

cause, as admitted by the Senator from Wisconsin, we have a right to give to the judge for whom we provide a life tenure, if we see fit, although it is a Territorial court.

Mr. SPOONER. I have not denied that.

Mr. FORAKER. I say the Senator from Wisconsin has admitted it.

Mr. SPOONER. But will the Senator from Ohio permit me?

Mr. FORAKER. Certainly.

Mr. SPOONER. Can we give him a four years' tenure?

Mr. FORAKER. We can give him a four years' tenure or a four months' tenure.

Mr. SPOONER. Can we give to the judge of a constitutional court anything less than a life tenure?

Mr. FORAKER. Certainly not; and I have said that as repeatedly as I have had occasion to say it in the course of this debate. But what I want to say is that there are two provisions in the Constitution under either one of which Congress may proceed in legislating for a court in a Territory. It can proceed under that authorizing it to legislate for Territories, and then, of course, it will create a Territorial court. But I do not know of anything in the Constitution that prevents Congress from proceeding under the judicial article to create a court that would have a life tenure and have the constitutional jurisdiction.

Now, ordinarily, they have given to the Territorial courts a jurisdiction that was not the constitutional jurisdiction, and the Supreme Court of the United States has pointed to that fact as a reason why the legislation was intended to create a Territorial court, or that Congress has given less than a life tenure as another reason why it should be regarded as a Territorial court. Now, I say, and that is all I want to say about it, we have a right to create a court for that Territory, and in creating that court we can proceed under the power to legislate for the Territories given in the Constitution or under the judicial article of the Constitution.

Now, when they legislated for the Territory of Louisiana, undoubtedly they proceeded under the judicial article of the Constitution, for what they did when they created a court for Louisiana was to say that Louisiana should be a district and should have a district court, and the judge of the district court should have the constitutional jurisdiction; and they said the jurisdiction of that judge should be precisely the jurisdiction conferred by the act of 1789 on the court for the Kentucky district. Nobody will pretend that the Kentucky district was not a constitutional court.

When they came to fix the tenure, having given to that court the constitutional jurisdiction, they gave to it the constitutional tenure. That is to say, they did not fix any tenure at all. That meant necessarily that it was for good behavior, and in the case of *Seré vs. Pitot*, Chief Justice Marshall, having occasion to review a decision of that court, referred to it as a court of the United States. He did not say it was a constitutional court, but he spoke of it as a United States court for the district of Louisiana in contradistinction to a Territorial or a legislative court in that Territory. It seems to me, in short, that the true test by which to determine whether a court is a legislative or a constitutional court is not locality, but jurisdiction and tenure.

Now, all I want to say further is that if it be conceded, as the Senator from Wisconsin does concede, that Congress has full power, proceeding under that clause of the Constitution authorizing us to legislate for the Territories, to create a court with constitutional jurisdiction and the judge with a life tenure, then he is conceding all that the framers of this bill claim for this provision, and I do not care whether you call it a constitutional court or a Territorial court; the enactment will be valid, for the question constantly recurs, Is this section valid which we are proposing to enact? Is it within the power of Congress to enact it? If so, as I think it is, then follows the question of policy, and that is all.

Mr. SPOONER. Mr. President—

Mr. HOAR. Will the Senator from Wisconsin allow me?

Mr. SPOONER. If I may presume after this great lapse of time to bring myself humbly to the attention of the Senate again in this debate upon this question, I yield to the Senator from Massachusetts.

Mr. FORAKER. I hope the Senator from Wisconsin will excuse me—

Mr. SPOONER. I do.

Mr. FORAKER. If I interrupted him improperly.

Mr. SPOONER. I do.

Mr. FORAKER. I was particular before commencing to inquire whether he had concluded.

Mr. SPOONER. I did not hear that.

Mr. FORAKER. I thought he answered me that he had.

Mr. HOAR. I have been so engrossed in other matters that I have not given the investigation I ought to give to this special question, which is imminent upon us in a thousand ways. The Senator from Ohio has given attention to it. He is the author, or at any rate the sponsor, of a bill which is intended to affirm the legislative authority of the United States over an important possession lately acquired.

Now, the question which I put to him was an exceedingly practical question in regard to the very matter on which we are going to vote when we vote next on this bill, to wit, whether in a bill which already contains a provision for five ordinary Territorial judges, which I concede and which he affirms, and you may add with jurisdiction over the entire Territory is within the power of Congress, a constitutional court with the constitutional life tenure, having its authority under the clause in the Constitution which provides for the creation of judicial officers other than the Supreme Court of the United States, I asked my honorable friend whether in his judgment he thought we could have the two kinds of court in the same possession.

Mr. FORAKER. Undoubtedly.

Mr. HOAR. Very well; that is what—

Mr. FORAKER. I thought I was misunderstanding the Senator a moment ago, because I had been just saying that.

Mr. HOAR. That is all I asked him, and I put it as preliminary to another question.

Mr. FORAKER. Now let me add what upon our own experience is true, as well as upon reason, or what I at least conceive to be the reason of the case.

Mr. HOAR. Very well. I agree with the Senator that we can establish each kind of a court separately. Now, then, if we can establish both kinds of court for the same Territory, what kind of law, fundamental law, is in force after you have done it? When you have established your constitutional court, is that to administer the Constitution as the valid supreme law of the place where it sits, or no; or can you establish a constitutional court over which court the Constitution of the United States has no authority?

Mr. FORAKER. Mr. President, I do not understand that there is any difficulty about that.

Mr. HOAR. I have difficulty about it.

Mr. FORAKER. The constitutional court is fixed by the Constitution itself. Congress could confer upon it additional jurisdiction undoubtedly, but when we speak of a constitutional court we mean a court, as I understand it, that has the jurisdiction that is conferred by the Constitution.

Mr. HOAR. And the tenure.

Mr. FORAKER. Now, if you will consider, I do not think you will find any difficulty such as the Senator seems to have in his mind. No matter where the court may sit, the judge is an officer appointed by the President of the United States, serving the United States, and under an oath of office that requires him to support the Constitution.

Mr. HOAR. That is it exactly.

Mr. FORAKER. And whenever he is called upon to administer law he must administer it, of course, in accordance with the statutes and the Constitution of the United States.

Mr. HOAR. Exactly. Then when you have got a constitutional court enactment by Congress, if I now understand the Senator, you have got the Constitution of the United States there to be administered and applied.

Mr. FORAKER. You have it—

Mr. HOAR. Let me state now.

Mr. FORAKER. Certainly.

Mr. HOAR. I am not putting a question, but making a statement.

Mr. FORAKER. It is so easy to answer that I am impatient.

Mr. HOAR. Perhaps it will not—

Mr. FORAKER. I beg your pardon.

Mr. HOAR. Perhaps the Senator's impatience is what makes him think it is easy to answer. It may be barely possible. I only suggest it. Now, my proposition is that if we concede, first, that the United States has the authority to establish a constitutional court; second, that it has lawfully done it; and third, that having lawfully exercised that authority the Constitution of the United States in all its provisions has extended to the territory within the jurisdiction of the United States, you can not escape the corollary that the Constitution is in force there, and that duties must be uniform, that exports from that place can not be taxed, that the persons in that Territory are citizens, that they have the right to go wherever in the United States they choose, and that everything the Senator from Ohio has by the right of his citizenship every dweller, every person on that soil, born there or lawfully there under the act acquiring it, has by the right of his citizenship. Now, I should like to know from my honorable friend how he escapes that result?

Mr. FORAKER. With very great pleasure.

Mr. SPOONER. Now will the Senator yield to me? [Laughter.]

Mr. FORAKER. I think in view of the very concise and direct question that was put to me by the Senator from Massachusetts, I ought to say a word in answer; but I will yield to the Senator from Wisconsin with very great pleasure, for I know we have unduly trespassed upon him.