That is recognized in this case to which I have called attention. At page 186 the majority of the court, in discussing the proposition, say that in all of this legislation the significant fact is that I am not inclined to read the substance of it; I had better read the whole paragraph and try to read the sentence, and that will put it in better form. 

Mr. TELLER. That is better.

Mr. FORAKER. The court say:

The significance of these enactments, as well as of the acts of 1867 and 1869, and as a matter of section 1 of the Constitution, is that the court has uniformly proceeded upon the theory that the judges of the territorial courts were not entitled, by virtue of their appointment and the Constitution of the United States, to hold their offices during good behavior, unless it was so declared in the respective acts providing for their organization and appointment, but were appointed under another power.

In other words, they came back right to the fact that Congress did not see fit in legislating to establish the court to give a life tenure, but they recognized that Congress might have done so if Congress had seen fit, for Congress in so legislating is without any limitations, as I understand it.

Mr. TELLER. Who is the Senator from Ohio allow me?

Mr. FORAKER. Certainly.

Mr. TELLER. I wish to ask the Senator if that language was not used with reference to the question simply whether the President could remove within the term for which the appointment was made for Congress.

Mr. FORAKER. No. Mr. President, the language which I have read was not used with reference to that alone. It is true in this case the question before the court was as to the power of the President to remove a district judge of Alaska. That district judge had been appointed for a term of four years. He was not removed. The opinion of the court, by a majority, was that the President wanted to displace him and substitute another man. The Supreme Court says that the civil tenure law which excepted judges of the United States courts did not except this judge, because Congress evidently intended that he should be only a legislative judge and not a constitutional judge. They did not think it necessary in that case to have made a distinction only to constitutional courts and constitutional judges. But, as I say, in disposing of it they recognized, by the quotation I have made from the opinion of the majority of the court, that Congress might have made that life tenure if Congress had seen fit to do so. In all these cases you will find the court is careful to point out that Congress were not constitutional judges, as, is, in the case, that they have jurisdiction that does not belong to the United States courts, the constitutional courts, as well as that jurisdiction, and because their tenure is made for years instead of for life.

Mr. PLATT of Connecticut. Mr. President——

Mr. TELLER. The President pro tempore. Does the Senator from Ohio yield to the Senator from Connecticut?

Mr. FORAKER. Certainly.

Mr. PLATT of Connecticut. The Senate has evidently overlooked the fact of the majority of the court. On page 184, after citing all the former decisions, Judge Harlan says:

"These cases close all discussion here as to whether territorial courts are of the class defined in the third article of the Constitution. It must be regarded as settled that the courts now properly known as territorial courts, which the Constitution possesses over the Territories of the United States, are not courts of the United States created under the authority conferred by the Constitution as to the cases recognized in the third article."

Mr. TELLER. Certainly. If the Senator will allow me, that is not at all inconsistent with what I am contending.

Mr. PLATT of Connecticut. I think it is.

Mr. FORAKER. They are speaking of territorial courts as they have been by Congress created. They are not speaking about the power of Congress to create something different, but they say in every instance, in every territorial court that they mentioned, the courts were not seen fit to create a constitutional court, but only a territorial court.

Mr. TELLER. Will the Senator allow me?

Mr. FORAKER. Yes, sir.

Mr. TELLER. I wish to read what Judge Nelson says in the case of Denman vs. Piper (Howard). He will find it in the McAllister case, page 181.

Mr. FORAKER. Certainly. After citing the judicial clause of the Constitution, Article III, section 1, the court said:

"Congress must not create inferior courts within a State, and the power to create such courts, both under the Constitution, but the judges appointed to administer them must possess the constitutional tenure of office before they can become effective, the exception to this rule in the Constitution. The territorial courts, therefore, were not courts in which the judicial power conferred by the Constitution on the Union was vested. They were incapable of receiving, as the tenure of the incumbents was but for four years."

Then the court cites the case of Marshall. Mr. FORAKER. Certainly. The court gives the reason why they are incapable of receiving, because they are not constitutional courts. Congress did not design to make them such, and Congress evidenced that fact when it denied to them a life tenure and limited them to a term of years.

Mr. TELLER. Then the quotes from Marshall, who declare that they were not meant to be, very emphatically.

Mr. FORAKER. In the other case the court decided and gave the reason why they were not constitutional courts, assigning as the reason that they were given a different jurisdiction from that which belonged to United States courts and because the tenure was limited to a term of years.

If the Senator from Ohio will allow me, I agree the court gave the reason, but it did not by any means give the reason the Senator is giving.

Mr. FORAKER. I so understand it.

Mr. TELLER. The court said they were not appointed under the authority to establish inferior courts, to appoint courts, but they were appointed under another power.

Mr. FORAKER. What the court said was that these were courts created by Congress in the exercise of the power conferred upon Congress to legislate for the Territories, and that Congress in the exercise of that power had created courts with a different jurisdiction from that which belonged to United States courts, and with a tenure limited to a number of years in stead of a life tenure, and that was a conclusive fact to show that Congress did not design to make them constitutional courts.

Mr. STEWART. Mr. President——

Mr. FORAKER. Certainly.

Mr. STEWART. I thought the Senator was through. I just wanted to say a word upon this subject. It seems to me to be too ambiguous.

The constitutional courts provide a limited jurisdiction; the state courts exercise large jurisdiction. It is a peculiar jurisdiction that is conferred upon the constitutional courts. The constitutional court is a peculiar court. It is a special court. Congress does not derive the power to legislate for the Territories, for the Territories would exist independent of any provision upon which the Territories do not create a special court. They create a court with general jurisdiction, covering all the jurisdiction that the States exercise and that the Federal Government exercises.

Mr. STEWART. It is one complete jurisdiction. It is a different system altogether; it may be just such a system as Congress may ordain and appoint. But when you come to constitutional courts, they are very different. They are limited, and by the Constitution a limited jurisdiction is prescribed, whereas a court created by Congress with all the jurisdiction, as it usually is, that the courts of the United States have in the States and that the State courts have.

It is all combined in one, and it results from the power to govern the Territories, whether that power be derived from the Constitution or from some other source. Authorities refer it to the very nature of sovereignty possessed by the Government.

When you say you have got no constitution for the Territories I deny that. We have got a constitution for the Territories, one that has grown up by custom, and it only remains to bind that constitution in from England. Ever since the formation of the Constitution we have legislated in one direction. We have given the Territories local self-government; we have given them all the freedom that we enjoy. Now, while you might have power to do almost anything to injure the Territories, you might have power to do almost anything to benefit them. If we should have a Constitution by precedent for a hundred years that tells us that we must be governed by the general principles of liberty, justice, and a republican form of government. We have done it in all instances, and that now is binding upon us without regard to the abstract power that Congress may have.

Congress has power to do wrong. So has any unlimited monarch. So far as the Territories are concerned we have that power, and Congress might exercise it if we were not governed by an unwritten constitution that has grown up, that we must give effect to it. They must have a republican government; that they must have local self-government; that they must be governed according to the laws of the most enlightened, being republican, as we are. That we have to do unless we violate every principle that governs us at all anywhere.

Mr. TELLER. That is exactly.

Mr. FORAKER. That is no constitution for the Territories except that which has grown up by custom. That has become binding upon us as well as binding upon the consciences of Congress as the Constitution of the United States. We dare not violate it, and we are not