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FEDERAL JUDGES—APPOINTMENT, SUPERVISION, AND REMOVAL—SOME POSSIBILITIES UNDER THE CONSTITUTION

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THE federal bench has, in general, been effective. Its independence has been a virtue which has outweighed even the defects in organization which will be presently pointed out. Nevertheless, these defects have had their effect on the federal judiciary and its reputation. Individual federal judges and the powers of federal judges in general are subjected in Congress and elsewhere to an unending series of attacks. Sooner or later an accumulation of irritation may attain enough force to shear the federal bench of some of its essential powers or destroy its principal source of strength: tenure during good behavior. The way to meet such dangers and forestall worse remedies, like recall, election of federal judges for short terms, and other popular nostrums, is to improve the organization of the federal bench within constitutional lines already fixed. The fundamental faults are faults in organization which no amount of tinkering with rules of practice or procedure will ever correct. In this sense three changes in the organization of the federal bench are put forward in the articles to follow: (1) Judicial appointment of district and circuit judges; (2) Judicial supervision over district and circuit judges; (3) judicial removal of unfit district and circuit judges. To each concrete proposal, one paper will be devoted; it will be shown that the change proposed is desirable and is possible without constitutional amendment.

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The improvement of the federal bench is, of course, the immediate end in view. But hardly less important than this immediate end are certain indirect benefits which might be expected to enure to the judicial systems of the several states if the federal judicial system were once established on a basis which might serve as a model for them to imitate. The state judicial systems, for the most part, stick deep in the political mire. Their unfortunate condition has resulted from the popular election of judges and the sacrifice of secure judicial tenure. Whenever one suggests that the remedy is to be found in the appointment of judges and in secure tenure, three awful spectres are at once conjured up: *first,* the peril of political appointment; *second,* the danger that state judges will become arbitrary and high-handed, like certain real or supposed federal judges; and *third,* the possibility that corrupt or disabled men will find an opportunity to remain on the bench for life. No doubt these dangers are overrated, but they are none the less "strong talking-points." If our national judicial system, which already operates with secure tenure, were to lead the way in showing how these real or supposed dangers can be met, the concrete demonstration would do more to smooth the way for a general reintroduction in the states of sound principles of selection and tenure than any amount of abstract argument.

PART I

JUDICIAL APPOINTMENT OF DISTRICT AND CIRCUIT JUDGES

(1) Weakness of the Existing Method of Appointment

Presidential appointment of Supreme Court justices, by and with the consent of the Senate, has worked well enough. It is far from clear that a better way of choosing these justices could be found even if the Constitution were to be amended. In making these important appointments both the President and the Senate assume that responsibility which, by the framers of the Constitution, they were intended to assume. The dignity and power of the Supreme Court, the need for ability and fairness in its members, are so deeply appreciated that the President and Senate are apt to scrutinize carefully the qualifications of prospective appointees thereto.

But, what has been a sound method of choosing Supreme Court justices, has not proved to be an equally sound way of choosing inferior judges.[1] The appointment of the latter has come to be mainly a matter of politics. While one would hesitate to say that the merit of candidates is entirely overlooked, partisan considerations are certainly those which predominate. Perhaps partisan political considerations affect even Supreme Court appointments, but in respect to inferior judgeships such considerations are openly admitted to be controlling.[2] Thus Senator Overman, in debate on the bill of 1922 to create additional federal judgeships, declared regarding previous bills directed to the same end: "There can be no question, Mr. President, that the House of Representatives refused to pass the bills proposing to create new judgeships which had been acted upon favorably by the Senate because, even though they were necessary, they would have involved the appointment of Democratic judges. Now, however, although we could not secure the appointment of Democratic judges who were needed, we have before us a bill proposing to provide 22 additional Republican judges. Is such a bill as that a log-rolling measure? Is it a pork-barrel bill? It is a pork-barrel judges' bill."

And Senator Walsh of Montana in the same debate said: "Half a dozen different bills for that purpose passed the Senate of the United States, went to the other branch of Congress, and were turned down over there or allowed to die, without any bones being made of it; it was openly declared and expressed in the corridors and in the committees that Republican members over there did not intend to allow any more Democratic judges to be appointed."[3]

But the fact that inferior judgeships are treated as "party pie" is not the worst of it. Worse is the fact that these judgeships have become local "party pie." District and circuit judgeships have come

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[1]President Hoover, in his message transmitting the Wickersham Commission's Preliminary Report to Congress, mentions "the *method* by which enforcement and *judicial personnel* is secured" among matters which "require further most exhaustive consideration and investigation." UNITED STATES DAILY, Jan. 14, 1930, p. 6, col. 6. (Italics ours.)

[2]Frankfurter and Landis, BUSINESS OF THE SUPREME COURT, 231, 236-237.

[3]Both these statements are quoted by Frankfurter and Landis, *op. cit.* supra note 2, p. 231 n. The bill under discussion was adopted September 14, 1922, 48 Stat. 837.

to be regarded as jobs to be handed out at the behest of local party chiefs.[4] The President has almost abdicated his power of selection. This has come about because political interest in district and circuit judgeships is local rather than national, because the President does not have time to investigate the reputation and standing of candidates and is forced to seek information and advice from local leaders, because senators and other influential persons of the state in which a vacancy occurs will naturally be consulted by the Senate when it passes upon an appointment, and finally because the President himself is in the midst of politics, and is forced to cede local patronage for political support. But whatever the causes, there is no doubt of the facts. Appointments of inferior judges and promotions to the circuit courts of appeal are dictated today by the senators from states where the vacancies exist, at least if they are influential and of the President's own party; if the senators are members of the opposition party, then naturally the President turns for "suggestions" to the local chiefs of his own party. Every vacancy results in a wild scramble and pulling of political wires which is only less hurtful to judicial independence and disinterestedness than is a popular primary or election. I ask the reader candidly whether we dare view this situation with indifference, whether we dare look on without concern while this last citadel of justice according to law, is engulfed by the rising tide of politics.

(2) The Change Proposed

The nature of the change proposed has already been indicated in the title of this paper: Appointment of inferior federal judges by the judiciary branch itself. Specifically it is suggested that district and circuit judges be appointed by the Chief Justice of the United States with the approval of the Supreme Court; or perhaps

[4]That these appointments are regarded as matters of local political patronage is well shown by the following from the New York Times of February 25, 1929: "The creation of three additional Federal judgeships for Southern New York, the bill for which passed the Senate on Saturday, is likely to furnish a test of the power of the Republican triumvirate—Hilles, Machold, and Hill—as dispensers of patronage under the Hoover administration, it was said by party leaders yesterday." And even when bar committees and others are active in support of good candidates (as apparently was the case in New York in the instance cited) their influence will depend on their political power; it is too much to expect that such influence will always be adequate.

that circuit judges be so appointed, and that district judges be appointed by the Chief Justice with the approval of the respective circuit courts of appeals. Other forms of appointment might easily be imagined which would embody the same idea, but these concrete proposals will furnish a sufficient basis for the remainder of our discussion. The one point intended to be stressed is the need for judicial control over appointments to inferior judgeships.[5]

The advantages of having judges chosen by some responsible member of the judiciary like the Chief Justice, would be several. The Chief Justice would be as little swayed as any person to be found in our entire goverment by considerations of politics. He himself holds office during good behavior and needs fear no man's favor or disfavor. He is interested in placing judges in the inferior courts who can work effectively; in this sense he should feel a responsibility and an inclination to choose purely on merit which neither the President nor a senator nor a local politician can feel.[6] Moreover the Chief Justice and his brethren on the Supreme Court are in a better position than anyone to know what district judges are most efficient and most deserving of promotion. In making appointments for district judgeships the Chief Justice would un-

[5]Perhaps the same end could be accomplished in the manner suggested by Mr. Laski: "In the case of federal judges, the President would confer with a committee composed of the Chief Justice of the Supreme Court, and, say, five other judges chosen by the federal bench, of whom three would be judges of the Supreme Court, and the others representative of the circuit and district court judges respectively. To them might be added, as representatives of the Bar, the Attorney-General and the President of the American Bar Association. It is not, I suppose, possible to abolish the right of the Senate to confirm. But a recommendation which came to the Senate with such authority would go far to make federal appointments to the Bench non-political in character, and, I should expect, rapidly reduce the power of the Senate to a mere form. I believe this to be a desirable end. For a committee of the legislature in which one party is in a majority is, where patronage is concerned, a most undesirable body to have any control over its exercise; and so large a body as the whole Senate is bound inevitably to lack the opportunity of informal discussion upon which the proper character of appointments so largely depends." Laski, "Technique of Judicial Appointments," 24 MICH. L. REV. 529, 538.

[6]And if Congress itself (or the Senate) had no actual part in the appointment of judges, and if their appointments were once placed on a non-partisan basis, Congress could very well exercise a restraining influence on the Chief Justice by the criticism of his appointments, or even by the threat to deprive him of his power to appoint if he misused it.

doubtedly listen to the suggestions of local bar associations, judges of the circuit courts of appeals and prominent lawyers. One can feel rather confident that his choice, especially if it had to be approved by the Supreme Court, or by a circuit court of appeals, would be made only after the fullest consideration of the merits of candidates. And on the other side, the judicial appointee of the Chief Justice would enter office free of entangling obligations. At present, it is almost inevitable that the candidate make some implied commitments in order to secure the favor of those who have the ear of the President and Senate.

However, it is not necessary to dwell at length on the advantages of judicial selection of judges. Many recent writers on the subject of court organization have recommended and approved this general method of selection.[7] The excellent English judicial system is a sufficient commentary on its success. The Lord Chancellor appoints all English judges.[8] While the Lord Chancellor himself does not hold his office as such, except for the time that his party remains in power, every Lord Chancellor retires from office with a £5,000 pension; he may thereafter as ex-Chancellor sit in the Court of Appeal;[9] and in practice he always becomes a permanent judicial member of the House of Lords.[10] So that for all practical purposes the Chancellor's tenure and judicial position are no less secure than

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[7]Rosenbaum, "Election of Judges or Selection," 9 ILL. L. REV. 489; Kales, UNPOPULAR GOVERNMENT IN THE UNITED STATES, ch. 17, "Methods of Selecting and Retiring Judges"; Willoughby, PRINCIPLES OF JUDICIAL ADMINISTRATION, 364; BULLS. AM. JUD. SOC., VI, 29, VII, 61-62, 84-87, VII A, 150-169, but cf. 82-86; and apparently Laski agrees in principle, see "The Technique of Judicial Appointment," 24 MICH. L. REV. 529, 538; editorial note on the report of a Cleveland Bar Association committee recommending appointment of judges in Ohio, 21 ILL. L. REV. 612 (1927).

[8]The appointment of English judges (with a few exceptions which are not important for our purpose) is in hands of the Lord Chancellor. 7 Halsbury's LAWS OF ENGLAND, 61.

[9]See 7 Halsbury, *op. cit.*, 57, 62, regarding the ex-Chancellor's pension and position in the Court of Appeal.

[10]Any person who has held high judicial office for two years, and who is a peer, becomes a Lord of Appeal in Ordinary; he sits as a "Law Lord" in the House of Lords and receives a salary of £6000 per annum. 39-40 Vict. ch. 59, secs. 6, 25; 7 Halsbury *op. cit.* 63; 9 *id.* 23. For the last century or more all Chancellors have been created peers of the realm, and in practice all ex-Chancellors do remain in the House of Lords as Lords of Appeal in Ordinary. These statements are based on a careful check of the Law Reports.

the tenure and judicial position of the Chief Justice of the United States.

It might be objected that the federal bench is powerful enough now, that the power of appointing inferior judges would simply make it more independent, more autocratic, and more self-sufficient. This kind of suggestion is plausible, but in reality quite unfounded. To begin with, it is not apparent how this power could make the Supreme Court itself any more independent and self-sufficient within its judicial sphere than it already is. And as far as inferior judges are concerned, appointment by the Chief Justice could not make them more independent than they now are except in one respect; they would be free of previous political commitments—that is just what is wanted. District and circuit judges owe their independence, not to the way in which they are selected, but to the fact that they enjoy tenure during good behavior. Bullies on the bench are primarily the result of faulty selection. A petty-minded man becomes autocratic when he becomes conscious of power and knows he has his job for life. A selection of judges by the Chief Justice should result in more right-minded judges being chosen; it should reduce the number of bullies who get on the bench. Certainly a choice of judges for political reasons does not help; political dependence in this or in any other respect does not make for judicial fitness. Assuming that judges hold office during good behavior and are politically independent as they should be, the proper guarantees against abuse of power are: (1) careful selection of judges by someone competent to select; (2) proper supervision over inferior judges by their judicial superiors (the matter to be discussed in the second paper in this series); and (3) effective methods of removing unfit judges (the subject to be considered in the third paper).

Would the President and Senate assent to the divesting of their power of appointment? Of course this is a question which can only be answered when the matter is put up to them. But two points ought not to be forgotten. Patronage is not an unmixed blessing. "Political pie" may, like other pastry, give joy to the palate but cramp the stomach. The President and senators are often embarrassed to decide between conflicting claims of rival candidates or factions; and must sometimes alienate important political friends whichever way they decide. Furthermore, it seems likely that the

same trend which has manifested itself in recent civil service legislation[11]—and this legislation also has cut down patronage—would again prevail here, provided the appointment of judges by the judiciary commended itself on its merits to Presidential and senatorial judgment. At least the change is worthy of serious consideration. It promises much in the way of positive benefits and no particular harm could come from a trial.[12] If some abuse became apparent, the remedy is easy; there is nothing irrevocable about vesting the appointing power in the Chief Justice. Congress could at any time restore the present method of appointment.

(3) Legal and Constitutional Questions

The Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for and which shall be established by Law; but the 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."[13] That district and circuit judges are inferior officers within the meaning of this clause, whose appointment may be vested by Congress when it thinks proper in the Chief Justice alone, or in the Chief Justice subject to the approval of the Supreme Court or another court, is the general position to be maintained in the remainder of this paper. This position involves the consideration of two questions, both of which are essentially questions of constitutional interpretation:

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[11]On the history of the civil service legislation, see Mayers, The Federal Service, 19 *et seq.*, and the learned opinion of Brandeis, J., (dissenting) in Myers v. United States, *272* U. S. *52*, *275 et seq.*

[12]There would not even be a material damage to the court system if (as is not at all likely) judicial appointment of judges were held to be unconstitutional. The appointees of the Chief Justice would certainly be *de facto* judges whose acts would be upheld as to all litigation handled by them. (See authorities infra notes 23 and 25). And if appointments were made by the Chief Justice and the Supreme Court, the very exercise of the power to appoint would be tantamount to a decision holding the power constitutional. (See authorities infra note 16).

[13]Art. II, sec. 2.

a. Whether appointment by the Chief Justice alone, or with the approval of a court, is *appointment by a court of law* within the meaning of the Constitution;[14] and
b. Whether district and circuit judges are *inferior officers* whose appointment may be vested in a court of law.

In deciding such questions, the practical construction of the Constitution by different organs of the federal government in the performance of their several functions, is hardly less significant than the judicial decisions themselves. The construction put upon some part of the Constitution by Congress, or the Executive in the early days of the federal government, has often been treated as controlling by the Supreme Court; a long-continued construction by Congress or the Executive has been regarded as having a like force.[15] Similarly, practical construction by the courts is important; long-continued judicial practice may settle a constitutional question quite as effectively as a judicial decision.[16] Accordingly, in the discussion to follow, the acts and debates of Congress, the Executive practice, and the practice of courts and judges will be discussed along

[14]It might be argued that the Chief Justice is the head of a department, and as such can be invested with power to appoint. But the argument is not convincing. "Heads" have always been understood to refer to heads of executive departments. Also the mention of "courts of law" along with "heads" indicates that "heads" was not meant to include judicial officers. Accordingly I have chosen rather to stand on the proposition that appointment by the Chief Justice, alone or with the approval of a court, constitutes appointment by a court of law.

[15]As to the importance of legislative or executive construction see Martin v. Hunter's Lessee, 14 U. S. (1 Wheat.) 304, 351; Cohens v. Virginia, 19 U. S. (6 Wheat.) 264, 418-429; In re Hennen, 38 U. S. (13 Pet.) 230; Cooley v. Port Wardens, 53 U. S. (12 How.) 299, 315; United States v. Germaine, 99 U. S. 508; Burrow-Giles Company v. Sarony, 111 U. S. 53, 57; Ames v. Kansas, 111 U. S. 449, 462-469; Cooper Manufacturing Company v. Ferguson, 113 U. S. 727; Field v. Clark, 143 U. S. 649, 609-691; United States v. Eaton, 169 U. S. 331, 344; United States v. Midwest Oil Co., 236 U. S. 459, 469; Ex parte Grossman, 267 U. S. 87, 118-119; Myers v. United States, 272 U. S. 52.

[16]As to the effect of judicial practice or construction see Stuart v. Laird, 4 U. S. (1 Cranch.) 299, 309; McKeen v. Delancy's Lessee, 9 U. S. (5 Cranch.) 22; Martin v. Hunter's Lessee, 14 U. S. (1 Wheat.) 304, 351; United States v. State Bank of North Carolina, 31 U. S. (6 Pet.) 29-39; Prigg v. Pennsylvania, 41 U. S. (16 Pet.) 359, 621; United States v. Pugh, 99 U. S. 265, 269; Ames v. Kansas, 111 U. S. 449, 462-69; United States v. Hill, 120 U. S. 169; Ex parte Grossman, 267 U. S. 87, 118-119.

with the decisions, in so far as they serve to fix the construction of the appointment clause of the Constitution.[17]

A. *What Constitutes Appointment by a Court of Law*

Is appointment by the Chief Justice alone appointment by a court of law? Or must the power to appoint be exercised by the Supreme Court as a whole, or a circuit court of appeals as a whole? Stated in another form, the question is whether appointment by a single judge, member of a court consisting of several judges, is appointment by a court of law. Whatever might be the proper reading of the appointment clause, as an original matter, the practical construction of it by Congress and the judiciary branch establishes conclusively the proposition that appointment by a single member of a court is appointment by a court of law.[18]

One striking instance of this practical construction of the appointment clause is furnished by the statutes and the judicial practice regarding designation of federal judges for service outside their re-

[17]In the following cases practical construction was relied upon as fixing the meaning of the appointment clause itself: In re Hennen, 38 U. S. (13 Pet.) 230; United States v. Germaine, 99 U. S. 508; United States v. Eaton, 169 U. S. 331, 344; and Myers v. United States, 272 U. S. 52.

[18]In addition to the practice and decisions referred to in the discussion to follow, it is interesting to consider McPherson v. Blacker, 146 U. S. 1, 26-36. In that case, the Supreme Court had to pass upon a question not unlike the question which we are considering, and answered the question on the basis of the practical construction which the Constitution had received. A clause of the Constitution provides: "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors for President equal to the whole Number of Senators and Representatives to which the State may be entitled in Congress." Art. II, sec. 1. In the exercise of this power to direct the method of appointing electors the legislatures of the states had, from an early date, variously employed three methods of choosing electors: (1) appointment directly by the legislature; (2) election by popular vote of the whole state; (3) election by popular vote by districts. The Supreme Court held, in sustaining a statute of Michigan which provided for election by districts, that the validity of this method of "appointment" (as well as the other methods used) had been settled by the early and long-continued practical construction of the above clause of the Constitution. If the direction that *each State shall appoint* is satisfied by election by separate districts of the several states as the court holds, and if the same requirement is satisfied by election *by the legislature,* since the Constitution has been so construed in practice, there should be no difficulty in holding that appointment by a court of law is satisfied by appointment by one organ of the court (to wit, a single judge) since that also represents a constitutional practice (See text infra).

spective districts and circuits.[19] The power to designate is in substance and effect a power to appoint for temporary service. It is a power which belongs under the statutes to the Chief Justice alone and to the presiding circuit judges individually. It is a power recognized by a long course of legislation and whose validity is established by an equally long judicial practice and by many decisions of the federal courts.[20] In *Lamar v. United States* the Supreme Court, speaking through Chief Justice White, disposed of the contention that "To assign a judge of one District and one Circuit to perform duty in another district or circuit was in substance to usurp the power of appointment and confirmation vested by the Constitution in the President and the Senate" with the remark, "We think merely to state it suffices to demonstrate its absolute unsoundness."[21] The reason—though the court does not here deem it necessary to state one—is that Congress has by law vested in the Chief Justice and the presiding circuit judges (to wit, courts of law) the power to make temporary appointments of judges in these cases. Indeed, designation is several times called appointment in the statutes,[22] and it is frequently referred to in the decisions by the same name.[23]

[19]A very limited form of designation has existed since 1809. 2 Stat. 534. But the first general provision for designation was made in 1850. 9 Stat. 422. The existing legislation may be found in U. S. C. title 28, secs. 17-23. For a general discussion of the designation legislation see Frankfurter and Landis, BUSINESS OF THE SUPREME COURT, ch. VI.

[20]See all of the authorities cited in the notes to this paragraph of the text.

[21]241 U. S. 103, 117-118. And in Donegan v. Dyson, 269 U. S. 49, 54, the authority of a Commerce Court judge (after the Commerce Court was abolished) to sit as a district judge by designation of the Chief Justice was challenged. The court speaking through Chief Justice Taft says: "Section 201 gives to the Chief Justice full discretion, without further designation by any other judge, to vest in a Commerce Court judge full authority directly to act as a judge either in a particular district court or in the Circuit Court of Appeals in any circuit, and the designation of Judge Mack in this case was ample for the purpose."

[22]The words "designation" and "appointment" are used interchangeably in the original act (1850) 9 Stat. 422. And the term "appointment" appears several times in the existing legislation.

[23]Ball v. United States, 140 U. S. 118; McDowell v. United States, 159 U. S. 596; National Home for Disabled Volunteer Soldiers v. Butler, 33 Fed. 374; In re National Telephone Manufacturing Company, 230 Fed. (C. C. A.) 785; United States ex rel Fehsenfeld v. Gill, 292 Fed. (C. C. A.) 136. And see also the language of the courts and contentions of counsels in Donegan v. Dyson and Lamar v. United States cited supra note 21.

If then designation for temporary service is to be regarded as appointment by a court under the constitutional appointment clause, as it seems it must be,[24] there is no escape from the conclusion that appointment by the Chief Justice alone has been settled by practice to be appointment by a court of law in the constitutional sense.[25]

Furthermore, from 1863 to 1898, the individual justices of the Supreme Court in their capacity as presiding circuit justices of the nine circuits of the United States, had the sole power to fill *temporary* vacancies in their respective circuits, in the offices of United States marshal and United States district attorney.[26] Each circuit justice sat in two courts, the Supreme Court and a circuit court; but in neither was he the sole member thereof. The power of the circuit justices, acting severally to fill these temporary vacancies, was apparently exercised and never questioned.[27] If a single cir-

[24]Whenever the Supreme Court has felt it necessary to justify appointments by courts or judges, it has always referred the power to appoint to the appointment clause. In re Hennen, 38 U. S. (13 Pet.) 230; Ex parte Siebold, 100 U. S. 371, 397-8; Rice v. Ames, 180 U. S. 371; Reagan v. United States, 182 U. S. 419.

[25]Those authorities which sustain the validity of a defective designation, do not militate in any sense against the position taken in the text. Cf., Ball v. United States, 140 U. S. 118, McDowell v. United States, 159 U. S. 596, Lamar v. United States, 241 U. S. 103, 117 and Donegan v. Dyson, 269 U. S. 49, 54. To be sure, a judge who has been defectively designated is a *de facto* officer, like any other officer whose appointment is defective; his acts can not be collaterally attacked. But if a United States judge were to assume to act in a district or circuit other than his own, without any designation or attempted designation whatever, it seems probable that his acts would be held to be void. Toland v. Sprague, 37 U. S. (12 Pet.) 300; Kendall v. United States, 37 U. S. (12 Pet.) 524, 616; Cary v. Curtis, 44 U. S. (3 How.) 236, 245; Ex parte Yerger, 74 U. S. (8 Wall.) 85, 104; Devoe Manufacturing Company v. District Judge, 108 U. S. 401, 417; Rosecrans v. United States, 165 U. S. 257; but see Luhrig Collieries Company v. Interstate Coal and Dock Company, 287 Fed. 711, (C. C. A.), where the contrary view is suggested. In Lamar v. United States, 241 U. S. 103, 117-118, and Donegan v. Dyson, 269 U. S. 49, 54, the question here mooted seems to be regarded as still an open one. But, even if an undesignated judge were treated as a *de facto* officer, the main argument of the text would still hold good. An undesignated judge could not claim a status as a *de jure* judge; that status would depend upon a *temporary appointment* in the form provided by law.

[26]12 Stat. 768 (1863) Rev. Stat. 793, gave circuit justices power to fill temporary vacancies in these offices in their respective circuits. In 1898 this power was taken away and was vested in the district courts. 30 Stat. 487.

[27]In re Farrow, 3 Fed. 112; In re Yancey, 28 Fed. 445; and see Ex parte

cuit justice had power to make temporary appointments like these, it seems once more to be because his appointments were, for constitutional purposes, appointments by a court of law. In fact, in a like case, in the executive branch, where a vice-consul claimed salary for the time that he acted temporarily in the place of a disabled consul under an appointment made by the *President alone* pursuant to statute, the Supreme Court felt obliged to support the President's power to appoint on just this basis: "The claim that Congress was without power to vest in the President the appointment of a subordinate officer called a vice-consul, to be charged with the duty of temporarily performing the functions of consular office, disregards both the letter and spirit of the Constitution. Although article II, section 2 of the Constitution requires consuls to be appointed by the President 'by and with the advice and consent of the Senate,' the word 'consul' therein does not embrace a subordinate and temporary officer like that of vice-consul as defined in the statute. The appointment of such an officer is within the grant of power expressed in the same section, saying, 'but the 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.' "[28]

Finally, it is by no means new for Congress to provide that *permanent* judicial officers, such as clerks, be appointed by one member of a court.[29] In 1839, it was provided that circuit courts were to have the appointment of their own clerks "and in case of disagreement between the judges, the appointment shall be made by the presiding judge of the court."[30] In 1869, the sole power of appointing the circuit court clerk was given to the circuit judge.[31] In 1878,

Siebold, 100 U. S. 371, 397, where the validity of this mode of appointment is taken for granted.

[28]United States v. Eaton, 169 U. S. 331, 343.

[29]And the Supreme Court has always rested the constitutional authority of courts or judges to make such appointments on the appointment clause. See authorities cited supra note 24.

[30]5 Stat. 322. Until this statute was passed, the clerks appointed by the district judges served also as circuit court clerks within their respective districts. For an interesting discussion of the legislation regarding the appointment of circuit court clerks, see In re Clerkship of Circuit Court, 90 Fed. 248, 253.

[31]16 Stat. 45.

the power of appointment was vested in the circuit court and in case of disagreement of the judges thereof, the appointment was to be made by the circuit justice.[32] In 1889, the circuit judge was given the sole power of appointing clerks[33] and the power remained in his hands until the circuit courts were abolished in 1911. The point to notice is that during all this time, the circuit court was a court consisting of more than one judge, but the power of appointment was exercised either absolutely or in certain events by only one member of the court. Similarly, since 1919, district court clerks are to be appointed, in districts where there is more than one judge, by the senior district judge.[34]

The legislation and the practice of the courts apparently leave no room for doubt that appointment by the Chief Justice alone is appointment by a court of law. But even if such were not the case, appointment by the Chief Justice, with the *approval* of the Supreme Court or of a circuit court of appeals, would certainly constitute appointment by a court of law. In *United States v. Hartwell,* a clerk appointed by an assistant-treasurer of the United States, with the *approval* of the Secretary of the Treasury, as required by statute, was held to have been *appointed* "by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power."[35] The principle of this case has often been reaffirmed and recognized;[36] its applicability to the situation in question is obvious. If appointment by an assistant-treasurer with the approval of the Secretary of the Treasury is, constitutionally speaking, appointment by the Secretary of the Treasury, then appointment by the Chief Justice with the approval of a circuit court of appeals could not well be denied to be appointment by

[32]20 Stat. 204.

[33]25 Stat. 655, 656.

[34]40 Stat. 1182; U. S. C. title 28, sec. 6. The difficulty, of course, does not arise where there is only one judge in a district, and yet, it would seem rather technical to hold in such cases that appointment by a single judge was appointment by a court of law, whereas appointment by a single judge in another district, pursuant to express statutory authority, was not appointment by a court of law inasmuch as the appointing judge happened to belong to a court of which there were several members.

[35]United States v. Hartwell, 73 U. S. (6 Wall.) 385, 394.

[36]United States v. Germaine, 99 U. S. 508; Ekiu v. United States, 142 U. S. 651; Burnap v. United States, 252 U. S. 512, and cases cited therein.

that court; and *a fortiori* appointment by the presiding member of the Supreme Court with the approval of that very court, would be appointment by the Supreme Court.

B. *Whether District and Circuit Judges Are Inferior Officers*

The appointment clause creates two general classes of officers. One class must be appointed by the President and Senate; Congress can exercise no control whatever over the method of their appointment. The other class which is referred to in the latter part of the clause as "inferior officers" is also normally appointed by the President and Senate; but the appointment of this class Congress may, when it thinks proper, vest in the President alone, the courts of law, or the head of departments.[37] The creation of two classes is clear. But what is the principle of division between them? How have the authorities classified officers with reference to this distinction? Are there any special considerations applicable to judges which should put them into the one class or the other? All these questions need to be considered and for the sake of clarity, the discussion to follow will be arranged under two separate heads: (1) the two classes of officers—distinction on principle and authority; (2) special considerations applicable to judges.

(1) *The Two Classes of Officers—Distinction on Principle and Authority*

Two principles of division between these classes are suggested by a reading of the appointment clause. The one principle would rest on an ordinary meaning of the word "inferior"; the word would be interpreted as a descriptive adjective, equivalent to "petty" or "unimportant." On this principle, the line of cleavage between the two classes of officers would be one between important officers and unimportant officers. Besides the significance to be attached to

[37]The clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the 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." Art. II, sec. 2.

the fact that the word "inferior" is often used in the sense indicated, two other considerations can be adduced to support this principle, which sets up importance of function as the criterion of division. In the course of the discussion of the appointment clause in the Federal Convention, some of the members dropped remarks which might indicate that "inferior officers" was intended to mean "petty officers."[38] Also in the debate on the creation of the executive departments the First Congress (House of Representatives) decided that heads of departments were too important to be classifiable as inferior officers. This determination was predicated largely on the ordinary implications of the name "head" and on the notion that the wide scope of such an officer's powers belied a classification as "inferior."[39] The grounds of classification relied upon on both these occasions tend to substantiate a principle of division based on importance of function. As to "heads" it is probably too late to question the binding force of this construction; their classification must be taken to be settled.[40] But to accept the principle on which their classification was based, is not equally necessary. Certainly importance of function can not stand today as a general criterion of classification. The weight of reason and authority sustains another and very different principle of division.

This other principle was stated by the Supreme Court in *United States v. Germaine,* decided some fifty years ago: "The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to *officers inferior to those specially mentioned,* Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments."[41]

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[38]2 FARRAND, RECORDS OF THE FEDERAL CONVENTION, 539, 627.

[39]See 1 ANNALS OF CONGRESS (Gales and Seaton) 383, 386, 387, 393-5, 396, 403, 404, 404-6, 409-10, 476-7, 480, 527-30, 538, 539, 551, 559.

[40]This has often been taken for granted; see dissenting opinions of McReynolds and Brandeis, J. J., in Myers v. United States, 272 U. S. 52, 193, 203-4, 209, 239, 241, 245, 247, 255, 257, 284, and authorities there cited. Other reasons on which to justify this construction are suggested in note 42 infra.

[41]99 U. S. 508, 510. (Italics ours). The case involved primarily the

Three lines of argument are involved in this terse statement by the court: First, the specific mention of certain officers in the first part of the appointment clause is stressed. If the naming of these officers were to be understood as a mere partial recital of officers included in the class which must be appointed by the President with the approval of the Senate, the recital would serve no logical purpose. Accordingly, this specification of officers is itself made the *ratio divisionis;* and all officers except those mentioned are said by the court to fall in the inferior class. Second, the word "inferior" can be understood in a relational sense, quite as well as in a sense that is descriptive. The word need not be taken to mean "petty" or "unimportant." The word is to be taken to mean, as the court says, "inferior to those specially mentioned" in the first part of the clause.[42] Third, the court refers to the necessity for legislative power to adapt methods of selection to meet the public need. There is no doubt that the public need can be best served by allowing Congress a wide latitude in choosing suitable methods of appointment. This fact constitutes the determining factor in support of the principle of division adopted by the *Germaine* case.[43]

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question whether a surgeon acting for the government in certain pension matters was an officer of the United States within the intent and meaning of a criminal statute.

[42]Accordingly, the sound reason for excluding heads of departments (rather than the reason suggested supra, note 40) would seem to be that these officers were not intended to be subordinate to any of the officers specifically mentioned, or to any other officers. Indeed, one can readily appreciate the difficulty the First Congress must have felt in calling a Secretary for Foreign Affairs an inferior officer, whereas certain persons who would normally be his inferiors, to wit, ambassadors, etc., were definitely classified by the Constitution as superior.

It might also be suggested that heads are excluded because they are mentioned in the latter part of the appointment clause. The general answer to this contention is: the President, courts of law, and heads of departments are merely referred to in the latter part of the appointment clause as potential appointing agents; the clause does not deal in this particular place with the classes of officers to be appointed, to wit, inferior and superior. This subject has already been covered in the earlier part of the clause. There is nothing anywhere in this clause to indicate that the class of officers to be appointed necessarily excludes the class of appointing agents. Some of the appointing agents may also fall in the class of inferior officers.

[43]If power to regulate the appointment of inferior judges is needed, then apart from any prohibition in the Constitution itself, legislation along this line falls within the constitutional grant of power "to make all laws which

In *Myers v. United States*[44] there is also a dictum which goes far to sustain the principle of division stated in *United States v. Germaine*. The specific question for decision was whether the President alone had power to remove a first-class postmaster appointed by him with the approval of the Senate for the statutory term of four years, or whether the Senate must approve the removal (as well as the appointment) of this officer. The court held that the President alone had the power to remove. In discussing the possible abuse of this exclusive power of removal held to belong to the President as an incident to his power to appoint, the Supreme Court declared: "It is true that the remedy for the evil of political executive removals of inferior offices is with Congress by a simple expedient, but it includes a change of the power of appointment from the President with the consent of the Senate. Congress must determine first that the office is inferior, and second that it is willing that the office shall be filled by appointment by some other authority than the President with the consent of the Senate. * * * It is said that, for forty years or more, postmasters were all by law appointed by the Postmaster-General. This was because Congress under the excepting clause so provided. But thereafter Congress required certain classes of them to be, as they now are, appointed by the President with the consent of the Senate. This is an indication that Congress deemed appointment by the President with the consent of the Senate essential to the public welfare, and until it is willing to vest their appointment in the head of the Department, they will be subject to removal by the President alone, and any legislation to the contrary must fall as in conflict with the Constitution."[45]

While the Supreme Court does not here undertake to fix the outside limit of the class of inferior officers over which Congress can exercise control, it does recognize in a very sweeping way the discretion of Congress to classify officers as inferior whenever the public welfare demands. And it must not be overlooked that the

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shall be necessary and proper for carrying into execution" (*inter alia*) the powers of the judicial branch of the federal government. Art. I, sec. 8.

[44] 272 U. S. 52.

[45] 272 U. S., at 162, 163. To the same effect see Schurtleff v. United States, 189 U. S. 311, 315.

court was talking about a rather important officer—a postmaster first class. If Congress can classify this important officer as inferior, where can a logical limit to legislative discretion be drawn, short of the limit stated in the *Germaine* case?

The dicta in the *Germaine* case and the *Myers* case are significant expressions of opinion.[46] And there are also decisions to be hereinafter discussed which confirm these expressions indirectly. But there has never been a case before the Supreme Court (and such a case is not likely to arise) in which it was necessary to set the general limit to Congressional power to classify officers as inferior for the purpose of appointment. The main reliance in support of the true principle of division between the two kinds of officers must be the *legislative practice* of Congress in *dealing with particular officers as inferior.*[47] All the material of this latter sort does, when marshalled, make out a conclusive case for a conception of inferior officers at least as broad as the conception defined in *United States v. Germaine.*

From 1794 to 1863 the Postmaster-General had and exercised statutory authority to appoint the Assistant Postmaster-General and all postmasters; this large body of officers formed the great bulk of all federal officers at that time.[48] The provision for their appoint-

[46]The text writers generally are in harmony with the interpretation stated in United States v. Germaine. STORY, CONSTITUTION, (5th ed.) secs. 1535, 1536. 2 TUCKER, CONSTITUTION OF THE UNITED STATES, sec. 357. MAYERS, THE FEDERAL SERVICE, 29, 30; Cooley does not discuss the question; Willoughby represents the only expression which does not entirely harmonize with the dictum quoted from United States v. Germaine. The learned writer cites that case, but fails, it seems to me, to appreciate its meaning, or the significance of the practical construction of the Constitution hereinafter referred to. (WILLOUGHBY, ON THE CONSTITUTION OF THE UNITED STATES, (2d ed.) sec. 986.)

[47]On the force and effect of the practical construction of the Constitution see authorities cited notes 15-18 supra. The effect of practical construction in fixing the meaning of the appointment clause was recognized in the following cases: In re Hennen, 38 U. S. (13 Pet.) 230; United States v. Germaine, 99 U. S. 508; United States v. Eaton, 169 U. S. 331, 344; and Myers v. United States, 272 U. S. 52.

[48]This legislation is cited and discussed in the opinions of McReynolds and Brandeis, J. J., in Myers v. United States, 272 U. S. 52, 188, 191, 240. All of the judges in this case take for granted that a first-class post-master is an inferior officer for the purpose of appointment. There is also a dictum to the effect that United States district attorneys and marshals have been recognized to be inferior, *id.* 159. And in ex parte Siebold, 100 U. S. 371, 397, is a similar dictum regarding marshals.

ment by the Postmaster-General necessarily meant that both Congress and this officer treated them as inferior officers. Moreover, today all the officers who fall within the existing civil service system are officers whom Congress has, by withdrawing their appointment from the President and Senate, in like manner declared to be inferior officers.[49] Among others, this system includes the Assistant Secretary of Commerce,[50] the Assistant Secretary of Labor,[51] some of the bureau heads[52] and many other important officers.[53] Apart from the instances mentioned, however, Congress has only in isolated cases vested the appointment of important officers elsewhere than in the President and Senate.[54] This policy is not hard to understand. Any other method of appointment involves a surrender

[49]CIVIL SERVICE ACT AND RULES (Government Printing Office, 1926) 37. "The classified civil service shall include all officers and employees in the executive civil service of the United States * * * except persons employed merely as laborers and persons whose appointment is subject to confirmation by the Senate * * *." (Rule 2) This classification cuts across methods of appointment as defined by the Constitution. The classified Civil Service includes two kinds of public servants, (1) inferior officers whose appointment has been vested in the President alone or the head of a department; (2) employees. Officers who are appointed by the President and the Senate, whether superior or inferior, are expressly excluded from the classification.

[50]Appointed by the President alone. U. S. C. title 5, sec. 592.

[51]Appointed by the President alone. U. S. C. title 5, sec. 612.

[52]For a list of heads of bureaus and services appointed by the President or a department head see MAYERS, THE FEDERAL SERVICE, 100, note 1. See also 20 Op. A. G. 728; 21 Op. A. G. 363; 29 Op. A. G. 116, 119. For a list of chief local officers appointed by heads of departments see MAYERS 121. Until 1897, the Librarian of Congress was appointed by the President alone, Rev. Stat. sec. 88; in that year his appointment was vested in the President, subject to the approval of the Senate, 29 Stat. 544.

[53]As to the classified civil service, see Classification Act of 1923, 42 Stat. 1488, U. S. C. title 5, sec. 661-676; as to the classification of foreign service officers see 43 Stat. 140, U. S. C. title 22, sec. 1 *et. seq.*

[54]In general, appointments in the Army and Navy have been made by the President with the consent of the Senate. But occasionally important officers have been appointed by the President alone. See, for example, 1 Stat. 352, superintendents of armories, superintendents of military stores; 12 Stat. 732, Provost-Marshal General; 12 Stat. 318, 2 Inspectors-General; 18 Stat. 58, Commandant of Marine Corps; 30 Stat. 995, 1045, Admiral of the Navy. The President alone has been authorized to appoint officers of the Army Reserve Corps below the rank of general, 39 Stat. 189, as amended by 41 Stat. 775. And there is not the slightest question that the power to appoint any officers in the Army or Navy could be vested in the President alone, 22 Op. A. G. 82.

of political power by the Senate, and so long as appointments are expected to be made on political grounds, such surrender is not apt to be made.[55] Nevertheless the constitutional practice represented by the legislation treating all these officers as inferior for the purpose of appointment, must be taken to settle, so far as practice can settle a constitutional question, that Congress has power to classify as inferior any executive officer whatever except the head of a department. In none of the debates which have occurred in Congress since 1789 on the topics of appointment and removal of federal officers, has there ever been a suggestion of a narrower limit to the discretion of Congress.[56]

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[55]For a list of the important appointments in the executive branches at present made by the President with the advice and consent of the Senate, see MAYERS, THE FEDERAL SERVICE, 32-38.

[56]In the First Congress it seems to have been assumed that the Comptroller of the Treasury (who was accorded a salary higher than that of any of the district judges, see note 80, infra) was classifiable as inferior. 1 ANNALS (Gales and Seaton) 637. See opinion of Brandeis J., dissenting in Myers v. United States, *272* U. S. 52, 252, 255 note 21.

The legislation regulating or restricting *removals* is also interesting. From an early date, but more especially since the day of President Jackson and the introduction of the "spoils system" Congress has undertaken to prevent in one way or another arbitrary political removals from office. This legislation indicates what officers Congress regards as inferior, inasmuch as it has all been based by Congress on the theory that it has power to control the removal as well as the appointment of inferior officers. If one can accept this legislation as an index of Congressional notions of the scope of the inferior class, one has again a complete confirmation of the proposition that this class embraces, either actually or at the will of Congress, every officer of the United States government except ambassadors, public ministers, consuls, Supreme Court judges, and the heads of departments. In addition to the executive officers, it includes also the Comptroller-General, and the members of all important boards and commissions. (For a citation and discussion of this legislation, see Myers v. United States, *272* U. S. 52, the opinion of McReynolds, J., dissenting, at 181, 182, 187, 188, 204 *et seq.*, and the opinion of Brandeis, J., dissenting, at 250-264.

In the Myers case, the Supreme Court holds that all such legislation is invalid so far as it purports to restrain the President from removing officers whom he has appointed with the approval of the Senate. However, the decision does not destroy the force of the legislative practice as a definition of the class of inferior officers. Congress can exercise control over the removal of just this class of officers; but Congress must set about its object in a different way; it must first provide for their appointment as inferior officers and not allow them to be appointed by the President and Senate. (Opinion of the court, 163-164.)

Congress has always asserted its power to classify as inferior for this purpose, certain officers who perform functions of the same kind as "superior officers." The statutes have differentiated between ambassadors, public ministers and consuls on the one hand, from lesser diplomatic and consular officers on the other, and provided for the appointment of the latter as inferior officers.[57] No doubt international law and usage furnish certain definitions of diplomatic and consular offices which Congress could not utterly ignore. And yet it must be obvious that no hard and fast line can be drawn, for example, between a consul and an officer who performs many but not all of the functions of a consul. In drawing such a distinction, in reference to the appointment of officers in the foreign service branches, a considerable range for Congressional discretion must be admitted. Substantially similar considerations apply to the distinctions made in the acts of Congress between department heads and chiefs of independent offices.[58] Many such chiefs perform functions which are similar to, if not quite as extensive as, the functions of department heads. If one assume that a department head is a superior officer, while the chief of an independent office is not, what is to be the basis of distinction? Take for example the case of the Comptroller-General, who has duties and responsibilities as chief of the General Accounting Office, which are quite as broad as those of a cabinet member.[59] Or consider the history of the office

[57]For a discussion of the earlier practice and legislation in line with the statements in the text, see 7 Op. A. G. 242; but cf. 7 Op. A. G. 186, regarding the power of the President and Senate to fix the rank of officers in the diplomatic and consular branches. By recent legislation (1924) the two branches have been entirely reorganized and placed on a basis of interchangeability. Nine classes of foreign service officers are established. Appointment as foreign service officer is to be made to a class and not to a particular post. While appointment to this statutory office is made by the President and Senate under existing law, no doubt the President alone could make such an appointment if the statute so provided. He could appoint a (statutory) foreign service officer but not a (constitutional) minister or consul. Under the statute as it stands, the President alone does assign the foreign service officer to a post; but he does not assign to a post of the rank of minister or consul, unless with the approval of the Senate. U. S. C. title 22 sec. 1 *et. seq.* Lay, FOREIGN SERVICE OF THE UNITED STATES (1925) ch. 9.

[58]Most of the independent offices are in charge of boards rather than single chiefs.

[59]The independent office known as the General Accounting Office was established in 1921. 42 Stat. 23, U. S. C. title 31, sec. 41-58. The office is

of Attorney-General; down to 1870, the Attorney-General was an independent executive officer, but not head of a department.[60] In both these cases and in others of like character it is the mere *fiat* of Congress based on notions of public convenience that has fixed the status of the officer in question. Congress might, if it saw fit, make the Comptroller-General head of an executive department,[61] just as it did alter the status of the Attorney-General when it created a Department of Justice, and put him in charge thereof. In short, one finds that the status of such officers as superior or inferior can not be determined *a priori* by reference to a fixed conception of the kind of function which a superior officer performs. Not only can Congress provide for the appointment of inferior officers as it sees fit, but one also finds the same or a similar discretion operative in determining the status of his office, and thus indirectly determining the form of his appointment thereto. Then there is another type of legislation in which Congress has asserted control over appointment to superior offices, and in which the normal line of distinction between superior and inferior officers is transcended. The statutes authorize the appointment of officers to fill temporary vacancies; officers appointed temporarily have been consistently treated as inferior officers, even when the office authorized to be temporarily filled is of a kind which would be commonly called "superior." Thus, for example, the President alone is authorized to fill temporarily vacancies in the office of consul or department

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under the control and direction of the Comptroller-General of the United States, who receives a salary of $10,000 per annum, holds office for fifteen years, and is removable only for cause. There is, however, some room to doubt whether the provisions of this statute, insofar as they purport to prevent the removal of this officer by the President, are constitutional. See Myers v. United States, 272 U. S. 52.

[60]The office of Attorney-General was first created in 1789. 1 Stat. 93. The Department of Justice was established and the Attorney-General made its head in 1870. 16 Stat. 162. The first section of the latter act provided: "That there shall be, and is hereby, established an executive department of the government of the United States, to be called the Department of Justice, of which the Attorney-General shall be the head. His *duties, salary,* and tenure of office shall remain as now fixed by law, except so far as they may be modified by this act." (Italics ours.)

[61]This course of action is not at all likely to be taken, however. This officer is regarded primarily as the eye of Congress which observes and checks the financial operations of the executive departments.

head.[62] This type of legislation has been upheld by the Supreme Court in *United States v. Eaton*:

"The claim that Congress was without power to vest in the President the appointment of a subordinate officer called a vice-consul, to be charged with the duty of temporarily performing the functions of the consular office, disregards both the letter and spirit of the Constitution. Although Article II, section 2, of the Constitution requires consuls to be appointed by the President 'by and with the advice and consent of the Senate,' the word 'consul' therein does not embrace a subordinate and temporary officer like that of vice-consul as defined in the statute. The appointment of such an officer is within the grant of power expressed in the same section, saying 'but the 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.' Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered. The manifest purpose of Congress in classifying and defining the grades of consular offices, in the statute to which we have referred, was to so limit the period of duty to be performed by the vice-consuls and thereby to deprive them of the character of consuls in the broader and more permanent sense of that word. A review of the legislation on the subject makes this quite clear. * * * The terms of the law and its construction in practice for more than forty years, sustain the theory that a vice-consul is a mere subordinate official and we do not doubt its cor-

[62]See as to vacancies in the office of heads of departments, Rev. Stat. sec. 177-180, U. S. C. title 5, sec. 4-7, 32 Op. A. G. 139 and prior opinions therein cited. As to temporary vacancies in the office of consul, Rev. Stat. 1674, U. S. C. title 22, sec. 51; United States v. Eaton, 169 U. S. 331. These appointments, it need hardly be said, are not the same as the recess appointments which the Constitution expressly authorizes the President to make. See authorities above cited.

rectness."[63] Here again one finds Congress asserting and the Supreme Court recognizing legislative discretion to classify officers as inferior so far as the public need and convenience demand. As one contemplates these different types of legislation one can not fail to be impressed with the fact that a satisfactory classification of officers with reference to any fixed logical line is altogether impractical. Even the wide limit to the class of inferior officers laid down in the *Germaine* case (all officers but those specified)[64] can not be accepted without qualification. "Inferior officers" can not be taken to mean petty officers, nor unspecified officers, nor any other kind of officers as such; some latitude for Congressional discretion in sizing up and meeting the needs of the public service must inevitably be acknowledged.

Congress not only purports to exercise discretion in classifying officers as inferior for the purpose of appointment but it also asserts complete legislative control over methods of appointment. The Constitution recognizes three available methods of appointing inferior officers. Congress has always claimed a freedom of choice in this regard which is practically absolute, and the Supreme Court has upheld this Congressional claim. In *ex parte Siebold* the validity of a statute requiring circuit courts of the United States to appoint supervisors of elections was squarely challenged. The court declared:

"Finally, it is objected that the act of Congress imposes upon the Circuit Court duties not judicial, in requiring them to appoint the supervisors of elections, whose duties, it is alleged, are entirely executive in their character. It is contended that no power can be conferred upon the courts of the United States to appoint officers whose duties are not connected with the judicial department of the government.

"The Constitution declares that 'the 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.' It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute require-

[63] 169 U. S. 331, 343-344.

[64] United States v. Germaine, supra note 41 and text thereto.

ment to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. Take that of marshal, for instance. He is an executive officer, whose appointment, in ordinary cases, is left to the President and Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it should be in the President alone, in the Department of Justice, or in the courts. The marshal is pre-eminently the officer of the courts; and, in case of a vacancy, Congress has in fact passed a law bestowing the temporary appointment of the marshal upon the justice of the circuit in which the district where the vacancy occurs is situated.

"But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. And, looking at the subject in a practical light, it is perhaps better that it should rest there, than that the country should be harrassed by the endless controversies to which a more specific direction on this subject might have given rise. * * * But the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depositary of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task.

"In our judgment, Congress had the power to vest the appointment of the supervisors in question in the circuit courts."[65]

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[65]100 U. S. 371, 397-8. In in re Hennen, 38 U. S. (13 Pet.) 230, 258, it was suggested that the appointing power in the clause referred to "was, no doubt, intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged." This dictum was explicitly overruled in the Siebold case, p. 397-8. According to Rev. Stat. 4415 which was in force until 1905, district judges were members (along with other officers) of boards to appoint inspectors of hulls and boilers in the Steamboat Inspection Service. And at the present time, the Chief Justice is a member of the Board of Regents of the Smithsonian Institute which appoints the personnel of that institution, Rev. Stat. 5580 U. S. C. title 20, sec. 42.

This case is very significant. It presented for decision a definite question of the limits to legislative control over appointments. The clause was construed by the court in a sense most favorable to the power to Congress. The officers who were to be appointed by the circuit court were clearly not subordinates of that court; in fact they were not even members of the judicial branch. Logically the court might well have declared that Congress could only authorize courts to exercise judicial powers and could therefore authorize them to appoint no officers except judicial officers. But it refused to accept this line of reasoning; it said instead: "The duty to appoint inferior officers when required thereto by law is a constitutional duty of the courts." In reaching this conclusion, the Supreme Court relied mainly on the practical need for this wide legislative power. While the correctness of the decision is clear, it is no less clear that the court was forced to go far in order to justify its conclusion; it had to recognize an implied exception to the normal constitutional presumption that courts of the United States can exercise only judicial powers.

Congress has consistently provided for the employment in government service of numerous persons who are *not* classified as *officers*. The duties and responsibilities of some of these employees are obviously different in character or duration from the duties and responsibilities ordinarily belonging to officers. But this is not true of most of them; most could quite as well be classified on the basis of function as officers of the United States; so that their classification as employees rather than officers represents an exercise of discretion by Congress. The distinction has been significant chiefly in connection with methods of appointment. Theoretically officers must be appointed in one of the four ways allowed in the Constitution; employees may be appointed in any way that legislative ingenuity devises. But so far as Congress has power to put public servants in either class, it can entirely ignore the distinction. And Congress has in fact ignored it.[66] The reason for this is not far to seek; it is not convenient to appoint the great bulk of public servants in either of the two ways which would normally come into question—by the President alone or by the head of a department.[67]

[66]MAYERS, THE FEDERAL SERVICE, 40-41.

[67]Even the requirement of the *approval* of a department head (which has

Accordingly, Congress simply provides for their appointment in some convenient way and then calls them employees.[68] Also in the decisions there has been no inclination to insist on the appointment of persons who might ordinarily be officers, in one of the ways in which officers are to be appointed. Rather the courts have admitted the discretion of Congress and accepted its classification as decisive. Instead of limiting or determining legislative power with reference to fixed conceptions of official function, the courts have treated the form of appointment provided by law as a criterion of classification. If Congress has provided for appointment in one of the ways prescribed for officers in the Constitution, the particular public servant is an officer; if his appointment is to be made in some other way, he is an employee.[69] Nothing could constitute a clearer recognition of Congressional power to adapt methods of appointment to practical needs, than this legislative practice and the supporting decisions. If Congress can exercise this sweeping discretion to decide whether a public servant is an officer or an employee, and can provide for the appointment of the latter in whatever way it deems fit, one can not avoid the inference that a similar discretion must apply in making distinctions inside the class of officers itself.

All the authorities cited up to this point go to support a conception of the class of inferior officers at least as broad as the conception defined in the *Germaine* case.[70] They show a uniform practical construction of the appointment clause which supports the

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been held, with certain limitations to constitute *appointment* by a head, United States v. Hartwell, 73 U. S. (6 Wall) 385, 394) would often be an inconvenient formality.

[68]Thus, for example, the classified civil service embraces both officers and employees. Formally the methods of appointing the two classes of public servants is different; but in substance and effect both alike are appointed and promoted on the basis of civil service examinations. The Civil Service Act and regulations pursuant thereto confer the same tenure and privileges on both these kinds of public servants; and the two classes may be transferred (with certain restrictions) from one type of service to the other—a classified employee to a classified office, or a classified officer to a classified employment. Civil Service Act and Rules, 38, 62-68; MAYERS, THE FEDERAL SERVICE, 276 *et. seq.*

[69]United States v. Germaine, 99 U. S. 508. Burnap v. United States, 252 U. S. 512, and cases therein cited.

[70]United States v. Germaine. See note 41, supra, and text thereto.

arguments of that case according to their general tenor and effect. But there is yet another line of argument more or less independent of the reasons there referred to which also leads to the same general conclusion. That line of argument is this: All the offices which might come in question as falling in the one class or the other are offices "which shall be established by law." This fact is significant because there is a well recognized principle of constitutional construction to the effect that the legislative power to create an office implies power to determine the method of selection or appointment thereto. Such power is to be implied no less than power to define the jurisdiction, duties, and tenure to be attached to the office created. Congress has always acted on this implied power in creating offices and positions which fall outside the purview of the appointment clause, such as territorial offices, offices in the government of the District of Columbia, and the public servants called employees. And the Supreme Court has uniformly upheld this Congressional power.[71] To be sure, an explicit constitutional provision might qualify or deny Congressional control over methods of appointment. But the appointment clause of the Constitution contains no explicit or necessary provision for the appointment of officers except certain officers who are specifically mentioned. The clause can not be said to deny (unless one is ready to imply such a denial) legislative power to define the manner of appointing other officers who are not specified and whose offices Congress does establish by law. On the contrary, the latter part of the appointment clause recognizes the discretion of Congress to choose one of three methods of appointing to "inferior" offices of its own creation. The question is simply whether inferior offices embrace all the offices which Congress can by law establish. When one is confronted thus by the question of interpretation: whether Congress has power to deter-

[71]This principle seems to be implicit in the legislation for the three kinds of public servants mentioned: (1) Territorial officers, Clinton v. Englebrecht, 80 U. S. (13 Wall.) 434; Murphy v. Ramsey, 114 U. S. 15, 44; (2) Officers of the District of Columbia, Metropolitan Railroad Company v. District of Columbia, 132 U. S. 1; District of Columbia v. Woodbury, 136 U. S. 450; Barnes v. District of Columbia, 91 U. S. 540; Commissioners of the District appoint all officers in the District, 20 Stat. 102, 104; (3) Employees of the United States as distinguished from officers, Burnap v. United States, 252 U. S. 512, and cases therein cited. The principle is also recognized by the decisions in the state courts, 46 C. J. 950, note 30.

mine the method of appointment to *all,* or only to *some,* of the offices which it establishes, the normal implication of legislative power to determine the method of selection should be effective to sustain the wider construction of Congressional power. This line of reasoning in turn is confirmed by the fact that the Constitution gives Congress power "to make all laws which shall be necessary and proper for carrying into execution" the powers of the federal government,[72] by the further fact that it leads to a result which harmonizes with the public need; and finally by the fact that the authorities already cited in regard to the Post Office, the Army and the Navy (which the Constitution expressly authorizes Congress to establish) as well as the authorities in regard to appointment to other branches of the federal service, clearly settle the proposition that Congress does have legislative control over appointment to all offices of its creation,[73] with the exception of headships of departments, which, as has been seen, must be treated as a special case.

On the basis of principle, constitutional practice, and judicial opinion, one has to accept the wider conception of the class of inferior officers. Except for officers specified in the first part of the appointment clause, and heads of departments, no other officer has ever been definitely classified as a superior officer. So far as the classification of any other officers has ever come in question, it has always been taken for granted that Congress might deal with them as inferior.

2. Special Considerations Applicable to District and Circuit Judges

If inferior officers meant those who performed a petty function, district and circuit judges would obviously be excluded from the inferior class. These judges can not be called petty officers or be said to perform an unimportant function. But function as a principle of division has only been relied on in one instance.[74] Heads of executive departments were declared in the First Congress not to be inferior officers because of the great importance of their function; in the debate the name "head" and the national scope of the

[72]Art. I, sec. 8.

[73]See notes 48-54, 56.

[74]But see also the suggestions made in the Federal Convention, note 38 supra.

jurisdiction of these officers were particularly stressed.[75] Arguments like these might also work to exclude Supreme Court judges from the inferior class, had the Constitution not itself in terms excluded them; the very position of these judges at the head of the judiciary branch would belie their classification as inferior; they could not be said to be inferior either in the sense of petty or in the sense of subordination to any other officers. But the analogy between the positions of executive head and of district judge is not close. An argument based on the relative importance of executive department head fails almost entirely as regards judges of courts below the Supreme Court. In every instance where these courts are mentioned in the Constitution, they are called "inferior" tribunals,[76] and the jurisdiction which is conferred on them by statute is always limited in a territorial sense, as well as in other respects. Indeed, if one accept the test of importance at all, the judges of these courts seem to be comparable rather to assistant-secretaries, bureau heads, first-class postmasters, district attorneys, marshals, and important military and diplomatic officers, all of whom it is settled, Congress can classify as inferior.[77] Not a few of these officers perform functions quite as important as those of federal judges.[78] Most of them have a field of action which is, territorially and otherwise, as extensive as the jurisdiction of a district or circuit judge. Many of them have, by the civil service legislation, been granted a form of tenure which is for all practical purposes as secure as that of judges.[79] And many of them enjoy a compensation substantially the equivalent of that of district and circuit judges.[80] At

[75]See references cited note 39 supra.

[76]Art. I., sec. 8 and Art. III, sec. 1.

[77]Authorities cited notes 48-54, 56.

[78]This is very apparent if one grant that even the highest Army and Navy officers and the members of such important commissions as the Interstate Commerce Commission and the Federal Trade Commission, and such officers as the Comptroller-General, are classifiable as inferior.

[79]As regards removal of officers and employees of classified civil service, see Civil Service Act and Rules, 71; as regards retirement and pensions, see Civil Service Act and Rules, 94; and cf. U. S. C. title 22, secs. 1, 2, 3, 21, governing the status, pension and retirement of foreign service officers.

[80]Salaries paid do furnish a rather good index of legislative notions of importance; it is therefore especially interesting to compare the salaries paid

least, importance of function can not serve as a tenable basis for differentiating district and circuit judges from this group of recognized inferior officers.

On the other hand, if one adopt, without qualification, the wide conception of the class of inferior officers, district and circuit judges clearly fall in this class. Not only is this true, but the reasons which operate in favor of a broad interpretation of the class, also work with particular force to support the inclusion of judges in the class.[81] *First,* whatever force is to be ascribed to the specific mention of certain officers in the appointment clause is peculiarly applicable to the classification of these judges. Supreme Court judges are there mentioned and they are the only members of the judiciary branch who are so mentioned. If specific mention is the criterion of inclusion in the class which must be appointed by the President and Senate, then they are the only judicial officers who must be so appointed; and all other judges and judicial officers are inferior officers; that is to say, inferior to the only judicial officers specified.

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to judges and the salaries paid to other officers at the time when our government was first organized.

Office	Orig. Salary
Judicial Dept.	
Sup. Ct. Judges	
C. J.	$4,000
Ass. J. J.	3,500
Dist. Ct. Judges	$800-$1,800
State Dept.	
Secretary	3,500
Chief Clerk	800
Attorney-General	1,500
Treas. Dept.	
Secretary	$3,500
Asst. to Sec.	1,500
Treasurer	2,000
Comptroller	2,000
Auditor	1,500
Register	1,250
Chief Clerk of Compt.	800
Post Office Dept.	
P. M. General	2,400
Asst. P. M. Gen.	1,200

See 1 Stat. 28, 67, 68, 72, 93, 354. It is noteworthy that department heads were placed on about the same salary scale as Supreme Court judges, while some of the district judges received no more ($800) than the chief clerk in the State Department who was appointed as an inferior officer, and substantially less than the Attorney-General (probably also an inferior officer), and the Assistant Postmaster-General (appointed as an inferior officer), and much less than several Treasury officials who would certainly be rated by the authorities as inferior officers. It would not be worth while to pursue this comparison of salaries down to the present time. It is a well known fact that many executive officers, not heads of departments, some of the foreign service officers, and the members of important boards and commissions, as well as the Comptroller-General, receive today salaries which are substantially equal to, and in some cases higher than, those of district and circuit judges.

[81] Cf. arguments made at pp. 500-501, 512-514, supra.

Second, as to the word "inferior" in the appointment clause: It has been shown that this word is to be understood in a relational sense, as equivalent to "inferior to those officers specified in the first part of the clause." This meaning, so far as it furnishes a basis for classifying judges, is confirmed by the language used elsewhere in the Constitution in referring to courts subordinate to the Supreme Court. Twice in the first section of the Article dealing with the judiciary,[82] and once in the eighth section of the Article dealing with the legislative branch,[83] the Constitution employs the very adjective "inferior" which is applied to officers in the clause under discussion. And the adjective "inferior" is used with the like meaning and effect—not in an attributive sense to describe something petty, but rather in a relational sense to contrast the Supreme Court with tribunals subordinate to it. In giving an interpretation to the word "inferior" in the appointment clause (at least as it applies to judges), this use of the word in other parts of the Constitution ought not to be treated as merely accidental. *Third,* The inference from legislative power to create an office, to legislative control over methods of appointment thereto, is also peculiarly applicable to judgeships of inferior federal tribunals. The Constitution expressly gives Congress power "to constitute" these tribunals.[84] In this regard, the language of the Constitution is not substantially different from that by which power is conferred on Congress "to establish Post Offices and post Roads," "to raise and support Armies," and "to provide and maintain a Navy."[85] But probably no one would doubt today that Congress can, when it thinks proper, classify as inferior for the purpose of appointment any officer in any of these branches of the government service, except the department head.[86] In other words, Congress has a recognized control over the method of appointment to all these offices which is in line with the normal presumption from the legislative power to create them. Inferior judgeships are likewise established by law; so far as legislative power to create is the basis for an inference of legislative control

[82]Art. III, sec. 1.

[83]Art. I, sec. 8.

[84]Art. I, sec. 8.

[85]Art. I, sec. 8.

[86]See authorities cited notes 48, and 54 supra. Cf. Crenshaw v. United States, 134 U. S. 99, 104-108.

over the method of appointment, it applies to judgeships quite as well as to offices in the postal department, or in the Army or Navy. To be sure, Congress can not control the tenure of judges as it controls the tenure of postal, naval or military officers. The Constitution limits the power of Congress explicitly as regards the tenure of the judgeships which it establishes. Nevertheless, Congress does have complete control over the jurisdiction of Federal courts, just as it has complete control over the powers and duties of officers in these other branches.[87] The Constitution contains no limitations

[87]ROSE'S FEDERAL JURISDICTION AND PROCEDURE, (2d ed.) secs. 22-24. In ex parte Bakelite Corporation, 279 U. S. 438, (and in numerous other cases therein cited) the Supreme Court makes a distinction between *constitutional* and *legislative* courts of the United States. The district and circuit courts are constitutional in the sense of the distinction; the legislative courts include territorial courts, courts of the District of Columbia, the Court of Claims, the Court for Customs Appeals and other customs courts, the consular courts, the United States Court for China, etc. The distinction and its significance are thus explained in the court's opinion: "* * * it has long been settled that Article III does not express the full authority of Congress to create courts, and that other Articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes of courts. Those established under the specific power given in section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of Article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior." The distinction here made between two kinds of courts is settled beyond question. Also the fact that this distinction is important for the purposes indicated in the court's opinion. But it must be noted that the distinction is a relative one; it is a distinction which holds only for certain purposes. The Supreme Court takes for granted here and in other cases that Congress *creates* both kinds of courts; for this purpose both kinds might well be called legislative courts. Congress must have some warrant in the Constitution for creating either kind of court; and yet both kinds equally owe their existence and their jurisdiction to acts of Congress. In this last respect the "constitutional" courts are not different from executive departments which exercise, or aid the President in exercising, his *constitutional executive power,* but which likewise owe their existence and jurisdiction to acts of Congress. Furthermore, Congress can abolish offices of its creation. Crenshaw v. United States, 134 U. S. 99. And there can be no

on the power of Congress to define the method of appointing inferior judges comparable to the explicit denial of Congressional control over tenure. Such a limitation, if any, must rest entirely on implication and there is no apparent reason for implying one; there is no reason why judgeships should be differentiated, as regards Congressional control over appointment, from any other offices which are established by law.

All these arguments, so far as they tend to show that judges of inferior federal tribunals are to be classified as inferior officers for the purpose of the appointment clause, are confirmed by the proceedings of the Federal Convention of 1787 which drafted the Constitution.[88] The appointment of Supreme Court judges presented a peculiar problem for the Convention. At least, it was a problem distinct and different from the appointment of inferior judges. From the moment when the Convention first adopted nineteen resolutions as the basis of its deliberations (June 13)[89] until the appointment clause was accepted in its final form (September 15), the Senate was consistently accorded some form of control over Supreme Court appointments. No draft was even provisionally adopted which did not recognize this control.[90] Originally the Senate was to have had

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doubt about the power of Congress to abolish "constitutional" courts which it creates; it has on several occasions exercised this power. Frankfurter and Landis, BUSINESS OF THE SUPREME COURT, 26 note 75, 69 note 52, 134, 166-173. (The only question that has ever been seriously raised is whether Congress when it abolishes such a court must make some provision for the judges thereof.)

[88]A complete statement of the proceedings of the Constitutional Convention, step by step, would be unnecessarily extensive. For the convenience of the reader who cares to go through the course of the discussion regarding the appointment of federal officers, the following list of the pertinent passages in the proceedings is suggested: 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION, 21; 119-121, 126-129; 232-233, 236-237; 1 FARRAND 397-2 FARRAND 20 (conflict regarding equal representation in the Senate); 2 FARRAND 29-32, 52-58 (controversy over choice of the President by the National Legislature); 41-46; 80-83; 128, 132, 145-146, 155, 168, 169, 171-172; 177-189; 233-234; 314-315; 389, 392-394, cf. 419; 405-406, 419; 481; 499-502, 511-515, 521-529, 535-536 (electoral college scheme for choosing the President debated and adopted); 533, 537, 540; 585, 590-603; 614; 627-628.

[89]On these resolutions see particularly 1 FARRAND 232-233, 236-237; 2 FARRAND 41-44, 46, 80-83.

[90]Besides the forms of appointing judges which found their way into the drafts considered or tentatively adopted by the Convention, a variety of

the sole power of making these appointments,[91] and even when, towards the close of the sessions, the President was finally given this power, the Senate was left with a control over these appointments in the form of a requirement for its approval. The reason for the insistence on the Senate's control over Supreme Court appointments is to be found in the fact that this court was intended to have very broad powers which might directly affect the states themselves. As President Washington declared in a message to the House of Representatives regarding the similar participation by the Senate in the treaty-making power: "It is a fact, declared by the General Convention, and universally understood, that the Constitution of the United States was the result of a spirit of amity and mutual concession. And it is well known that, under this influence, the smaller States were admitted to an equal representation in the Senate, with the larger States; and that this branch of the Government was invested with great powers; for, on the equal participation of those powers, the sovereignty and political safety of the smaller States were deemed essentially to depend."[92] The same forces which worked for equal representation in the Senate and which endeavored to retain the choice of the President in agencies controlled by the state governments, and which at first insisted on vesting the power to make treaties in the Senate but finally compromised on a provision for participation by the Senate in treaty-making, and which from first to last insisted upon the control of the Senate over the choice of foreign representatives,—these were the forces which also worked to retain the control of the Senate over the appointment of Supreme Court judges.[93]

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other methods of choosing judges were proposed; as to some of these see 1 FARRAND 21, 119-121, 242-245, 291-292..

[91]Resolution 11, among those adopted on June 13. 1 FARRAND, 232-233, 236-237.

[92]3 FARRAND 371. This message was sent by President Washington on March 30, 1796. It was meant as a direct denial of the claim by the House of Representatives of the power to participate in making treaties. The President explained, by the considerations mentioned, the fact that the treaty-making power was vested by the Constitution exclusively in the President and *Senate.*

[93]To this effect see, in addition to the message of President Washington just quoted, Madison (2 FARRAND 392, 3 FARRAND 131-136); Davie, (3 FARRAND 348); Gouverneur Morris (3 FARRAND 404-4-5). During the debates

The appointment of inferior judges was never linked with the appointment of Supreme Court judges as a topic of discussion.[94] In all the drafts of the Constitution, the treaty-making power and the power to appoint ambassadors and Supreme Court judges were dealt with together in one clause, just as they are in the Constitution as finally adopted. That part of this clause which had to do with appointment of ambassadors and Supreme Court judges was twice amended: first, by adding "other public ministers" and later, by adding "consuls."[95] By these changes the Convention manifested unequivocally a purpose to have all foreign representatives appointed in the like manner; that is to say, appointed by the Senate or with the Senate's approval. In striking contrast, "judges of the Supreme Court" stood alone in this clause from first to last. If other judges had been intended to be appointed in the same manner as Supreme Court judges, it would have been quite natural to have so provided; but no such provision as "and other judges" was ever suggested.

The Senate was not associated specifically with the appointment of inferior judges in any of the drafts of the Constitution, nor did anything occur in the debates to connect these judges irrevocably with the Senate as an appointing agency, or, what is the same thing, to exclude them from the class of inferior officers. By the terms of one of the original resolutions (June 13), already referred to, inferior judges were to be chosen by *Congress*.[96] But in the first draft of the Constitution (August 6), the method of their appointment was altered.[97] Congress was to have power to *constitute* inferior tribunals; the President was to have power to appoint all officers whose appointment was not otherwise provided for in the Constitution. Since no provision for the appointment of

in the Convention, Madison, as his journal shows, "observed that the Senate represented the States alone." (2 FARRAND 392.)

[94]Sometimes in the discussion of the appointment of Supreme Court judges, the language used by some of the members might indicate that judges of all sorts were meant; but if one reads such passages in connection with the topic of debate, it is clear in each instance that Supreme Court judges alone were intended.

[95]"Public ministers" was added on August 23, 2 FARRAND 389, 392-4, cf. 419. "Consuls" was added on September 7, 2 FARRAND 537-540.

[96]Resolution 12. 1 FARRAND 232-233, 236-237.

[97]This draft of the Constitution is set out in full in the records of the Convention. 2 FARRAND 177-189.

inferior judges appeared in this draft, their appointment belonged to the President alone.[98] All the provisions just referred to were thereafter accepted by the Convention.[99] But, later, a general compromise on the appointing power was reached between those who wanted the President alone to appoint all officers and those who were insisting upon giving the Senate power to make important specified appointments.[100] In place of the Senate having power to appoint certain specified officers and the President having power to name all others, the President and Senate were joined in the appointing power—the President to appoint and the Senate to approve. But it is noteworthy that while the appointment of Supreme Court judges was frequently and vigorously discussed, the method of appointing other judges was never mentioned as such, except in one of the original nineteen resolutions and the discussion upon it.[101] From the moment when the first draft of the Constitution was sub-

[98]On July 26, the drafting of a Constitution was referred to a Committee of Detail (2 FARRAND 128). As the memoranda of provisions considered by this Committee show, it adhered strictly to the substance of Resolution 11 in reference to the appointment of Supreme Court judges; their appointment and that of ambassadors was left to the Senate (2 FARRAND 132, 145, 155, 169, 172). But in reference to inferior judges, the Committee made important changes; instead of a power to *appoint* inferior tribunals, Congress was given power to *constitute* them (2 FARRAND, 132, 146, 168, 182). The appointment of these judges was vested in the President according to the draft which the Committee adopted, (2 FARRAND 132, 145, 171, 185). But this method of appointment was not chosen without consideration of still another method, to wit, appointment by the Senate in the same manner as Supreme Court judges (2 FARRAND 145-146). There can not be much doubt after an examination of these memoranda that the appointment of inferior judges was left to the President by this Committee with a clear consciousness of what it was doing. That the appointment of these judges belonged to the President alone and was so understood is also indicated by the proceedings of the Convention. (2 FARRAND 314, 315).

[99]On August 24 (2 FARRAND 405, 406).

[100]This compromise evidently was agreed to outside the convention meetings. Certain matters were referred to a Committee of eleven on August 31. (2 FARRAND 481.) Among others, the question whether the Senate alone was to make treaties and to appoint ambassadors and Supreme Court judges was still undecided. (2 FARRAND 389, 392-394). On September 4, this Committee submitted a report recommending that the President and Senate be joined in regard to these matters and also joined in regard to the appointment of officers not specifically named. (2 FARRAND 497.)

[101]Resolution 12, of June 13, adopted July 18. (1 FARRAND 232-233, 236-237; 2 FARRAND 45-46).

mitted, inferior judges always were relegated to the residuary unspecified class of officers whose appointment was "not otherwise provided for in the Constitution."

Undoubtedly, if the appointment clause had been left in the form which it took immediately after this compromise, the Senate's approval would have been essential to all appointments made by the President; and probably all or substantially all officers of the United States would have been required to be appointed by the President and Senate. The clause as it then stood was as follows: "The President * * * shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors and other public ministers, judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise herein provided for."[102] But it is to be observed that when this clause was brought up for adoption in this form (September 7), the Convention voted upon it as three separate and distinct propositions. First, the phrase dealing with foreign representatives was accepted after the addition of the word "consuls" already referred to; second, the phrase dealing with judges of the Supreme Court was accepted; and third, that part of the clause dealing with other officers was accepted after the addition to it of the passage, "and which shall be established by law."[103] The Convention dealt with the method of appointing Supreme Court judges, even at this time, as a distinct problem; and, on the other hand, it did not differentiate the appointment of other judges from the appointment of other federal officers.

When the appointment clause was brought up for final adoption (September 15), after the Committee on Style had reported a revised and rearranged draft of the Constitution, the Convention added, on motion of Gouverneur Morris, that part of the clause which authorizes Congress when it thinks proper to vest the appointment of inferior officers in the President alone, the courts of law, or the

[102]This is the clause which was proposed to the Convention as a compromise provision, by the Committee of Eleven. See note 100 supra and 2 FARRAND 496-499.

[103]The official journal shows that the clause was voted on as three distinct propositions. (2 FARRAND 533.) According to the journal of Madison, it was voted on as two propositions; first, the phrase dealing with foreign representatives and judges of the Supreme Court, and second, the phrase dealing with all other officers. (2 FARRAND 537-540.)

heads of departments.[104] It may be fairly inferred that one purpose of this addition was to authorize Congress to reinvest the President alone with some or all of that power of appointment which had been his under the terms of the earlier drafts of the Constitution. According to those drafts the President was to have constitutional power to appoint all officers except foreign representatives and justices of the Supreme Court; in other words, he was to have power to appoint inferior judges and all officers who would now fall in the class of inferior officers, as most broadly interpreted.

To sum up, it seems that the inclusion of federal judges among inferior officers is quite in harmony with the proceedings of the Constitutional Convention. Supreme Court judges were dealt with specifically throughout all of the proceedings and mentioned by name in all of the drafts. The Senate was consistently connected with their appointment, for reasons peculiar to the choice of judges of this court. On the other hand, inferior judges were not specifically mentioned in any of the drafts, but were lumped together with other federal officers in a residuary, unspecified class. In all the earlier drafts, the appointment of this residuary class of officers belonged to the President alone. Only after the great compromise on appointments was the Senate joined with the President in the appointment of this group of officers. Thereafter, Congress was given a discretionary control over the method of appointing an undefined group of inferior officers. Logically, this group should be interpreted to include all that indefinite body of officers whose appointment had in the earlier drafts been assigned to the President alone. These proceedings go far to contradict any supposed purpose of the framers to associate the Senate in the appointment of inferior judges, or to confer on the President and Senate as a joint agency, an irrefragible Constitutional hold on their appointment.

Admitting the force of all the points that have been made, is there some good and valid reason for excluding district and circuit judges from the inferior class to which they seem, *prima facie,* to belong? All other officers whose work is connected with the judicial establishment, to wit, court clerks, United States commissioners, marshals, district attorneys, and the reporter of the Supreme Court,

[104] 2 FARRAND 627-628.

are inferior officers.[105] Is there a rational basis for distinguishing between judges and all these other functionaries? Only two possible reasons for making a special case of judges have occurred to the writer. It might be urged that these judges have by the practical construction of the Constitution, been assigned to that class of officers who must be appointed by the President with the approval of the Senate. In a note to his text on the Constitution, Story seems to argue to this effect: "Whether the judges of the inferior courts of the United States are such inferior officers as the Constitution contemplates to be within the power of Congress to prescribe the mode of appointment of, so as to vest it in the President alone, or in the courts of law, or in the heads of departments, is a point upon which no solemn judgment has ever been had. The practical construction has uniformly been, that they are not such inferior officers. And no act of Congress prescribes the mode of appointment."[106] It is true that federal judges have always been appointed by the President and Senate.[107] But this practice alone does not furnish a ground for deciding their status under the appointment clause. Inasmuch as superior officers must be appointed by the President and Senate, and inferior are normally so appointed, the bare fact that judges or any other group of officers always have been so appointed is utterly inconclusive. It may mean quite as well that Congress has always regarded this method of appointment as the most convenient method available, as that Congress has considered it the method which is constitutionally prescribed. Unless

[105]Reagan v. United States, 182 U. S. 419 (United States commissioners); Rice v. Ames, 180 U. S. 381, 378 (United States commissioners); Ex parte Hennen, 38 U. S. (13 Pet.) 230 (district court clerks); and see Ex parte Siebold, 100 U. S. 371, 397 (dictum regarding marshals); Myers v. United States, 272 U. S. 52, 159 (dictum regarding district attorneys and marshals); the Supreme Court has always appointed its own clerk, reporter, and marshal under statutory authority.

[106]STORY, CONSTITUTION, (5th ed.) sec. 1599, note.

[107]The existing legislation expressly provides for the appointment of circuit judges in this manner. U. S. C. title 28, sec. 213. As to district judges, none of the statutes which have existed since the organization of district courts in 1789 has ever expressly defined the method of appointment. But no one has ever doubted that the power to appoint these judges belongs to the President and Senate; the Constitution declares that this method of appointment is to be used unless Congress otherwise provides. 26 Op. A. G. 627; 29 Op. A. G. 116.

Congress were to propose to vest the appointment of district and circuit judges elsewhere than in the President and Senate, and were to refrain from so doing on the ground that it lacks the legislative power to bring this result about, no practical construction to operate as a denial of this power would be involved.[108] And so far as the writer can determine, no proposal such as this has ever been made or considered. The logical effect of Story's argument (if I have correctly understood his meaning) would be to deprive Congress of its power to vest the appointment of officers in the President alone, the courts of law, or the heads of departments, simply because Congress had never exercised the power. This effect is manifestly unacceptable. That Congress has always allowed or authorized district and circuit judges to be appointed by the President and Senate is a fact which by itself has no constitutional significance whatever.

It might next be contended that all judges of the United States are to be lumped together in a special class (to be appointed by the President and Senate) because they all enjoy *good behavior tenure* under the Constitution. The force of this contention is already substantially weakened by what has been said about classification with regard to importance. One may admit that all judges of the United States enjoy secure tenure and that the judicial function is always solemn and important, and yet maintain that judges of the inferior tribunals of the United States are inferior officers for the purpose of the appointment clause. The reason why federal judges were given good behavior tenure by the Constitution was that the members of the Constitutional Convention appreciated the

[108]There is only one item of constitutional practice which can fairly be said to have a direct bearing on the status of district and circuit judges as superior or inferior officers. The designation legislation and practice heretofore mentioned (see notes 19-25 supra) does furnish some basis for contending that district and circuit judges have been determined to be inferior officers. If designation is, for constitutional purposes, temporary appointment by a court of law, it may be argued that the legislation and the judicial practice in regard to designation involve a tacit recognition of the inferior status of district and circuit judges. This practice undoubtedly has some force by way of sustaining an argument to this effect. But it can hardly be treated as decisive for the simple reason that a temporarily designated judge may be an inferior officer for the purpose of appointment, while a permanent judge may not be. (See authorities notes 62, 63, supra.)

need for judicial independence.[109] There was not a great deal of discussion of the matter. Supreme Court judges were accorded this tenure in all the *proposals* and drafts. Inferior judges were given this tenure in the first and all subsequent *drafts*.[110] But tenure and methods of appointment were taken up quite independently of one another. And as has already been shown, the appointment of Supreme Court judges and the appointment of inferior judges were treated as distinct and different problems. There is, therefore, no basis for inferring that these two kinds of judges are to be appointed in the same way because they are given the same kind of tenure. Indeed, in England and in this country at the time our Constitution was adopted, good behavior tenure was not a tenure peculiar to superior judges. Most of the English court functionaries enjoyed, and for centuries prior thereto had enjoyed, this kind of tenure.[111] In five of the revolutionary constitutions of the original thirteen states existing when the Federal Constitution was adopted, either justices of the peace, or clerks of court, or both, held office during good behavior.[112] And within a few years after the Federal Constitution was adopted, one of the original states (Pennsylvania),[113] and several new states, made like provision for minor judicial functionaries.[114] Congress itself attached this kind

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[109]Especially 2 FARRAND 428-430.

[110]1 FARRAND 21, 121, 231-233, 236-237, 292; 2 FARRAND 44, 132, 146, 186, 428-430.

[111]1 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed.) 246-264.

[112]Other officers besides superior judges who enjoyed tenure during good behavior under constitutions established prior to 1787 as shown in THORPE, AMERICAN CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS (1492-1908) are as follows: *Maryland* (1776): attorney-general, clerks of courts, registers of land office and registers of wills (*op. cit.* 1697); *New York* (1777): clerks of courts (*op cit.* 2634); *North Carolina* (1776, in force to 1861): attorney general and justices of the peace (*op. cit.* 2791, 2793); *Virginia* (1776): attorney-general, clerks of courts (*op. cit.* 3817, 3818); *Vermont* (1777): sheriffs and justices of the peace (*op. cit.* 3746).

[113]*Pennsylvania* (1790): justices of the peace (THORPE, *op. cit.* 3097-8).

[114]*Kentucky* (1792): court clerks and justices of the peace (THORPE, *op. cit.* 1270-1); *Louisiana* (1812): court clerks (*op. cit.* 1386-7); *Mississippi* (1917): court clerks (*op. cit.* 2042-3); *Missouri* (1820): court clerks (*op. cit.* 2159); *Tennessee* (1796): states attorneys and court clerks (*op. cit.* 3419). Appointments to most of the good behavior offices in England were made by courts or judges, and the court clerks holding during good behavior in the eight jurisdictions mentioned in note 112 supra, and in this note (Md.,

of tenure to most of the territorial judgeships which it created prior to 1836.[115] Today, if Congress were to establish special federal courts to handle petty civil matters, or to try misdemeanor cases so as to relieve the district courts of the overwhelming burden of police court work under which they now stagger, the judges of these courts would manifestly fall within the letter and spirit of the constitutional grant of good behavior tenure. One would hesitate to say that, for this reason only, such judges could not be appointed except by the President with the approval of the Senate.

In conclusion it appears that there is no basis for a distinction between judges and other officers of the judiciary department which is not artificial and out of harmony with the construction which has in other respects been given to the appointment clause. On the other hand, the view which would enable Congress to classify district and circuit judges as inferior officers is supported by the natural reading of the language of the appointment clause, by the references of the Constitution to all federal tribunals except the Supreme Court as "inferior tribunals," by the course of the debates in the Constitutional Convention, by the practice of Congress in classifying officers, by all the utterances of the Supreme Court itself, and finally by considerations of policy which demand that Congress be free "to make all laws which shall be necessary and proper for carrying into execution" the powers vested in the judicial establishment.[116] On this last point it is to be noticed how often in construing the appointment clause, the Supreme Court has argued from practical need to constitutional power. Certainly this kind of argument has a ready application to our own proposed change, by which the power to appoint judges would be vested by law in the Chief Justice. The court which, in *Myers v. United States* stressed so emphatically the need for an untrammeled control by the President over his inferiors in the executive branch in order that he be able to administer the affairs of that branch effectively,[117] should not be slow to appre-

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N. Y., Va., Ky., La., Miss., Mo., and Tenn.) were also judicially appointed; so it must be apparent that vesting appointment to a good behavior tenure office in a court of law, was in no sense strange to the notions of our early Constitution framers.

[115]See note to Wingard v. United States, 141 U. S. 201, 203 *et. seq.*

[116]Art. I, sec. 8.

[117]Myers v. United States, 272 U. S. 52, 121-125, 131-135, 164.

ciate the connection between a careful selection of inferior judges and the proper administration of judicial affairs. Indeed, several members of the Supreme Court, (including Chief Justice Taft) have in recent years urged, and the Supreme Court itself has acted upon, changes in the organization and procedure of the federal court system which run in the same direction as the change proposed.[118] The most important of these changes have been (1) enlarging the powers of the Chief Justice and presiding circuit judges to assign district and circuit judges from one district or circuit to another as need requires; (2) widening the Supreme Court's rule-making powers; (3) providing for an annual conference of senior circuit court judges with the aim of expediting the handling of business in the federal courts; (4) allowing the Supreme Court discretion to determine (for the most part) what cases shall come before it for review. The attitude of the court and its individual members toward all these changes indicates that so far as the need of power can be made the basis for a constitutional argument, the Supreme Court would not be insensible to the advantages to be expected to result from vesting the appointment of inferior federal judges in the Chief Justice alone, or in the Chief Justice subject to the approval of a court.

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[118]Frankfurter and Landis, BUSINESS OF THE SUPREME COURT, ch. VI and VII.