

2012

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James E. Pfander

Northwestern University School of Law, j-pfander@law.northwestern.edu

Repository Citation

Pfander, James E., "THE CHIEF OR THE COURT: ARTICLE II AND THE APPOINTMENT OF INFERIOR JUDICIAL OFFICERS" (2012). *Faculty Working Papers*. Paper 224.

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THE CHIEF OR THE COURT: ARTICLE II AND THE APPOINTMENT OF INFERIOR JUDICIAL OFFICERS

By James E. Pfander*

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.¹ In 2011, for example, Chief Justice John G. Roberts participated in the appointment of a new director of the Federal Judicial Center, the research and teaching arm of the federal judiciary.² And with the 2011 retirement of the head of

* Owen L. Coon Professor of Law, Northwestern University School of Law. Copyright 2012. For helpful suggestions, my thanks to the Florida International and Northwestern University faculty workshops, the constitutional law colloquium at Loyola law school, Steve Calabresi, Ted Ruger, John McGinnis, Judith Resnik, Long Truong, and Howard Wasserman. For expert research assistance, my thanks to Anna Fodor and Sofia Vickery.

¹ In recent years, the role of the Chief Justice as the judiciary's administrator in chief has attracted growing scholarly attention. Early contributions include Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. Pa. J. Const. L. 341 (2005) (detailing the wide-ranging appointment power of the Chief) [hereinafter Ruger, *Appointment Power*]. For a sense of the literature, see 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 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) (analyzing the Chief's appointments to the Foreign Intelligence Surveillance Act (FISA) Court) [hereinafter, Ruger, *FISA*]; 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 (Paul Carrington and Roger Cramton eds., 2006) (raising the prospect of strategic retirement in support of term limits for federal judges); cf. 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.

² Created in 1967, the Federal Judicial Center operates under the direction of a board of directors. 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 28 U.S.C. 621. For a history of the FJC, see Denise L. Arial, *History of the Federal Judiciary: The Federal Judicial Center*, <http://>

the Administrative Office of the United States Courts, the Chief Justice bore sole responsibility for the appointment of a successor.³ Apart from these bureaucratic figures, the Chief Justice also selects the judges, magistrates, and bankruptcy judges who serve on the various committees of the Judicial Conference of the United States, the policy-making body of the federal judiciary over which he presides at bi-annual meetings.⁴ Finally, the Chief chooses sitting judges to staff specialty courts, such as the courts established in the Foreign Intelligence Surveillance Act (FISA).⁵ 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.⁶

Despite the familiarity of the practice, the power of Congress to vest the Chief with appointment authority poses a constitutional puzzle. After setting a

www.fjc.gov/history/home.nsf/page/landmark_18.html. The FJC Board selected Judge Jeremy D. Fogel as its director effective October 2011.

³ The Administrative Office of the United States Court 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 28 U.S.C 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*, The Third Branch (Oct. 2011), http://www.uscourts.gov/News/TheThirdBranch/11-10-01/New_Director_of_AO_Appointed.aspx.

⁴ On the origins and current structure of the Judicial Conference of the United States, see *infra* note .

⁵ See *infra* note _.

⁶ For accounts of the changing make-up 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 rule-making 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 Comparative Approach*, 23 J. Leg. Stud. 721, 724-28 (1994) (examining the use of the assignment power to influence the way judges decide cases in Japan).

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.”⁷ 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). 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.⁸

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.⁹ 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

⁷ 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 appointment 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); John F. Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1639 (2010) (arguing against the use of presumptions in resolving disputes over the separation of power); Steven G. Calabresi & Saikrishna Prakash, *The President’s Power to Execute the Laws*, 104 Yale L.J. 541 (1994); Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994) Steven G. Calabresi & Joan E. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel*, 79 Cornell L. Rev. 1045 (1994).

⁸ As we shall see, early practice at the Supreme Court makes clear that judicial clerks are to be regarded as inferior officers within the meaning of this provision. *See infra* text accompanying notes ; *see also* Ex parte Hennen, 38 U.S. (13 Pet.) 230, 243 (1839) (treating 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 of Internal Revenue, 501 U.S. 868, 881 (1991).

⁹ *See* Ruger, *Appointment Power*, *supra* note 1, at 351, 367-70.

“court” and the “judge” one and the same.¹⁰ Ruger also points to *Freytag v. Commissioner of Internal Revenue*,¹¹ 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,¹² Ruger notes that neither side questioned the exercise of the appointing authority by the chief judge of the Tax Court rather than by the court itself.¹³ 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.¹⁴

In this Essay, 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 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 re-think the nature and perquisites of judicial office.¹⁵ 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.¹⁶ Non-salary perquisites grew controversial during the run up to the Revolution, as

¹⁰ See Ruger, *Appointment Power*, *supra* note 1, 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).

¹¹ 501 U.S. 868 (1991).

¹² 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 *Freytag v. Comm’r of Internal Rev.*, 501 U.S. 868, 918 (1991) (Scalia, J., dissenting).

¹³ 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.

¹⁴ See Resnik & Dilg, *supra* note 1, at 1619 n.188.

¹⁵ 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) [hereinafter Pfander, *Judicial Compensation*].

¹⁶ See *infra* text accompanying notes ___. 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 p. ___.

the colonists chafed under the burden of multiple fee-paid offices.¹⁷ 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 harrass our people, and eat out their substance.”¹⁸

Earlier work contends that Article III may have presumptively foreclosed the practice of allowing federal judges to collect fees from the litigants who appeared before the federal courts.¹⁹ Article II may complement the no-fees assumptions of Article III²⁰ 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,²¹ 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.²² Early

¹⁷ 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, *Judicial Compensation*, *supra* note 15, at 8-9 n. 34-37.

¹⁸ Decl. of Indep., para. 12 (U.S. 1776). For an account, *see* Edward Dumbauld, *The Declaration of Independence and What It Means Today* 115-117 (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).

¹⁹ *See* Pfander, *Judicial Compensation*, *supra* note 15.

²⁰ *See id.* at 15-10 n. 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).

²¹ *See id.* at 24-26 (discussing the absence of judicial fee-based compensation provisions in the Compensation and Process Acts of 1789; the Act specifically allowed for fee-based compensation for clerks and marshals and excluded “fees to judges” from state fees to federal court personnel, but the Act did incorporate fees of state courts in equity, admiralty, and maritime cases).

²² *See infra* p. 17. *See also* 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);

practice, overseen by the nation's first Chief Justice, John Jay, confirms the perceived importance of court-based appointments.²³

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 system.²⁴ These powers of oversight may extend to state courts, when constituted as tribunals within the meaning of Article I,²⁵ to federal agencies exercising judicial power,²⁶ and to lower federal courts,²⁷ 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.²⁸ Under Article III, the Court bears ultimate responsibility for the way in which the judicial department exercises the judicial power of the United States.²⁹

²³ See *infra* text accompanying notes _.

²⁴ 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);

²⁵ James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction Stripping*, 101 Nw. U.L. Rev. 191 (2007) (arguing that the Court's supremacy operates in relation to state courts) [hereinafter Pfander, *Federal Supremacy*].

²⁶ 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) [hereinafter Pfander, *Article I Tribunals*].

²⁷ James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 Texas L. Rev. 1433 (2000).

²⁸ See Pfander, *Federal Supremacy*, *supra* note 26 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 24, at 1622 (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").

²⁹ 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, 218 (1995) (holding that Congress violated the Constitution's separation of powers when requiring federal courts to reopen final judgments by retroactive legislation).

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.³⁰ Such a view would portray the FJC, the Administrative Office, 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. For the Chief Justice, acting within the judicial department, the relevant reporting obligation runs to the Supreme Court itself.

This Essay 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 examines 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 such marquee posts 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

³⁰ See *infra* text accompanying note .

and plays a role in selection of the FJC's director.³¹ For help with various administrative chores, the Chief also appoints an administrative assistant who works at the Supreme Court.³² Depending on the Chief, the administrative assistant can play a substantial role in the development of judicial branch policy.³³ Chief Justice Burger, in particular, was thought to have delegated significant authority to his administrative assistant, Mark Cannon.³⁴

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.³⁵ Formal policy-making responsibility falls to the Judicial Conference of the United States, which meets in March and September every year.³⁶ The Chief presides at meetings of the Judicial Conference, but does not pick its members.³⁷ 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.³⁸ Between the March and September meetings, the Conference acts through an executive committee made up of seven members of the Conference.³⁹

³¹ 28 U.S.C. § 621 (a)(1) (1996) (“the Chief Justice of the United States, who shall be the permanent Chairman of the Board”); 28 U.S.C. § 624 (2011) (“This 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”).

³² See Resnik & Dilg, *supra* note 1, at 1590 n. 46 (discussing the creation of the administrative assistant position at Chief Justice Burger's request through 28 U.S.C. § 677 (a)-(b) (2000)).

³³ While Chief Justice Burger's administrative assistant served from the creation of the position to the end of Burger's tenure for a period of fourteen years, Chief Justice Rehnquist limited the tenures of his administrative assistants to two to five year terms. *Id.* at 1623-24 n. 211.

³⁴ *Id.* at 1623 n. 210 (describing the “many nonadjudicative responsibilities” of Mark Cannon and the close and confidential relationship he held with Chief Justice Burger).

³⁵ See *id.* at 1597 n. 80-81 (finding that though statute only grants the Chief Justice authority to appoint members of the Standing Committee, the Chief Justice appoints members who sit on more than two dozen committees)

³⁶ See *Sessions, United States Courts*, <http://www.uscourts.gov/FederalCourts/JudicialConference/Sessions.aspx> (last visited Jan. 28, 2012).

³⁷ 28 U.S.C. § 331 (2008) (“[the Chief Justice] shall preside at such conference which shall be known as the Judicial Conference”).

³⁸ *Id.* § 331

³⁹ See *Frequently Asked Questions, United States Courts*, <http://www.uscourts.gov/Common/FAQS.aspx#conference> (last visited Jan. 28, 2012) (“The seven-member Executive Committee of the Judicial Conference serves as the senior

The formulation of Judicial Conference policy begins at the committee level. The Conference consists of some twenty 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 bi-annually.⁴⁰ Best known, the Standing Committee on Rules of Practice and Procedure presides over a variety of rule-making committees, such as those that work up recommended amendments to the rules of civil procedure, appellate procedure, bankruptcy procedure, criminal procedure, and so forth.⁴¹ Less well known committees oversee such matters as court administration, courthouse construction, federal-state jurisdiction, the federal defenders program, and magistrate judges.⁴² 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,⁴³ of reappointment to a second three-year term.⁴⁴ In a typical year, the Chief may make some ten to fifteen such appointments.⁴⁵

executive arm of the Conference”). The Director of the Administrative Office of the United States Courts serves as an ex-officio, non-voting member of the Executive Committee and brings the roster total to eight. *See* Organization, United States Courts, <http://www.uscourts.gov/FederalCourts/JudicialConference/Organization.aspx> (last visited Jan. 28, 2012); *see also* *Two New Members Named to Judicial Conference’s Executive Committee*, United States Courts (Dec. 28, 2010), 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).

⁴⁰ *See Federal Court Governance and Administration: National*, Federal Judicial Center, <http://www.fjc.gov/federal/courts.nsf/FCGA1> (last visited Jan. 28, 2012); *see also* Resnik & Dilg, *supra* note 1, at 1597 n. 81 (detailing the number of Judicial Conference committees as of 2006).

⁴¹ *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 (the Judicial Conferences is required “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”).

⁴² *See Reports of the Proceedings*, United States Courts (Sept. 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 Sept. 2011 meeting).

⁴³ In Sept. 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* Carlyn Kolker, *Chief Justice Names Judges to Policy Group Posts*, Reuters, Sept. 21, 2011, *available at* http://newsandinsight.thomsonreuters.com/Legal/News/2011/09_-_September/Chief_justice_names_judges_to_policy_group_posts/.

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.⁴⁶ 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.⁴⁷ The judges of these FISA courts, drawn from the ranks of active Article III judges, typically serve for a term of seven years.⁴⁸ They often meet at a secure location in the Department of Justice in Washington, D.C.⁴⁹ Other specialty courts to which the Chief makes term-limited appointments include the Judicial Panel on Multidistrict Litigation and the Alien Terrorist Removal Court.⁵⁰

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. Working on the assumption that the party of the nominating

⁴⁴ See *Committees, United States Courts*, <http://www.uscourts.gov/FederalCourts/JudicialConference/Committees.aspx> (last visited Feb. 4, 2012) (specifying term lengths and the option of reappointment).

⁴⁵ The Judicial Conference lists 17 various committee members whose terms began in 2011. See *Rulemaking Process, United States Courts*, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess.aspx> (last visited Feb. 8, 2012). Cf. Kolker, *supra* note 45 (reporting the appointment of eight committee members and the renewal of three committee members' terms in Sept. 2011).

⁴⁶ 50 USC § 1803(a)(1), (b) (2010). See Ruger, *FISA*, *supra* note 1 at 243-45 n. 19, 21 (describing the statutory history of the eleven judge FISA Court and the three judge FISA Court of Review).

⁴⁷ 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 n. 15-16.

⁴⁸ FISA Court judges are limited to serving a single, staggered term. 50 USC § 1803 (d) (2010). See Ruger, *FISA*, *supra* note 1, at 244 n. 18.

⁴⁹ See 50 USC § 1803 (a) (2010) ("The Chief Justice . . . shall 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").

⁵⁰ 28 USC § 1407 (2000) ("The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice"); for the appointment provisions of the Alien and Terrorist Removal Court, see 8 USC § 1532 (a) (1996) ("The Chief Justice . . . shall publicly designate 5 district court judges from 5 of the United States judicial circuits").

president reveals important information about the ideology of the judge, scholars have observed that Rehnquist appointed more Republicans than Democrats to fill crucial judicial offices,⁵¹ particularly on the Special Division, which exercised control over the appointment of independent prosecutors.⁵² 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.

Critics also worry that the Chief's administrative responsibilities may inform his views as a judge on a multi-member judicial body. As Professor Resnik has shown, Chief Justice Burger urged Congress to deny bankruptcy judges Article III status in the 1978 legislation that expanded the jurisdiction of the bankruptcy courts.⁵³ Later, when parties to a breach of contract claim challenged the assignment of judicial power to non-Article III bankruptcy judges, Chief Justice Burger defended the legislation from a constitutional challenge and dissented from a decision invalidating the arrangement in part.⁵⁴ 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.⁵⁵ Professor Resnik contends that, in each instance, views that the Chief formed as

⁵¹ See Ruger, *Judicial Appointment*, *supra* note 1, at 394, Table 2 (listing Chief Justice Rehnquist's appointments by party).

⁵² See *id.* at 344 n. 10, 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).

⁵³ 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)

⁵⁴ See *id.* at 1612 n. 149 (quoting Chief Justice Burger's dissent in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (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).

⁵⁵ 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 an 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).

chief court administrator may have influenced the exercise of the Chief's judicial function as a Justice of the Supreme Court.⁵⁶

Despite these criticisms, the weight of scholarly opinion holds that the Chief's bureaucratic role should not be regarded as unconstitutional.⁵⁷ A variety of considerations inform this constitutional consensus. First, the Chief's powers have grown up over time, beginning with Chief Justice Taft's power to transfer judges between regions and evolving into a practice so extensive that it could be difficult to uproot.⁵⁸ 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.⁵⁹ While the Justices disagreed as to whether the non-Article III Tax Court would 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 multi-member 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, one can point to an earlier practice quite at odds with 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.⁶⁰ Jay's early conduct in the office, moreover, appears to

⁵⁶ 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. *Id.* 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*, *Seminole Tribe v. Florida*, . 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 Mass Transit Authority*, (Rehnquist, J., dissenting).

⁵⁷ See Ruger, *Appointment Power*, *supra* note 1, at 368-372; see also *supra* pp. 2-3. See Resnik & Dilg, *supra* note 1; see also *supra* p. 3.

⁵⁸ See Ruger, *Appointment Power*, *supra* note 1, at 350 (describing the Taft-era transfer authority as a precursor to the modern appointments to specialized courts).

⁵⁹ See *supra* pp. 2-3 and notes 13-14.

⁶⁰ See *infra* text accompanying note . For the view that early actions by the Supreme Court and other departments of the government set precedents that shape constitutional understanding, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124

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.⁶¹ 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 sections explore 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 Essay, I sketch the nature of judicial office in 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 was consistent with the framers’ decision to eliminate non-salary based compensation for judges and to create a hierarchical judicial system with a single Supreme Court.

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

Harv. L. Rev. 1939, 2033 (2011) (describing the Jay Court’s refusal to issue advisory opinions as a foundational precedent); Michael Bhargava, *The First Congress Canon and the Supreme Court’s Use of History*, 94 Cal. L. Rev. 1745, 1787 (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). 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.” Manning, *supra*, at 2033 (quoting Judge Easterbrook).

⁶¹ See *infra* text accompanying note .

as Chancellor, was a source of handsome financial reward.⁶² 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.⁶³ 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. 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.⁶⁴ While often associated with judicial independence, the Act of Settlement might be viewed as expressing a preference for judicial dependence on Parliament rather than on the Crown.

Apart from salaries, superior court judges earned income in the form of fees, paid by litigants as part of the costs of litigation.⁶⁵ 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.⁶⁶ 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.⁶⁷ This incentive to condemn would violate due process today;⁶⁸ it was no more popular in colonial America as the

⁶² 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 Pfander, *Removing Federal Judges*, 74 U. Chi. L. Rev. 1227, 1235 n. 37 (citing the Act of Settlement, 1701, 12 & 13 Will. 3, ch. 2.)

⁶³ See Duman, *supra* note 16, at 111.

⁶⁴ Act of Settlement 1701, 12 & 13 Will. 3, c. 2, § 3 (Eng.). See Pfander, *Judicial Compensation*, *supra* note 15, at 8 n. 30 (noting that the Act's establishment of judicial salary did not preclude litigant fees).

⁶⁵ *Id.* at 8 (discussing the different stages in the litigation process - including commencement, process, and jury empanelment - at which fees were incurred), See *infra* Table.

⁶⁶ *Id.* 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).

⁶⁷ See Duman, *supra* note 16, 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 £5,500 for the judges during wartime).

⁶⁸ See Pfander, *Judicial Compensation* at 10 n. 44 (referring to *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Connally v. Georgia* 429 U.S. 245 (1977): two Supreme Court cases that

mode by which the vice-admiralty courts enforced various mercantile regulations.⁶⁹

Fees and salaries were supplemented by the right of judges to derive income from the appointment of individuals to offices within the judge's "gift."⁷⁰ Judges with a substantial patronage in offices could secure revenue in two ways.⁷¹ 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 individual installed.⁷² 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.⁷³ The value of patronage obviously depended on the length of the appointing judge's service; more offices would become vacant and require re-appointment over the course of a long tenure on the bench. Like

invalidated a conviction and a warrant issue, respectively, by judges who received a fee on condition that they convict and approve of the warrant).

⁶⁹ On the controversial character of the admiralty courts during the run-up to independence, see C. Ubbelohde, *The Vice Admiralty Courts and the American Revolution* (1960); D.S. Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764-1776*, Wm & Mary Q. (1959).

⁷⁰ On the origins of office sales in early Norman history, linking office to a form of feudal property and describing its corrupting influence, see William Holdsworth, 1 *A History of English Law* 246-51 (7th ed. 1956). For criticisms of the sale of office, see G.E. Aylmer, *The King's Servants: The Civil Service of Charles I, 1625-42*, at 225-30 (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 Bench were either absolute or partial sinecures). No wonder reformers complained of the law's expense and delay.

⁷¹ See Duman, *supra* note 16 at 116 (detailing the patronage received by the Chancellor, the Chief Justice of King's Bench, and the Chief Justice of Common Pleas).

⁷² If not sold outright, a judge might have chosen to keep the office for himself as a supplemental income. See *id.*

⁷³ 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, at 227.

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.⁷⁴

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:⁷⁵

| Court | Office | Salary ⁷⁶ | Fees | Patronage | Total |
|--------------|---------------------|----------------------|----------------------|-----------------------|---------|
| Chancery | | | | | |
| | Lord Chancellor | £5,000 | £5,000 ⁷⁷ | £15,000 ⁷⁸ | £25,000 |
| | Master of the Rolls | £4,000 | £2,500 ⁷⁹ | £6,900* ⁸⁰ | £13,400 |
| King's Bench | | | | | |
| | Chief | £4,000 | £3,000 ⁸¹ | £23,000 ⁸² | £30,000 |

⁷⁴ See *infra* Table.

⁷⁵ See Duman, *supra* note 16, at 105.

⁷⁶ See *id.* at 112-13, Table 9 (Salary figures are based on Duman's projections for the year 1790 for all offices except the Master of Rolls, whose salary is unknown for that year. The salary of the Master of Rolls is based on Duman's figure from 1750. 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).

⁷⁷ *Id.* at 111, 114. The Lord Chancellor's remunerations were also augmented by income collected for serving as Speaker of the House. In addition to the £5,000 collected in fees, Lord Hardwicke received nearly £1,100 per annum from 1736 and 1755 for officiating as Speaker.

⁷⁸ *Id.* at 116 (based on Duman's finding of an 1810 House of Commons committee report documenting that the Lord Chancellor received £6,391 for offices in his gift and that relatives of former Chancellors held offices worth an additional £8,790 per year).

⁷⁹ *Id.* at 114. From 1751-1753, the Master of the Rolls received an annual fee between £2,400-£2,500 from the Hanaper Officer.

⁸⁰ *Id.* at 120. *Represents patronage figure for the first half of the eighteenth century for a total of 13 offices.

⁸¹ *Id.* at 119.

| | | | | | |
|--------------|--------------------|--------|----------------------|-----------------------|---------|
| | Justice | | | | |
| | Associate Justices | £2,400 | £500 ⁸³ | | £2,900 |
| Common Pleas | | | | | |
| | Chief Justice | £3,500 | £1,100 ⁸⁴ | £10,000 ⁸⁵ | £14,600 |
| | Associate Justices | £2,400 | | | £2,400 |
| Exchequer | | | | | |
| | Chief Baron | £3,500 | | £4,200 ⁸⁶ | £7,700 |
| | Associate Barons | £2,400 | | | £2,400 |

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.⁸⁷

⁸² *Id.* at 119. 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.

⁸³ *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).

⁸⁴ *Id.* at 120.

⁸⁵ *Id.* at 120.

⁸⁶ *Id.* at 120 (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 60 and Table.

⁸⁷ 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

Eventually, a reform-minded Parliament in the nineteenth century conducted investigations of fees and patronage and made changes in the rules.⁸⁸ 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.⁸⁹ 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.⁹⁰

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.⁹¹ In addition, governors earned an income and a measure of influence through the disposition of the many offices in their gift.⁹² Some governors, in fine, never moved to America; they simply sold the office to a deputy and collected a portion of the salary while living in England.

system provided an annual pension of £4,000 for the Chancellor, £3,000 for the Chief Justices and Chief Baron, £2,500 for the Master of the Rolls, and £2,000 for all other judges. *Id.* 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.

⁸⁸ See Sir William Holdsworth, 1 HISTORY OF ENGLISH LAW, 262 (1982) (finding that salary reform and the elimination of many sinecure offices were the immediate result of the publication of such investigations).

⁸⁹ *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”).

⁹⁰ See *infra* text accompanying note .

⁹¹ See 2 The Colonial Records of North Carolina: 1713-1728, 158-59 (2000) (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).

⁹² See 2 Records, *supra* note , 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 Millitary 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.”)

The same was true of customs officials, who often sold the post to a deputy and stayed at home.⁹³

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:

We cannot omit mentioning . . . another practice lately crept in among 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.⁹⁴

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.⁹⁵

Governors naturally resented any intrusion on their powers of patronage, often to little avail. 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

⁹³ Leonard Woods Labaree, *ROYAL GOVERNMENT IN AMERICA: A STUDY OF THE BRITISH COLONIAL SYSTEM BEFORE 1783*, 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*, 332-33 (2000) (“the 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”).

⁹⁴ 40 *Archives of Maryland: 1737-1740*, 392-93 (Bernard Christian Steiner ed. 1921).

⁹⁵ *See* 2 *Colonial Records of North Carolina*, *supra* note __, 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.”); Carl Russell Fish, *THE CIVIL SERVICE AND THE PATRONAGE* 1 (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).

children “so much bread.”⁹⁶ 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. Office-holders who held patents directly from London, rather than through the colonial governor, felt no sense of allegiance to, and little need to obey, the governor. Customs officials in particular were notably reluctant to follow gubernatorial advice.

One can see growing resentment of colonial patronage practices in the provisions of the great state papers that attended the movement to independence from England. 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.⁹⁷

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.”⁹⁸ (It 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 to assigning the obligations to a do-nothing deputy.) Discontent with the corrupting influence of the appointment power also shows up in the Articles of Confederation of the newly independent states, which articulates 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.”⁹⁹ 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 different approaches. Some states

⁹⁶ Labaree, *supra* note , at 105.

⁹⁷ Decl. of Indep., para. 12 (U.S. 1776).

⁹⁸ See Gordon Wood, *supra* note , at 213 (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, *Judicial Compensation*, *supra* note 15, at 9 (discussing officeholders who benefited from fee payments but performed little substantive work and the resulting anger of colonists).

⁹⁹ Arts. of Confed., art. V, para. 2.

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.¹⁰⁰ 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 officers.¹⁰¹ 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.¹⁰² 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.¹⁰³

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."¹⁰⁴ 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

¹⁰⁰ See Ga. Const., 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").

¹⁰¹ 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 Gerber, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606-1787*, 281-82 n. 67.

¹⁰² 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 *supra* note 82.

¹⁰³ As correspondent with those who framed the North Carolina Constitution, John Adams expressed his adamant views that the judiciary 'should not have their Minds distracted with complicated jarring Interests...and...Salaries Should be fixed by Law.' See Gerber, *supra* note 101, at 202.

¹⁰⁴ See Md. Const., art. 30 (1776)

prohibited them from holding any other office or receiving “fees or perquisites of any kind.”¹⁰⁵ 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.¹⁰⁶

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 courts of common pleas and orphans’ courts, and clerks of the peace, was vested in the president and *privy council*.¹⁰⁷ 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 “judges” of the courts of common pleas.¹⁰⁸ 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.”¹⁰⁹

Of all the constitutional experiments at the state level, perhaps the most significant developments occurred in New York. There, John Jay, Gouverneur

¹⁰⁵ See Pa. Const., sec. 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.”)

¹⁰⁶ 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 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., art. 47 (1776).

¹⁰⁷ See Del. Const., art. 12 (1776) (“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”).

¹⁰⁸ See Del. Const., art. 14 (1776) (“The clerks of the supreme court shall be appointed by the chief justice thereof, and the recorders of deeds, by the justices of the courts of common pleas for each county severally”).

¹⁰⁹ *Id.*, art. 12.

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.¹¹⁰ In addition to this general purpose mechanism, the New York constitution specified a mode for the appointment of court clerks and other judicial personnel:

The 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 court of probate, by the judge of the said court; and the register and marshal of the court of admiralty, by the judge of the admiralty.¹¹¹

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."¹¹² Among other things, Jay worried that the judges would develop a "partiality" to their appointees, and would combine with them to "conceal[] or excuse[] their mutual Defects or misdemeanors."¹¹³ Jay's criticism of vesting appointment power in the judges may

¹¹⁰ See New York Const., Apr. 20, 1777, sec. 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 Jared Sparks, I *The Life of Gouverneur Morris* 122-23 (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* 194-202 (1992) (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 Carl Russell Fish, *supra* note , at 86-91 (describing the way politicians used the council as a mechanism for patronage appointments, setting the stage for the spoils system).

¹¹¹ New York Const., Apr. 20, 1777, sec. XXVII.

¹¹² Letter from Jay to Morris, Apr. 29, 1777, reprinted in 1 DHSC, pt. 2, *supra* note , at 683 n.1.

¹¹³ *Id.* 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, *Order in the Courts: A History of the Federal Court Clerk's Office* (Federal Judicial Center 2002). 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, complaint, and injustice"). One important reform was to establish a uniform bill of fees in

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 lodging responsibility in a single chief executive.¹¹⁴ Alexander Hamilton, James Wilson, and Gouverneur Morris, in particular, shared the view that a multi-member body was an inappropriate recipient of the appointment power.¹¹⁵ During June discussions of the selection of federal judges, Wilson opposed appointment by the legislature on the ground that “intrigue, partiality, and concealment were the necessary consequences.”¹¹⁶ 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.”¹¹⁷ 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

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 DoJ revealed clerical misconduct in some 28 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, Felix Frankfurter derided the clerks as “placemen whose clerical jobs were threatened.” *Id.* at 40 (quoting Felix Frankfurter & James Landis, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 133-34 (1928)).

¹¹⁴ For the classic account of the movement away from legislative toward executive appointment, see Gordon Wood, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969).

¹¹⁵ See *The Federalist*, No. 77, at 462 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (“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, 3 *Defence of the Constitutions of the Governments of the United States* 310 (1778) reprinted in *The Political Writings of John Adams* (George A. Peek, Jr. ed. 2003) (describing the executive as capable of cautious and “responsible” appointments, whereas a representative assembly is “accountable to nobody”).

¹¹⁶ See 1 *Records of the Federal Convention of 1787*, 128 (Max Farrand rev. ed. 1966) (recording June 5, 1787 remarks of James Wilson) [hereinafter *Farrand’s Records*].

¹¹⁷ *Id.* at 120 (remarks of Madison).

Senate . . . it was particularly wrong to let the Senate have the filling of vacancies which its own decrees were to create.¹¹⁸

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.¹¹⁹

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.”¹²⁰ Notably, the provision authorizes the assignment of appointment power to a multi-member 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.¹²¹ As we have seen, Morris and his fellow Federalists generally opposed the assignment of appointment power to multi-member bodies, worrying about corruption, intrigue, and concealment.¹²² The convention’s choice of the “courts” as the only (obvious) multi-member body to which Congress can assign the appointment power thus demands explanation.¹²³

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

¹¹⁸ See 2 Records of the Federal Convention of 1787, (Max Farrand rev. ed. 1966) (recording Aug. 23, 1787 remarks of Gouverneur Morris) [hereinafter 2 Farrand’s Records].

¹¹⁹ 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 an account of the dynamic

¹²⁰ *Id.* at 627 (recording Sept. 15, 1787 remarks of Govr. Morris).

¹²¹ Cf. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010) (concluding that the multi-member Securities and Exchange Commission could be considered a department “head” for purposes of the appointment clause).

¹²² See *supra* text accompanying notes 85, 88.

¹²³ The Court has now concluded that another, less obvious, multi-member body can exercise the appointment power as a department “head.” See note 121 *supra*. One might argue that the convention chose the “courts” as a generic place-holder 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 place-holder reference to judges (“judges of the courts of law”) had that been the intention of the framers.

record, on days officially designated for the conduct of such business, and the public was free to attend.¹²⁴ 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 multi-member 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.¹²⁵ During the remainder of the year, the Justices dispersed to hold circuit courts throughout the country.¹²⁶ 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

¹²⁴ On the public quality of court days in colonial and early statehood America, see A.G. Roeber, *Authority, Law, and Custom: The Rituals of Court Day in Tidewater Virginia, 1720-1750*, Wm & Mary Q. (1980). See also Rhys Isaac, *The Transformation of Virginia, 1740-1790*, 90 (University of North Carolina Press, 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, ___. Cf. Draft Letter from the Justices of the Supreme Court to George Washington (Sept. 13, 1790) 2 DHSC at 88-92 (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).

¹²⁵ 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 DHSC, *supra* note , at ___ (reporting the Court’s first sessions as devoted to admission of counsel and other housekeeping work); Julius Goebel, Jr., *History of the Supreme Court: Antecedents and Beginnings, 1789-1801*, 663 (1969) (observing that it was not until 1796 “that a substantial amount of appellate business was ready for disposition”).

¹²⁶ For an account of the burdens of circuit riding and the Justices’ efforts to secure legislative relief, see Pfander, *Judicial Compensation*, *supra* note , at 31-34.

was not sitting.¹²⁷ 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 issue a writ of certiorari to remove an action brought by Robert Morris from the courts of that state. According to a contemporaneous letter from Morris's attorney, Rutledge was willing to grant relief on the merits but doubted his power to act as a judge out of court.¹²⁸ District judges were free to act for their own account during vacation; indeed, some continued to act as lawyers in state court proceedings until a federal statute forbade the practice.¹²⁹

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.¹³⁰ 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

¹²⁷ 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* JA89, sec. 14 (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 enquiry into the cause of commitment."); *see also* Pfander, *supra* note 27, 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).

¹²⁸ *See* 2 DHSC, at 95, 98 (reproducing a letter from Richard Nichols Harison to Robert Morris, dated September 24, 1790, stating that Judge Rutledge "made no Objection to the Propriety of removing the Suit, or to granting the Injunction so 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 questions arose about that solution. *See* Pfander, *Judicial Compensation*, *supra* note 15, at ___. *See also* David P. Currie, *The Constitution in Congress: The Second Congress, 1791-93*, 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 extra-judicial duties).

¹²⁹ *See* Pfander, *Judicial Compensation*, *supra* note , at 23 n.118 (describing federal statute that forbade federal judges from practicing law).

¹³⁰ U.S. Const., art. III, § 1.

service.¹³¹ 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.¹³² What's more, when Congress learned that a federal judge in South Carolina was collecting fees in admiralty cases, it promptly enacted a fee bill to govern such cases that ruled out the collection of judicial fees and thus curtailed the practice.¹³³ 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 Essay 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 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 Jay about preserving the formal distinction between court-based and judge-based appointments,¹³⁴ 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.¹³⁵

¹³¹ See *supra* text accompanying note 21.

¹³² See Pfander, *Judicial Compensation*, *supra* note 16, at 24 n. 122 (discussing the Compensation and Process Acts of 1789); see also *supra* text accompanying note 22.

¹³³ 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 *id.* at 25-26 n. 133-34.

¹³⁴ 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 (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, Clerks, *supra* note , at 2 (reporting that David Sewall, district judge for the district of Maine, appointed his nephew Henry as clerk).

¹³⁵ See *Ex parte Hennen*, 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

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.¹³⁶

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.¹³⁷ Clearly, Congress opted to place the appointment power in the Court itself, rather than in the Chief.

Some might argue that the provision for appointing marshals complicates the story of early implementation.¹³⁸ 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.”¹³⁹ The provision fails to identify an appointing and removing superior and certainly does not specify a court-based appointment mechanism. But nor 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

disagreement (between the district and circuit judge), the presiding judge would have the appointment. *See* Act of Feb. 28, 1839, 5 Stat. 322, ch. 36, § 2 (declaring that “all the circuit courts of the United States shall have the appointment of their own clerks”).

¹³⁶ *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73, 76 § 7.

¹³⁷ *See* JA 89, *supra* note , at § 1 (declaring that the supreme court shall consist of one chief justice and five associate justices, and specifying the time and place of the court’s sessions).

¹³⁸ *See, e.g.,*

¹³⁹ JA 89, *supra* note , at § 27. Deputy marshals were to be appointed by the marshal, subject to removal from office “by the judge of the district court.” 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.

and consent of the Senate. And so they were.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² In any case, later legislation carried on the pattern of vesting the power to appoint judicial officers in the courts.¹⁴³

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 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 burdening Jay with a solicitation. But, Sedgwick explained, such applications must frequently come "to men [like Jay] who have the power to confer offices."¹⁴⁴ Fisher Ames made the same assumption, writing in November 1789 to recommend an "eminently qualified" candidate "to your favor and patronage."¹⁴⁵ Even his

¹⁴⁰ 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 LAWMEN: UNITED STATES MARSHALS AND THEIR DEPUTIES, 1789-1989* (1989); David S. Turk, *A Brief Primer on the History of the U.S. Marshals Service*, 55 *Fed. Lawy.* 26 (2008).

¹⁴¹ 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").

¹⁴² 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.

¹⁴³ See Act of Feb. 28, 1799, 1 Stat. 626, ch. 19 § 7 (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 (quoting the provision in the Act of Feb. 28, 1839 for the circuit courts to appoint the court's clerk).

¹⁴⁴ See Letter from Sedgwick to Jay, Sept. 23, 1789, reprinted in 1 DHSC, pt. 2, *supra* note , at 665.

¹⁴⁵ See Letter from Ames to Jay, Nov. 10, 1789, reprinted in 1 DHSC, pt. 2, *supra* note , at 676.

fellow Justice, William Cushing, wrote Jay to press the case of an applicant for the clerkship position.¹⁴⁶

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 meantime remain free from engagements, express or implied, to or for any gentleman, however well recommended.¹⁴⁷

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 advisable. . . . 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.¹⁴⁸

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

On these occasions it is best to be very explicit. It 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 Court. As to offices in the Gift of other Departments I think it my Duty not to interfere.¹⁴⁹

¹⁴⁶ See Letter from Cushing to Jay, Nov. 18, 1789, reprinted in 1 DHSC, pt. 2, *supra* note , at 678-79.

¹⁴⁷ Letter from Jay to Ames, Nov. 27, 1789, reprinted in 1 DHSC, pt. 2, *supra* note , at 680.

¹⁴⁸ Letter from Jay to Cushing, Dec. 7, 1789, reprinted in 1 DHSC, pt. 2, *supra* note , at 682.

¹⁴⁹ See Letter from Jay to DuMott, Feb. 27, 1790, reprinted in 1 DHSC, pt. 2, *supra* note , at 696-97.

In each instance, then, 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.”

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,¹⁵⁰ 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.¹⁵¹

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.¹⁵²

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 that would become a part of the official record. 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

¹⁵⁰ 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. The Court would not docket its first case for several sessions and would not issue its first written opinion until 1792.

¹⁵¹ Fine minutes, Supreme Court of the United States, Feb. 2, 1790, reprinted in 1 DHSC, pt. 1, *supra* note , at 175.

¹⁵² *Id.*, Feb. 3, 1790, reprinted in 1 DHSC, pt. 1, *supra* note , at 175.

such from conducting official business.¹⁵³ 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.¹⁵⁴ 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.¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷ 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.

Whatever the crier's significance for the debate over inherent powers, the two appointments reveal a consistent commitment to a court-based appointment

¹⁵³ *Id.*, Feb. 1, 1790, reprinted in 1 DHSC, pt. 1, *supra* note __, at 171.

¹⁵⁴ On the appointment of a temporary clerk, see 1 DHSC, pt. 1, *supra* note __, at 175 n.9 (noting that John McKesson acted as clerk on the first day the Court convened).

¹⁵⁵ See An Act to Regulate Processes in the Courts of the United States, 1 Stat. 93, ch. 21 § 2 (1789) (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.* An Act for Allowing Certain Compensation, Sep. 22, 1789, 1 Stat. 72, ch. 18 (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).

¹⁵⁶ See Act of February 28, 1799, vol. 3, p. 133, § 7, as reprinted in Alfred Conklin, A Treatise on the Organization and Jurisdiction of the Supreme, Circuit and District Courts of the United States, 106 (Gould, Banks & Co. 1842)

¹⁵⁷ 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 the conduct of 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. *Id.* at .

process.¹⁵⁸ 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.¹⁵⁹

Bayard served for nine years, in part by appointing deputy clerks to perform the office in his absence, and then resigned in 1800.¹⁶⁰ Even though Jay had long since retired from his post as Chief Justice, the Court duly appointed Bayard's successor by entering an order to that effect in open court.¹⁶¹ Even today, the power to appoint the Court's clerk, librarian, reporter, and marshal remains in the Court, rather than the Chief Justice.¹⁶²

¹⁵⁸ 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 Jay had advised Cushing that candidates for the office should plan to attend the Court's first session in New York. Tucker, accordingly, was present in the courtroom. 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, Jay ensured that the Court itself played the official role as the appointing agency.

¹⁵⁹ Fine Minutes of the Supreme Court, Aug. 1, 1791, reprinted in 1 DHSC, pt. 1, *supra* note , at 192.

¹⁶⁰ For an account of Bayard's service as clerk and his reliance on deputy clerks, see 1 DHSC, pt. 1, *supra* note , at 162-63.

¹⁶¹ Fine Minutes of the Supreme Court, Aug. 15, 1800, reprinted in 1 DHSC, pt. 1, *supra* note , at 330-31 ("Samuel Bayard having resigned the Office of Clerk of this Court. It is Ordered that Elias B. Caldwell be appointed to the said Place."). 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.

¹⁶² See 28 U.S.C. §§ 671-74 (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." 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. I, 167 (1971) (describing the adoption of the marshal provision).

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 for inclusion in a bill to reorganize the federal judiciary.¹⁶³ Among his suggestions was one that provided: The "Chief Justice with the approval of the Court may appoint a Marshal."¹⁶⁴ When the issue came before the Senate, the proponent of the language urged it as something the "judges" had suggested.¹⁶⁵ Senator Reverdy Johnson countered that he had never heard from the "judges" any complaint about the existing practice of court-based appointment.¹⁶⁶ 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."¹⁶⁷ 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.¹⁶⁸ Messenger also tells the story of *Ex parte*

¹⁶³ 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 Roger Taney's death. With him on the bench were a number of Justices appointed by Lincoln's predecessors (Wayne, from Georgia; Catron, from Tennessee; Nelson, from New York; Grier, from Pennsylvania; and Clifford, from Maine). In addition, Chase had four Republican colleagues who had, like him, been named to the bench by Lincoln (Swayne, Ohio; Miller, Iowa; Davis, Illinois; and Field, California). For an account, see Charles Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88*, pt. I, 1-4 (1971).

¹⁶⁴ See Charles Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88*, pt. I, 167 (1971) (quoting language of section 2 of the Chase draft).

¹⁶⁵ *Id.* at 168-69.

¹⁶⁶ *Id.* at 169.

¹⁶⁷ *Id.* at 167, 171. See also John Niven, *SALMON P. CHASE: A BIOGRAPHY* 410 (1995) (confirming that Chase wanted to secure the position for his close friend and associate Richard Parsons)

¹⁶⁸ See I. Scott Messenger, *Order in the Courts: A History of the Federal Court Clerk's Office* 1, 15 (2002) (noting that Henry Sewall, nephew of district court judge David

Hennen, litigation that grew out of the decision of a newly appointed district judge in Louisiana to replace the incumbent clerk with a friend.¹⁶⁹ 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.¹⁷⁰ 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.¹⁷¹ 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.¹⁷²

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

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 (available at http://www.fjc.gov/history/home.nsf/page/admin_03_01.html). Messinger 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, Democrat Printing Co. 1898).

¹⁶⁹ *See Ex parte Hennen*, 38 U.S. 230. 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* note. 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 1839*, § 2, 5 Stat. 322 (declaring that all "circuit courts 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).

¹⁷⁰ Messinger, *supra* note, at 17 (describing Judge Lawrence's decision to replace Hennen with Winthrop).

¹⁷¹ *See Ex parte Hennen*, 38 U.S. at 258.

¹⁷² *See Ex parte Hennen*, 38 U.S. at 259.

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.¹⁷³ A short time later, Congress broadened the authority of the circuit judge and Chief Justice to allow them to designate adjoining district judges to address the “accumulation or urgency of judicial business in any district.”¹⁷⁴ At the time of the enactment, the Court’s term ran from the first Monday in December, 1851 to May 27, 1852.¹⁷⁵ 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.¹⁷⁶

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.¹⁷⁷

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

¹⁷³ See Act of July 29, 1850, ch. 30, 9 Stat. 442 (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).

¹⁷⁴ See Act of April 2, 1852, ch. 20, 10 Stat. 5.

¹⁷⁵ See Carl B. Swisher, 5 *Oliver Wendell Holmes Devise: History of the Supreme Court of the United States: The Taney Period 1836-1874*, 279, 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).

¹⁷⁶ 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 and 1852, *supra* notes 139-40, served as a “piecemeal attempt” to maintain the circuit riding system while mollifying the overworked Justices. See Swisher, *supra* note 141, at 282-84.

¹⁷⁷ Bankruptcy Act of 1867, ch. 176, § 3, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99 (1878).

interest in controlling the patronage and in part to his desire to maintain good relations with the Republican members of Congress.¹⁷⁸ But 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.¹⁷⁹ 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 which that judge was expected to exercise an uncertain degree of independent judgment.¹⁸⁰

Apparently, it was this straddle that persuaded both 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.¹⁸¹ 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 . . . give them merely a negative on the nomination of the Chief Justice."¹⁸²

¹⁷⁸ See Fairman, *supra* note , at 355-65 (recounting the episode and the consultation with Chase, and criticizing Chase for having failed to resist the imposition of the appointive role).

¹⁷⁹ In a letter to his Republican colleague, Justice Miller, Chase expressed a willingness to perform the duty, onerous as it was, so long as it was "not unconstitutional." Fairman, *supra* note , at 357.

¹⁸⁰ Thus, in correspondence with the district judges, Chase described the action of the district judge as "wholly independent of mine." Fairman, *supra* note , 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.*

¹⁸¹ *Id.* at 361.

¹⁸² *Id.* at 358 (quoting Senator 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* (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").

Others expressed practical concerns; how was the Chief to learn the qualifications and reputation of local office seekers?¹⁸³ Thus, when Chase initially declined to make any nominations, members of Senate unsuccessfully moved to repeal the provision in part on constitutional grounds.

Whatever one's view of the formal distinction between 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. Both of the alternatives -- the Court, with several hold-over Justices from previous administrations,¹⁸⁴ and the district courts -- were conceivably less well disposed to Republican office-seekers.¹⁸⁵ 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.¹⁸⁶ 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.¹⁸⁷

Although the Chief's nominating power did not survive the repeal of the bankruptcy law,¹⁸⁸ the Chief's designation power took hold. Thus, the early

Robert J. Kaczorowsky, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866-1876* at 63 (1985).

¹⁸³ *Id.* at 356 (quoting Senator Hendricks of Indiana).

¹⁸⁴ *See* note *supra* (describing the ten-Justice Court of the day as including five Justices appointed by previous administrations and five appointed by Lincoln).

¹⁸⁵ *See* Fairman, *supra* note , at 355-56 (quoting Senator 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.

¹⁸⁶ 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* Fairman, *supra* note , at 360 (quoting the comment of Senator Conkling). 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* John Niven, *Salmon P. Chase: A Study in Paradox* 428-32.

¹⁸⁷ *See* note *supra*.

¹⁸⁸ 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. For an account, see Charles J.

designation statutes from the 1850s provided a precedent on which Congress could rely in creating the Commerce Court in 1910.¹⁸⁹ 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.¹⁹⁰ 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. Members of Congress criticized this vesting of appointment authority in a single person and argued that the Court should make the appointment instead.¹⁹¹

While Congress later repealed 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 (1942-61), 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 pre-trial 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. As Professor Ruger aptly notes, Congress has apparently come to regard Taft's once-controversial model of Chief designation as "relatively

Tabb, *The History of the Bankruptcy Laws of the United States*, 3 *Am. Bank. Inst. L. Rev.* 5, 25 (1995) (citing Bankruptcy Act of 1898, ch. 541, § 34, 30 Stat. 55).

¹⁸⁹ 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 Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Model of Administrative Law*, 111 *Colum. L. Rev.* 939, 965-67 (2011); George E. Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 *Am. J. Legal Hist.* 238 (1964).

¹⁹⁰ See 36 Stat. at 540.

¹⁹¹ See Ruger, *Appointment Power*, *supra* note 1, at 561 (quoting Senators LaFollette and Gore).

unexceptional.”¹⁹² In the next part, this Essay 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 preside.¹⁹³ 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 Essay does not set out to advance any particular claim about the theory of constitutional interpretation. Rather, drawing on the interpretive modalities of Professor Bobbitt,¹⁹⁴ the Essay relies on textual, structural, and historical evidence, all of which points 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,

¹⁹² *Id.* at 367.

¹⁹³ See Ruger, Appointment Power, *supra* note 1, at __ (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

¹⁹⁴ See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 9-119 (1982) (elaborating six modalities of constitutional argument, including arguments from text, structure, history, precedent, prudence, and ethos); cf. Akhil R. 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 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).

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, 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.¹⁹⁵ 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

¹⁹⁵ 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* (2000) (same).

payola. While 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.¹⁹⁶ (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.¹⁹⁷ 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.¹⁹⁸ Although it operates as a multi-member body, then, 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

¹⁹⁶ See U.S. Const., art. III, § 2.

¹⁹⁷ See generally Pfander, *One Supreme Court*, *supra* note ____.

¹⁹⁸ 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 tribunals were required to remain subordinate to the Session and to comply with its decisions. See Pfander & Birk, *supra* note 25, at 1674-77.

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's role 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 growing 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 such an argument fails 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.¹⁹⁹ 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.²⁰⁰ Today, by contrast, the power to appoint such officers as the Director of the Administrative Office has been statutorily assigned to the Chief Justice alone.²⁰¹ 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.²⁰² 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

¹⁹⁹ See *supra* pp.

²⁰⁰ See *supra* pp.

²⁰¹ See 28 U.S.C. § 601 (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").

²⁰² See *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991).

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.²⁰³ 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. The Chief acts neither as the Court's agent nor pursuant to the Court's oversight in performing the appointment duties assigned to him by statute.²⁰⁴

Apart from providing little support for current appointment practices of the Chief Justice, *Freytag* may itself have been decisively re-shaped by the Court's later decision in *Free Enterprise Fund*.²⁰⁵ In *Free Enterprise*, the Court specifically adopted the view (advanced by Justice Scalia in his separate *Freytag*

²⁰³ 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 members" 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 v. Commissioner of Internal Revenue*, 501 U.S. 868, available at 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 multi-member Tax Court itself as a department head. See *Free Enterprise Fund*, 130 S. Ct. at 3164 (quoting *Freytag*, 501 U.S. at 918 (Scalia, J., concurring)).

²⁰⁴ 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.

²⁰⁵ See *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. ___ (2010).

opinion) that a multi-member commission could be regarded as a department head for purposes of being empowered to appoint inferior officers within the meaning of Article II.²⁰⁶ The Court also maintained that the SEC's Chairman could be regarded as acting for the commission in making appointments.²⁰⁷ 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 multi-member 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.

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 Administrative Office of the US Courts and the Federal Judicial Center play supportive roles in the administration of justice and both lack any direct adjudicative role.²⁰⁸ (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 between his judicial role (acting as a member of the Supreme Court) and his administrative responsibilities.²⁰⁹ Congress has often assigned extra-judicial 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

²⁰⁶ See *Free Enterprise Fund*, 130 S. Ct. at 3164 (quoting *Freytag*, 501 U.S. at 918 (Scalia, J., concurring)).

²⁰⁷ 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 *Free Enterprise*, 130 S. Ct. at 3163 n.13 (upholding the Chairman's appointments on the ground that they were made "subject to the approval of the Commission").

²⁰⁸ See *supra* text accompanying notes 2-3.

²⁰⁹ See Ruger, *Judicial Appointment*, *supra* note 1, at n. 12 (referencing a thorough collection of scholarly work regarding the Chief's administrative duties).

lines of separation between the two roles.²¹⁰ 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 Administrative Office of the U.S. Courts lobbies Congress for new courthouses, new judgeships, and new support personnel,²¹¹ 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,²¹² 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.²¹³ (Here, we should distinguish the executive work of the marshal's office from the work of judicial support and administration.) But even if one were to imagine a 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

²¹⁰ See *supra* text accompanying notes 57-58.

²¹¹ 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*, The Third Branch (Apr. 2011), 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.

²¹² See, e.g., *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1817 (2009) (describing a "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., Report of the Committee with Studies of Administrative Management in the Federal Government 40 (1937).

²¹³ 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 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 note *supra*.

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 appointment clause of Article II, *Free Enterprise Fund v. Public Company Accounting Oversight Board*.²¹⁴ There, the Court invalidated a provision of Sarbanes-Oxley, which had doubly insulated members the newly created Public Accounting Oversight Board from presidential oversight and removal from office.²¹⁵ 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."²¹⁶

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 multi-member body – could qualify as a department head in which the power to appoint inferior officers could be constitutionally vested.²¹⁷ As the *Free Enterprise* Court

²¹⁴ 130 S. Ct. 3138 (2010).

²¹⁵ 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. 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.

²¹⁶ *Id.* at 3155.

²¹⁷ 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 multi-member Tax Court as the head of a department within the meaning of Article II. As the Court observed, there was nothing particularly anomalous about viewing a multi-member 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

explained, “the Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a ‘Departmen[t]’ for the purposes of the Appointments Clause.”²¹⁸ 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’s 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, then, the Chief plainly does not qualify.

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 that purports to place a lower court beyond the oversight and control of its judicial superior,²¹⁹ so too does Article III suggest that officers working for the Third Branch should remain accountable to their judicial superiors. Article II’s provision for appointment 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

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.

²¹⁸ *Id.* at 3163. While the Court did not question the Commission’s dependence on the President, it found that the statute’s insulation of the Commission’s appointees from at-will removal broke the chain of dependence.

²¹⁹ See Pfander, *Federal Supremacy*, *supra* note , at (contending that the Court’s supremacy entails a power, not subject to congressional exceptions, to oversee the work of judicial inferiors); Pfander, *supra* note , at (same).

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.²²⁰

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. But rather than providing for their appointments by the courts they serve, Congress chose to vest the appointment of marshals in the executive branch of government (following the model of the states in which the governor appoints local sheriffs). Marshals today (with the exception of the Supreme Court's own marshal service) remain employees of the executive branch, housed in the Department of Justice, a structure that reportedly creates tensions of its own.²²¹ Whatever its wisdom, the structure of the marshals' service 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.²²² Chief Justice John Jay presided over a Court with only two inferior officers, the crier and the clerk; court-based appointment did not impose a

²²⁰ Some scholars have argued that the Constitution does not necessarily vest the President and Senate with the sole power to nominate and appoint the Chief Justice. These scholars contend that Congress might create term limits for the Chief and provide for a rotation in office among other members of the Court. See Resnik & Dilg, *supra* note 1, at ___. Although this Article does not take a position on the constitutionality of such changes, they could alter the Chief's relationship to the Court and call for a reassessment of the Chief's appointive role.

²²¹ See *supra* text accompanying note

²²² 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., *CFTC v. Schor*, 478 U.S. 833 (1986) (upholding assignment of judicial power to 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 (2008) (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.

significant burden on the Court or interfere with the Court's primary function of deciding cases. Today, the Administrative Office of the US Courts employs more than 32,000 individuals at some 800 locations nationwide.²²³ 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; 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 Administrative Office serves as the chief administrative officer of the federal courts and as the secretary to the Judicial Conference. Court-based selection of the director would represent only a limited distraction for the Justices and would occur only once every several years.²²⁴

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.²²⁵ Whatever of the persuasiveness of Ackerman's account of the New Deal,²²⁶ 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.²²⁷ Further growth occurred in 1939, with the creation of the Administrative Office.²²⁸ But even then, the Director of the Office

²²³

See <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice.aspx> (last visited June 1, 2012).

²²⁴ Since its inception in 1939, eight individuals have served as director of the Administrative Office for an average term of nine years.

²²⁵ See Bruce Ackerman, *We the People: Transformations* (1998) (describing Reconstruction and the New Deal as periods of heightened citizen engagement and unconventional higher law-making); Bruce Ackerman, *The Living Constitution*, 120 *Harv. L. Rev.* 1737 (2007).

²²⁶ For criticisms, see John O. McGinnis & Michael Rappaport, *Our Supermajoritarian Constitution*, 80 *Tex. L. Rev.* 703 (2002); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 *Stan. L. Rev.* 759, 768 (1992) (highlighting the problem of identifying when such a moment has occurred and what content to ascribe to it).

²²⁷ See Ruger, *supra* note , at ___ (describing the growth of the federal judicial bureaucracy and the Chief's appointment power).

²²⁸ See Resnik, *Trial as Error*, *supra* note , at ___ (recounting the legislative impetus behind the creation of the Administrative Office); Peter Fish, *The Politics of Federal Judicial Administration* (1973).

was to be appointed by the Court.²²⁹ It was not until 1990 that Congress altered the appointment mechanism to vest the appointment power in the Chief.²³⁰ 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 authority that occurs when the relevant actors have lost sight of 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 the way Congress and the Court can 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."²³¹ 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.²³² 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

²²⁹ See Pub. L. No. 76-299, 53 Stat. 1223, ch. 15 § 302 (1939) (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").

²³⁰ See Pub. L. No. 101-650, § 307, 104 Stat. 5112 (Dec. 1, 1990) *codified at* 28 U.S.C. § 601.

²³¹ *Free Enterprise Fund*, 130 S. Ct. at 3163 n.13.

²³² On the importance of deliberation and collective decision-making, see Ruger, *supra* note 1.

such engaged in a joint deliberative process before announcing its decision. 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, unpersuaded by 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 that the Chief put forward for a particular post or posts would appeal broadly to the Justices.²³³

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.²³⁴ 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. Fuller was a genial person, but he presided over a Supreme Court that had increasingly drawn the fire of progressives.²³⁵ 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.²³⁶ The identity of the Chief may have also influenced Congress's decision to establish a Special Division of the D.C.

²³³ 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.”).

²³⁴ For an account, see text accompanying notes – *supra*.

²³⁵ 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 Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 Cal. 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, *HISTORY OF THE SUPREME COURT: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910* (1993 Holmes Devise).

²³⁶ See 45 Cong. Rec. 7347, 7348, 7349, 7350 (June 3, 1910) (remarks of Senators Carter, Bailey, and Hale on the subject 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 Senator Gore) (identifying Chief Justice Taney, author of the *Dred Scott* decision, as a Chief who should not be trusted with the appointment power).

Circuit to appoint the independent prosecutors specified in the Ethics in Government Act of 1978.²³⁷ 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 power instead in the hands of such D.C. Circuit judges as David Bazelon and Skelly Wright.²³⁸ 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 would not welcome the additional oversight role, 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.²³⁹ In the Court's view, officers are those who exercise "significant authority" under the laws of the United States, while employees act as

²³⁷ The Ethics in Government Act 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).

²³⁸ See Letter from Abner J. Mikva to James E. Pfander, Jan. 2012, at 1 (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).

²³⁹ 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 Clerks* 42-4, 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 G.W. L. Rev. 1255 (2010) (arguing that Congress should strip the Court of its law clerks and force the Justices to do their own work). But the law clerks propose and the 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 pocket, a fact that tends to support their characterization as employees rather than inferior officers. See Melvin Urofsky, *Louis D. Brandeis and His Clerks*, 49 U. Louis. L. Rev. 163, 165 (2010) (recounting the practice of Horace Gray, the first Justice to hire a law clerk).

“lesser functionaries” pursuant to the oversight of officers.²⁴⁰ While the line can be a bit unclear,²⁴¹ the Court can obviously refrain from playing any role in the appointment of lesser functionaries. Established law pretty clearly establishes the clerk 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.²⁴² 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 Accounting Oversight Board that figured in the *Free Enterprise Fund* decision.²⁴³ Presumably, such precedents suffice to establish that prominent figures in the judicial bureaucracy, such as the Director of the Administrative Office, 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. (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.²⁴⁴) Such designation of existing judges does not obviously entail the appointment of a new inferior (or principal) officer. After all, the judicial office as understood today includes both the adjudication of

²⁴⁰ *Free Enterprise Fund*, 130 S. Ct. at 3160. 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).

²⁴¹ Thus, the Court acknowledged that the status of administrative law judges, officer or employee, remains a matter of dispute. *See id.* at 3160 n.10.

²⁴² *See supra* text accompanying note

²⁴³ *See supra* text accompanying note

²⁴⁴ *See* Burke Shartel, *Federal Judges--Appointment, Supervision, and Removal--Some Possibilities under the Constitution*, 28 Mich. L. Rev. 870 (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).

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 designation of judges might well be viewed as specifying what immediate duties, out of a range of possibilities, the judge should perform.²⁴⁵

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.²⁴⁶ 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 came into play only after the initial five-year term for initial appointees had run its course.²⁴⁷ 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.²⁴⁸

²⁴⁵ 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*, 147 282, 300-01 (1893). It follows *a fortiori* that the designation of particular duties from an established range would not present appointment clause problems.

²⁴⁶ See *supra* text accompanying note 169.

²⁴⁷ See *supra* text accompanying note 173.

²⁴⁸ 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 note *supra*, 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.

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 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.²⁴⁹ A collegial designation process would go far to blunt such criticisms.

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 Administrative Office, then the argument for regarding the appointment as a mere designation seems harder to sustain. If the office entails the exercise of law or policy-making power, then the argument for regarding it as the sort of inferior office that the Court itself must oversee becomes harder to resist.

IV. 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

²⁴⁹ See *supra* text accompanying notes.

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.'²⁵⁰

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 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 played 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."

²⁵⁰ See *Free Enterprise Fund*, 130 S. Ct. 3138, 3156 (2010) (quoting *Chadha v. INS*, 462 U.S. at 944).