

## ARTICLES

### THE JUDICIAL APPOINTMENT POWER OF THE CHIEF JUSTICE

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[J]udges are as honest as other men, and not more so. . . . I doubt if the fathers of the Republican party would have consented to intrust that power [of special court appointment] to Chief Justice Taney, the author of the Dred Scott decision. . . . Now, sir, there is no reason why we should affect such a sentimentality to-day.<sup>1</sup>

A Court, in making such an appointment, exercises not a judicial, but . . . a merely naked power.<sup>2</sup>

#### INTRODUCTION

The constitutional democracy of the United States reposes significant public authority in the hands of unelected and life-tenured federal judges. This fact is well studied by legal academics, as questions regarding the scope, contours, and legitimacy of the judicial power have preoccupied constitutional law discourse for at least a century. As the federal judiciary has grown both in size and assertiveness over the past fifty years, such issues have become more pressing and perhaps more contested, giving rise to an entire field of legal thought addressing what has come to be known as the “countermajoritarian difficulty”—the alleged paradox of unelected officials exercising great power in a democracy.<sup>3</sup>

These debates continue to rage, and will do so into the foreseeable future. Yet within the framework of debate there is generally a

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<sup>1</sup> 45 CONG. REC. 7351 (1910) (statement of Senator Gore in opposition to giving the Chief Justice appointment authority over Commerce Court judges).

<sup>2</sup> *In re Hennen*, 38 U.S. (13 Pet.) 230, 235–36 (1839) (argument of petitioner).

<sup>3</sup> The literature in this area is too voluminous to cite here. For a thoughtful summary and critique of the field, see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

shared agreement about certain structural features of the American judiciary that render judicial review less objectionable both in theory and in practical operation. One of these baseline compromises is explicit in the Constitution's text—the proposition that federal judges, though life-tenured, are appointed to their seats through a political process. Judicial authority is thus rendered more democratic because the discretion to choose judges lies in the political arena. This fundamental constitutional bargain—judges generally insulated from public pressure but chosen with popular input—is a key component of the standard theoretical defense of judicial review against accusations of excessive “countermajoritarianism.” So important is this up front public input that the Constitution does not vest appointment authority in just one elected body, but instead bifurcates the power between the President and the Senate. Leading descriptive accounts of judicial behavior also stress the importance of the selection process, asserting, for instance, that the Supreme Court generally tracks the nation's political center precisely because of the role of the political branches in the appointment process.<sup>4</sup> The selection of judges by two different political branches is also discourse-generating; the public, through its elected representatives, debates the kind of jurists it prefers to sit on particular federal courts.

This basic appointment power strikes a separation of powers balance, placing the discretion to choose judges outside of the judiciary itself. But even within Article III, in the internal architecture and operation of the federal judicial power, there exist norms and practices that likewise serve to soften concerns about the grant of too much power to particular unelected judges. Three of these adjudicative norms in particular are germane to this Article in ways that will be explained at greater length below. First, the decisions that judges make—at least those most relevant to the adjudicative enterprise—are typically justified by opinions giving express reasons for them. Second, Article III decision making is embedded in a collective decisional structure, as individual judges are situated in a corporate enterprise with lines of authority and agreement running vertically (review by a higher court) and horizontally (the norm of majority opinions by multimember courts and appellate panels). Finally, there is a longstanding norm in Article III adjudication against strategically steering particular kinds of cases to particular kinds of judges, and a preference instead for case assignment mechanisms that, if not wholly random, are at least regularized.

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<sup>4</sup> See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) (arguing that the Court rarely contradicts the views of a political majority).

Given these structural features and norms of behavior that typically accompany the exercise of Article III authority, we might view any arrangement Congress makes that divests the political branches of the power to choose the judges who comprise important federal courts with skepticism, particularly where the discretion to choose judges is placed in the hands of a single judicial official operating outside of the normal Article III decisional constraints. Our concerns might be further heightened when the subject matter jurisdiction of the judicial bodies to be filled is narrow and specific, giving the appointing officer the ability to strategically match a particular kind of judge with a particular kind of case. But Congress has made several such transfers of the judicial appointment power to the Chief Justice of the United States in the past few decades. Various federal statutes vest the Chief Justice with the power to choose, from among hundreds of existing Article III judges, the members of special judicial bodies who hear disputes and make decisions in several important policy areas: the fight against international terrorism,<sup>5</sup> immigration and deportation,<sup>6</sup> mass tort litigation,<sup>7</sup> and (until recently) the independent investigation of the conduct of executive branch officials including the President.<sup>8</sup> Although this power to appoint mirrors the President's Article II nomination authority, it is even more absolute because it is not subject to Senate confirmation, or to input from any other official. The power is also frequently recurring. Because the spots on these specialized courts are numerous in the aggregate, and because appointments are time-limited (typically to five or seven years), the current Chief Justice has made over fifty such special court appointments, filling more federal judicial seats than did every individual United States President before Ulysses S. Grant.<sup>9</sup>

This special appointment power is functionally similar to, and historically derivative of, the general judicial designation power that the

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<sup>5</sup> See 50 U.S.C. § 1803(a), (b), (d) (2004) (giving the Chief Justice the power to designate eleven federal district court judges to serve in seven-year terms on the Foreign Intelligence Surveillance Court, which reviews and decides government applications for electronic surveillance, and three circuit judges to sit on an appellate panel).

<sup>6</sup> See 8 U.S.C. § 1532(a) (2004) (giving the Chief Justice the power to designate five federal district court judges to serve in five-year terms on the Alien Terrorist Removal Court, which hears all alien removal proceedings).

<sup>7</sup> See 28 U.S.C. § 1407(d) (2004) (giving the Chief Justice the power to designate five to seven district or circuit court judges to serve on the Judicial Panel on Multidistrict Litigation).

<sup>8</sup> See 28 U.S.C. § 49(a), (d) (1994) (establishing a special "division" of the District of Columbia Circuit, comprised of three judges designated by the Chief Justice "for the purpose of appointing independent counsels."); see also Independent Counsel Reform Act of 2003, S. 1712, 108th Cong. § 2 (2003) (amending the statute to require the Chief Justice to appoint these judges "by a lottery").

<sup>9</sup> See Federal Judicial Center, *Judges of the United States Courts: Federal Judges Biographical Database*, at <http://www.fjc.gov/newweb/jnetweb.nsf/hisj> (last visited Oct. 20, 2004).

Chief Justice has exercised in various degrees at least since the beginning of the twentieth century, and which is employed often today when one federal judge temporarily sits on another court. But there is an important conceptual difference between the two powers. Although the act in both cases is the same (a temporary appointment of an existing judge to a different court), the substantive choice antecedent to the act is fundamentally different when the transferee court is specialized in nature—where, in other words, the Chief Justice knows precisely the type of matter the designated judge will rule upon. Most courts in the federal system have generalized jurisdiction and systematic case assignment mechanisms, meaning that the basic reassignment authority poses only indirect danger of strategic impact on case outcomes. This is not so with the special court appointment power studied here, which vests the Chief Justice with the unilateral discretion to select certain kinds of judges to hear certain kinds of matters, thereby potentially affecting results.

Although typically made with scant public attention—perhaps an additional problematic feature of the power—the Chief Justice’s appointment choices have occasionally been noticed and criticized in the aftermath of high profile actions by particular special courts. Many observers in the late 1990s criticized Chief Justice William Rehnquist’s selection of Judge David Sentelle, a former Republican Party official, to head the Special Division of the D.C. Circuit that appointed Kenneth Starr as Independent Counsel to investigate President Clinton.<sup>10</sup> More recently, some media commentators noted Chief Justice Rehnquist’s choice of three Republican-appointed judges to staff the Foreign Intelligence Surveillance Act (“FISA”) Court of Review in the wake of that body’s ruling in favor of the government, reversing the lower FISA Court’s denial of surveillance authority.<sup>11</sup>

This Article examines this special appointment power of the Chief Justice along three different dimensions: historical, theoretical, and empirical. Part I addresses a basic historical question—how did this

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<sup>10</sup> See, e.g., Steve Daley, *Choice of Starr Has Partisan Smell*, CHI. TRIB., Aug. 14, 1994, at 4 (debating the selection of Kenneth Starr due to his Republican affiliation); Michael Kramer, *Fade Away, Starr*, TIME, Aug. 29, 1994, at 37 (urging Starr to quit his new position as Whitewater Independent Counsel); see also Erwin Chemerinsky, *Learning the Wrong Lessons from History: Why There Must Be an Independent Counsel Law*, 5 WIDENER L. SYMP. J. 1, 10 (2000) (describing the Starr/Sentelle appointments and noting the “great danger” that “a conservative Chief Justice . . . is perceived as likely to select conservative judges.”).

<sup>11</sup> See *In re Sealed Case*, 310 F.3d 717, 735 (Foreign Int. Surv. Ct. Rev. 2002) (holding that surveillance of an agent does not violate the Fourth Amendment as long as a “significant purpose” of that surveillance is foreign intelligence); see, e.g., Karen Branch-Brioso, *Court Approves New Wiretap Powers*, ST. LOUIS POST-DISPATCH, Nov. 19, 2002, at A1 (noting a decision by “three federal judges appointed by President Ronald Reagan and tapped to the review court by Chief Justice William Rehnquist.”).

power develop in the American constitutional regime, both as an actual statutory device employed by Congress and as a conceptual norm with which American politicians and judges are generally comfortable? The power is not an original or inherent feature of the Chief Justice's office, and Part I details its early roots and significant expansion in the early twentieth century. Part II is conceptual, analyzing both the doctrinal constitutionality of the practice and its deeper theoretical implications. I conclude that although not doctrinally "unconstitutional," in the sense that a court would, or should, invalidate it, the device is troubling for several reasons, which suggest that Congress should use it sparingly, and in different forms than it currently does. Part III assesses the actual appointment choices of Chief Justices Burger and Rehnquist (the two who have had the most meaningful special court appointment authority), and a related Appendix lists the appointments (over 100 in total) made by these two men.

These three separate strands of analysis are, of course, related. The historical discussion in Part I informs contemporary consideration of the constitutional doctrine and theory in two ways. First, the fact that courts and judges have long exercised some kind of appointment power, and for the past century the Chief Justice has exercised significant executive authority over the federal judiciary, supports the basic constitutionality of the practice; courts have so held on the few occasions where they squarely addressed the issue. Most of the specialized courts studied here have survived constitutional attack, and one can put together a reasonable case grounded in history, text, and precedent in support of the Chief Justice's appointment authority to fill special court judicial seats that would satisfy all but the most rigid standard of separation of powers formalism. This Article does not take issue with this doctrinal conclusion, and does not revisit the separation of powers concerns raised by the specialized tribunals themselves. Nor does the Article undertake a broad exploration of the full sweep of the judiciary's (and the Chief Justice's) multifaceted administrative powers, of the sort found in works by Peter Fish, Judith Resnik, Stephen Burbank, and others.<sup>12</sup> Rather, it is a more focused

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<sup>12</sup> See, e.g., Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1050-1158 (1982) (exploring history of, and experience with, federal court rulemaking authority); Peter Graham Fish, *Crises, Politics and Federal Judicial Reform: The Administrative Office Act of 1939*, 32 J. POL. 599, 621 (1970) (describing the growth of the Chief Justice's office, including the view that the Chief Justice could be held "as the responsible officer" for "administrative problems in faraway courts"); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 232-70 (2003) [hereinafter Resnik, *Constricting Remedies*] (discussing the Rehnquist Court's refusal to expand the judiciary's equitable powers); Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269, 283-93 (2000) [hereinafter Resnik, *The Programmatic Judiciary*] (analyzing the policy impact and effects of judicial preoccupation with offering advice); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV.

inquiry into several dimensions of one anomalous feature of the Chief Justice's power.

As noted above, there is no claim here that the Supreme Court, or any other court, should rule this type of appointment power unconstitutional. To say the practice is "constitutional" in this doctrinal sense, however, does not resolve the theoretical difficulties it poses. Not every choice that Congress can make—within the parameters of the judicially-enforceable Constitution—is one that it should make, and some structural innovations put more strain on the Constitution's baseline assumptions than others. The remainder of Part II explores the problematic features of Congress's delegation of the appointment power to the Chief Justice from the perspective of constitutional theory and history. Most of these objections derive from the fact that this kind of unconstrained selection power, coupled with the specialized subject matter of the courts at issue, confers on the Chief Justice the ability, whether exercised or not, to directly match particular judges with particular types of cases and thereby influence outcomes. Moreover, unlike most power exercised by federal judges, it is unilateral, without any check from any collective body of other judges.

In light of these concerns, I argue that Congress should employ this appointment device with caution, and I propose some preferable alternatives—both for Congress in giving and the Chief Justice in exercising the power. Historical practice and case law make clear that Congress has several options to choose from in selecting a process for filling up the judicial vacancies on a new specialized court. It often mirrors the Article II nomination and consent procedure even for non-life-tenured judges (for example, the Tax Court and Court of Veterans Appeals), and when Congress involves the judiciary in staffing a new specialist body with existing Article III judges, there is important precedent in the Sentencing Guidelines Commission<sup>15</sup> for giving appointment authority to a collective group of judges (such as

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924 (2000) (discussing the effects of a changing judiciary throughout the twentieth century). See also PETER GRAHAM FISH, *THE OFFICE OF THE CHIEF JUSTICE* (1984) (addressing generally the various administrative powers of the Chief Justice).

<sup>15</sup> The United States Sentencing Commission has up to three members who are sitting Article III judges chosen from a list submitted to the President by the Judicial Conference of the United States. 28 U.S.C. § 991(a) (2004). In *Mistretta v. United States*, 488 U.S. 361 (1989), the Court upheld this appointment arrangement and other aspects of the Commission's structure and authority against a constitutional challenge. Congress recently amended the statute (via the "Feeney Amendment") to limit the number of judges who could serve on the commission at any one time to three. Pub. L. No. 108-21, § 401(n)(1), 117 Stat. 650, 675-76 (2003). None of the important constitutional questions about the Sentencing Guidelines raised by *Blakely v. Washington*, 124 S. Ct. 2531, 2538 n.9 (2004) (declining to examine the constitutionality of the federal Sentencing Guidelines), and its progeny relate to this basic judicial appointment mechanism.

the entire Judicial Conference) rather than to the Chief Justice alone. Such alternatives, in addition to others discussed, would operate to constrain (or remove altogether) the current broad discretion that the Chief Justice holds.

The last section of this Article is a preliminary effort to collect, record, and assess the complete special court appointment record of the two Chief Justices who have exercised the authority most frequently, Warren Burger and William Rehnquist. The Appendix to this Article lists the special court appointments that these two Chief Justices have made, and Part III is an initial exploration of the manner in which Chief Justices have exercised this power. The appointment record suggests that the special designation power has been at least occasionally exercised in strategic terms to advance the particular substantive preferences of the Chief Justice.

## I. THE RISE OF THE CHIEF JUSTICE'S EXECUTIVE AUTHORITY

Judges should be independent in their judgments, but they should be subject to some executive direction as to the use of their services, and somebody should be made responsible for the whole business of the United States.<sup>14</sup>

More than any other major constitutional office, the powers and stature of the modern Chief Justice are a creation of historical development rather than textual provision or original constitutional design.<sup>15</sup> Article III of the Constitution does not mention the Chief Justice, and the office appears only once in the entire document, in Article I's requirement that the Chief Justice should preside in the Senate during an impeachment trial of the President.<sup>16</sup> Although the Framers debated questions of the proper role of the judiciary and the

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<sup>14</sup> William H. Taft, *Three Needed Steps of Progress*, 8 A.B.A.J. 34, 35 (1922).

<sup>15</sup> For the most comprehensive treatment of this development through two centuries of American history, see ROBERT J. STEAMER, *CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT* (1986). See also *id.* at 4–9 (noting the historical development of the office). This comparative claim does not ignore the fact that the President's power has grown and changed dramatically through history, in ways that the Framers might not have foreseen. Article II and its original understanding, however, provided for at least the basic structure of meaningful executive authority, whereas Article III is totally silent as to the Chief Justice.

<sup>16</sup> See U.S. CONST. art. I, § 3, cl. 6 ("When the President of the United States is tried, the Chief Justice shall preside . . ."). As I discuss below, it is instructive that the single mention of the Chief Justice in the original Constitution is in the role of a neutral arbiter of disputes between the other two branches. Several of the twentieth-century efforts to vest appointment power with the Chief Justice or the Supreme Court were motivated in significant part by congressional desire to provide a reasonably neutral check on executive authority. See *infra* Part I.B (discussing the failed effort to vest appointment of the Comptroller General with the Supreme Court and the successful transfer of appointment power over independent counsels and the Foreign Intelligence Surveillance Act tribunals).

selection of Justices for the Supreme Court, they rarely mentioned the Chief Justiceship or its specific functions. Nor did John Jay, the original occupant of the post, seem to think it a particularly compelling occupation; he performed part of his work from abroad and resigned the office to serve as governor of New York in 1794.<sup>17</sup> By the twentieth century, such a career choice became so unthinkable that Felix Frankfurter fairly stated that "only a madman, a certified madman" would swap offices as Jay did.<sup>18</sup>

While the office has evolved over two centuries and has involved many individuals and influences, it is possible to identify two men who held the post who are most responsible for the Chief Justice's modern power and status. The first of these, of course, is John Marshall; the other is William Howard Taft. Marshall's influence is well-known and foundational; through a series of judicial decisions over the course of several decades, he played a pivotal role in shaping the contours of judicial power in America. Under his leadership, the Supreme Court articulated its authority to review both the actions of the coordinate branches of the federal government<sup>19</sup> and the rulings of state high courts.<sup>20</sup> The Court further helped to solidify the power of the new national government.<sup>21</sup> In no small way Marshall essentially defined the institution of American courts, and he contributed partially to the making of the federal government itself. As perceived in almost mythic form by later generations of Americans, his influence has persisted, and perhaps even grown, after his death. New assertions of judicial authority are regularly justified by invoking the man and his most famous opinions.<sup>22</sup>

Marshall's contribution to the American judiciary was so sweeping that it is much bigger than the particular office he held. By promoting the idea of robust judicial review, Marshall increased the power of all American judges and courts. Furthermore, by solidifying the Su-

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<sup>17</sup> CONGRESSIONAL QUARTERLY, *THE SUPREME COURT AT WORK* 128 (1st ed. 1990). Jay declined a second nomination to the Chief Justiceship in 1800, in part because he felt the Court lacked "the energy, weight, and dignity which are essential to its affording due support to the national government." *Id.*

<sup>18</sup> Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 884 (1953).

<sup>19</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

<sup>20</sup> See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (articulating the Court's power to review state court decisions arising under federal law); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351 (1816) (holding that the Court has absolute appellate power over state tribunals under the Constitution).

<sup>21</sup> See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) (articulating the supremacy of the federal government and the Constitution).

<sup>22</sup> See, e.g., ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 103 (1989) (describing *Marbury* as having "taken on a symbolic significance which it did not possess at the hour of its decision.").



preme Court as the preeminent interpretive authority on matters of federal law, Marshall undoubtedly raised the stature of the institution and its Justices. But most of this institutional accretion did not lead to an increase in the authority of the Chief Justiceship itself as opposed to the Court as an institution. Marshall's actions as Chief Justice undoubtedly increased the general stature of the post, both contemporaneously and for later occupants, however the magisterial leadership that Marshall exercised was only a potentiality of the office rather than an inherent attribute. The Chief Justice's actual ability to lead is dependent on he or she possessing at least some of what Marshall had: unusual persuasive authority, longevity of service, and, perhaps most importantly, enough like-minded colleagues.

Even today, the Chief Justice's unique influence *within* the Supreme Court's core adjudicative enterprise is limited, and both case outcomes in recent terms and prevailing academic attitudes toward Supreme Court decision making in law and political science confirm this proposition. The standard attitudinal model that has predominated until recently among empirical political scientists who study the Court ascribes no special weight to the Chief Justice's vote, instead treating it as one of nine equal covariates for modeling purposes.<sup>23</sup> Similarly, most law professors who comment on the Court recognize the crucial outcome-determinative status of the views of the Justices at the ideological center of the Court's voting array, even going so far as to occasionally label the current Supreme Court the "Kennedy Court," or, more commonly, the "O'Connor Court," in lieu of the conventional "Rehnquist Court."<sup>24</sup> This basic proposition was borne out in several recent prominent cases, such as *Lawrence v. Texas*<sup>25</sup> and *Grutter v. Bollinger*,<sup>26</sup> in which Chief Justice Rehnquist dissented.

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<sup>23</sup> See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 242-55 (1993) (treating the Chief Justice's vote as equivalent to those of other justices for modeling purposes).

<sup>24</sup> See, e.g., Erwin Chemerinsky, *October Term 2002: Value Choices by the Justices, Not Theory, Determine Constitutional Law*, 6 GREEN BAG 2D 367, 377 ("For better or worse, this really is the O'Connor Court."). A similar dynamic takes place in much academic commentary on the "Warren Court," where, despite the name, many scholars ascribe primary jurisprudential leadership to William Brennan, not Earl Warren. See, e.g., MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 8 (1998) (describing Justice Brennan as "the most important intellectual influence on the Warren Court."). *But see* L.A. SCOT POWE, *THE WARREN COURT AND AMERICAN POLITICS* (2000) 499-500 (rebutting the claim that Justice Brennan was the intellectual leader of the Warren Court).

<sup>25</sup> 539 U.S. 558 (2003) (finding a Texas statute criminalizing same-sex sodomy to be in violation of the Due Process Clause).

<sup>26</sup> 539 U.S. 306 (2003) (upholding the use of race-based admissions criteria at the University of Michigan Law School).

Linda Greenhouse described the Supreme Court's most recent Term as "the one when Chief Justice William Rehnquist lost his court."<sup>27</sup>

The Chief Justice possesses several institutional powers that can affect Court decision making in important ways. The Chief Justice controls opinion assignment (but only if in the majority),<sup>28</sup> and has some authority over the Court's docket (although the other Justices can override this decision).<sup>29</sup> Some political science studies have suggested that the Chief Justice is able to exercise some additional authority through agenda control, and generalized persuasive authority, but these accounts recognize that such internal strategic leadership—in an institution with eight other confident decision makers with life tenure—only has a limited effect on the Court's outcomes.

For all of these reasons, the Supreme Court's adjudicative function does not capture exclusively, or even primarily, the full extent of the modern Chief Justice's power. Much of the Chief's unique authority is administrative and bureaucratic, and includes the particular appointment power discussed here as well as other important roles, such as presiding over the Federal Judicial Conference.<sup>30</sup> Understanding the rise of this power requires some historical attention to the early decades of the twentieth century, when William Howard Taft and other like-minded judicial reformers worked a conceptual and administrative transformation of the Chief's role in the American judiciary. A key component of this effort was a significant enhancement in the Chief Justice's discretionary authority to transfer existing federal judges from one court to another within the federal system. This power is a generalized precursor to a power which, later in the twentieth century, Congress increasingly made even more specific, enabling the Chief Justice to appoint existing federal judges to particular specialized courts.

The Taft-era reforms laid the foundation for the modern special appointment authority of the Chief Justice in two ways. First, a central feature of the Taftian reform program entailed the promulgation of two related ideas about the operation of the federal judiciary: the presumption of *interchangeability* of federal judges (e.g., that a given

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<sup>27</sup> Linda Greenhouse, *The Year Rehnquist May Have Lost His Court*, N.Y. TIMES, July 5, 2004, at A1 (noting the "invisibility of Chief Justice Rehnquist" in some of the Term's leading cases).

<sup>28</sup> WALTER F. MURPHY ET AL., COURTS, JUDGES & POLITICS 618 (2002); Forrest Maltzman & Paul J. Wahlbeck, *May It Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 AM. J. POL. SCI. 421 (1996) (discussing the Chief Justice's authority to assign majority opinions); see also Warren Richey, *The Quiet Ascent of Justice Stevens*, CHRISTIAN SCI. MONITOR, July 9, 2004 (describing Justice Stevens's crucial role in opinion assignment in several cases where the Chief Justice was in dissent), available at <http://www.csmonitor.com/2004/0709/p01s03-usju.html>.

<sup>29</sup> See MURPHY, *supra* note 28, at 610 (describing the Chief Justice's "special role" in the selection process).

<sup>30</sup> For a discussion on the Chief Justice's potential to affect policy in this presiding role, see Resnik, *The Pragmatic Judiciary*, *supra* note 12, at 284–88.

judge could temporarily fill a geographically distinct judicial seat), and the *executive authority* of the Chief Justice in determining and executing such judicial transfers. Both of these conceptions were critical to Taft's reform efforts, and both are historical and theoretical preconditions for the special court appointment authority that the Chief Justice exercises today. Neither idea went uncontested at the time, and the story of the early twentieth-century opposition to this program sheds light on the troublesome features of the modern judicial appointment power. Part I.A tells the story of these reforms with an emphasis on the rise of these twin basic conceptions—the allocative authority of the Chief Justice over a federal judiciary that was at least partially interchangeable.

Part I.B more specifically examines the rise of the special judicial appointment power that is the subject of this Article, which also had roots in the early twentieth century. During Taft's tenure as President, Congress for the first time considered a statute (establishing the Commerce Court) which vested the Chief Justice with the power to select judges to sit on a specialized Article III tribunal. This initial effort generated significant opposition. Such was not the case later in the century, when Congress shed its reluctance to confer such authority on the Chief Justice, and did so with increasing frequency after World War II. This feature of the historical story is less about judicial power than about congressional path dependence, as what was once a controversial delegation of the appointment power became an accepted statutory device.

This history is an interesting story in itself, but it is also relevant in two somewhat countervailing ways to the constitutional discussion that follows later in the Article. First, every type of power conferred on the Chief Justice was similar in kind to something that had gone before, and no individual statute gravely altered the prior constitutional regime. Once the Chief Justice had extensive authority to transfer judges from one generalist federal court to another, it was a small conceptual leap (although one with important theoretical differences, as I explore below) to confer similar appointment authority to place existing federal judges on specialized judicial bodies. It is thus difficult to make a strong claim that it is "unconstitutional," at least in the modern sense, that a federal court should tell Congress that it cannot so allocate the appointment function.

Second, although the gradual accretion of the Chief's appointment authority makes it difficult to assail its doctrinal constitutionality, the historical story also demonstrates a different point: there is nothing inherent or original in the vast appointment and transfer authority that the current Chief Justice possesses. It represents a choice by twentieth-century Congress—a permissible choice, but not the only one available for staffing specialized bodies that Congress creates in the future. Where difficulties exist based on political theory

or empirical evidence, Congress should reconsider the use of this device. Later sections of this Article discuss these problems and several alternatives.

*A. Taft and the "Executive Principle" Applied to the Judiciary*

As noted above, John Marshall's primary historical influence was connected with the Supreme Court's adjudicative role—the authority with which the Court decides cases and the reception of those holdings by other governmental actors and by the American public. Befitting this central jurisprudential role, the modern Supreme Court building memorialized Marshall as a brooding seated figure whose distant neutral gaze embodies the mythic conception of "the Great Chief Justice"<sup>31</sup> who discerns and declares the enduring legal principles to guide the nation's constitutional development. A different kind of monument just as aptly symbolizes William Howard Taft's significant contribution to the scope of the modern Chief Justice's power, although few Court visitors ever see this monument, and it bears the name of another Justice. The Thurgood Marshall Federal Judicial Building, tucked next to Washington D.C.'s Union Station, houses a few judges and most of the hundreds of administrators, clerks, and researchers who staff the Federal Judicial Conference and the Administrative Office of the United States Courts. These judicial agencies are manifestations of Taft's vision of a bureaucratized, efficient judiciary—with, significantly, the Chief Justice as its executive head.

Taft, the only individual to hold the offices of both President and Chief Justice, was as energetic and visionary a court reformer as has ever occupied either post. He recognized and repeatedly acknowledged this focus of his intellectual energy, stating at one point: "I love judges and I love courts. They are my ideals on earth of what we shall meet afterward in Heaven under a just God."<sup>32</sup> Others noticed as well. Felix Frankfurter, no ally of Taft in terms of substantive jurisprudence, nonetheless thought Taft was a great "law reformer," deserving "a place in history . . . next to Oliver Ellsworth, who originally devised the judicial system."<sup>33</sup> Louis Brandeis concurred, remarking that, "it's astonishing [that Taft] should have been such a horribly

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<sup>31</sup> For an example of this commonly used phrase, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 1 (1962).

<sup>32</sup> Daniel S. McHargue, *President Taft's Appointments to the Supreme Court*, 12 J. POL. 478, 478 (1950).

<sup>33</sup> Robert Post, *Taft and the Administration of Justice*, 2 GREEN BAG 2D 311, 312 (1999).

bad President, for he has considerable executive ability. The fact, probably, is that he cared about law all the time [and] nothing else.”<sup>34</sup>

Taft’s conception of the federal judiciary as a hierarchical organization, and of the Chief Justice as its head, was fundamentally different from the theory and practice that prevailed in the nineteenth century. Throughout the nineteenth century and into the twentieth, the various courts were generally independent, not just from the other branches of government, but also from each other.<sup>35</sup> To be sure, lower federal judges operated in a hierarchical system of review when hearing cases, and had to conform their holdings to existing precedent or risk being overruled by a higher court.<sup>36</sup> But in virtually all of their administrative functions, each court operated as a separate entity, closely linked to its particular geographic district. The mobility of judges that Taft envisioned, which underlies the Chief Justice’s special court appointment power today, “ran counter to all traditional conceptions of American judicial organization.”<sup>37</sup> The first Judiciary Act of 1789 made no provision for the temporary transfer of one district judge to another district, and as such, the inability of a judge to act meant court adjournment.<sup>38</sup> Each district court hired its own clerk and retained exclusive power of removal.<sup>39</sup> The clerks themselves received no salaries from Washington, but instead paid themselves out of litigants’ fees.<sup>40</sup> This localism helped facilitate the gradual public acceptance of the federal judicial presence in the

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<sup>34</sup> Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 313 (quoting a statement made by Brandeis to Felix Frankfurter on June 28, 1923).

<sup>35</sup> See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 217 (1928) (stating that until World War I, “neither Congress nor the profession thought much about those elements of organization and administration called for by all modern judicial systems.”); see also ALPHEUS THOMAS MASON, *WILLIAM HOWARD TAFT: CHIEF JUSTICE* 100 (1964) (“Judges must be kept independent not only of the President and Congress but also of each other.”). See generally FRANKFURTER & LANDIS, *supra*, (describing the history of the Supreme Court from the period prior to the Civil War through the Judiciary Act of 1925).

<sup>36</sup> See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315 (1999) (examining the operation of the independent judicial branch); Charles Gardner Geyh, *Customary Independence*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 160 (Stephen B. Burbank & Barry Friedman eds., 2002) (discussing the incompatibility of judicial independence and accountability).

<sup>37</sup> FRANKFURTER & LANDIS, *supra* note 35, at 219.

<sup>38</sup> See ch. 20, § 6, 1 Stat. 73, 76 (1789) (“[A] district court, in case of the inability of the judge to attend at the commencement of a session, may . . . be adjourned . . .”). Not until 1850 did anything like the modern transfer authority arise, and even then it permitted transfer of district judges only within the same circuit or the next contiguous circuit. FRANKFURTER & LANDIS, *supra* note 35, at 219 n.3.

<sup>39</sup> Federal Judicial Center, *Judicial Administration and Organization: Court Officers and Staff: Clerks of Court*, at <http://www.fjc.gov/newweb/jnetweb.nsf/hisa> (last visited Oct. 1, 2004).

<sup>40</sup> *Id.*

states, as federal district judges were free to modify their procedures in ways more consistent with local norms.<sup>41</sup> However, this decentralization came at a price; vast discrepancies existed in case backlogs among federal courts around the country, and there was no ready mechanism to permit significant numbers of additional judges to be assigned to the recalcitrant districts.<sup>42</sup>

As the twentieth century began, there was much criticism of American courts, most notably manifested in the sweeping positivist critique of the tenets of classical Langdellian jurisprudence and the institution of strong judicial review.<sup>43</sup> Taft shared at least part of this reform vision; he had no patience for classical categorical distinctions or for complex procedural niceties. He urged a merging of the traditional forms of law and equity and a new ability for courts themselves to draft simplified procedural rules.<sup>44</sup> But Taft parted fundamentally with the progressive reformers on the question of the proper role of judicial authority—he saw robust judicial review as a desirable conservative counterweight to progressive legislative excess.<sup>45</sup>

Accordingly, Taft did not seek to minimize or limit judicial power, but rather endeavored to save the courts from themselves and from the more populist views of other reformers by strengthening the judiciary. Although Taft acknowledged that the “judges of our courts have their faults,” he felt that the problem was nothing inherent in the institution of judicial review, but rather “with the legislative power which does not provide them with adequate machinery for the prompt and satisfactory dispatch of business.”<sup>46</sup> Rather than discouraging federal judges from declaring law authoritatively, as some contemporaneous reformers sought to do, Taft instead sought to give

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<sup>41</sup> See ch. 20, § 17, 1 Stat. at 83 (“[A]ll the said courts of the United States shall have power . . . to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.”); see, e.g., MARY K. BONSTEEL TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789–1816*, at 179–83 (1978) (describing the Kentucky federal district court’s judicial innovations to better comport with local norms and attitudes).

<sup>42</sup> See generally ch. 20, 1 Stat. 73.

<sup>43</sup> For a comprehensive overview of populism and attitudes toward judicial power, see WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND THE LABOR UNIONS CONFRONT THE COURTS, 1890–1937*, at 49–69 (1994).

<sup>44</sup> William H. Taft, *The Attacks on the Courts and Legal Procedure*, KY. L.J., Nov. 1916, at 3, 14–16 (1916) [hereinafter Taft, *Attacks on the Courts*].

<sup>45</sup> See, e.g., *id.* at 6 (declaring “judge-made law” to be “a part of jurisprudence that can not be dispensed with in any civilized government.”).

<sup>46</sup> William H. Taft, *Adequate Machinery for Judicial Business*, 7 A.B.A. J. 453, 453 (1921) [hereinafter Taft, *Adequate Machinery*]; see also Post, *supra* note 33, at 312 (noting that Taft was “in the paradoxical position of urging progressive reform of the judiciary so as to preempt what he candidly term[ed] . . . the growing progressive ‘disposition to try experiments.’”).

them the administrative tools to do this more forcefully by introducing increased efficiency and organization to the federal judiciary.<sup>47</sup>

Taft's program of judicial reform had many elements, but central to it were two intersecting conceptual innovations that were important precursors to the modern special appointment power of the Chief Justice. Both were controversial at the time. They were: (1) the notion that federal judges were not geographically fixed, but instead were interchangeable, and could be moved from one court to another without material impact on case outcomes; and (2) the idea that the Chief Justice was the proper and exclusive repository to control such judicial resource allocation.<sup>48</sup> Taft pushed for these reforms in a series of speeches spanning the last two decades of his public career.<sup>49</sup> He proposed

the adjustment of our judicial force to the disposition of the increasing business by introducing into the administration of justice the ordinary business principles in successful executive work, of a head charged with the responsibility of the use of the judicial force at places and under conditions where the judicial force is needed.<sup>50</sup>

The Chief Justice, in Taft's view, was the natural executive head of the judiciary, in charge of making "assignments . . . of the judicial force to various districts and circuits, with a view to the most economic use of each judge for the disposition of the greatest amount of business by him."<sup>51</sup> Elsewhere, Taft campaigned for "teamwork" and the implementation of the "executive principle" in federal judicial administration.<sup>52</sup> Taft, like Landis, Frankfurter and other judicial reformers of the day, admired the "elasticity" of the revamped British system, the success of which he thought "rest[ed] on the executive control vested in a council of judges to direct business and economize judicial force."<sup>53</sup> He also based some of his reforms on new state and local judicial institutions like the Chicago Municipal Court, whose chief judge acted administratively to allocate judges to cases as docket demands arose.<sup>54</sup>

The most exemplary manifestation of this new conception of judicial branch "elasticity"—too extreme for the Congress of the time (and probably for today's Congress as well)—was a 1922 bill that

<sup>47</sup> See generally Taft, *Attacks on the Courts*, *supra* note 44.

<sup>48</sup> *Id.* at 16–17.

<sup>49</sup> See Taft, *Adequate Machinery*, *supra* note 46, at 453 (advocating a pending bill which would provide for additional district judges and for the introduction of the executive principle of assignment to places most needed); Taft, *Attacks on the Courts*, *supra* note 44, at 3 (recommending judicial reform during a commencement address at Cincinnati Law School).

<sup>50</sup> Taft, *Attacks on the Courts*, *supra* note 44, at 16.

<sup>51</sup> *Id.*

<sup>52</sup> MASON, *supra* note 35, at 97.

<sup>53</sup> Taft, *Attacks on the Courts*, *supra* note 44, at 13.

<sup>54</sup> *Id.* at 17.

would have established a set of at-large federal district judges, with no home district, who could be sent from one place to another at the direction of the Chief Justice. This “flying squadron”<sup>55</sup> of judges would have been subject to temporary assignment anywhere in the country that the Chief Justice chose to send them. Taft concisely summarized his vision for the bill to the Senate Judiciary Committee in 1921: “The principle of this bill is the executive principle of having some head to apply the judicial force at the strategic points where the arrears have so increased that it needs a mass of judges to get rid of them.”<sup>56</sup> Not surprisingly, the plan encountered heated opposition in Congress because of the proposal’s sharp break from the traditional conception of geographic fixity. Much of the criticism centered around the significant new authority the Chief Justice would enjoy. Senator Shields declared that the plan conjured up unsavory images of “the Chief Justice as Commander in Chief,”<sup>57</sup> and criticized Taft’s reliance on contemporary English judicial organization, stating: “[T]he Lord High Chancellor of England, is both a judicial and political officer. . . . Are we not somewhat copying after the system in England in creating a political as well as a judicial head of the Federal Judiciary?”<sup>58</sup> Shields concluded with a ringing defense of the traditional intra-branch independence of the lower federal court judges, contending that the Chief Justice, who already held “as much power as any officer in our government . . . has no more to do with the judges of the district courts of the United States . . . than does King George.”<sup>59</sup> Senator Overman added his opposition along similar grounds, voicing concern about “eighteen roving judges to be sent around at the will of the Chief Justice . . . [I]t is fundamentally wrong.”<sup>60</sup>

Senator Shields raised another concern relevant to the modern special appointment power;<sup>61</sup> specifically, that proponents of this power must justify it, at least implicitly, by treating federal judges as essentially interchangeable parts—similarly competent judges applying uniform federal laws in a reasonably mechanical and neutral fashion. An alternative understanding—that federal judges are *not* fungible, that they have different ideologies that become manifest in decisions—alters and expands the character of discretion that the Chief exercises when making reassignment allocations. Today, the fixed, and largely random, case assignment mechanisms of the fed-

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<sup>55</sup> 62 CONG. REC. 4858 (1922) (statement of Sen. Shields).

<sup>56</sup> MASON, *supra* note 35, at 99.

<sup>57</sup> 62 CONG. REC. 4855.

<sup>58</sup> *Id.* at 4853.

<sup>59</sup> *Id.* at 4858.

<sup>60</sup> *Id.* at 5098 (statement of Sen. Overman).

<sup>61</sup> See *infra* Part I.B.



eral circuit and district courts ameliorate much of the theoretical concerns generated by the exercise of this discretion, but no such veil of procedural randomness exists with respect to special subject matter courts.

For congressional opponents, the generalized court transfer authority embodied in the at-large judges bill was problematic when vested in the Chief Justice alone. Shields thought that the power to assign judges provided the Chief with “political influence and power over the judiciary of which a designing man could avail himself in times of great political turmoil.”<sup>62</sup> Shields also objected to Congress “giving [away] this great and unlimited and dangerous power to the Chief Justice.”<sup>63</sup> Senator Thaddeus Caraway agreed that the proposal gave the Chief too much unconstrained discretion; the bill was “personal government, so far as the Chief Justice is concerned.”<sup>64</sup>

Many opponents thought the substantive content of this new discretion would be directed toward vigorous uniform enforcement of the prohibition statutes. Noting that lobbyists for the Anti-Saloon League were strongly in support of the legislation, Shields denounced it as merely a scheme for “sending dry judges into wet territory.”<sup>65</sup> Other opponents of the at-large judges bill raised objections grounded in somewhat different conceptual concerns. Some thought that the enhanced at-large appointment power, though a raw increase in the Chief Justice’s power, might ultimately undermine judicial stature. Representative Lea of California thought that “[w]e should not endanger the prestige of our judges . . . by compelling them to perform functions primarily legislative or political.”<sup>66</sup> Representative Hayden thought that the departure from the traditional localist ideal undermined one minor public check on a generally unaccountable federal judiciary. Said Hayden:

Almost the only restraining influence upon [federal judges] is that, by reason of their selection from the bar of the State in which they continue to reside, old friends can address them with frankness respecting their official conduct. Judges with no fixed assignment would be without even this slight check upon their actions . . . .<sup>67</sup>

These three basic objections to the temporary appointment power of the Chief Justice—(1) that it vests too much discretion in a single judicial official; (2) that it generates an additional level of counterma-

<sup>62</sup> 62 CONG. REC. 4863 (statement of Sen. Shields).

<sup>63</sup> *Id.* at 4853.

<sup>64</sup> *Id.* at 4849 (statement of Sen. Caraway).

<sup>65</sup> *Id.* at 4861–62 (statement of Sen. Shields). Another Southern Representative denounced the plan as creating a class of “carpetbag judges.” 62 CONG. REC. 204 (1921) (statement of Rep. Stevenson).

<sup>66</sup> *Id.* at 202 (statement of Rep. Lea).

<sup>67</sup> *Id.* at 206–07 (statement of Rep. Hayden).

goritarian difficulty; and (3) that it might actually undermine judicial prestige by forcing the Chief Justice to make inherently political choices—are still germane today, as explored in Part I.B. They are expressed less and less in modern congressional debates, however, even as, and probably *because*, the use of the power has become more routine over the twentieth century. Although Taft lamented that his suggestion of a “flying squadron of judges” did not meet with congressional approval, the passage of a more limited transfer provision furthered his ability to “promote the strategic massing of the judicial force of the country at the points of congestion.”<sup>68</sup> Other reforms, like the Judicial Conference and the Administrative Office statute, would soon follow and promote the hierarchical bureaucratic model that Taft favored for the federal judiciary. This across-the-board rise in the Chief Justice’s executive authority was a central feature of the early twentieth-century reforms. Promoting the general acceptance of the Chief Justice as the executive head of the judiciary established an important historical and conceptual foundation for the special court appointment power studied here.

### *B. The Power of Specific Appointment to Special Courts*

It was also at Taft’s behest, this time while President, that Congress first debated, and briefly enacted, the first instance of the more specific appointment power that is studied here—the special power of the Chief Justice to appoint specific federal judges to a specific court. This occurred in connection with the ill-fated Commerce Court, which although short-lived, established the initial statutory precedent of a special court of limited jurisdiction whose judges were selected by the Chief Justice to fixed terms from among the existing federal judiciary. By mid-century, Congress appeared to have shed its initial qualms about this particular structural innovation, and the level of oppositional debate dropped as the appointment device was used more frequently in statutes after 1940.

Two other features of the Commerce Court debate also appeared to persist through the twentieth century, and both now have the effect of suppressing the breadth and depth of meaningful debate over this type of authority-vesting in the Chief Justice. First, each recurrence of the Chief’s special appointment power was in the context of a new specialized court, so that policy debate focused more heavily on the wisdom of the new courts themselves rather than the use of the increasingly familiar means of staffing them. So, for instance, public debate over the FISA Court or the Ethics in Government Act under-

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<sup>68</sup> MASON, *supra* note 35, at 106 (quoting a Nov. 28, 1923 letter from William H. Taft to H.M. Daughtrey).

standably centered on the substantive parts of those statutes that were novel and controversial rather than on the relatively familiar appointment power of the Chief.<sup>69</sup> Second, members of Congress have avoided candidly discussing the fact that the Chief Justice might exercise substantive preferences via this delegation of power. Even the occasional criticism of statutes proposing to vest appointment authority in the Chief is typically cast in oblique terms about appearances of impropriety rather than the potential for actual misuse. Rarely is there a frank admission about judicial discretion of the sort embodied in Senator Gore's speech quoted at the beginning of this Article.<sup>70</sup>

With these general explanations in mind, it is possible to move rather quickly through the specific instances where Congress created a special court staffed by temporary appointments by the Chief Justice in the twentieth century.

### 1. *The Commerce Court (1910–1913)*

At the urging of the Taft White House, Congress created the Commerce Court in 1910 to hear appeals from orders of the Interstate Commerce Commission ("ICC"), which was itself charged with regulating the nation's railroads.<sup>71</sup> The new court had exclusive jurisdiction to enforce all orders of the ICC and to hear all challenges to the Commission's rulings.<sup>72</sup> Its inception exemplifies the rationale behind many of the specialized courts in the federal system, including, but not limited to, those courts whose judges are chosen by the Chief Justice. With the advent and significant growth of the American administrative state, driven by a consensus that with modernism "problems of law became problems of administration,"<sup>73</sup> there arose a

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<sup>69</sup> See, e.g., Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 608–32 (1998) (discussing the separation-of-powers concerns that occupied discussion of various special prosecutor bills, including the fear that Congress and the judiciary were taking power from the executive branch); Katy J. Harringer, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 MERCER L. REV. 489, 498–505 (1998) (addressing the disagreement about whether the power to appoint independent counsel should be taken away from the executive branch and given to the judiciary); see also Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 810 (1989) (noting that the elements of FISA that were most hotly debated were the "standard for targeting Americans, [the] status of the President's inherent authority," the role of the federal court, the treatment afforded aliens, and possible warrantless surveillance of Americans overseas).

<sup>70</sup> See source cited *supra* note 1.

<sup>71</sup> Commerce Court (Mann-Elkins) Act of 1910, ch. 309, 36 Stat. 539; see also George E. Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM. J. LEGAL HIST. 238, 239 (1960).

<sup>72</sup> §§ 1–2, 36 Stat. at 540–42.

<sup>73</sup> FRANKFURTER & LANDIS, *supra* note 35, at 146.

need to create special technical tribunals to review the work of special technical agencies.<sup>74</sup>

More germane for present purposes, however, is the obvious fact that each newly-minted specialized court requires judges to staff it, which forces Congress to choose from among several available appointment devices. The simplest option, from the viewpoint of constitutional precedent, is to create the new tribunal as a full-fledged Article III court staffed with new life-tenured judges who are appointed via the normal nominate-and-consent process.<sup>75</sup> Many special courts are termed "legislative courts," in that technically they are situated outside of Article III. The judges on these courts do not enjoy life tenure, but they nonetheless are usually appointed using the standard two-stage process articulated in Article II.<sup>76</sup> There are several specialized judicial bodies that vest some appointment discretion in groups of judges, such as the federal bankruptcy courts (whose judges are chosen by the judges of the federal circuit court encompassing the bankruptcy district)<sup>77</sup> and the United States Sentencing Commission (whose Article III judicial members are initially nominated by the Federal Judicial Conference).<sup>78</sup>

The Commerce Court represented an early instance of Congress facing these choices by creating a specialized tribunal, as well as the first time Congress chose to transfer the appointment decision to the Chief Justice. The particular Commerce Court statute involved a compromise appointment device. The President nominated the initial five Commerce Court judges, who were then subject to senatorial confirmation; these judges would serve no more than five years on the special court.<sup>79</sup> After this initial round of appointments, the Chief Justice had the power to fill up subsequent vacancies on the Com-

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<sup>74</sup> There is a rich literature on the history, practice, and theory of these specialized courts; an exegesis of the many issues of interest is well beyond the scope of this Article. For examples of this large body of literature, see KENNETH R. REDDEN, *FEDERAL SPECIAL COURT LITIGATION* (1990); Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377 (1990); Richard R. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990).

<sup>75</sup> See U.S. CONST. art. III, § 1 (allowing for the creation of courts by Congress, and allowing for life tenure of judges); *id.* art. II, § 2, cl. 2 (granting the President the power to appoint judges with the advice and consent of the Senate). The court that has evolved into the Federal Circuit is one example of this model.

<sup>76</sup> *Id.* art. II, § 2. A prominent example of a special court following this process is the Tax Court.

<sup>77</sup> 28 U.S.C. § 152(a) (2004).

<sup>78</sup> 28 U.S.C. § 991(a) (2004).

<sup>79</sup> 36 Stat. 539, 540 (1910). These initial judges were simultaneously appointed to an existing geographic circuit, where they would go with life tenure once their special court terms expired. *Id.*; see also Federal Judicial Center, *Courts of the Federal Judiciary: Commerce Court 1910-1913* (detailing the history of the Commerce Court), at <http://www.fjc.gov/history/home.nsf/> (last visited Oct. 2, 2004).

merce Court, and he was empowered to appoint existing federal circuit judges to serve on the court for staggered five-year terms.<sup>80</sup>

In both its jurisdictional scope and appointment mechanism, the Commerce Court proposal was novel for its time; a contemporary political scientist called it "a tribunal unlike any other known to American law."<sup>81</sup> This novelty produced a fair measure of opposition in Congressional debates. Part of this debate centered on the question of the Chief Justice's specific role in appointing judges, more robustly so than would occur later in the century when Congress chose the same selection device for other specialized tribunals. Opponents of the vesting of appointment discretion in the Chief Justice raised concerns similar to those detailed above in the context of the at-large judges bill. Senator Robert LaFollette questioned the wisdom of vesting so much discretion in a single officer, arguing that "[i]t seems to me too important a matter to leave the designation of the members of this court to one man, the Chief Justice of the Supreme Court of the United States."<sup>82</sup> To restrain this individual discretion, LaFollette proposed an amendment whereby appointment of the Commerce Court judges "should be made by the entire membership of the Supreme Court instead of by a single member of that body."<sup>83</sup> Senator Gore concurred, criticizing the "overwrought sentimentality" of those Senators who had opposed LaFollette's collective device on the grounds that it unduly impugned the honor and integrity of the Chief Justice.<sup>84</sup> Gore explained that Americans "have, indeed, had a long and illustrious line of Chief Justices," and "trust[ed] that line [to] continue with undimmed and undiminished luster."<sup>85</sup> But since "[j]udges are possessed . . . of the ordinary frailties that 'flesh is heir to,'" Gore thought that Congress "should omit the erection of no safeguard that contributes to the wise and just administration of the law," and so should vest the appointment power in the Supreme Court collectively.<sup>86</sup> These opposing views were a minority, and the new court was established in 1910. Although congressional critics of the new appointment mechanism did not prevent the initial Commerce Court statute from passing, the new court had a short life. Congress dissolved the tribunal three years later, before the Chief Justice actually had the opportunity to exercise the appointment power he possessed to select the second set of Commerce Court

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<sup>80</sup> 36 Stat. at 540; see also James Wallace Bryan, *The Railroad Bill and the Court of Commerce*, 4 AM. POL. SCI. REV. 537, 537-38 (1910).

<sup>81</sup> *Id.* at 537.

<sup>82</sup> 45 CONG. REC. 7347 (1910) (statement of Sen. LaFollette).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 7351 (statement of Sen. Gore).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

judges. This abolition of the tribunal resulted from congressional displeasure concerning the Court's substantive decisions reviewing ICC orders, and was unrelated to the appointment procedures used to fill the seats.<sup>87</sup>

The Commerce Court, although short-lived, provided an important institutional device for filling special court seats that was applicable to other tribunals in other subject areas. After Congress employed this mechanism in later decades for a few relatively non-controversial special panels (described in the following pages), the practice became well-established. More broadly, Taft's general judicial reform program coincided with this initial grant of power to the Chief Justice, and the other reforms greatly expanded a number of other executive functions of the Chief Justice, including the power to transfer judges from one general federal court to another. The increasing prevalence and exercise of this general designation authority likewise helped reassure later Congresses that the increasing use of the special court appointment device was uncontroversial. As explained below, however, the choice underlying the act of transfer is significantly more problematic when the Chief Justice knows exactly what kind of legal matter the transferee judge will hear.

Viewed in mechanical terms, it was a small intellectual leap for Congress to shift from a general comfort level with the Chief Justice's basic reassignment to an acceptance of the special court appointment device. With the traditional norms of geographic fixity and localism eroded, Congress felt free to transfer this special power to the Chief Justice on multiple occasions as the century progressed. The following few pages summarize these specific special courts in chronological order.

## 2. *Emergency Court of Appeals (1942–1961)*

During World War II, Congress implemented national wage and price controls through passage of the Emergency Price Control Act of 1942, and created a specialized agency, the Office of Price Administration ("OPA"), to promulgate and apply implementing regulations.<sup>88</sup> The OPA was a centralized, specialized entity, and Congress concurrently created a centralized, specialized mode of reviewing its actions: the Emergency Court of Appeals ("ECA").<sup>89</sup> The ECA had

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<sup>87</sup> For a careful analysis of the legal rulings of the Commerce Court and its treatment by the United States Supreme Court, see Samuel O. Dunn, *The Commerce Court Question*, 3 AM. ECON. REV. 20 (1913).

<sup>88</sup> Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23 (1942).

<sup>89</sup> § 204(c), 56 Stat. at 32 ("There is hereby created . . . the Emergency Court of Appeals . . ."); see also Dreyfuss, *supra* note 74, at 393–94 (surveying briefly the creation of the Emergency Court of Appeals).

exclusive jurisdiction to “determine the validity of any regulation or order issued under [the Act], of any price schedule effective in accordance with [the Act], and of any provision of any such regulation, order, or price schedule.”<sup>90</sup> Its authority was narrow, as it was statutorily required to review the OPA’s decisions under an “arbitrary and capricious” standard; it was constrained in its review of the record, and it had no power to enjoin or stay OPA regulations.<sup>91</sup>

Congress provided the ECA with judges by reviving the part-time model vesting authority in the Chief Justice that it had enacted in the earlier Commerce Court statute. The Chief Justice was given the power to choose three existing federal judges to serve as temporary appointments on ECA while still sitting part-time on their home courts.<sup>92</sup> The ECA had significant business during the war, and by 1945, five circuit judges heard cases nearly full-time.<sup>93</sup> Congress extended the court’s special jurisdiction over related matters for more than a decade after the war’s end, and it was generally considered “a successful innovation” by “most observers” in law practice and the legal academy.<sup>94</sup> Most significantly for the purposes of this Article, Congress would replicate the ECA’s basic Chief Justice-centered appointment provision in the decades ahead, making it “the template upon which several subsequent courts were modeled.”<sup>95</sup>

### 3. *Temporary Emergency Court of Appeals (1971–1992)*

The Temporary Emergency Court of Appeals (“TECA”) was one replication of the ECA model in jurisdictional scope as well as appointment device.<sup>96</sup> Like the ECA, the TECA’s jurisdiction was exclusive and initially focused on appeals arising from implementation of the wage and price control program embodied in the Economic Stabilization Act of 1970.<sup>97</sup> TECA was more like a regular federal circuit court, however, in that it reviewed decisions of the federal district courts instead of a specialized agency.<sup>98</sup> TECA survived for twenty-one years because Congress added other specialized statutes (typically in the energy area) to its exclusive jurisdiction after the initial price

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<sup>90</sup> § 204(d).

<sup>91</sup> Dreyfuss, *supra* note 74, at 394.

<sup>92</sup> § 204.

<sup>93</sup> Dreyfuss, *supra* note 74, at 395.

<sup>94</sup> *Id.* at 396.

<sup>95</sup> *Id.*

<sup>96</sup> See Pub. L. No. 92-210, 85 Stat. 743 (1971).

<sup>97</sup> Pub. L. No. 91-379, §§ 201–06, 84 Stat. 796, 799–800 (1970) (authorizing the President to stabilize prices, rents, wages, and salaries to prevent inequalities).

<sup>98</sup> 85 Stat. 743.

control act expired.<sup>99</sup> TECA's appointment provision fit the basic model discussed here: the Chief Justice chose existing Article III judges to fill the requisite number of spots.

#### 4. *Judicial Panel on Multidistrict Litigation (1968–present)*

In response to increasing instances of similar litigation arising repeatedly in different districts, Congress in 1968 centralized and formalized an institutional structure that had been developing for several years within Article III under the leadership of the Federal Judicial Conference. The enabling statute created the Judicial Panel on Multidistrict Litigation (“JPMDL”), a panel of seven federal district or circuit judges with sweeping procedural authority over the consolidation, coordination, and transfer of civil cases involving common questions of fact.<sup>100</sup> The JPMDL was empowered with significant authority to shape the procedural resolution of import. More than any other specialized tribunal, its impetus came from the judiciary itself; judges (of the Federal Judicial Conference) drafted the bill “to refine and regularize a system of consolidated pretrial proceedings for the more troublesome instances of multiple litigation.”<sup>101</sup> Congress introduced and passed the bill as essentially “identical to the proposal of the [FJC’s] Coordinating Committee.”<sup>102</sup> The Chief Justice chose the seven members of the JPMDL, who had to come from seven different circuits, from among existing circuit judges.<sup>103</sup>

#### 5. *The Special Division of the D.C. Circuit (1978–2000)*

The ECA, TECA, and JPMDL exercise judicial power in specialized areas that are relatively narrow, technical, and procedural. The ECA and TECA courts apply a highly technical rule scheme, and the JPMDL’s role is primarily one of oversight and consolidation. Later in this Article, I discuss a problematic feature of the Chief Justice’s appointment authority—the potential that the Chief Justice could

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<sup>99</sup> See generally James R. Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 DUKE L. J. 113 (1978) (describing the history and practice of TECA).

<sup>100</sup> Pub. L. No. 90-296, § 1, 82 Stat. 109 (1968) (codified as amended at 28 U.S.C. § 1407); see Judith Resnik, *From “Cases” to “Litigation”*, 54 L. & CONTEMP. PROBS. 5, 34–35 (1991) (discussing the composition of the panel and the process by which cases are heard and decided); see also Stephen B. Burbank, *Case Five: Complex Litigation and Prior Rulings Issues*, *Conference on Jurisdiction, Justice, and Choice of Law for the Twenty-first Century*, 29 NEW ENG. L. REV. 724 (1995) (discussing the law and practice of pretrial transfer by federal courts).

<sup>101</sup> 112 CONG. REC. 22,146 (1966) (statement of Sen. Tydings).

<sup>102</sup> *Id.*

<sup>103</sup> 28 U.S.C. § 1407(d).



strategically select judges. But if there is a general concern about judicial preferences being manifested through the particular acts of special tribunals, it is perhaps muted in the context of a body that hears relatively technical matters with little ideological undercurrent. If this is so, then perhaps the Chief Justice's appointment authority over these first three tribunals is little cause for alarm.

In the aftermath of the Watergate scandal, and with widespread distrust of presidential authority persisting, the 1970s produced a very different kind of special judicial body, created in part with the express purpose of checking executive power. The basic structure of the Ethics in Government Act,<sup>104</sup> which instituted and governed the selection of independent counsel, is well known. So too is the manner in which the operation of this statutory scheme led to several high profile and politically charged investigations, most notably Kenneth Starr's inquiry into President Clinton's conduct that culminated in an impeachment trial in 1998.<sup>105</sup> The Act vested two different appointment powers in the judiciary; the most hotly debated has been the second—the power of the three judges on the Special Division of the District of Columbia Circuit to select independent counsels and to define the scope of the counsels' investigations.<sup>106</sup> But the statute also gave the Chief Justice the antecedent authority to pick the three specific judges who would, in turn, pick the independent counsel.<sup>107</sup> As I will discuss in the last section of this Article, Chief Justice Rehnquist's selection of allegedly conservative judges to form a majority of this panel was much noted and criticized during the Starr investigation.<sup>108</sup>

#### 6. *The Foreign Intelligence Surveillance Court and Court of Review (1978–present)*

Congress enacted the Foreign Intelligence Surveillance Act of 1978 ("FISA")<sup>109</sup> in response to allegations of executive branch misconduct in intelligence gatherings that were contained in the

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<sup>104</sup> See Pub. L. No. 95-521, § 602(a), 92 Stat. 1824, 1867-75 (1978) (codified at 28 U.S.C. §§ 49, 591-99 (1994)).

<sup>105</sup> See generally Chemerinsky, *supra* note 10, at 2-3 (noting the impact of the Clinton investigation on the public debate surrounding the office of independent counsel).

<sup>106</sup> 28 U.S.C. § 593(b), (c) (1994) (rendered ineffective in 1999 by operation of § 599).

<sup>107</sup> 28 U.S.C. § 49(a), (d) (2004).

<sup>108</sup> See, e.g., Chemerinsky, *supra* note 10, at 10 (noting that a "conservative Chief Justice, such as William Rehnquist, is perceived as likely to select conservative judges" and that "[t]he selection of Kenneth Starr as Whitewater independent counsel indicates this danger.").

<sup>109</sup> Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. §§ 1801-11, 18 U.S.C. §§ 2510-11, 2518-19 (2003)).

“Church Report” issued in 1975,<sup>110</sup> as well as a Supreme Court opinion suggesting that the Fourth Amendment might require some prior judicial warrant in certain types of national security related investigations.<sup>111</sup> FISA created a new specialized federal district court, housed in a special secure chamber within the Department of Justice and closed to the public.<sup>112</sup> The FISA Court reviews Department of Justice applications for warrants related to national security investigations. Initially comprised of seven judges, Congress recently responded to increased counterterrorism enforcement activity by expanding the FISA Court to eleven judges who serve staggered, non-renewable terms of no more than seven years.<sup>113</sup> The Chief Justice selects the FISA Court judges from existing federal district court judges.<sup>114</sup> If the government’s warrant application is denied, a circumstance that has happened exactly once in twenty-five years,<sup>115</sup> it can appeal to a special FISA Court of Review, comprised of three federal circuit judges selected by the Chief Justice.<sup>116</sup>

As with the Chief Justice’s appointment power relative to the independent counsel structure, this specific power generated only a small amount of debate. By 1978, the power had been used so often that historical practice served as a persuasive justification for its use. Robert Kastenmeier, the sponsor of FISA in the House, expressly invoked this history in justifying the appointment device, noting that the Chief Justice’s FISA Court appointment power was supported by “the example of” the Temporary Emergency Court of Appeals; he contended that TECA provided “ample precedent for such a special

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<sup>110</sup> STAFF OF S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94TH CONG., REPORT ON COVERT ACTION IN CHILE 1963–1973 (Comm. Print 1975) (identifying the need for “procedures for insuring that covert actions are and remain accountable both to the senior political and foreign policy officials of the Executive Branch and to Congress.”), available at <http://www.foia.state.gov/reports/churchreport.asp> (last visited Oct. 27, 2004).

<sup>111</sup> See *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 313, 319 (1972) (discussing the “convergence of First and Fourth Amendment values” in national security cases and requiring “an appropriate warrant procedure” for electronic surveillance in domestic security matters).

<sup>112</sup> See 50 U.S.C. § 1803(a), (c) (2004) (discussing the security measures for the record of the proceedings); see also Cinquegrana, *supra* note 69, at 812 (“[T]he government presents applications for warrants to the [FISA Court] judges in *in camera*, *ex parte* proceedings conducted under physical security measures designed to protect sensitive national security information.”).

<sup>113</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, § 208, 115 Stat. 272 (2001) (amended and codified at 50 U.S.C. § 1803(a), (d) (2003)).

<sup>114</sup> § 1803(a).

<sup>115</sup> See *In re Sealed Case*, 310 F.3d 717, 719 (Foreign Int. Surv. Ct. Rev. 2002) (noting that the case was “the first appeal from the Federal Surveillance Court to the Court of Review since the passage of [FISA] in 1978.”).

<sup>116</sup> See § 1803(b) (directing the Chief Justice to appoint three judges to review denials of electronic surveillance applications).

court.”<sup>117</sup> One committee of Congress did express concern over the Chief Justice exercising purely individual discretion, noting in passing that “the conferees expect that the Chief Justice will consult with the chief judges of the judicial circuits in making designations of judges under this section.”<sup>118</sup>

The importance of the FISA Court and the FISA Court of Review have only increased with the advent of the post-September 11 “war on terror.” In a legal world where the Supreme Court has recently stressed the important supervisory role that courts are to play in mediating the balance between civil liberties and national security in times of war,<sup>119</sup> the FISA’s exclusive role in reviewing government surveillance requests will continue to be critical.

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To sum up the foregoing historical story, it appears that only a few generations after Taft’s proposals were robustly criticized, sometimes on expressly constitutional grounds, members of Congress came to regard the Chief Justice’s appointment authority within the judicial branch as relatively unexceptional. To be sure, judicial authority over *interbranch* appointments remained (and remains) controversial, as the Special Division’s role in selecting an independent prosecutor demonstrates. But with regard to transferring existing judges from one court to another, and a host of other administrative and bureaucratic powers, Taft’s vision of a federal judiciary imbued with the “executive principle,” and managed by the Chief as the “head,” has been realized.

## II. CONSIDERATIONS OF CONSTITUTIONAL DOCTRINE AND THEORY

Under current doctrine, the Chief Justice’s appointment power appears safe from a judicial declaration of unconstitutionality. Although early twentieth-century Congresses expressed significant doubts about the wisdom of the Chief Justice’s appointment power, by mid-century and beyond, Congress became more and more comfortable with the power and considered its conceptual implications less and less. Meanwhile, Supreme Court rulings over this long period emboldened Congress. Although the Supreme Court has never

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<sup>117</sup> 124 CONG. REC. 28172 (1978) (statement of Rep. Kastenmeier).

<sup>118</sup> H.R. CONF. REP. NO. 95-1720, at 27 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4048, 4056.

<sup>119</sup> *See* *Rasul v. Bush*, 124 S. Ct. 2686, 2692–99 (2004) (holding that United States courts have jurisdiction to consider the legality of detention of foreign nationals captured abroad and held at Guantánamo Bay); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2646–50 (2004) (emphasizing the due process rights of citizens detained in the war on terror and declaring that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”).

squarely considered and upheld the constitutionality of the special court appointment power of the Chief Justice, it has implicitly done so by upholding several of the special courts themselves.<sup>120</sup> In addition, it has rejected challenges to very similar powers held by the Chief Justice, such as the power to temporarily transfer judges from one general federal court to another.<sup>121</sup> With these and other precedents, together with the established history and some textual support from the Appointments Clause, it is not hard to build a convincing case for doctrinal constitutionality.

However, not all constitutionally permissible legislative choices are equally consistent with the Constitution's basic allocation of authority, and with the theoretical grounds that justify the Constitution's structure. The special court appointment power vests the Chief Justice with meaningful discretion to select specific judges to sit on specific kinds of courts—a kind of decisional authority that is rarely, and uncomfortably, vested in a single unelected official. This Part examines this conceptual difficulty in greater detail, and proceeds in three distinct parts. Part II.A tracks the basic doctrinal constitutionality of the Chief's special court appointment authority, and sets forth the relatively convincing arguments that this is almost certainly, in the conventional doctrinal sense, a "constitutional" policy choice by Congress. Part II.B is a deeper exploration of some of the troubling features of such a power from the perspective of theories of judicial authority. Part II.C explores alternatives that Congress might use if it wishes to staff future special courts by mechanisms other than Article II's nominate-and-consent framework, which would avoid vesting unconstrained authority in the Chief Justice alone.

### A. *The Doctrinal Case for Constitutionality*

The Supreme Court has never expressly considered and affirmed the constitutionality of the special court appointment authority at issue here. But it has implicitly done so, by upholding the Emergency Court of Appeals and the independent counsel system established by the Ethics in Government Act.<sup>122</sup> It has also upheld other very similar

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<sup>120</sup> See, e.g., *Morrison v. Olson*, 487 U.S. 654, 696 (1988) (holding that it was constitutionally permissible "for Congress to vest the appointment of independent counsel in the Special Division"); *Yakus v. United States*, 321 U.S. 414, 443 (1944) (validating the Emergency Price Control Act's conferral of exclusive jurisdiction to determine the validity of price control regulations to the United States Emergency Court of Appeals and the United States Supreme Court).

<sup>121</sup> See *Lamar v. United States*, 241 U.S. 103, 118 (1916) (suggesting that the mere contention that the transfer of judges between federal courts violated the Constitution "suffices to demonstrate its absolute unsoundness.").

<sup>122</sup> See *Morrison*, 487 U.S. at 696 (affirming the constitutionality of the independent counsel provision of the Ethics in Government Act).

powers of the Chief Justice, such as the temporary appointment power from one general federal court to another.<sup>123</sup> The basic case for constitutionality entails these and other well-supported elements.

First, the act of appointing a judge to fulfill special duties on a special court is unquestionably “executive” in form, but it is the *kind* of executive action that American judges have performed throughout history, although to a more limited degree than the Chief Justice now does. Even the earliest federal judges appointed clerks and marshals, and for the past century the Chief Justice and the chief judges of the circuits have regularly exercised administrative authority to shift existing judges from one court to another for a temporary designation. Since the Taft reforms of the 1920s, this reassignment power has been exercised more and more frequently as described earlier.

Second, the text of Article II’s Appointments Clause is also helpful, at least at a certain level of generality and perhaps as a more specific authorization as well. At the very least, the clause’s statement that Congress may “vest the Appointment of . . . inferior Officers . . . in the Courts of Law”<sup>124</sup> confirms two general propositions: (1) Congress has some latitude to structure alternative methods of making appointments, and (2) it may vest meaningful authority in the judiciary for this purpose. Despite the Constitution’s baseline premise of bifurcated President-Senate participation, other means of appointment are possible in appropriate cases, and the fact that the Chief’s special court appointment authority is novel does not render it automatically invalid. The text gets most of the way to a case for constitutionality, but strict reliance on the words presents two linguistic hurdles due to the clause’s two limitations on vesting this power in the judiciary. First, Article II says that Congress may transfer the power to “courts of law,” but is silent as to transfer to individual judges, raising doubts about whether the Chief Justice alone can exercise it.<sup>125</sup> Second, and more problematic, the ability to structure alternative appointment arrangements hinges on the classification of appointees as “inferior officers,” and it is unlikely that lower federal court judges would fit this definition.

History and recent precedent suggest that the “courts of law” phraseology is probably no limitation at all. In early practice this was a distinction without a difference because nineteenth-century district court judges had the power to appoint clerks and commissioners, but most federal districts were staffed by a single judge, who essentially was “the court.” That this fact of life eroded with the passage of time

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<sup>123</sup> See *Lamar*, 241 U.S. at 118 (upholding the Chief Justice’s temporary appointment power).

<sup>124</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>125</sup> *Id.* (“Congress may by Law vest the Appointment of such inferior Officers, as they think proper . . . in the Courts of Law . . .”).

did not change the practice. The Supreme Court has never been troubled by the precise reading of the text, even where appointment discretion is placed solely with the chief judge of a multimember court. A decade ago, in its decision in *Freitag v. Commissioner of Internal Revenue*,<sup>126</sup> the Court considered the question of whether Congress could vest the chief judge of the Tax Court, a non-Article III tribunal, with authority to appoint commissioners who would assist in the adjudication of cases.<sup>127</sup> The hard question for the Justices in that case was whether the Tax Court qualified as a “court of law,” but once a majority of the Supreme Court answered that question affirmatively,<sup>128</sup> it had no trouble with (and did not analyze) the fact that the appointment authority was vested solely in the chief judge of the Tax Court rather than the entire group of judges.

More troubling is the “inferior officer” limitation: do lower federal judges qualify as inferior officers? At one time in recent history, it was possible to so argue; Professor Burke Shartel did just that in a carefully reasoned article that appeared in the *Michigan Law Review* in 1930.<sup>129</sup> Outside of law journals, however, no serious claim has been recently made by Congress, the President, or the Supreme Court that federal district or circuit judges are “inferior officers” who could be appointed in any way other than the nominate-and-consent framework. Just this year the Department of Justice rejected such an argument as it appeared in a Supreme Court brief, claiming that Article III judges must be appointed as “principal officers” in the normal Article II frame.<sup>130</sup>

For this reason, the constitutional text cannot do all of the work by itself, although it does support the more general idea of a range of policy alternatives in appointment mechanisms. In this regard, the fact that this is a device that Congress has employed throughout the

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<sup>126</sup> 501 U.S. 868 (1991).

<sup>127</sup> *Id.* at 873 (noting the “important questions the litigation raises”).

<sup>128</sup> *Id.* at 892 (“Including . . . the Tax Court . . . among the ‘Courts of Law’ does not significantly expand the universe of actors eligible to receive the appointment power.”). Justice Scalia took a different path to the same result. He disputed that the Tax Court was a “court of law,” a term he found limited to Article III tribunals, but instead thought it qualified as a “Department” and the chief judge as “Head” could exercise appointment powers. *Id.* at 922 (Scalia, J., dissenting) (“[C]onsidering the Chief Judge of the Tax Court to be the head of a department seems to me the only reasonable construction of Article II, § 2.”). Standard principles of avoiding redundancy in textual interpretation would suggest that Scalia’s argument would not work as a textual justification of the Chief Justice’s appointment authority. Since the Supreme Court is unquestionably a “court of law,” it would not also be considered a “Department.”

<sup>129</sup> See Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485, 514 (1930) (suggesting that the appointment of inferior judges should be done by the judicial branch itself).

<sup>130</sup> See Brief for the United States at 32–35, *Nguyen v. United States*, 538 U.S. 920 (2003) (Nos. 01-10873 & 02-5034), available at <http://www.usdoj.gov/osg/briefs/2002/3mer/2mer/2001-10873.mer.aa.pdf> (last visited Oct. 2, 2004).

twentieth century supports its constitutionality. The limitation of the Chief Justice's appointment discretion to the existing pool of federal judges matters for this kind of doctrinal acceptance, even if, as a functional matter, this limitation leaves vast discretion to choose among widely divergent viewpoints. An exemplar of this reasoning is then-Judge Anthony Kennedy's Ninth Circuit opinion in the case of *United States v. Cavanagh*,<sup>151</sup> which upheld the FISA Court's appointment procedures against constitutional challenge by stressing the long-standing power of the Chief Justice to reassign<sup>152</sup> existing Article III judges to other courts within the federal system.

Finally, viewed in light of the long history of the Chief Justice's authority to reallocate the federal judicial force, this kind of special court appointment power looks much more familiar, and therefore much less controversial, than other novel arrangements that the Court has explicitly upheld. For instance, in the independent counsel structure, the most dubious appointment device was the authority of the Special Division to make an *interbranch* appointment of independent counsel.<sup>153</sup> Next to this controversial innovation, the Chief Justice's *intra*branch designation of existing federal judges to staff the Special Division looks comfortably familiar, and it is hard to imagine a Court that upheld the former device is seriously questioning the latter.<sup>154</sup> Similarly, the Supreme Court upheld the unusual selection mechanism for the United States Sentencing Commission,<sup>155</sup> which vests responsibility for selection of the judicial members of that body in three different places sequentially: the Federal Judicial Conference, the President, and the Senate.<sup>156</sup> I argue below that this sequential multibranch appointment process is better policy than vesting sole discretion in a single judicial official, but it is undoubtedly more unusual as a matter of constitutional structure, and was upheld by a large majority of the Court.<sup>157</sup>

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<sup>151</sup> 807 F.2d 787 (9th Cir. 1987).

<sup>152</sup> *Id.* at 792.

<sup>153</sup> See 28 U.S.C. § 593(b) (1994) (rendered ineffective in 1999 by operation of § 599) (authorizing the Special Division to appoint independent counsel at the request of the Attorney General); see also *Morrison v. Olson*, 487 U.S. 654, 707 (1988) (Scalia, J., dissenting) (referring with disapproval to the Special Division's authority "to determine the scope and duration of the [independent counsel's] investigation.").

<sup>154</sup> See *supra* text accompanying note 120; *Morrison*, 487 U.S. 654 (upholding the independent counsel provision).

<sup>155</sup> *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (upholding the structure and authority of the United States Sentencing Commission).

<sup>156</sup> 28 U.S.C. § 991 (2004).

<sup>157</sup> See *Mistretta*, 488 U.S. at 389 (8-1 decision) ("[A]lthough the judicial power of the United States is limited by express provision of Article III to 'Cases' and 'Controversies,' we have never held . . . that the Constitution prohibits Congress from assigning to courts or auxiliary bodies within the Judicial Branch administrative or rulemaking duties that . . . are 'necessary and proper [to executing judicial holdings].'" (citation omitted)).

Just as the Chief's appointment power has been held to work no impermissible incursion on the President's Article II authority, so too does it uphold the constitutional independence of individual federal judges selected to fill the special spots. Early twentieth-century critics of judicial mobility made this sort of argument, claiming that Article III guaranteed judges a specific geographic locale, and moreover, formed a sort of "contract" with the public that the judge would occupy that—and only that—seat.<sup>138</sup> Such an argument is not tenable today, given the widespread judicial mobility that has existed for over half a century.

### *B. Problematic Features of the Power*

As the foregoing account explains, the special court appointment power of the Chief Justice is a type of authority that American courts have not declared to be unconstitutional, and will not declare unconstitutional in the foreseeable future. It is an appointment mechanism that Congress can safely use in the design of new specialized courts, and it is a device that Congress has used with increasing frequency over the past several decades. The question, then, becomes whether Congress *should* do so—or, to put it differently, whether the practice does sufficient violence to basic constitutional norms that Congress should look hard for alternative devices that are less problematic. In this section, I contend that there are significant theoretical problems with vesting the Chief Justice with sole authority to place particular judges on particular kinds of cases, and that Congress should delegate such authority sparingly, if at all. I explore these difficulties in further detail below; most stem from the basic starting point that the power to choose judges for special courts contravenes several express and implicit norms that are fundamental to the architecture and application of Article III power.

First, at the most obvious level of textual expression, the Constitution normally vests the appointment of federal judges in the political branches.<sup>139</sup> The Chief Justice's special court designation authority is an appointment power—even if limited in time and to existing federal judges—and is exercised without the salutary features of democ-

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<sup>138</sup> See Bryan, *supra* note 80, at 543 ("This proposition, if pushed to its logical conclusion, would seem to identify the 'powers and duties' of a circuit judge with his 'office.'").

<sup>139</sup> The Constitution provides:

[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States . . . but Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.



atic accountability and discourse that normally accompany the selection of federal judges. Second, and more subtly, the Chief Justice's sole appointment power for these special courts runs counter to several customary norms that typically constrain the exercise of Article III power. It entails an exercise of discretion that is both *meaningful*, in that it can potentially affect substantive outcomes, and inherently *political*, in that it is unconstrained by any of the factors—such as application of doctrine or text, or the norms of reason-giving—that may operate to constrain judicial discretion in the adjudicative function. Moreover, adjudication in the federal judiciary is a collective act, with individual judges' decisions subject either to review by a higher court, or to the collective voting dynamics of a multimember court, or both. The Chief Justice's appointment power departs dramatically from this collective action norm, and is unchecked by any other federal judge. Finally, the ability to match a specific judge with a specific subject matter case also deviates from the normal, more mechanical (if not completely random), assignment process whereby federal judges are assigned to cases. It is not the kind of power that can be comfortably vested in a single life-tenured judge without placing a strain on these basic Article III norms.

To speak of the wrong “kind” of power in the separation of powers context can suggest a formal categorical analysis, but my claim here is not of that sort. The problem is not that the Chief Justice's act of appointing a special court judge is executive in nature, although it unquestionably is. This is the type of executive act that American judges have exercised almost from the beginning, and is expressly contemplated in the text of Article II's Appointments Clause.<sup>140</sup> The concern is not with the character of the *act* itself but in the nature of the substantive *choice* that precedes it: the selection of which judge among hundreds will sit on a given special court. Because the choice is made with foreknowledge that the appointee will rule on a particular kind of matter, it is a more meaningful exercise of discretion than that which accompanies other judicial appointment acts that look superficially much the same (such as that of choosing a clerk or marshall, or transferring a judge from one generalist court to another where case assignments are random). Of course, federal judges exercise meaningful discretion all the time in their regular adjudicative role, however these jurisprudential choices are distinguishable for good reasons, which will be explored below. Conversely, the appointment choice is generally not the kind of decision that the Constitution presumptively allocates to a single unelected judge—particularly where, as here, the choice is freighted with the potential to affect specific

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<sup>140</sup> *Id.*

outcomes. It is, both in its nature and in terms of its conceptual placement within the constitutional structure, a fundamentally political choice inappropriately allocated to a single judicial official.

### 1. *Incongruity with Original Allocative Choices*

As a matter of relatively plain constitutional text, the Chief Justice's designation authority departs fairly obviously from the presumptive mechanism for placing federal judges in judicial seats. For reasons stated above, the Appointments Clause permits alternative—perhaps even quite innovative—arrangements for selecting federal officials, and it is by no means clear that this mechanism represents a doctrinally impermissible choice. But the Chief's authority does run counter to the fundamental assumptions underlying the Appointments Clause. The Framers, recognizing that the appointment of judges was an act that entailed the exercise of political discretion rather than legal judgment, vested that choice in branches of government that were at least indirectly responsible to the public.

The Appointments Clause follows two different premises, both of which are undermined when the power to fill special court seats is delegated to the Chief Justice. First, by allocating the appointment of federal judges to elected officials, the Framers ensured that those who selected judges “were accountable to political force and the will of the people.”<sup>141</sup> This up-front political influence is an important feature of an American judiciary that is otherwise immune from popular accountability. Accordingly, it was important to the Framers that the nomination choice be placed with the President, who was “answerable” for the selections he made.<sup>142</sup>

Second, the Appointments Clause goes further than this, evincing an unwillingness to vest the power in one *branch* of government, much less one individual. As the Supreme Court has explained, the Appointments Clause “bespeaks a principle of limitation by dividing the power to appoint the principal federal officers—ambassadors, ministers, heads of departments, *and judges*—between the Executive and Legislative branches.”<sup>143</sup> The Framers regarded the Senate's po-

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<sup>141</sup> *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 884 (1991) (holding that a special trial judge is an “inferior officer” and that the Tax Court is a “court of law” within the meaning of the Appointments Clause).

<sup>142</sup> NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 316 (Ohio University Press 1966) (1920) [hereinafter NOTES OF DEBATES] (“The Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone.”). For general discussion of the historical debates over the Appointments Clause, see MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 17–44 (2000), and William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 55–58 (1990).

<sup>143</sup> *Freytag*, 501 U.S. at 884 (emphasis added).

tential veto as an important constraint on executive discretion, “an excellent check upon a spirit of favoritism in the President, . . . tend[ing] greatly to [prevent] the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.”<sup>144</sup> As Gouverneur Morris described the operation of this sequential structure, as “the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.”<sup>145</sup>

As expressed by the Framers, the baseline two-step appointment process was grounded primarily in conceptual concerns of legitimacy, placing the choice with elected officials, and collectivity bifurcating the approval between the President and the Senate. The Chief Justice’s appointment activity contravenes both ideals because it is both unilateral and unaccountable. Moreover, whether or not contemplated by the Framers, there is a discourse-generating feature of the bifurcated appointment process that is also missing in the exercise of the Chief Justice’s power. Judicial nominations generate significant discussion in the Senate and the broader public about what kind of judges—and indirectly, what kind of judicial decisions—the nation desires. The extent and quality of such discourse is occasionally criticized, but few have suggested eliminating the discussion about nominees altogether, and there are many ways in which such discussion is a public good.

The Chief Justice’s appointment power presents the opposite problem. Despite the national importance of courts such as FISA or the former D.C. Circuit Special Panel, there is no *ex ante* public discussion of specific possible candidates or even what general views and attributes we would want these special court judges to possess. The silence goes beyond this, for there is likewise no rationale by the Chief Justice, even after the fact, to justify his appointment choices; additionally, there is no clear centralized public list that records the special appointments made by the office of Chief Justice.<sup>146</sup> This problem, although initially derived from the removal of the appointment decision from the Article II framework, is a separate issue that could be remedied independently. As I discuss below, Congress could devise a regime whereby the Chief Justice or a group of judges retain some special court appointment authority, but make those choices in a more transparent fashion, or the Chief Justice could do so voluntarily.

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<sup>144</sup> THE FEDERALIST No. 76, at 513 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>145</sup> NOTES OF DEBATES, *supra* note 142, at 598.

<sup>146</sup> A significant component of the research for this Article was the collection of data, from multiple sources, to compile the unified listing of Burger and Rehnquist special court appointments in Appendix A. See app. A. *infra* pp. 397–402.

## 2. *Incongruity with Internal Article III Norms*

The normal operation of the Appointments Clause represents an allocative choice between different branches of government. Recognizing the fact that life-tenured judges are, by design, relatively independent from public opinion, the Constitution vests the basic appointment choice outside of Article III, thus ameliorating the “countermajoritarian difficulty” in an important way. This interbranch collaboration is well-studied and clearly expressed in the Constitution’s text, and for the reasons stated above, the Chief Justice’s appointment power sits in uneasy tension with that basic allocative choice. Unlike the Appointments Clause, the norms discussed in this subsection are *not* explicit in the constitutional text. However they are sufficiently well established to be considered fundamental building blocks of federal judicial power. In turn, they are: (1) the norm of reason-giving accompanying the exercise of judicial power; (2) the norm of collective action within Article III; and (3) the norm against strategic matching of particular judges with particular cases. In the ways I describe below, the Chief Justice’s appointment authority is inconsistent with all three of these basic Article III norms.

### a. *The Norm of Reason-Giving*

One justification for the immense power federal judges hold is that the judges are obligated to record and articulate reasons for the meaningful actions they make. This norm is not expressly stated anywhere in Article III, but it has been a component of adjudication for much longer than the Constitution itself has existed. By virtue of giving written reasons for their actions, judges’ discretion is arguably constrained—both by the bounds of precedent and logic and also by a requirement of consistency with their own previously expressed statements. Written judicial reasoning also facilitates broader discourse among academics, other judges, and the public about the particular choices judges make in ways that may produce better specific results, and, more generally, a more robust civic dialogue. Owen Fiss has described this aspect of the judicial office as a “judge’s obligation to participate in a dialogue” and “to speak back” to the public at large with well-stated explanations that transcend the judge’s personal beliefs and attitudes.<sup>147</sup> Measured against this background norm, the Chief Justice’s special court appointment power is highly anomalous; the Chief Justice does not justify or explain his appointment choices by giving any contemporaneous reasoning about the chosen judges.

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<sup>147</sup> Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 13 (1979).

Public discourse, if it occurs at all, happens long after the Chief Justice makes the appointment choices.

This discursive void arises more from the essential character of the choice Congress has vested in the Chief Justice than from any specific disinclination by the Chief Justice to promulgate reasons. The appointment choice is not effectively channeled by any of the tools that judges normally use to constrain their individual preferences in the course of adjudication. Nothing in the normal judicial tool kit for deciding cases—text, precedent, original history, and common law reasoning, to name a few possibilities—provides any basis upon which to select one federal judge of reasonable competence over another to sit on a given specialized court. Even if the Chief Justice were to clearly articulate the underlying reasons behind a particular appointment choice, they would not be the kind of reasons that we would accept to justify a judicial ruling.<sup>148</sup> The appointment authority of the Chief Justice is, as the *In re Hennen* argument quoted earlier aptly describes, a “merely naked power” shorn of judicial rationale.<sup>149</sup>

The discretion that the Chief Justice exercises is thus unconstrained by any recognizable rules of decision. Such executive discretion is not necessarily atypical in the modern judiciary; the Chief Justice also has significant authority in many other matters of federal judicial administration, such as the hiring of court personnel, the scheduling of court business, or the leadership of the Federal Judicial Conference.<sup>150</sup> Standardless discretion is only problematic in the judicial context if its exercise is meaningful relative to results—that is, if the appointment power that the Chief Justice possesses can potentially be exercised in a way that could skew the outcomes of the special tribunals. I assert that the Chief Justice’s appointment power is potentially significant in this way. This claim that the choice of special court judges can affect case outcomes rests on several separate assumptions (all fairly well accepted), and it is worth spelling out these assumptions in the context of the special court appointment situation. All must be present for the Chief Justice to strategically manifest his policy preferences into possible outcomes of the special courts.

First, for the Chief Justice’s appointment discretion to materially affect results, federal judges must be diverse in terms of their ideolo-

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<sup>148</sup> See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1037–39 (2002) (arguing that it may not be desirable to exert outside influence on the judicial branch because the judiciary has been effective at implementing institutional and doctrinal devices of self-restraint).

<sup>149</sup> *In re Hennen*, 38 U.S. (13 Pet.) 230, 235–36 (1839) (argument of petitioner).

<sup>150</sup> See Resnik, *Constricting Remedies*, *supra* note 12, at 224–25 (discussing the Rehnquist Court’s and the Judicial Conference’s relationships with Congress in creating new federal rights).

gies, legal philosophies, and/or technical competence.<sup>151</sup> The Chief Justice's special court appointment power is limited to existing federal judges, a limit that has been important to courts in upholding its constitutional validity.<sup>152</sup> If federal judges are truly fungible, then the Chief Justice's discretion is essentially meaningless with regard to special court decision making—federal judges would be expected to be identical in terms of their judicial behavior. To state such a proposition is virtually to refute it, for the federal bench is obviously diverse in terms of judges' individual ideologies. The extent to which such judicial preferences impact case outcomes is a different and harder question that I address below, but the fact that such diversity exists is indisputable. Revealing in this regard is the dynamic that occurs when the President nominates an existing district judge to fill a circuit court seat. The Senate does not automatically acquiesce in every case on the theory that federal judges are alike and fungible, nor does it confine its inquiry to technical competence. Rather, it often probes the nominee's specific philosophies, in recognition of the fact that not all federal judges think alike.

Another necessary predicate for the Chief Justice's ability to potentially affect results is that the different preferences judges possess affect special court outcomes at least some of the time. Mere judicial heterogeneity would be little cause for concern if those differences were never manifested in case outcomes. There is a significant amount of work in law and political science that suggests that judicial preferences do matter at least in some cases;<sup>153</sup> even those who contend that neutral rules constrain judicial decision making most of the time concede that there are hard, or ambiguous cases, where judges necessarily draw on extralegal considerations that might track with

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<sup>151</sup> Obviously, it matters on *which* of these scales judges differ. A federal bench that is diverse in terms of technical competence presents different kinds of appointment choices for the Chief Justice than one that is also, or alternatively, diverse along observable ideological lines. The claim here, and more specifically in Part II.A, is that the federal bench is ideologically diverse in a way that can at least occasionally affect cases.

<sup>152</sup> See *United States v. Cavanagh*, 807 F.2d 787, 792 (9th Cir. 1987) (stating that the Chief Justice's appointment power has not been considered contrary to Articles II and III of the Constitution).

<sup>153</sup> See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 64–74 (1993) (analyzing the processes and decisions of the Supreme Court from an attitudinal perspective); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) (positing that judicial minimalism, a form of judicial restraint, causes a minimalist court to decide cases on narrow grounds, notably in the cases regarding the right to die, affirmative action, sex and sexual orientation, and the First Amendment and new technologies); Richard Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100 (2001) (showing empirically that D.C. Circuit judges vote along ideological lines).

personal ideology.<sup>154</sup> In this regard, the different special courts may provide different constraints on, and opportunities for, the exercise of individual judicial preferences. If we assume that different kinds of rule schemes vary in their determinacy and in the degree of constraint they provide on adjudicative decision making, then the fact that the courts at issue are subject-matter specialized means that some might constrain judicial latitude more than others. Courts like ECA or TECA (which adjudicate relatively technical rule schemes with circumscribed standards of review) may permit less space for the exercise of judicial discretion than a court like FISA (which balances abstract notions of national security and “probable cause”), or a body like the D.C. Circuit Special Division (which was charged with selecting independent counsel). The Chief Justice’s appointment discretion is more problematic with respect to special courts that present opportunities for the appointee judges to manifest their policy preferences in outcomes.

A third requirement for potential strategic use of the appointment power is that these potentially relevant differences among lower federal judges must be observable by the Chief Justice, at least in a rough sense. If a Chief Justice prefers judges of a certain type on a given special court, he must be able to identify the specific individuals on the federal bench that are likely to embody those characteristics. This criterion is not dependent on any absolute certainty or predictability that the appointed judge will vote in accord with the observable traits; judges frequently behave in ways that surprise their appointers,<sup>155</sup> and presumably this dynamic might also occur with respect to judges designated by the Chief Justice. It is enough that the Chief Justice can observe differences in judicial ideology that are likely to be manifested on the special court. The Chief Justice has several methods to ascertain such attitudes; he has all of the public information about the nominating President and the judge’s prior public career that outside scholars have, and additional inside information about judicial reputation (gleaned from other judges or directly in adjudicative or extramural interactions).<sup>156</sup>

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<sup>154</sup> See, e.g., Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1648 (2003) (noting that when “collegiality” was absent on the D. C. Circuit, “judges of similar political persuasions too often sided with one another”).

<sup>155</sup> Justice David Souter is one such example. See, e.g., Scott P. Johnson & Robert M. Alexander, *The Rehnquist Court and the Devolution of the Right to Privacy*, 105 W. VA. L. REV. 621, 645 (2003) (describing the manner in which Justice Souter has “surprised many conservatives with his moderate to liberal voting record” after appointment by President George H.W. Bush in 1990).

<sup>156</sup> The Chief Justice’s ability to observe and ascertain the preferences of lower court judges can take many forms; Judge David Sentelle, who headed the Special Division of the D.C. Circuit that appointed Kenneth Starr, was a member of a regular poker game with Chief Justice

Finally, even if all three of these elements exist, there is one final link that must be in place to create the possibility of strategic use of the appointment power to affect outcomes; the Chief Justice must be able to match the observable attitudes of a given lower court judge with the right kind of case where such attitudes can apply to the decision. A Chief Justice might wholly approve of a lower court judge's view of the Fourth Amendment, but such synchronicity would be largely irrelevant if the judge was appointed to hear a civil antitrust suit, or even if the judge was to hear a random drawing of federal cases. The incentive for strategic appointment behavior is much higher where there is a close fit between judicial attitude and the type of case; the presence of this dynamic makes the Chief Justice's special court appointment power more problematic than the generalized designation and transfer authority. When the Chief Justice transfers a judge from one generalist court to another, the eclectic case mixture and random selection mechanisms of these courts make it impossible to precisely match a judge with a case.<sup>157</sup> Therefore, when the transfer is between two generalist courts, the veil of subject matter uncertainty obviates most of the potential for meaningful strategic allocation of judges. The probability of just the right case coming to the transferred judge in the new court is too slim to justify much strategic behavior, and where a designated judge temporarily vacates a different generalist seat, there is always the chance that an important case will come to the temporarily vacated seat. No such uncertainty exists with special court appointments, where it is clear *ex ante* the kinds of matters the appointees will consider. This foreknowledge, coupled with the observable attitudinal differences in the pool of potential appointees, vests the Chief Justice with some ability to use the appointment power instrumentally. And, to the extent that the judicial norm of reason-giving provides a constraint on judges in the exercise of their normal adjudicative function, it exerts no such influence with respect to this power.

b. *The Norm of Collective Judicial Action*

Beyond the absence of any articulated reasons for the appointment choices, there is another central feature of the Chief Justice's appointment discretion that makes it distinct from the choices he and other judges make in deciding cases—in a manner highly un-

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Rehnquist. Ann Geracimos, *D.C. Power Players Ponder Big Deals; Poker Game Offers Relaxation*, WASH. TIMES, Nov. 10, 1998, at A1.

<sup>157</sup> For a comprehensive treatment of current case assignment practices in the federal circuit courts, see J. Robert Brown & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1069–79 (2000).



usual within Article III's structure, the appointment discretion is unchecked by other judges. It is commonplace to describe federal judges as "unaccountable," in the sense that their decisions are insulated from direct review of the political branches. But while the judiciary may be "unaccountable" in this sense, almost all important adjudicative decisions that judges make are conditional on the approval of other judges. For federal district judges, this intrabranch accountability relationship is vertical (review by a higher court), for Supreme Court Justices it is horizontal (the collective vote of colleagues), and for circuit judges it is in both directions.<sup>158</sup> These institutional features of judicial action are independent of questions of individual judicial motivation, so even the ultra-attitudinalist would agree that a judge's ability to translate personal preferences into final outcomes is dependent on the consent of other judges.

Thus, even if judges' usual choices are not constrained by legal rules at all, they are at least checked by other judges in a way that the Chief Justice's unitary appointment authority is not. In concrete terms, Chief Justice Rehnquist's view on Fourth Amendment questions does not always prevail in the Supreme Court, but his choices of which federal judges would best apply the quasi-Fourth Amendment standards of the FISA statute do prevail. To be sure, the Chief Justice's ability to manifest policy preferences into outcomes through the special appointment power is constrained by other judges in a literal sense—the appointee judges themselves. But the grant to a single individual of absolute discretion to select these appointees is a significant step toward the Chief Justice's ability to promote probable outcomes. The corporate feature of typical Article III decision making often operates to blunt ideologically extreme positions, and also may have a discourse-generating feature as judges who share alternative viewpoints explain their differences.

By placing the special court appointment power in a single official, Congress fails to capture the benefits of collective judicial decision making—either in terms of ideological moderation or in terms of its discourse-promoting effects. As I suggest below, some of the normative qualms about this judicial appointment device would be ameliorated simply by collectivizing the power. Congress could, for instance, vest the special court appointment authority in the Supreme Court as a whole, or in a broader group of judges such as the Federal

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<sup>158</sup> For scholarship that has explored the constraints this institutional setting places on individual judicial discretion, see Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 823–25 (1994) (explaining hierarchical organization of Article III judiciary) and McNollgast, *Politics and the Courts: A Positive Theory of Judicial Decisions and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1641–48 (discussing influence of potential vertical review on lower court judges' decisions).

Judicial Conference, thereby avoiding the appearance or actuality of individualistic policy-oriented behavior.

c. *The Norm Against Specific Matching of Judge and Case*

The Chief Justice's appointment power is conceptually anomalous in one more sense when measured against another baseline surrounding the normal exercise of federal judicial power. Throughout the federal judiciary, there exists a longstanding norm against specific matching of certain judges with certain cases; instead, federal courts employ random, mechanistic, or broadly categorical case assignment mechanisms. Circuit chief judges generally do not select the judges who will hear a specific appeal in the manner that the Chief Justice is authorized to select particular federal judges to hear particular kinds of matters on the specialized federal courts. Although nowhere textually specified, the strength of the anti-selection norm in the normal operation of the federal judiciary is revealed by the rare instances where it is allegedly breached. One example is the furor that ensued on the Fifth Circuit in the 1960s when several judges accused the court of "stacking" a series of panels in important civil rights cases.<sup>159</sup> More recently, the strength of the norm against discretionary selection has come to public light in the Sixth Circuit's ongoing dispute arising out of the *en banc* panel composition for the Michigan Law School affirmative action case, *Grutter v. Bollinger*.<sup>160</sup> In a procedural appendix to his dissent in that case, Judge Boggs accused the circuit's Chief Judge Martin of improperly handling the case in order to affect the judges that would sit on the *en banc* panel;<sup>161</sup> this charge subsequently produced an internal investigation. The severity of this charge is instructive for the discussion here, as it ultimately alleges the same kind of act (selecting specific judges for specific cases) that Congress empowers the Chief Justice to exercise.

The response from another Sixth Circuit judge is also telling. In a separate concurrence, Judge Moore disputed Judge Boggs's allegations, but also stressed that the mere allegation that such strategic behavior occurred was a severe threat to judicial legitimacy. Moore noted that "[b]ecause we judges are unelected and serve during good behavior, our only source of democratic legitimacy is the perception that we engage in principled decision-making."<sup>162</sup> In this context, even the suggestion that Chief Judge Martin had matched judges with

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<sup>159</sup> For a detailed discussion of this episode, see Brown & Lee, *supra* note 157, at 1043–65.

<sup>160</sup> 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003).

<sup>161</sup> *Id.* at 811–14 (Boggs, J., dissenting) (accusing the Chief Judge of violating court rules by failing to circulate the order for appeal and calling an irregular panel of judges to hear the case).

<sup>162</sup> *Id.* at 753 (Moore, J., concurring).

cases could cause “grave harm . . . to this court and even to the Nation as a whole,” by “undermin[ing] public confidence in our ability to perform our important role in American democracy.”<sup>163</sup> Judge Moore embraced the notion that it was profoundly inappropriate for a judicial official to strategically match specific judges with specific cases; furthermore, this impropriety was so deeply rooted in norms of judicial power that a mere allegation of its occurrence was corrosive.

It is possible to elaborate this point further with a hypothetical involving the Chief Justice’s routine authority to transfer judges among various federal courts of general jurisdiction to hear cases “by designation.” I have argued here that although this formally resembles the Chief Justice’s power to appoint existing federal judges to a fixed term on special federal courts, it is fundamentally different because the Chief Justice has precise foreknowledge of the kinds of matters his special appointees will decide upon; such knowledge is absent in generalist transfers. The following counterfactual illustrates the distinction between the two powers, and (relatedly) the strength of the norm against discretionary matching of judge and case. Imagine that the Chief Justice could assign designee judges not merely to sit temporarily on a different generalist court subject to the normal automatic case assignment procedures of that court, but instead to hear any and all cases of a specific kind that arose in that general court. So, for instance, the Chief Justice would have the power to transfer a handful of judges from other circuits to the Sixth Circuit, with the mandate that “these judges shall hear *only* appeals involving constitutional challenges to affirmative action during their temporary assignment, and they shall hear *all* such cases that arise in the circuit.” There is something profoundly wrong with such a power, and its wrongness derives in large part from its departure from the deep-seated norm against strategically matching specific judges with specific cases.

Now imagine that the Chief Justice transferred a number of existing federal judges to the District Court for the District of Columbia, with the mandate that “these transferee judges, and only these judges, shall rule on all government requests to undertake surveillance for national security purposes.” And for good measure, he selected three circuit judges from the entire federal appellate judiciary to sit by designation on the D.C. Circuit, with similarly exclusive jurisdiction over all national security surveillance cases. The objection to this mandate derives not merely (or primarily) from its intrusion into the lower courts’ administrative autonomy, but rather from the more substantive concern expressed above. The Chief Justice’s

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<sup>163</sup> *Id.* at 752, 758.

autonomous selection of hand-picked judges to hear all cases on a particular kind of issue is inappropriate when measured against the normal operation of, and theoretical basis for, the power to designate judges to a different generalist court. But of course, this specific selection is precisely what Congress authorized in establishing the FISA courts and other similar tribunals. The Chief Justice commits no literal impropriety in carrying out the statutory command to fill up these special courts, but specific congressional authorization of such discretionary selection is nonetheless at odds with longstanding norms of federal judicial administration.

### 3. *A Subtle Encroachment*

In the foregoing pages, I have argued that the Chief Justice's special appointment power is incongruous with several express and customary norms of Article III structure and practice. A related argument derives from the fact that the political nature of the power may ultimately be subversive of the judiciary's stature and authority. A standard principle of the separation of powers discourse is that a reallocation of functions is particularly disfavored if it works as an "encroachment" on one or more branches of government.<sup>164</sup> In policing separation of power boundaries, the Court has often expressed its role as providing a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other."<sup>165</sup> It is perhaps counterintuitive to conceive of the Chief Justice's additional power to appoint as a possible encroachment on the judiciary. At the most basic level, the net quantity of power reposed in Article III increases by virtue of this delegation to the Chief Justice. A congressional decision to vest the Chief Justice with additional authority to select special court judges hardly seems like encroachment; or if it is encroachment, it is of the President's baseline judicial nomination authority.<sup>166</sup>

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<sup>164</sup> See, e.g., Peter Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 507 (1987) (discussing *Bowsher v. Synar*, 478 U.S. 714, 770 (1986) (White, J., dissenting) (considering whether a congressional action intruding into executive function ultimately led to "the encroachment or aggrandizement of one branch at the expense of the other.")); cf. Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 603 (1984) ("Interpenetration of function and competition among the branches . . . protect[s] liberty by preventing the irreversible accretion of ultimate power in any one.").

<sup>165</sup> *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam); see also *Mistretta v. United States*, 488 U.S. 361, 380–82 (1989) (detailing the Court's "separation-of-powers jurisprudence"); THE FEDERALIST No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961) (stating that the separation of powers confers on each branch the means "to resist encroachments of the others.").

<sup>166</sup> This claim of encroachment on the executive was made in *Cavanagh*, and rejected by Judge Kennedy on the grounds that the appointees had already been nominated and confirmed by the President and Senate. See *United States v. Cavanagh*, 807 F.2d 787, 791–92 (9th Cir. 1987).

How, then, is this delegation perceived to “encroach” on the judiciary? The first point is a general one—the grant of a public law power is not purely gratuitous. The power to make an appointment choice carries with it a duty to make such a choice. To the extent such exercise entails difficult and controversial choices, there is a burden alongside the benefit of this additional power.<sup>167</sup> If this burden is manifested in public criticism of specific appointment choices, at one general level it is no more troubling to the Chief Justice than to any other public official, and indeed may be less so given the Chief Justice’s life tenure. But at an institutional level there are features of this criticism that are more injurious to a judicial official, and derivatively to the judiciary generally, than similar attacks levied against the President or the Senate.

The power and stature of the American judiciary is historically dependent on public acceptance of its role and function. Lacking the bureaucratic and enforcement mechanisms to impose its rules on noncompliant actors, the judiciary depends on voluntary acquiescence from other government officials and the American people. Judges cast their role as fundamentally different from, and above ordinary politics and through history have used this perception as the primary mechanism for securing and retaining such public stature.<sup>168</sup> Judicial decisions are accepted in large part because they are seen as nonpolitical: they are more deliberative, more reasoned, more neutral than the stuff of ordinary politics. In this way the legal reasoning that Justices engage in is important—even if it is in fact malleable and indeterminate—because it makes judicial decisions seem less overtly political. Much of the academic criticism of the Supreme Court’s *Bush v. Gore*<sup>169</sup> opinion is phrased in these terms, accusing the Court of squandering some of its prestige by engaging in a poorly-reasoned political decision.<sup>170</sup> A judicial choice of a judge for a special court is,

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<sup>167</sup> Even Taft, who generally welcomed such influence as President and Chief Justice, noted the burdens he felt from presidential exercise of the judicial appointment power: “‘Oh John! you don’t know—you can’t know—the difficulties of such responsibility as I have to exercise, and how they burden a man’s heart with the conflicting feelings prompted by duty and personal affection.’” Daniel S. McHargue, *President Taft’s Appointments to the Supreme Court*, 12 J. POL. 478, 484 (1950).

<sup>168</sup> See, e.g., Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 994 (2004) (“The Court’s legitimacy stems from many sources . . . [including] the insulation of judges from ordinary politics . . .”).

<sup>169</sup> 531 U.S. 98 (2000).

<sup>170</sup> See, e.g., Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408 (2001) (describing the decision as “troubling because it suggested that the Court was motivated by a particular kind of partisanship”); David Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 756 (2001) (describing how the Supreme Court “splintered along ideological lines” in the decision, which in the author’s view “was not a triumph for the rule of law”); Lawrence H. Tribe, *Erog v. Hsub and its Disguises: Freeing Bush v.*

of course, of much less importance than the choice of a President. Whatever one's view about the strength of *Bush v. Gore's* rationale, there is certainly more there than what supports the Chief Justice's unexpressed appointment choices. Although there is little public attention to the Chief Justice's appointments when he makes them, there is often pointed criticism of his choices in the wake of important special court actions.

It may be that such additional criticism is of little damage given the high stature of the current Supreme Court, even after *Bush v. Gore*.<sup>171</sup> But a general reduction in the Court's prestige might render this extra ground for critique more meaningful. Chief Justice Rehnquist has presided over a Court at its apex in terms of public stature, and he has also shown no disinclination to exercise the appointment power robustly. The Chief Justice who presided over the Court at its most tenuous period in the twentieth century adopted a very different position. Chief Justice Hughes, who waited out the court-packing controversy of the 1930s and the attendant attacks on the Court, did not desire additional powers that might generate additional criticism. However, in his efforts to maintain judicial stature during and after that crisis, Hughes was adamant that he did not want additional authority like the appointment power. He said that he and the Justices "strongly opposed the imposition of that burden" of additional administrative authority, which would "possibly mak[e] the Chief Justice and the Court itself a center of attack."<sup>172</sup> Hughes objected, on the grounds that it was "undue centralization," to the Chief Justice receiving sole appointment power of the administrator of a new office overseeing federal courts, and at his request that power was vested with the entire Supreme Court.<sup>173</sup> Instead of Taftian centralization, he advocated "greater attention to local authority and local responsibility."<sup>174</sup> By decentralizing the system, Hughes sought to diminish the visibility of the Chief Justice and the Supreme Court, thereby warding off political attacks.<sup>175</sup> His colleague Felix Frankfurter specifically praised Hughes's approach, noting that it "avoided the temptations of a strong executive," and "realized fully that elabo-

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*Gore from its Hall of Mirrors*, 115 HARV. L. REV. 170, 173 (2001) (noting "673 law professors who denounced the Court right after it announced its stay").

<sup>171</sup> Public opinion polls show that the Court remains highly regarded by Americans even after *Bush v. Gore*. See James L. Gibson et al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 535 (2003) (suggesting "little if any diminution of the Court's legitimacy in the aftermath of *Bush v. Gore*").

<sup>172</sup> Peter Graham Fish, *Crises, Politics and Federal Judicial Reform: The Administrative Office Act of 1939*, 32 J. POL. 599, 621 (1970) (footnote omitted).

<sup>173</sup> *Id.* at 624 (footnote omitted).

<sup>174</sup> *Id.* (footnote omitted).

<sup>175</sup> This feature of Hughes's managerial style has been referred to as his "magic touch of decentralization." *Id.* at 626 (footnote omitted).

ration of administrative machinery is deadening to the judicial process."<sup>176</sup> Such concern may seem less poignant now, given the Supreme Court's high prestige, but that should not obscure the fact that the appointment authority carries with it at least some potential cost to the Chief Justice and to judicial stature more broadly.

### C. *Alternative Devices*

In the foregoing discussion, I highlighted several problems with the special court appointment power that Congress has been willing to give exclusively to the Chief Justice: it is an act of political discretion exercised by a life-tenured official, it is unilateral, and it is exercised without significant public debate or discourse. In the next few paragraphs, I tentatively set forth several proposals that Congress might implement to fill special court seats while addressing one or more of the defects of the current system. Importantly, as the earlier historical discussion illustrates, there is nothing inherent in the Chief Justice's office that *requires* that Congress give the power of special court appointment to him alone, or give it to the judicial branch at all. This power represents a historical choice that Congress made to shift a small part of the appointment power to the Chief Justice, and it is a choice that Congress can revoke or reconfigure. The same flexibility that permitted the delegation to the Chief Justice in the first place permits alternate delegations to a different collection of judges.

In much of the foregoing discussion, I have stressed the general problems involved with placing the appointment choice with the judiciary, and thus one obvious solution would be to appoint a federal special court judge through the baseline nominate-and-consent procedure spelled out by Article II.<sup>177</sup> This would have the aforementioned advantages of vesting the appointment decisions in politically accountable branches, and sharing it among the President and the Senate. Some of the judges of various specialized courts, like the Tax Court, are appointed this way, even where they serve fixed, rather than life, terms. There may be reasons, however, not to staff special courts this way. Many of the courts are part-time in operation, so it is most efficient to rotate existing Article III judges through the spots.

There is a different kind of reason why the normal Article II nominate-and-consent model might be disfavored for special courts, although this reason makes it more problematic to shift the power to the Chief Justice. As I discuss above, the fact that the narrow subject

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<sup>176</sup> Felix Frankfurter, "The Administrative Side" of Chief Justice Hughes, 63 HARV. L. REV. 1, 4 (1949).

<sup>177</sup> See U.S. CONST. art. II, § 2, cl. 2.

matter of these courts is known *ex ante* freights the specific appointment choice with additional strategic importance—the appointing officials know with certainty on what kind of matter the appointee will rule. When the appointment choice is consigned to the political branches, this results in a process that is potentially more overtly politicized with respect to specific cases than normal judicial appointments; this potential may provide a justification for shifting the power to the the judiciary.

Even if the special court appointment power remained in the judiciary, however, provision for a collective appointment authority would remove the problem of unilateralism discussed above. One type of reform that would still entail a judicial choice of special court appointees would vest the appointment choice in a group of Article III judges. This could be the Supreme Court as a whole; indeed, past statutes and unenacted proposals have embodied this method. It would be possible to vest this appointment function in a collective judicial body, such as the Supreme Court, the Federal Judicial Conference, the chief judges of the federal circuits, or some other administrative subset. One precursor bill to the independent counsel regime embraced such a collective appointment mechanism, and would have vested power to appoint special prosecutors in the District Court for the District of Columbia sitting *en banc*, without any involvement by the Chief Justice.<sup>178</sup> An early congressional proposal involving the comptroller general would have vested power to appoint that official in the Court as a whole.<sup>179</sup> There is some precedent for this method (for example, the Sentencing Commission members, who are nominated by the Federal Judicial Conference), and the collective nature of the choice would provide a structural check on individual strategic behavior. Such a collective approval requirement would provide a check on unbridled discretion even if the Chief Justice was, in practice, the official who made selections in the first instance. For example, although the Chief Justice takes the lead in assigning the justices as “circuit justices” to particular jurisdictions, it is the Court as a whole that must order those assignments, thus providing a latent check on the Chief Justice’s discretion.<sup>180</sup>

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<sup>178</sup> See Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 609 (1998) (describing Senator Bayh’s proposal).

<sup>179</sup> See 59 CONG. REC. 8647, 8647–57 (June 5, 1920). The House of Representatives debated H.R. 14441, which provided in part for a comptroller general “who shall be appointed by the Supreme Court of the United States” and who “may be removed at any time by the Supreme Court” for various causes. *Id.* at 8648.

<sup>180</sup> See 28 U.S.C. § 42 (2004) (“The Chief Justice of the United States and the associate justices of the Supreme Court shall from time to time be allotted as circuit justices among the circuits *by order of the Supreme Court.*”) (emphasis added). Only when the Court is out of session is the Chief Justice empowered to make such assignments without the Court’s approval. *Id.*



The alternative to collectivizing the choice is more fundamental—it would remove all possibility of strategic selection by making the selection of special court judges either random, or via a mechanical application of a universal principle (like seniority, for example, whereby every active federal judge would serve for a time on a special court after ten years of service).<sup>181</sup> Such automatic seniority triggers are not rare in federal judicial administration—an existing application is the statutory mechanism for selecting the chief judges of the circuit courts, which provides that

[t]he chief judge of the circuit shall be the circuit judge in regular active service who is senior in commission of those judges who (A) are sixty-four years of age or under; (B) have served for one year or more as a circuit judge; and (C) have not served previously as a chief judge.<sup>182</sup>

Such devices may seem distressingly mechanical, but in a conceptual sense they are actually *more* faithful to the mythic ideal of federal judicial interchangeability than the Chief Justice's allocation authority, which is likewise historically rooted in that same fiction. If judges are truly interchangeable, then a random selection method does not produce a negative outcome; conversely, if judges *are not* fungible (and few think they are), random selection at least creates a veil in the assignment mechanism that avoids the strategic dangers of the current system.

Finally, whether or not Congress chooses a different appointment mechanism for specialized courts in the future, for the foreseeable future the Chief Justice will continue to exercise this discretion with respect to a number of special courts. This leads to one final suggestion geared specifically to the Senate Judiciary Committee. When the current Chief Justice retires, the Senate will hold confirmation hearings on the President's new nominee. Undoubtedly, the Judiciary Committee members will question the nominee about his or her judicial philosophy relative to important constitutional and policy areas. During this process, the Judiciary Committee may also wish to take note of the small but significant component of the office's administrative authority explored here, and expressly question the nominee about how he or she would go about choosing judges for specialized courts, just as a Chief Justice nominee would field questions about other aspects of judicial administration.

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<sup>181</sup> Rochelle Dreyfuss proposed some of these measures in a 1990 article on special court adjudication. See Dreyfuss, *supra* note 74, at 377 (arguing that specialized courts could, "at least in theory, enable the judiciary to meet the nation's adjudication needs effectively, and may even produce benefits of its own.").

<sup>182</sup> 28 U.S.C. § 45 (2004).

### III. THE APPOINTMENT CHOICES OF RECENT CHIEF JUSTICES

In the previous section, I made the argument that the congressional decision to vest exclusive special court appointment authority in the Chief Justice is problematic because there is no structural balancing device to prevent the Chief from exercising that power in a strategic way to affect outcomes. The foregoing argument is not dependant on actual empirical proof that any Chief Justices have sought to advance their substantive issue preferences through their special court appointment choices—the power is problematic because of the potential to do so, whether latent or not. Of course, this theoretical criticism gains some additional traction if the actual record of appointments by particular Chief Justices suggests evidence of such strategic behavior. This section attempts—in a very blunt aggregative sense—to examine that specific factual question.

The proliferation in the 1970s of special courts that were filled with judges chosen by the Chief Justice<sup>183</sup> means that two particular men—Warren Burger and William Rehnquist—have made significantly more appointments, across a greater swath of specialized tribunals, than any of their predecessors. Chief Justice Burger made seventy appointments to five different specialized courts, and Chief Justice Rehnquist has made at least fifty-six such selections. The appointment activity of these two Chief Justices is also relatively recent and thus, although apparently never before collected into a single list, basic information on their choices is generally ascertainable with a bit of research. A list of particular appointments that both men made is organized chronologically by court and presented in an Appendix to this Article.<sup>184</sup>

This appointment record is potentially interesting in that it may shed a new kind of light on the ongoing debates among political scientists and legal academics over the factors that motivate judicial decision making.<sup>185</sup> Although unanimous on little else, this body of literature has understandably focused on judicial behavior manifested in voting on actual judicial decisions, and not on extralegal judicial behavior such as the Chief Justice's choices in making appointments. More sophisticated models have recently challenged the long popular

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<sup>183</sup> These courts were TECA, FISA, FISA Court of Review, and the Special Division of the D.C. Circuit for independent counsel appointment. See *supra* Part I.B (providing information on each court, the ability of the Chief Justice to appoint the judges from each court, and the significance of that appointment power).

<sup>184</sup> For a description of the various sources used to compile the Appendix, see *infra*, note 197.

<sup>185</sup> Useful summaries of these debates can be found in Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 POL. RES. Q. 625 (2000), and Michael Heise, *The Past, Present and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 833–43 (2002).

“attitudinal” model of judicial decision making,<sup>186</sup> arguing that judges are often limited from voting their sincere preferences by strategic constraints, such as those imposed by other branches of government,<sup>187</sup> by norms of precedent, or *stare decisis*.<sup>188</sup> The Chief Justice’s appointment discretion is interesting in the context of this debate because it is so obviously unconstrained by case law precedent, and perhaps also unconstrained by strategic interaction with the other branches. Filling these judicial vacancies is, it would seem, an area where the Chief Justice could implement his or her policy preferences without meaningful constraint. The obvious question then becomes: have Chief Justices Rehnquist and Burger done so?

A definitive answer to this question is beyond the scope of this Article, and may be difficult to ascertain even with more focused analysis. It is difficult to assess judicial ideology precisely with clear external markers, and so any assessment of the actual judges chosen by the Chief Justice is fraught with some uncertainty. The party of the appointing President is one such overly blunt measure. Consider, for instance, that Justice John Paul Stevens, a consistently “liberal”<sup>189</sup> voter on the current Supreme Court, was appointed by President Ford, and so would be coded as a “Republican” appointee under any such analysis. Such blunt analysis should be employed with appropriate caution, especially for this relatively small sample set of judges. Nonetheless, in the large body of empirical political science literature on the lower federal courts, the party of the appointing President remains a widely recognized, if crude, metric from which to assess the composition of courts.<sup>190</sup> Over a sufficient number of judges, studies show that this rough party identification can affect voting behavior. This variable also has one feature that explains its academic popularity: it is easily and objectively available for every Article III judge.

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<sup>186</sup> See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 64–74 (Cambridge University Press 1993) (analyzing the processes and decisions of the Supreme Court from an attitudinal perspective).

<sup>187</sup> See, e.g., William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331 (1991) (assessing the implications for statutory interpretation that arise in the context of the interaction between Congress, the President, and the Court).

<sup>188</sup> See, e.g., Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 *AM. J. POL. SCI.* 1018 (1996) (arguing that, as a norm, *stare decisis* manifests itself throughout the decision-making process).

<sup>189</sup> The standard attitudinal coding terms “liberal” and “conservative” are, of course, also overly blunt in many cases.

<sup>190</sup> For a comprehensive collection of eighty-four studies measuring party and judicial ideology, see Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 *JUST. SYS. J.* 219, 243 (1999) (concluding that “[c]umulating and synthesizing empirical findings . . . confirm conventional wisdom that party is a dependable measure of ideology in modern American courts” and that “Democratic judges indeed are more liberal on the bench than Republican counterparts.”).

Applying this party-based method of analysis to the appointments made by Chief Justices Burger and Rehnquist yields results that appear striking at first glance, but are less so relative to the background pool of all federal judges at the relevant times. In raw percentage terms, Chief Justice Rehnquist's special court appointments were much more likely to be Republican appointees than the corresponding group of Burger special court judges. A full 74% of judges selected by Chief Justice Rehnquist were appointed by Republican presidents, compared to fewer than half of Burger's appointments (46%).<sup>191</sup>

There is an important qualifier here—although Chief Justice Rehnquist predominantly appointed Republicans, he made his appointments from a federal judicial pool that, for most of his tenure as Chief Justice, had been primarily Republican appointed, sometimes overwhelmingly so. Still, Rehnquist's 74% rate exceeds even the high-water mark of this trend, which occurred at the end of the first Bush administration in 1992, when 72.2% of the lower federal bench (circuit and district judges) was Republican appointed.<sup>192</sup> William Rehnquist became the Chief Justice in 1986. In 1988, the percentage of Republican appointees in the lower federal courts was 61.2%, and by 1992 it was 72.2%. Yet during the eight years of President Clinton's tenure this figure gradually decreased, and by the year 2000 Democrat-appointed judges comprised a slight majority of the federal bench. Chief Justice Rehnquist's appointment patterns show a tendency to select Republican appointees that slightly exceeds these fluctuating background rates. This feature of his appointment record can be explained partly by the baseline composition of the federal judiciary, but other factors may also influence his choices.

Beyond this blunt party-based analysis, there is also evidence of appointment practices that are consistent with more sophisticated and nuanced strategic behavior by both Chief Justices. Consider the three-judge Special Division of the D.C. Circuit that was empowered to select independent counsels and to define their jurisdiction. Because the independent counsel investigates the sitting Executive Branch, and because there is no corpus of selection criteria to constrain judicial discretion in the way that case law is said to operate, it is plausible that the judges on the Special Division exercise an unusual degree of discretion where their individual preferences might matter. If this is true, then the choice of which judges and which preferences comprise the panel is a critical one vested with the Chief Justice.

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<sup>191</sup> See tbls.1 & 2 *infra* p. 393 (detailing the Burger and Rehnquist appointments).

<sup>192</sup> See Sheldon Goldman et al., *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 253 (2001).

TABLE 1: BURGER APPOINTMENTS  
BY PARTY OF APPOINTING PRESIDENT

Court	Republicans	Democrats
JPMDL	4	7
TECA	16	23
Special Division	3	2
FISA Court	7	5
FISA Court of Review	2	1
<b>Total (70)</b>	<b>32 (46%)</b>	<b>38 (54%)</b>

TABLE 2: REHNQUIST APPOINTMENTS  
BY PARTY OF APPOINTING PRESIDENT

Court	Republicans	Democrats
JPMDL	13	3
Special Division	4	2
FISA Court	16	9
FISA Court of Review	6	0
Alien Terrorist Removal	4	1
<b>Total (58)</b>	<b>43 (74%)</b>	<b>15 (26%)</b>

Both Chief Justice Burger and Chief Justice Rehnquist placed more Republican appointees on the Special Division than Democrat appointees, but the skew is not overwhelming. For Burger it was three of five (60%), and for Rehnquist it was four of six (66.7%). As I explained above, these numbers do not—standing alone—demonstrate clear ideological behavior by either Chief Justice, and they come close to replicating the background composition of the federal judiciary, at least during the Rehnquist years. However, there is a pattern to the distribution of these appointments that appears non-random. The Special Division sat for twenty-two years, and for all but 1.5 of those years the panel breakdown was precisely the same: two Republican appointees and one Democrat.<sup>195</sup> Although the ag-

<sup>195</sup> See John Q. Barrett, *Special Division Agonistes*, 5 WIDENER L. SYMP. J. 17, 44 (2000) (listing the Special Division judges and their independent counsel appointees from 1978 through 2000); Kenn G. Kern, *The Special Division of the Court and the Independent Counsel Arrangement*:

gregate figures look proportional enough—over a third of those chosen by two conservative Chief Justices were Democrat-appointed judges—the allocation of those appointments meant that for over twenty of the Division’s twenty-two years, Republican appointees were a majority of the three-judge panel.<sup>194</sup>

Finally, as noted above, Nixon-appointee Warren Burger actually used his special court appointment power as Chief Justice to select more Democrat-appointed judges than Republican appointees to these posts. However, Burger’s Democrat appointees were not randomly spaced across all of the special courts whose spots he filled. Thirty of the thirty-eight Democrat-appointed judges that Burger selected were placed on either the Judicial Panel on Multidistrict Litigation (“JPMDL”) or the Temporary Court of Appeals (“TECA”)—bodies whose decisional authority is confined to relatively specific fields and perhaps also channeled by relatively more neutral technical standards than other types of special courts (or, even if this assumption is unfounded, perhaps Chief Justice Burger *perceived* such a distinction, which in turn guided his appointment behavior). In contrast, the twenty appointments that Burger made to the Special Division (itself performing the largely political task of selecting independent counsels) and the FISA Court and Review Court (which balance national security needs, civil liberties, and weigh incomplete evidentiary claims in deciding whether to issue a warrant) were predominantly Republican appointees. This contrasts with the TECA and JPMDL, where only forty percent of the Burger selections were Republican appointees. This record suggests that Chief Justice Burger may have employed a different kind of appointment criterion depending on the particular subject matter that his appointees would decide and, relatedly, the degree of attitudinal discretion that they would potentially exercise.<sup>195</sup>

In addition to the foregoing analysis, it is possible to make a few normative suggestions regarding the Chief Justice’s exercise of his appointment authority. As I detailed in Part II, much of the theoretical difficulty with this exercise of authority derives from the vesting of an inherently discretionary act in an official that is insulated from accountability for his actions. I have suggested that Congress might be more sparing in its delegation of this power, and might do so in the future in a manner that reduces the unconstrained discretion given to one particular jurist. But many of the same discretion-confining techniques advocated earlier (seniority, random selection, group se-

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*Safeguarding the Appearance of Judicial Impartiality*, 4 GEO. PUBLIC POL’Y REV. 39, 42 (1998) (listing the Special Division judges from 1978 through 1998).

<sup>194</sup> See app. A *infra* pp. 397–402 (listing the Burger and Rehnquist appointments).

<sup>195</sup> *Id.*

lection by the judicial conference, or the Supreme Court as a whole) might be adopted voluntarily—even if only in a non-binding advisory capacity—by a Chief Justice seeking to avoid the appearance of unilateral partiality.

A separate area for reform would be greater transparency in the actual appointments made, if not also for the candidates under consideration. The research for this Article has underscored the fact that the Chief Justice's special court appointments are not collected and published regularly in the same place.<sup>196</sup> A step beyond ex-post publication of appointment choices would be a Chief Justice's announcement of several potential judges for a soon to be vacant special court seat. It would be a useful discourse-generating technique for the Chief Justice to issue a slate of potential appointees to, for example, the FISA Court, and receive commentary from bar groups and the broader public. All of this would shed light on the exercise of a power that currently is largely outside of public view until long after the appointment choices are made.

#### CONCLUSION

This Article has explored a particular kind of power exercised by a particular American judge. Like much judicial action, the appointment authority exercised by the Chief Justice entails the application of significant discretion. But unlike the normal choices that judges make in deciding cases, the Chief Justice's appointment discretion is unchecked by the votes of colleagues or by a reviewing court, and is also unfettered by the doctrinal and textual factors that may constrain ordinary judicial decision making. There is some evidence that the two Chief Justices who have exercised this power of appointment most often have occasionally used it to advance their substantive policy preferences. As I argued above, these concerns counsel against regular congressional use of the power in connection with new special courts.

On this point, there is one more way that the special appointment power of the Chief Justice differs from the ordinary work that judges do. The discretion exercised by life-tenured judges in their normal adjudicative function may be a problematic "difficulty" in theory and practice, but it is a difficulty that is inherent in the basic dualist structure of American democracy, and one that many feel is preferable to an alternative regime of absolute legislative supremacy. In contrast, there is nothing inherent or necessary about vesting the Chief Justice

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<sup>196</sup> Many, but not all, such appointments are announced sporadically in *The Third Branch*, an official periodical publication of the federal judiciary, available at <http://www.uscourts.gov/ttb/> (last visited Oct. 27, 2004).

alone with the power to fill up special court positions. This appointment device represents a policy choice by Congress, and is a choice that Congress can, and should, employ more cautiously in the future.



## APPENDIX A

THE BURGER AND REHNQUIST APPOINTMENTS<sup>197</sup>

TABLE 1: JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

## Burger Appointments

<b>Appointee</b>	<b>Year</b>	<b>Home Court</b>	<b>Appointing President</b>
Andrew A. Caffy	1975	D. Mass.	Eisenhower
Murray I. Gurfein	1979	2d Cir.	Nixon
Roy W. Harper	1979	E.D. & W.D. Mo.	Truman
Charles R. Weiner	1979	E.D. Pa.	Johnson
Edward S. Northrop	1979	D. Md.	Kennedy
Robert H. Schnacke	1979	N.D. Cal.	Nixon
Frederick A. Daugherty	1980	W.D., E.D. & N.D. Okla.	Kennedy
Sam C. Pointer, Jr.	1980	N.D. Ala.	Nixon
S. Hugh Dillin	1980	S.D. Ind.	Kennedy
Louis H. Pollak	1980	E.D. Pa.	Carter
Milton Pollack	1980	S.D.N.Y.	Johnson

## Rehnquist Appointments

<b>Appointee</b>	<b>Year</b>	<b>Home Court</b>	<b>Appointing President</b>
Halbert O. Woodward	1989	N.D. Tex.	Johnson
John F. Nangle	1990	E.D. Mo.	Nixon
Robert R. Merhige, Jr.	1990	E.D. Va.	Johnson
William B. Enright	1990	S.D. Cal.	Nixon
Clarence A. Brimmer	1992	D. Wy.	Ford
John F. Grade	1992	N.D. Ill.	Ford
Barefoot Sanders	1992	N.D. Tex.	Carter

<sup>197</sup> Data on the special court appointments presented here is not compiled in any one official or secondary source, and apparently (based on telephone and email requests by the author) is not kept in comprehensive unofficial form by the Administrative Office of U.S. Courts or the Federal Judicial Center. Accordingly, the information in this Appendix was compiled through detailed chronological review of several sources: (1) The Third Branch, an official periodical of the federal judiciary, which often published individual special court appointments when made; (2) the introductory pages of the bound West Federal Reporters (e.g., "F.2d" and "F.Supp"), which include lists of current members of some special courts; (3) the Federal Judicial Center's judicial biography database, found at <http://www.fjc.gov>; (4) the judicial biographical information contained in electronic editions of the West Legal Directory and the Almanac of the Federal Judiciary; and (5) individual media reports recounting relevant appointments.

## Rehnquist Appointments

<b>Appointee</b>	<b>Year</b>	<b>Home Court</b>	<b>Appointing President</b>
Louis C. Bechtle	1994	E.D. Pa.	Nixon
John F. Keenan	1998	S.D.N.Y.	Reagan
William T. Hodges	2000	M.D. Fla.	Nixon
Morey L. Sear	2000	E.D. La.	Ford
Bruce M. Selya	2000	1st Cir.	Reagan
Julia S. Gibbons	2000	W.D. Tenn.	Reagan
D. Lowell Jensen	2000	N.D. Cal.	Reagan
J. Frederick Motz	2001	D. Md.	Reagan
Robert L. Miller, Jr.	2003	N.D. Ind.	Reagan

TABLE 2: TEMPORARY EMERGENCY COURT OF APPEALS

## Burger Appointments

<b>Appointee</b>	<b>Year</b>	<b>Home Court</b>	<b>Appointing President</b>
John S. Hastings	1972	7th Cir.	Eisenhower
William H. Hastie	1972	3d Cir.	Truman
Martin D. Van Oosterhout	1972	8th Cir.	Eisenhower
Robert P. Anderson	1972	2d Cir.	Eisenhower
James M. Carter	1972	9th Cir.	Truman
Frank M. Johnson	1972	5th Cir.	Eisenhower
Edward A. Tamm	1972	D.C. Cir.	Truman
Joe Ewing Estes	1972	N.D. Tex.	Eisenhower
A. Sherman Christensen	1972	D. Utah	Eisenhower
William J. Jameson	1976	D. Mont.	Eisenhower
Joe McDonald Ingraham	1976	5th Cir.	Eisenhower
Robert A. Grant	1976	N.D. Ind.	Eisenhower
William H. Becker	1977	W.D. Mo.	Kennedy
Walter E. Hoffman	1977	E.D. Va.	Eisenhower
Herbert P. Sorg	1977	W.D. Pa.	Eisenhower
Walter P. Gewin	1977	5th Cir.	Kennedy
John K. Regan	1977	E.D. Mo.	Kennedy
Dudley B. Bonsal	1977	S.D.N.Y.	Kennedy
Alfonso J. Zirpoli	1977	N.D. Cal.	Kennedy
Frederick B. Lacey	1978	D. N.J.	Nixon
Earl R. Larson	1979	D. Minn.	Kennedy
Lewis R. Morgan	1979	5th Cir.	Kennedy
John W. Peck	1979	6th Cir.	Kennedy
Charles M. Metzner	1979	S.D.N.Y.	Eisenhower

## Burger Appointments

<b>Appointee</b>	<b>Year</b>	<b>Home Court</b>	<b>Appointing President</b>
Ben Cushing Duniway	1979	9th Cir.	Kennedy
Edward T. Gignoux	1980	D. Me.	Eisenhower
Sam C. Pointer, Jr.	1980	N.D. Ala.	Nixon
Stanley A. Weigel	1980	N.D. Cal.	Kennedy
Wesley E. Brown	1980	D. Kan.	Kennedy
Adrian A. Spears	1981	W.D. Tex.	Kennedy
Robert W. Hemphill	1981	D.S.C.	Johnson
Robert E. Maxwell	1981	N.D. Va.	Johnson
J. Skelly Wright	1981	D.C. Cir.	Truman
Reynaldo Garza	1982	5th Cir.	Kennedy
Frederick A. Daugherty	1982	W.D., E.D. & N.D. Okla.	Kennedy
Homer Thornberry	1982	5th Cir.	Kennedy
Thomas J. MacBride	1982	E.D. Cal.	Kennedy
Morey L. Sear	1982	E.D. La.	Ford
Ray McNichols	1982	D. Idaho	Johnson

TABLE 3: SPECIAL DIVISION FOR THE PURPOSE  
OF APPOINTING INDEPENDENT COUNSELS (D.C. CIRCUIT)

## Burger Appointments

<b>Appointee</b>	<b>Year</b>	<b>Home Court</b>	<b>Appointing President</b>
Roger Robb	1978	D.C. Cir.	Nixon
J. Edward Lumbard	1978	2d Cir.	Eisenhower
Lewis R. Morgan	1978	5th Cir.	Kennedy
Walter R. Mansfield	1984	2d Cir.	Johnson
George E. MacKinnon	1985	D.C. Cir.	Nixon

## Rehnquist Appointments

<b>Appointee</b>	<b>Year</b>	<b>Home Court</b>	<b>Appointing President</b>
Wilbur F. Pell, Jr.	1987	7th Cir.	Nixon
John D. Butzner, Jr.	1988	4th Cir.	Kennedy
David B. Sentelle	1992	D.C. Cir.	Reagan
Joseph T. Sneed	1994	9th Cir.	Nixon
Peter T. Fay	1994	11th Cir.	Ford
Richard D. Cudahy	1998	7th Cir.	Carter

TABLE 4: FOREIGN INTELLIGENCE SURVEILLANCE ACT COURT

## Burger Appointments

<b>Appointee</b>	<b>Year</b>	<b>Home Court</b>	<b>Appointing President</b>
Albert V. Bryan Jr.	1979	E.D. Va.	Nixon
Frederick B. Lacey	1979	D.N.J.	Nixon
Lawrence W. Pierce	1979	S.D.N.Y.	Nixon
Frank J. McGarr	1979	N.D. Ill.	Nixon
George L. Hart	1979	D.D.C.	Eisenhower
James H. Meredith	1979	E.D. Mo.	Kennedy
Thomas J. MacBride	1979	E.D. Cal.	Kennedy
William C. O'Kelley	1980	N.D. Ga.	Nixon
Dudley B. Bonsal	1981	S.D.N.Y.	Kennedy
Fred A. Daugherty	1981	W.D. Okla.	Kennedy
Edward J. Devitt	1984	D. Minn.	Eisenhower
Edward S. Northrop	1985	D. Md.	Kennedy

## Rehnquist Appointments

<b>Appointee</b>	<b>Year</b>	<b>Home Court</b>	<b>Appointing President</b>
Conrad K. Cyr	1987	D. Me.	Reagan
James E. Noland	1987	S.D. Ind.	Johnson
Joyce H. Green	1988	D.D.C.	Carter
Robert W. Warren	1989	E.D. Wis.	Nixon
Wendell A. Miles	1989	W.D. Mich.	Nixon
Frank Freedman	1990	D. Mass.	Nixon
Ralph G. Thompson	1990	W.D. Okla.	Ford
Charles Schwartz, Jr.	1991	E.D. La.	Ford
Earl H. Carroll	1992	D. Ariz.	Carter
James C. Cacheris	1993	E.D. Va.	Reagan
John F. Keenan	1994	S.D.N.Y.	Reagan
Royce C. Lamberth	1995	D.D.C.	Reagan
William Stafford	1996	N.D. Fla.	Ford
Stanley S. Brotman	1997	D.N.J.	Ford
Harold A. Baker	1998	C.D. Ill.	Carter
Michael J. Davis	1999	D. Minn.	Clinton
John Edward Conway	2000	D.N.M.	Reagan
Claude M. Hilton	2000	E.D. Va.	Reagan
James G. Garr	2001	N.D. Ohio	Clinton

## Rehnquist Appointments

<b>Appointee</b>	<b>Year</b>	<b>Home Court</b>	<b>Appointing President</b>
Nathaniel M. Gorton	2001	D. Mass.	Bush <sup>198</sup>
Colleen Kollar-Kotelly	2002	D.D.C.	Clinton
James Robertson	2002	D.D.C.	Clinton
Robert Broomfield	2003	D. Ariz.	Reagan
George Kazen	2003	S.D. Tex.	Carter
Dee Benson	2004	D. Utah	Bush

TABLE 5: FOREIGN INTELLIGENCE SURVEILLANCE ACT  
COURT OF REVIEW

## Burger Appointments

<b>Appointee</b>	<b>Year</b>	<b>Home Court</b>	<b>Appointing President</b>
James E. Barrett	1979	10th Cir.	Nixon
George E. MacKinnon	1979	D.C. Cir.	Nixon
A.L. Higginbotham, Jr.	1979	3d Cir.	Carter

## Rehnquist Appointments

<b>Appointee</b>	<b>Year</b>	<b>Home Court</b>	<b>Appointing President</b>
Bobby R. Baldock	1992	10th Cir.	Reagan
Paul H. Roney	1994	11th Cir.	Nixon
Laurence H. Silberman	1996	D.C. Cir.	Reagan
Ralph B. Guy	1998	6th Cir.	Reagan
Edward Leavy	2001	9th Cir.	Reagan
Ralph K. Winter, Jr.	2003	2d Cir.	Reagan

<sup>198</sup> All "Bush" appointees in this table were appointed by George Herbert Walker Bush.

TABLE 6: ALIEN TERRORIST REMOVAL COURT

## Rehnquist Appointments

<b>Appointee</b>	<b>Year</b>	<b>Home Court</b>	<b>Appointing President</b>
Earl H. Carroll	1996	D. Ariz.	Carter
David D. Dowd, Jr.	1996	N.D. Ohio	Reagan
William C. O'Kelley	1996	N.D. Ga.	Nixon
Michael A. Telesca	1996	W.D.N.Y.	Reagan
Alfred M. Wolin	1996	D.N.J.	Reagan