sense. In the same way the not infrequent practice of Presidents of appointing Members of Congress as commissioners to negotiate treaties and agreements with foreign governments may be regularized, notwithstanding the provision of Article I, § 6, clause 2 of the Constitution, which provides that "no Senator or Representative shall . . . be appointed to any civil Office under the Authority of the United States, which shall have been created," during his term; and no officer of the United States, "shall be a Member of either House during his Continuance in Office."[503] The Treaty of Peace with Spain, the treaty to settle the Bering Sea controversy, the treaty establishing the boundary line between Canada and Alaska, were negotiated by commissions containing Senators and Representatives.

Appointments and Congressional Regulation of Offices

It has never been questioned that the Constitution distinguishes between the creation of an office and appointment thereto. The former is *by law* and takes place by virtue of Congress's power to pass all laws necessary and proper for carrying into execution the powers which the Constitution confers upon the government of the United States and its departments and officers.[504] As an incident to the establishment of an office, Congress has also the power to determine the qualifications of the officer and in so doing necessarily limits the range of choice of the appointing power. First and last, it has laid down a great variety of qualifications, depending on citizenship, residence, professional attainments, occupational experience, age, race, property, sound habits, and so on. It has required that appointees be representative of a political party, of an industry, of a geographic region, or of a particular branch of the Government. It has confined the President's selection to a small number of persons to be named by others.[505] Indeed, it has contrived at

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[503] *See* 2 G. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 48–51 (1903).

[504] However, "Congress's power . . . is inevitably bounded by the express language of Article II, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be 'Officers of the United States.'" Buckley v. Valeo, 424 U.S. 1, 138–39 (1976) (quoted in Freytag v. Commissioner, 501 U.S. 868, 883 (1991)). The designation or appointment of military judges, who are "officers of the United States," does not violate the Appointments Clause. The judges are selected by the Judge Advocate General of their respective branch of the Armed Forces. These military judges, however, were already commissioned officers who had been appointed by the President with the advice and consent of the Senate, so that their designation simply and permissibly was an assignment to them of additional duties that did not need a second formal appointment. Weiss v. United States, 510 U.S. 163 (1994). However, the appointment of civilian judges to the Coast Guard Court of Military Review was impermissible and their actions were not salvageable under the *de facto* officer doctrine. Ryder v. United States, 515 U.S. 177 (1995).

[505] *See* Myers v. United States, 272 U.S. 52, 264–74 (1926) (Justice Brandeis dissenting). Chief Justice Taft in the opinion of the Court in *Myers* readily recognized the legislative power of Congress to establish offices, determine their func-