to vest appointment power in the Court, rather than the Chief, was meant to foster these consultative values. Even though the Court did not give reasons for the appointment of John Tucker as its first clerk, the Chief Justice took pains to ensure that the Court as such engaged in a joint deliberative process before announcing its decision.<sup>241</sup> We can assume that the deliberations focused on the relative merits of the candidates and resulted in a consensus selection. Although it would be a drastic step, one can imagine that a Justice, doubting the merits of a proposed appointee, might file a short dissent, perhaps to highlight procedural concerns. In any case, the prospect of group deliberation would impose an important discipline on the appointment process, ensuring that the mix of candidates

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<sup>239</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3163 n.13 (2010) (quoting Reorganization Plan No. 10 of 1950, § 1(b)(2), 15 Fed. Reg. 3175 (May 25, 1950), reprinted in 5 U.S.C. app. at 568 (2006)).

<sup>240</sup> On the importance of deliberation and collective decisionmaking, see Ruger, *Appointment Power*, *supra* note 1, at 385–88.

<sup>241</sup> See *supra* notes 150–51, 154–56 and accompanying text.

that the Chief put forward for a particular post or posts would appeal broadly to the Justices.<sup>242</sup>

Shifting to a court-based appointment process might also improve the legislative process by eliminating deliberations that focus on the politics or personal character of the incumbent Chief. On at least three occasions, the identity of the incumbent Chief appears to have played a role in the congressional deliberations over how to vest the appointment power. First, in 1867, the political affiliation of Chief Justice Chase appears to have persuaded the Republican majority to give him a role in the selection of bankruptcy registers.<sup>243</sup> Later, in 1910, just one month before his death in July, the Senate focused on the fact that Chief Justice Melvin Fuller would be exercising power to appoint replacement judges to serve on the Commerce Court. Justice Fuller was a genial person, but he presided over a Supreme Court that had increasingly drawn the fire of progressives.<sup>244</sup> Progressives sought to shift the appointment power from the Chief to the Court, but critics of the proposed amendment criticized proponents for casting aspersions on the current incumbent.<sup>245</sup>

The identity of the Chief may have also influenced Congress's decision to establish a Special Division of the D.C. Circuit to appoint the independent prosecutors specified in the Ethics in Government Act of 1978.<sup>246</sup> Members of Congress close to that curious appointment mechanism later explained that the decision to create the Special Division was informed, at least in part, by a desire to avoid vesting Chief Justice Burger with the power to choose an independent counsel and to place the

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<sup>242</sup> For an intriguing echo of the argument that the process of appointment differs significantly when an administrator submits proposed appointments to the oversight of a larger group, see *Free Enterprise Fund*, 130 S. Ct. at 3163 n.12, observing, in the context of an inquiry into standing, that the Court “cannot assume, however, that the Chairman would have made the same appointments acting alone.”

<sup>243</sup> For an account, see *supra* text accompanying notes 182–92.

<sup>244</sup> Among the more notorious of the Fuller Court decisions, *Lochner v. New York*, 198 U.S. 45 (1905), had come down just a few years before the debate and had been the target of focused progressive criticism, see Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 779–81 (2009) (describing the galvanizing effect of Theodore Roosevelt's 1910 attack on the *Lochner* decision). For a broader view of the Fuller Court, see OWEN M. FISS, 8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910 (1993).

<sup>245</sup> See 45 CONG. REC. 7347–50 (1910) (remarks of Sens. Carter, Bailey, and Hale on the subject of whether the proposal to switch from the Chief to the Court could be seen as an adverse “reflection” on Chief Justice Fuller); *cf. id.* at 7351 (remarks of Sen. Gore identifying Chief Justice Taney, author of the *Dred Scott* decision, as a Chief who should not be trusted with the appointment power).

<sup>246</sup> The Ethics in Government Act of 1978, Pub. L. No. 95-521, § 602, 92 Stat. 1824, 1873, authorized the Chief Justice to appoint three members of the D.C. Circuit to serve on a Special Division that was, in turn, authorized to appoint independent counsel and define the scope of their investigative power. On the constitutionality of that appointment device, see *Morrison v. Olson*, 487 U.S. 654 (1988), upholding the power of the Special Division to make appointments as a court of law, even though the appointments in question were to positions in another branch of government.

power instead in the hands of such D.C. Circuit judges as David Bazelon and Skelly Wright.<sup>247</sup> If it were clear that the Court was to make these appointments, rather than the Chief, Congress would have little occasion to debate the comparative virtues of specific Chiefs or to create elaborate statutory workarounds.

Although one can predict that the Associate Justices may not initially embrace their new duties,<sup>248</sup> the Court would have some flexibility in deciding how far to press for court-based oversight of the Chief's appointment role. The Constitution requires the court to appoint inferior officers but does not address the appointment of employees.<sup>249</sup> In the Court's view, officers are those who exercise "significant authority" under the laws of the United States, while employees act as "lesser functionaries" pursuant to the oversight of officers.<sup>250</sup> While the line can be a bit

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<sup>247</sup> See Letter from Abner J. Mikva to author (Jan. 2012) (on file with the *Northwestern University Law Review*) (confirming the story that Democratic members of the House distrusted the Chief Justice and created a Special Division in part to place the power to appoint independent counsel in other hands).

<sup>248</sup> See Letter from Peter G. Fish to author 1 (July 19, 2012) (on file with the *Northwestern University Law Review*) (recounting a conversation with Justice Brennan in which the Justice "emphatically rejected" any role for the Associate Justices in the selection of administrative personnel on the ground that the Chief was obliged to shoulder all "administrative burdens"). For further evidence of Associate Justice antipathy to sharing the Chief's administrative chores, see Conference on the Office of Chief Justice (Oct. 15, 1982), in *THE OFFICE OF CHIEF JUSTICE*, *supra* note 1, at 155, 168, describing Associate Justice McKenna as preferring to be left totally out of administrative work.

<sup>249</sup> The inapplicability of Article II to the appointment of employees likely means that the practice of permitting each Justice to appoint law clerks and other staff does not present a constitutional problem. For an account of the practice, see TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 42–44, 190–205 (2006), contrasting the role of law clerks as stenographers in the late nineteenth century with their more expanded role on the Rehnquist Court. Some might argue that the clerks now exercise real power in the decision of cases, both in recommending action to their Justices and, through the cert. pool, in shaping the Court's docket. See, e.g., Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 *GEO. WASH. L. REV.* 1255, 1290–95 (2010) (arguing that Congress should strip the Court of its law clerks and force the Justices to do their own work). But law clerks propose and Justices dispose, making it hard to argue that the clerks occupy inferior offices that require full-Court participation in the appointment process. Notably, the first Justices to hire law clerks paid for them out of their own pockets, a fact that tends to support their characterization as employees rather than inferior officers. See Melvin I. Urofsky, *Louis D. Brandeis and His Clerks*, 49 *U. LOUISVILLE L. REV.* 163, 165 (2010) (recounting the practice of Horace Gray, the first Justice to hire a law clerk).

<sup>250</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3160 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 & n.162 (1976) (per curiam)). The Court put it this way in a leading statement:

[I]n the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.

*Edmond v. United States*, 520 U.S. 651, 663 (1997). Under guidance issued by the Office of Legal Counsel, officers of the United States include only those individuals who hold an office that is both "continuing" and that has been delegated a significant portion of the "sovereign" power of the nation. See *Officers of the United States Within the Meaning of the Appointments Clause*, 31 *Op. O.L.C.* (Apr.

unclear,<sup>251</sup> the Court can obviously refrain from playing any role in the appointment of lesser functionaries. Settled law pretty clearly establishes the clerks of the Supreme and district courts as inferior officers; the Court treated its clerk as such, and the decision in *Ex parte Hennen* so regards the clerks of the district courts.<sup>252</sup> In addition, the Court held that special judges of the Tax Court were inferior officers within the meaning of Article II, as are the members of the Public Company Accounting Oversight Board that figured in the *Free Enterprise Fund* decision.<sup>253</sup> Presumably, such precedents suffice to establish that prominent figures in the judicial bureaucracy, such as the director of the AO, qualify as inferior officers for whom court-based appointment should be the norm. Hiring practices at lower levels in the bureaucracy need not change.

As with employees, the Court's appointment obligations would not necessarily extend to decisions about how to designate judges for special judicial service. Here, one must distinguish between the initial appointment of Article III judges, which has conventionally been thought to require presidential nomination and senatorial advice and consent, and the designation of current Article III judges to play a special role within the Judicial Branch.<sup>254</sup> Such designation of existing judges does not obviously entail the appointment of a new inferior (or principal) officer.<sup>255</sup> After all, the judicial office as understood today includes both the adjudication of cases and controversies as a member of a specified court and the performance of additional tasks in accordance with proper designations. Such additional tasks, as we have seen, could potentially include service on a wide range of Judicial Conference committees as well as service on a court of specialized jurisdiction. Rather than filling offices, the Chief's

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16, 2007), available at <http://www.justice.gov/olc/2007/appointmentsclausev10.pdf>. On such a view, the range of employees subject to appointment without regard to Article II would be quite broad indeed.

<sup>251</sup> Thus, the Court acknowledged that the status of administrative law judges, as officers or employees, remains a matter of dispute. See *Free Enter. Fund*, 130 S. Ct. at 3160 n.10.

<sup>252</sup> See *supra* text accompanying note 176.

<sup>253</sup> *Free Enter. Fund*, 130 S. Ct. at 3162.

<sup>254</sup> Some scholars have contended that lower court judges could be regarded as inferior officers, as befits their status as the judges of inferior courts. If adopted, such a view could presumably clear the way for the appointment of inferior federal judges by the Court itself, as Professor Burke Shartel contended some years ago. See Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485 (1930) (arguing that one might characterize lower court judges as inferior officers within the meaning of Article II, thereby clearing the way for their appointment by the Supreme Court). For an update of Shartel's analysis in light of recent cases, see Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783, 824–39 (2006).

<sup>255</sup> Congress has instituted an elaborate process of designation and assignment that governs the eligibility of senior judges. For an account, see Burbank et al., *supra* note 1, at 19–21.

designation of judges might well be viewed as specifying what immediate duties, out of a range of possibilities, the judge should perform.<sup>256</sup>

This conception of designation conforms to early practice under the 1850 statute that first conferred power on the Chief Justice to identify a judge from an adjoining district to assist in the case of judicial disability. There, Congress specifically conferred on the Chief the power to “designate and appoint” a judge for the purpose.<sup>257</sup> But it was clearly understood that the Chief was to select from among current Article III judges in making the designation, rather than to appoint new judges to provide assistance. Similarly, when Congress returned to designation in the creation of a Commerce Court in 1910, the initial appointment of judges was to be made by the President and the Senate; the Chief’s designation power came into play only after the initial five-year term for initial appointees had run its course.<sup>258</sup> In both cases, the designation mechanism relied on initial presidential appointment and authorized the Chief to assign existing Article III judges to the positions in question. Designation may thus be best understood as specifying the work of an Article III judge, rather than as the appointment of an inferior officer. On this basis, the Court might well leave intact a wide range of designation authority now exercised by the Chief.<sup>259</sup>

The Court’s deference to the Chief’s designation of judges might extend to such specialized courts as the Judicial Panel on Multidistrict Litigation and the FISA courts. To be sure, judges designated for service on such courts exercise the judicial power of the United States, performing the core work of overseeing the resolution of cases and controversies. In that sense, their designation does not differ from other designations, such as those to address disabilities or temporary workload dislocations. On the other hand, designation to a specialized court poses a risk that the Chief

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<sup>256</sup> Congress can impose new duties on an existing officer without running afoul of Article II so long as the new duties can be considered “germane” to the work already being performed by that official. *See Weiss v. United States*, 510 U.S. 163, 171–75 (1994); *Shoemaker v. United States*, 147 U.S. 282, 300–01 (1893). It follows *a fortiori* that the designation of particular duties from an established range would not present Appointments Clause problems. *But cf.* David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453 (2007) (arguing that the office of senior judge would require a separate appointment and that the oversight entailed in designating and assigning senior judges represents an unconstitutional abridgement of judicial independence).

<sup>257</sup> *See supra* note 178 and accompanying text.

<sup>258</sup> *See supra* text accompanying note 196.

<sup>259</sup> On the other hand, the simple fact that the Chief designates a sitting Article III judge to fill an available post does not necessarily address all concerns. It strikes me as relatively easy to maintain that specialized judicial work, such as that on the Judicial Panel for Multidistrict Litigation, represents simply one more element of the core judicial responsibility of adjudicating cases and controversies. But some designations, such as those of sitting judges to serve as director of the AO or FJC, *see supra* notes 2–3, would occasion a marked departure from the business of adjudication. In taking up the new task, the director more closely resembles an officer with new executive responsibilities than a judge on temporary assignment to a new judicial venue.

will be perceived as staffing the court with judges who favor a certain approach to the legal questions likely to come before the tribunal. Critics have suggested, for example, that Chiefs in the past have favored relatively conservative designees for the FISA court, Republican judges for the Special Division, and judges open to procedural reform for the civil rules committee.<sup>260</sup> A collegial designation process would go far to blunt such criticisms.<sup>261</sup>

One final challenge lies in drawing the line between offices to which the Chief can make designations and those to which he makes new appointments. Obviously, deliberations at the Court could help to inform this line-drawing puzzle. But at least two factors might help to distinguish designative offices, which the Chief can fill alone, from appointive offices. If the office requires the exercise of judicial power and can only be filled by an Article III judge, the argument for treating it as a designation seems relatively straightforward. If Article III judges and others can both serve in an office, such as a membership on the civil rules advisory committee or the directorship of the AO, then the argument for regarding the appointment as a mere designation seems harder to sustain. If the office entails the exercise of law- or policymaking power, then the argument for regarding it as the sort of inferior office that the Court itself must oversee becomes harder to resist.

#### CONCLUSION

Chief Justice Jay's scrupulous adherence to a court-based appointment model sharply contrasts with a modern practice that treats the Chief as the presumptive appointing authority. Like many functional adaptations to the growth of the federal government, the Chief's new role as the head of a judicial bureaucracy has its defenders. One can certainly sympathize with arguments from administrative efficiency, and can predict that the Court might not welcome the burden of sharing the Chief's administrative portfolio. Yet the Court's own decisions refuse to allow arguments from convenience to trump the lines of accountability sketched out in the Constitution's appointment provisions. As the Court recently reaffirmed, "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."<sup>262</sup>

It seems likely that the courts were installed as the appointing entity to put fences around the patronage power of chief judges and to ensure that offices were to be viewed as part of a public trust for distribution on the

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<sup>260</sup> See *supra* notes 4, 48–50 and accompanying text.

<sup>261</sup> See Burbank et al., *supra* note 1, at 101 (noting the importance of ensuring that any designation process for senior status judges take account only of genuine administrative needs and not be tainted by personal animosity or political considerations).

<sup>262</sup> See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010) (alteration in original) (quoting *Bowsher v. Synar*, 478 U.S. 714, 736 (1986)).

basis of merit after due consultation. Granted, we do not need to police Judicial Branch appointments to ensure democratic accountability; the people play at best an indirect role in the choice of the Article III judiciary and the exercise of the judicial power. Yet a growing body of evidence suggests that hierarchy plays an important role in the structure of the federal judiciary, with one Supreme Court sitting atop a federal judicial pyramid. While no one would insist that the Court adjudicate every case or controversy or approve every appointment in the Third Branch, the structural imperatives of hierarchy call for the Court to participate in or oversee adjudication and significant appointment decisions involving inferior officers. Such oversight would honor the Court's supremacy and the Article II provision for appointments by the "courts of law."