SUPREME COURT OF THE UNITED STATES

No. 92–1482

ERIC J. WEISS, PETITIONER *v.* UNITED STATES

ERNESTO HERNANDEZ, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

[January 19, 1994]

JUSTICE SOUTER, concurring.

I join the Court's opinion on the understanding that military judges, like ordinary commissioned military officers, are "inferior officers" within the meaning of the Appointments Clause. Because this case would raise a far more difficult constitutional question than the one the Court today decides if, as petitioners argue, military judges were "principal officers," I write separately to explain why I conclude that they are not.

Under the Appointments Clause, the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" all "Officers of the United States" (or "principal officers," as we have called them, see *Morrison* v. *Olson*, 487 U. S. 654, 670 (1988); *Buckley* v. *Valeo*, 424 U. S. 1, 132 (1976)). Art. II, §2. "[B]ut the Congress may be 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.'' *Ibid*.

Military officers performing ordinary military duties are inferior officers, and none of the parties to this case contends otherwise. Though military officers are appointed in the manner of principal officers, no analysis permits the conclusion that each of the more than 240,000 active military officers (see Department

of Defense, Military Manpower Statistics, Table 9, p. 18 (Mar. 31, 1993)) is a principal officer. See *Morrison* v. *Olson*, *supra*, at 670–673 (outlining criteria for determining Appointments Clause status of a federal officer). Congress has simply declined to adopt the less onerous appointment process available for inferior officers.

The Uniform Code of Military Justice authorizes the Judge Advocate General of the relevant branch of the armed forces to select as a military judge any commissioned military officer who meets certain qualifications going to legal knowledge and experience. See *ante*, at 4. If, as petitioners argue, military judges were principal officers, this method of choosing them from among the ranks of inferior officers would raise two constitutional questions. As to military officers who received their commissions before Congress created the post of military judge in 1968, the question would be whether the duties of a principal officer may be assigned to an existing multi-person inferior office, so that some of the office's occupants, at the choice of a lower-level Executive Branch official, will serve in new principal-officer positions. And as to officers who received their commissions after 1968 and whose appointments therefore included the potential for service as military judge, the question would be whether a multi-person office may be created in which individuals will occupy, again at the choice of a lower-level Executive Branch official, either inferior-officer or principal-officer positions.

The Appointments Clause requires each question to be answered in the negative. "The Constitution, for purposes of appointment, very clearly divides all its officers into two classes," *United States* v. *Germaine*, 99 U. S. 508, 509 (1879), and though Congress has broad power to create federal offices and assign duties to them, see *Myers* v. *United States*, 272 U. S. 52, 128–129 (1926), it may not, even with the President's assent, disregard the Constitution's distinction between principal and inferior officers. It may not, in particular, dispense with the precise process of appointment required for principal officers, whether directly or "by indirection," *Springer* v. *Philippine Islands*, 277 U. S. 189, 202 (1928). Accordingly, I find it necessary to consider the status

of military judges under the Appointments Clause but, first, to explain why the Appointment Clause's origins and purposes support my reading of its text.

In framing an Appointments Clause that would ensure "a judicious choice" of individuals to fill the important offices of the Union, The Federalist No. 76, p. 510 (J. Cooke ed. 1961) (A. Hamilton), the delegates to the Philadelphia Convention could draw on their experiences with two flawed methods of appointment. They were aware of the pre-revolutionary "`manipulation of official appointments'" by the Crown and its colonial governors, "one of the American revolutionary generation's greatest grievances against executive power." *Freytag* v. *Commissioner*, 501 U. S. __, __ (1991) (slip op., at 14) (quoting G. Wood, The Creation of The American Republic 1776–1787, p. 79 (1969)). They were also aware of the post-revolutionary abuse by several State legislatures which, in reaction, had been given the sole power of appointment; by the time of the Convention the lodging of exclusive appointing authority in state legislatures "`had become the principal source of division and faction in the states.'" *Freytag*, *supra*, at __, and n. 4 (slip op., at 13, and n. 4) (SCALIA, J., concurring in part and concurring in judgment) (quoting Wood, *supra*, at 407).

With error and overcorrection behind them, the Framers came to appreciate the necessity of separating at least to some degree the power to create federal offices (a power they assumed would belong to Congress) from the power to fill them, and they came to see good reason for placing the initiative to appoint the most important federal officers in the single-person presidency, not the multi-member legislature. But the Framers also recognized that lodging the appointment power in the President

alone would pose much the same risk as lodging it exclusively in Congress: the risk of "a[n] incautious or corrupt nomination." 2 M. Farrand, Records of the Federal Convention of 1787, p. 43 (rev. ed. 1937) (J. Madison) (hereinafter Farrand). Just as the Appointment Clause's grant to the President of the power to nominate principal officers would avert legislative despotism, its requirement of Senate confirmation would serve as an "excellent check" against presidential missteps or wrongdoing. The Federalist No. 76, *supra*, at 513.[1] Accord, 3 J. Story,

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[1]Hamilton's Federalist Papers writings contain the most thorough contemporary justification for the method of appointing principal officers that the Framers adopted. See The Federalist Nos. 76 and 77, pp. 509–521. Hamilton was clear that the President ought initially to select principal officers and that the President was therefore rightly given the sole power to nominate:

"The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will on this account feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretentions to them." *Id*., No. 76, at 510–511.

Hamilton also left no doubt that the role of ultimate approval assigned to the Senate was vital:

"To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though in general a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." *Id*., at 513.

The same notes were struck in the Constitutional Convention,

Commentaries on the Constitution of the United States 374–377 (1833) (The President will be more likely than "a large [legislative] body" to make appointments whose "qualifications are unquestioned, and unquestionable"; but because exclusive presidential appointment power "may be abused," the Appointments Clause provides the "salutary check" of Senate confirmation, and "[t]he consciousness of this check will make the president more circumspect, and deliberate in his nominations for office").

In the Framers' thinking, the process on which they

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where Hamilton was actually the first to suggest that both the President and the Senate be involved in the appointments process. See 1 Farrand 128 (rev. ed. 1937); J. Harris, The Advice and Consent of the Senate 21 (1953). For example, Gouvernor Morris, who was among those initially favoring vesting exclusive appointment power in the President, see 2 Farrand 82, 389, ultimately defended the assignment of shared authority for appointment on the ground that "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security." *Id*., at 539. See also 4 J. Elliott, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 134 (1891) (James Iredell in North Carolina ratifying convention) ("the Senate has no other influence but a restraint on improper appointments . . . . [The Appointments Clause provides] a double security"). See generally Harris, *supra*, at 17–26 (summarizing debates in the Constitutional Convention and in the ratifying conventions).

settled for selecting principal officers would ensure "judicious" appointments not only by empowering the President and the Senate to check each other, but also by allowing the public to hold the President and Senators accountable for injudicious appointments. "[T]he circumstances attending an appointment [of a principal officer], from the mode of conducting it, would naturally become matters of notoriety," Hamilton wrote; "and the public would be at no loss to determine what part had been performed by the different actors." The Federalist No. 77, at 517. As a result,

> "[t]he blame of a bad nomination would fall upon the president singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the senate; aggravated by the consideration of their having counteracted the good intentions of the executive. If an ill appointment should be made the executive for nominating and the senate for approving would participate though in different degrees in the opprobrium and disgrace." *Ibid*.

The strategy by which the Framers sought to ensure judicious appointments of principal officers is, then, familiar enough: the Appointments Clause separates the government's power but also provides for a degree of intermingling, all to ensure accountability and "preclude the exercise of arbitrary power." *Myers* v. *United States*, 272 U. S., at 293 (Brandeis, J., dissenting).

The strict requirements of nomination by the President and confirmation by the Senate were not carried over to the appointment of inferior officers. A degree of flexibility was thought appropriate in providing for the appointment of officers who, by definition, would have only inferior governmental authority. See 2 Farrand 627. But although they allowed an alternative appointment method for inferior officers, the Framers still structured the

alternative to ensure accountability and check governmental power: any decision to dispense with presidential appointment and Senate confirmation is Congress's to make, not the President's, but Congress's authority is limited to assigning the appointing power to the highly accountable President or the heads of federal departments, or, where appropriate, to the courts of law.

If the structural benefits the Appointments Clause was designed to provide are to be preserved, the Clause must be read to forbid the two ways in which the benefits can be defeated. First, no Branch may aggrandize its own appointment power at the expense of another. See *Buckley* v. *Valeo*, 424 U. S., at 128–129. Congress, for example, may not unilaterally fill any federal office; and the President may neither select a principal officer without the Senate's concurrence, nor fill any office without Congress's authorization.[2] Second, no Branch may

[2]While it is true that "the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches," *Buckley* v. *Valeo*, 424 U. S. 1, 129 (1976), the Framers also expressed concern over the threat of expanding presidential power, including specifically in the context of appointments. See, *e.g.*, 1 Farrand 101 (G. Mason); *id*., at 103 (B. Franklin). Indeed, the Framers added language to both halves of the Appointments Clause specifically to address the concern that the President might attempt unilaterally to create and fill federal offices. See C. Warren, The Making of the Constitution

abdicate its Appointments Clause duties. Congress, for example, may not authorize the appointment of a principal officer without Senate confirmation; nor may the President allow Congress or a lower-level Executive Branch official to select a principal officer.[3]

To be sure, "power is of an encroaching nature" and more likely to be usurped than surrendered. The Federalist No. 48, at 332 (J. Madison). For this reason,

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642 (1937) (discussing references in the Appointments Clause to principal offices "`established by Law,'" and to the power of appointing inferior officers which "`Congress may by law'" vest as specified). No doubt, Article I's assignment to Congress of the power to make laws makes the Legisla-
tive Branch the most likely candidate for encroaching on the power of
the others. But Article II gives the President means of his own to encroach, and indeed we have been forced to invalidate presidential attempts to usurp legislative authority, as the *Buckley* Court recog-
nized: "The Court has held that the President may not execute and exercise legislative authority belonging only to Congress." *Buckley*, *supra*, at 123 (citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343
U. S. 579 (1952)).

[3]In *Freytag* v. *Commissioner*, 501 U. S. __, __ (1991), we observed
that in the Appointments Clause the Framers limited the "diffusion"
of the appointment power in order to "ensure that those who wielded
it were accountable to political force and the will of the people." *Id*.,
at __-__ (slip op., at 14–15). Depending on the means used to circumvent the Appointments Clause, "diffusion" can implicate either the
anti-aggrandizement or the anti-abdication principle. If the full

our Appointments Clause cases (like our separation-of-powers cases generally) have typically addressed allegations of aggrandizement rather than abdication. See, *e.g.*, *Buckley* v. *Valeo*, *supra; Springer* v. *Philippine Islands*, 277 U. S. 189 (1928); *Shoemaker* v. *United States*, 147 U. S. 282 (1893).[4] Nevertheless, "[t]he structural interests protected by the Appointments Clause are not those of any one branch

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Congress creates a principal office and fills it, for example, it has adopted a more diffuse and less accountable mode of appointment than the Constitution requires; and it has violated the bar on aggrandizement. Cf. The Federalist No. 77, at 519 (explaining that the House of Representatives is too numerous a body to be involved in appointments). And if Congress, with the President's approval, authorizes a lower-level Executive Branch official to appoint a principal officer, it again has adopted a more diffuse and less accountable mode of appointment than the Constitution requires; this time it has violated the bar on abdication.

[4]The theme of abdication has not been entirely absent, however. In *Morrison* v. *Olson*, 487 U. S. 654 (1988), the Court considered a challenge to a law authorizing appointment of an independent counsel by a three-judge panel and without Senate confirmation. Though the law was adopted by Congress and signed by the President, the Court said that the law would nevertheless violate the Appointments Clause if the independent counsel were a principal officer. See *id*., at 671. If the independent counsel were such an officer, the law would represent an impermissible abdication by both the Congress and the President of their Appointments Clause duties.

of Government but of the entire Republic," and "[n]either Congress nor the Executive can agree to waive th[e] structural protection[s]" the Clause provides. *Freytag*, 501 U. S., at __ (slip op., at 11). The Appointments Clause forbids both aggrandizement and abdication.[5]

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[5]Cf. *J. Hampton, Jr. & Co.* v. *United States*, 276 U. S. 394, 406 (1928) (Taft, C. J.) ("[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power"). As Chief Justice Taft's remark suggests, the ready analogy to the Appointment Clause's anti-abdication principle is what has been called "nondelegation doctrine." The Court has unanimously invalidated legislation in which Congress delegated "to others the essential legislative functions with which it is . . . vested," *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 529 (1935); *id*., at 553–554 (Cardozo, J., concurring), and it has read other statutes narrowly to avoid annulling them as excessive abdications of constitutional responsibility, see *Industrial Union Dept., AFL-CIO* v. *American Petroleum Institute*, 448 U. S. 607, 646 (1980) (plurality opinion); *National Cable Television Assn., Inc.* v. *United States*, 415 U. S. 336, 342 (1974). See also *Industrial Union Dept.*, *supra*, at 672–676 (REHNQUIST, J., concurring in judgment) (discussing limits on the delegation of Congress's legislative power). Nondelegation doctrine has been criticized. But see J. Ely, Democracy and Distrust 131–134 (1980) (distinguishing nondelegation doctrine from less defensible theories invoked to strike down New Deal legislation). Barring Appointments Clause abdication strikes me as plainly less problematic, however, because the text of the Constitution describes with precision the nature of the Branches' appointments powers.

If military judges were principal officers, the method for selecting them, which is prescribed in legislation adopted by Congress and signed by the President, would amount to an impermissible abdication by both political Branches of their Appointments Clause duties. Military officers commissioned before 1968, though they received presidential appointment and Senate confirmation, were chosen to fill inferior offices that did not carry the possibility of service as a military judge. If military judges were principal officers, the 1968 Act would have authorized the creation and filling of principal offices without any presidential nomination or Senate confirmation to that principal office, or indeed to any principal office at all. Such a process would preclude the President, the Senate, and the public from playing the parts assigned to them, parts the Framers thought essential to preventing the exercise of arbitrary power and encouraging judicious appointments of principal officers.

The office to which military officers have been appointed since enactment of the Military Justice Act of 1968 includes the potential for service as a military judge. But that would be a sufficient response to petitioners' Appointments Clause objection only if military judges were inferior officers. Otherwise, the method for selecting military judges even from the ranks of post-1968 commissioned officers would reflect an abdication of the political Branches' Appointments Clause duties with respect to principal officers. Admittedly, the degree of abdication would not be as extreme as in the prior setting, for the President and Senate are theoretically aware that each officer nominated and confirmed may serve as a military judge. Judging by the purposes of the Appointments Clause, however, this difference is immaterial. It cannot seriously be contended that in confirming the literally tens of thousands of military officers each year the Senate would, or even could,

adequately focus on the remote possibility that a small number of them would eventually serve as military judges.[6] And the method for appointing military judges allows the President no formal role at all in the selection of the particular individuals who will actually serve in those positions. This process likewise deprives the public of any realistic ability to hold easily identifiable elected officials to account for bad appointments. Thus while, as the Court explains, see *ante*, at 7–9, Congress has certainly attempted to create a single military office that includes the potential of service as a military judge, I believe the Appointments Clause forbids the creation of such a single office that combines inferior- and principal-officer roles, thereby disregarding the special treatment the Constitution requires for the appointment of principal officers. For these reasons, if military judges were principal officers, the current scheme for appointing them would raise a serious Appointments Clause problem indeed, as the Solicitor General conceded at oral argument. See Tr. of Oral Arg. 30–31.

The argument that military judges are principal officers is far from frivolous. It proceeds by analogizing military judges to Article III circuit and district judges, who are principal officers,[7] and to

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[6]Writing in 1953, one observer pointed out that if each of the 49,956 nominations for military office sent to the Senate in 1949 "were considered for one minute . . . , it would require 832 hours to pass upon the nominations [or] an average of more than 5 hours each day that the Senate is in session." J. Harris, *supra*, at 331. This observer concluded that "Senate confirmation of military and naval officers has become for all practical purposes an empty formality." *Ibid*.

[7]It is true that the Court has never so held and that the

Article I Tax Court judges, who *Freytag* suggests are principal officers too (since, *Freytag* held, Tax Court judges may appoint inferior officers). In terms of the factors identified in *Morrison* v. *Olson* as significant to determining the Appointments Clause status of a federal officer, the office of military judge is not "limited in tenure," as that phrase was used in *Morrison* to describe "appoint[ment] essentially to accomplish a single task [at the end of which] the office is terminated." 487 U. S., at 672. Nor are military judges "limited in jurisdiction," as used in *Morrison* to refer to the fact that an independent counsel may investigate and prosecute only those individuals, and for only those crimes, within the scope of the jurisdiction granted by the special three-judge appointing court. See *ibid*. Over the cases before them, military judges would seem to be no more "limited [in] duties" than lower Article III or Tax Court judges. *Ibid*., at 671. And though military judges are removable, the same is true of "most (if not all) principal officers in the Executive Branch." *Id*., at 716 (SCALIA, J., dissenting) (emphasis deleted).

Constitution refers to the lower federal courts as "inferior Courts." Art. III, §1. But from the early days of the Republic "[t]he practical construction has uniformly been that [judges of the inferior courts] are not . . . inferior officers," 3 J. Story, Commentaries on the Constitution 456, n. 1 (1833), and I doubt many today would disagree. In *Freytag*, indeed, the Court assumed that lower federal judges were principal officers.

See 501 U. S., at __ (slip op., at 15) (listing "ambassadors, ministers, heads of departments, and judges" as principal officers). But see Shartel, Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution, 28 Mich. L. Rev. 485, 499–529 (1930) (arguing that lower federal judges should, and constitutionally can, be appointed by the Chief Justice).

The argument that military judges are principal officers, however, is not without response. Since Article I military judges are much more akin to Article I Tax Court judges than lower Article III judges, the analogy to Tax Court judges proves nothing if Tax Court judges are inferior officers, which they may be. The history that justifies declaring the judges of "inferior" Article III courts to be principal officers is not available for Tax Court judges, and though *Freytag* holds that the Tax Court is a "Cour[t] of Law" that can appoint inferior officers, it may be that the Appointments Clause envisions appointment of some inferior officers by other inferior officers.

But even if Tax Court judges are principal officers, military trial judges compare poorly with them, because not only the legal rulings of military trial judges but also their factfinding and sentencing are subject to *de novo* scrutiny by the Courts of Military Review. See 10 U. S. C. §866(c). Though the powers of Court of Military Review judges are correspondingly greater, they too are distinguishable from Tax Court judges. First, Tax Court judges are removable only for cause, see 26 U. S. C. §7443(f), while Court of Military Review judges may be freely "detail[ed]" by the relevant Judge Advocate General to non-judicial assignments.[8] See *ante*, at 8. Second, Tax Court judges serve fixed 15–year terms, see 26 U. S. C.

[8]According to the Government, "[t]he [Uniform Code of Military Justice] and the services' implementing regulations are carefully structured to ensure that military judges are independent and impar-tial." Brief for United States 42. This is offered to repel petitioners' due-process claim, but it strengthens petitioners' Appointments Clause position. It does not strengthen it enough, however, for the fact remains that military judges are removable for a broad array of reasons.

§7443(e), while Court of Military Review Judges have no fixed term of office and typically serve for far less than 15 years.[9] See Brief for Petitioners 5 (military judges "often serve terms of two, three, or four years").

"The line between `inferior' and `principal' officers is one that is far from clear," *Morrison*, 487 U. S., at 671, and though there is a good deal of force to the argument that military judges, at least those on the Courts of Military Review, are principal officers, it is ultimately hard to say with any certainty on which side of the line they fall. The Court has never decided how to resolve doubt in this area; the *Morrison* Court did not address this issue since it understood the independent counsel to be "clearly" an inferior officer. *Ibid*. Forced to decide

now, I agree with the approach offered by then-Judge Ginsburg in her Court of Appeals opinion in the independent-counsel case. "Where . . . the label that better fits an officer is fairly debatable, the fully rational congressional determination surely merits . . . tolerance." *In re Sealed Case*, 838 F. 2d 476, 532 (CADC 1988) (R. B. Ginsburg, J., dissenting), rev'd *sub nom*. *Morrison* v. *Olson*, 487 U. S. 654 (1988). Since the chosen method for selecting military judges shows that neither Congress nor the President thought military judges were principal officers, and since in the presence of doubt deference to the political Branches' judgment is appropriate, I

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[9]According to the Government, "military judges have the equivalent
of tenure in the form of stable tours of duty." *Id*., at 31. Again,
though offered as a defense to petitioners' due-process challenge, this aids petitioners' Appointments Clause argument. The fact remains, however, that the statute provides no fixed term of office for military judges.

conclude that military judges are inferior officers for purposes of the Appointments Clause.

Because the limits the Appointments Clause places on the creation and assignment of duties to inferior offices are respected here, for the reasons the Court and JUSTICE SCALIA give, and on the understanding that the Court addresses only the Appointment Clause's limits regarding inferior officers, I join the Court's opinion.