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# JUDICIAL POWER AND TERRITORIAL JUDGES

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The Constitution of the United States reads in part as follows:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, . . ."[1]

Judges of the United States District Courts in Hawaii hold office for six years,[2] in Puerto Rico eight years,[3] in Alaska four years,[4] in the Virgin Islands four years,[5] in the Canal Zone eight years,[6] in Guam four years,[7] Judges of the Tax Court of the United States hold office for twelve years.[8] On the other hand, by recent amendment Judges of the United States Court of Claims,[9] the United States Court of Customs and Patent Appeals,[10] and United States Customs Court[11] each hold office during good behavior. This, however, is by act of Congress, not by virtue of the constitutional provisions.[12] These latter courts are said to be "legislative courts," not constitutional courts."[13] How is it possible for judges of courts in the territories to exercise the judicial power of the United States and still hold office for a term of less than good behavior?

It has been judicially declared that courts created by act of Congress for the territories are created not by virtue of authority conferred on Congress under article III, section 1, but by virtue of authority conferred by article IV, section 3, as follows:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."[14]

By virtue of this language it has been held in a number of cases that Congress has the constitutional power to create a court and endow it with

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[1] U. S. CONST. art. III, § 1.
[2] 28 U.S.C. § 134 (1952).
[3] *Ibid.*
[4] 31 STAT. 325 (1900) as amended, 48 U.S.C. § 112 (1952).
[5] 49 STAT. 1813 (1936) as amended, 48 U.S.C. § 1405y (1952).
[6] 7 CANAL ZONE CODE § 42.
[7] 64 STAT. 390 (1950) as amended, 48 U.S.C. § 1424b (1952).
[8] 43 STAT. 336 (1924) as amended, 26 U.S.C. § 1102 (1952).
[9] 28 U.S.C. § 173 (1952).
[10] 28 U.S.C. § 213 (1952).
[11] 28 U.S.C. § 252 (1952).
[12] Ex parte Bakelite, 279 U.S. 438 (1929).
[13] Magruder v. Brown, 106 F.2d 428 (4th Cir. 1939), *cert. denied*, 308 U.S. 624 (1940); Bland v. Commissioner, 102 F.2d 157 (7th Cir. 1939), *cert. denied*, 308 U.S. 563 (1940); Williams v. United States, 289 U.S. 553 (1933).
[14] United States v. Seagraves, 100 F.Supp. 424, 425 (Guam 1951).

judicial power even when Congress does not so act under article III, section 1.[15] We thus have the anomalous situation where a court purports to exercise the judicial power of the United States derived from a source other than article III of the Constitution. It has been said by eminent authority:

> "The territorial courts, e.g., those of Hawaii and Alaska, do not exercise 'judicial power of the United States', but a special judicial power conferred upon them by Congress, by virtue of its sovereign power over these places (See art. IV, sec. III, ¶ 2). Their judges accordingly have a limited tenure and are removable by the President."[16]

These cases, in effect, establish that there are in fact two governments of the United States: one government of the United States exists and operates within the territorial limits of the forty-eight states and is divided into three parts, executive, legislative and judicial; the other government of the United States exists and operates within the territories of the United States and the entire sovereignty of such government, executive, legislative and judicial, is vested in the Congress. Furthermore, none of the personal guarantees of the United States Constitution apply to such latter government excepting only as Congress in its infinite wisdom shall expressly so provide. For example there is no constitutional right to trial by jury in such territory.[17] Whatever rights a citizen possesses in the territories of the United States he possesses by virtue of the grace of Congress and not by virtue of the guarantees of the Constitution.

It should be noted that article IV, section 3 makes no reference to or provision for judicial power to be exercised by the legislative branch in the territories. It provides only, and that very briefly, for the enactment of "Needful Rules and Regulations Respecting the Territory." Some people might argue that this at least leaves some doubt about the judicial power, and therefore there is room for "interpretation."

The Constitution, however, eliminates any ambiguity on the subject. It defines what is meant by "judicial power." It says, in part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the *Laws of the United States,* and Treaties made, or which shall be made, under their authority; . . ."[18] (Emphasis added.)

Section 1 vests judicial power of the United States in judges who shall

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[15] United States v. McMillan, 165 U.S. 505 (1897); Clinton v. Englebrecht, 80 U.S. (13 Wall.) 434 (1872); Lietensdorfer v. Webb, 61 U.S. (20 How.) 176 (1858); Benner v. Porter, 50 U.S. (9 How.) 235 (1850); The American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828); In re Jessie's Heirs, 259 Fed. 694 (E.D. Okla. 1919); James v. United States, 38 Ct. Cl. 627 (1903); Howard v. United States, 22 Ct. Cl. 316 (1887); Nickel v. Griffin, 1 Wash. Terr. R. 374 (1872).

[16] EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 34 (1954).

[17] Balzac v. Porto Rico, 258 U.S. 298 (1922); United States v. Seagraves, 100 F.Supp. 424 (Guam 1951). See also Pugh v. United States, 212 F.2d 761 (9th Cir. 1954); Government of Guam v. Pennington, 114 F.Supp. 907 (Guam 1953).

[18] U. S. CONST. art. III, § 2, cl. 1.

hold office during good behavior. Section 2 defines the judicial power of the United States as extending to all cases in law and equity which arise under the laws of the United States.

There is nothing in the Constitution limiting the judicial power of the United States to the territorial limits of the states themselves. On the contrary, the framers of the Constitution expressly intended that the judicial power should extend beyond those territorial limits. As a part of the same section 2, of article III, defining the judicial power of the United States, the Constitution further provides:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; *but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.*" (Emphasis added.)

In the debate in the Constitutional Convention on August 28, 1787, Madison's notes with reference to this clause read:

> "The object of this amendment was to provide for trial by jury of offences committed out of any state."[19]

But not in Guam![20]

If the judicial power of the United States under the Constitution applies only *within* the territorial limits of the states, how is it possible for a person to commit a crime against the United States *outside* of the territorial limits of the States? The Constitution provides for the trial of such a crime and it can only do so if the Constitution applies at the point where the crime is committed!

Sections 1 and 2 of article III speak of the entire judicial power of the United States. No more and no less! If it is judicial power arising under the laws of the United States, if it is exercised by a court of the United States in any area subject to the sovereignty of the United States, the conclusion seems manifest that it must be exercised by a judge who has been appointed to hold office during good behavior, and who may not be removed from office except by impeachment. It may be worth noting at this point that it has been recently ruled that the powers of the Tax Court of the United States "are wholly judicial in character,"[21] yet its judges do not serve during good behavior. Why? The independence of the federal judiciary is a principle the merit of which cannot be weighed by reference to the territory within which it is asserted.

How did we arrive at this peculiar position that a United States District

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[19] 3 U. S. STATE DEPARTMENT, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 628 (1900).

[20] See note 14, *supra*.

[21] Stern v. Commissioner, 215 F.2d 701, 707 (1954).

Judge in Los Angeles serves for good behavior but a United States District Judge in Honolulu serves for only six years? The judicial story has its genesis in an obscure case involving 356 bales of cotton.[22] The ship *Point a Petre* on a voyage from New Orleans to Havre de Grace in France went down off the Florida Keys and the inhabitants of Key West salvaged a part of its cargo of cotton. A Territorial Court, consisting of a notary and five jurors of the Territory of Florida, sold the salvaged cargo to David Canter to satisfy the salvors.

The Territorial Court had been created by the Territorial Legislature whose authority was derived from an act of Congress. The ship owners abandoned their rights to the insurance underwriters, who filed an action to recover the cotton in the United States District Court in South Carolina, where the cotton was temporarily located. Canter relied on the decree of the Florida Territorial Court. The appellant (libelant in the trial court) asserted such decree was void for want of jurisdiction because the Florida decree was really an effort by the Florida court to exercise admiralty jurisdiction, which was vested by the Constitution exclusively in the courts of the United States. In an opinion written by Chief Justice Marshall, the United States Supreme Court said that Congress, when legislating with respect to a territory, had the authority to authorize the Territorial Legislature to confer admiralty jurisdiction upon a court created by the Territorial Legislature. In some of the oddest reasoning ever resorted to, the United States Supreme Court disposed of the appellant's contentions that the Territorial Court was exercising the judicial power of the United States, by asserting:

(a) Article III section 1 of the United States Constitution provides that judges exercising judicial power of the United States shall be appointed to hold office during good behavior;

(b) The judges of the Florida Court were appointed only for four years;

(c) Conclusion: Therefore, such judges could not be exercising the judicial power of the United States as defined in article III of the Constitution.[23] The court appears not to have considered the possibility of a fallacy

[22] The American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828).

[23] "It has been contended, that by the Constitution the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and that the whole of this judicial power must be vested 'in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish.' Hence it has been argued, that Congress cannot vest admiralty jurisdiction in courts created by the territorial Legislature.

"We have only to pursue this subject one step further, to perceive that this provision of the Constitution does not apply to it. The next sentence declares that 'the judges both of the supreme and inferior courts, shall hold their offices during good behavior.' The judges of the Superior Courts of Florida hold their offices for four years. These courts, then, are not Constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue

—that its minor premise was wrong—that the limitation on the tenure of office of the territorial judges was an unconstitutional violation of article III.

The fundamental fallacy in the case is the implied assumption that some sovereignty existed in the Territory of Florida separate, apart, and independent of the sovereignty of the United States of America, as expressed in the Constitution of the United States. The *complete* sovereignty of a territory is vested in the United States of America. It cannot be partially vested elsewhere. It cannot be suspended partially in mid-air. Congress apparently thought the Constitution of the United States extended to the Florida Territory because, as counsel for the appellant pointed out in his argument, it required an oath from the officers of the Territory to support the Constitution of the United States. This they could hardly do if the Constitution did not apply in the Territory.

Even if it be contended that some different or special sovereignty applies to territories acquired by treaty, the judicial power of the United States, as set forth in article III of the Constitution would still apply because of section 2, which says it extends to cases arising under treaties made pursuant to the Constitution.

It would have been far better for subsequent history if the court had merely said "estoppel" in answer to the respondent's argument that:

> "This will be a hard case against the claimant of this property, should he lose it, having purchased it in good faith under the decree of a court exercising jurisdiction over the matter, and to which jurisdiction no objection was made by the parties to the proceeding."[24]

This is one instance in which a king supplanted the Constitution of the United States. King Cotton! 356 Bales!

Referring to this opinion by Chief Justice Marshall, the United States Supreme Court in an opinion written by Justice Brown has said:

> "As the only judicial power vested in Congress is to create courts whose judges shall hold their offices during good behavior, it necessarily follows that, if Congress authorizes the creation of courts and the appointment of judges for a limited time, *it must act independently of the Constitution and upon territory which is not part of the United States within the meaning of the Constitution.*"[25] (Emphasis added.)

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of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3rd article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the 3d article of the Constitution, the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general and of a State Government." *Id.* at 546.

[24] *Id.* at 537.

[25] Downes v. Bidwell, 182 U.S. 244, 266 (1900).

Can Congress act independently of the Constitution? From what source did it acquire any such sovereignty and power? What is the nature of "territory which is not part of the United States"? How can Congress exercise power under article IV section 3 in such territory?

The conclusion indicated does not "necessarily" follow. Another possible conclusion is that the limitation on the tenure of office is unconstitutional.

Justice White in a concurring opinion in *Downes v. Bidwell* expressed a much clearer concept of the problem when he said:

> "First. The Government of the United States was born of the Constitution, and *all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument.* . . . (Emphasis added.)
>
> "Second. Every function of the government being thus derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable.
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> . . . . . .
>
> "Sixth. As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It follows, also, that every provision of the Constitution which is applicable to the territories is also controlling therein. . . .
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> "Seventh. In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied upon is applicable."[26]

Justice White refers to:

> ". . . the erroneous principle that the Constitution did not apply to Congress in legislating for the territories and was not operative in such districts of country."[27]

Continuing:

> ". . . it cannot, it seems to me, be doubted that the United States continued to be composed of States and territories, all forming an integral part thereof and incorporated therein, as was the case prior to the adoption of the Constitution."[28]

Why is the provision of article III, section 1 that judges exercising the judicial power of the United States shall hold office during good behavior not applicable to the exercise of the judicial power of the United States by a judge in the territories?

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[26] *Id.* at 288-92.
[27] *Id.* at 294.
[28] *Id.* at 321.

What Chief Justice Marshall said in the case of the 356 bales of cotton would appear to be in conflict with what he had previously said:

> "The District of Columbia, or the territory West of the Missouri is not less within the United States than Maryland or Pennsylvania; . . ."[29]

It is indeed puzzling that the Chief Justice who courageously enunciated the implied constitutional power vested in the judiciary to declare acts of Congress unconstitutional,[30] voluntarily abdicated the judicial power of the United States in the territories.

A recent enactment of Congress might precipitate some very knotty legal problems which may, like *Erie R. Co. v. Tompkins*,[31] afford an opportunity to reverse an error which has existed for over one hundred years.

> "The new judicial code creates judicial districts for the District of Columbia, 28 USC § 88; for Hawaii, 28 USC § 91; and for Puerto Rico, 28 USC § 119; but none for the Canal Zone, the Virgin Islands or for Alaska."[32]

If the judicial power of the United States as set forth in article III of the Constitution of the United States does not apply per se to territories beyond the limits of the forty-eight states (as the adjudicated cases seem to hold), how is it possible for Congress to create a judicial district, within which will be exercised the judicial power of the United States, in Hawaii and Puerto Rico? Can Congress unilaterally extend or withhold the Constitution to territories beyond the forty-eight states without the consent, or even consultation with the forty-eight states who are parties to the Constitution? The answer is obvious. The Constitution applies, where it applies, without the consent of Congress. It applies to all territory within the sovereignty of the United States.

If the districts in the territories of Hawaii and Puerto Rico are now in fact judicial districts of the United States, the judges thereof must certainly exercise judicial power of the United States. A limitation of less than good behavior on their term of office would appear to be unconstitutional. But why distinguish Hawaii and Puerto Rico from Alaska, the Canal Zone, Guam and the Virgin Islands? If these courts do not exercise the judicial power of the United States, how can their decrees be given the effects of judgments? If they do exercise the judicial power of the United States, why is the term of office of their judges restricted to something less than good behavior?

Does it not appear strange that a United States District Court in Hawaii, Alaska, Puerto Rico, Virgin Islands, Guam or the Canal Zone is not exer-

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[29] Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 319 (1820). *But see* Downes v. Bidwell, *supra* note 25 at 261 (criticizing).

[30] Marbury v. Madison, 5 U.S. (1 Cranch) 138 (1803).

[31] 304 U.S. 64 (1938).

[32] ILWU v. Juneau Corp., 342 U.S. 237, 241 n. 4 (1952).

cising the judicial power of the United States when it presides over a case,[33] yet when the Supreme Court of the United States reviews a judgment of these courts it does exercise the judicial power of the United States? A critical legal issue may arise at some future date in a case in which a territorial Judge is sitting in a Circuit Court by assignment. Clearly, when the territorial Judge sits in a Circuit Court, presiding over appeals in cases arising within the forty-eight states, he is exercising judicial power under article III of the Constitution. Yet he has not been appointed to his judicial office for good behavior, but only for a term of years.

The answer to this problem is that it was error to rule in the first place that the judicial power set forth in article III is not coextensive with the sovereignty of the United States, and is limited to the territory within the states which are members of the United States.

Article III, section 2, in defining judicial power speaks of "the laws of the United States." It makes no distinction between laws enacted under article I and laws enacted under article IV. Can it be said that an enactment of Congress under article IV with reference to a territory is *not* a law of the United States? If such an enactment is a law of the United States, why does the judicial power of the United States not apply to it under article III?

Any fair reading of Madison's notes of the debate in the Constitutional Convention on August 30, 1787[34] will demonstrate that the framers of the Constitution clearly understood that the judicial power of the United States extended to the territory outside of the then states of the United States. Delegate Luther Martin wanted to insert an express provision to this effect but James Madison and Governor Morris were of the opinion that this was so obvious that no such express provision was necessary[35] and the delegates from New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware and Vermont agreed, only New Jersey and Maryland dissenting. They had not yet heard of the 356 bales of cotton at Key West!

It should be remembered that by the Treaty of Peace following the Revolutionary War, Great Britain ceded to the United States sovereignty over vast areas of territory not embraced within the sovereignty of the thirteen colonies. It was by virtue of its sovereignty over such territory that the Continental Congress adopted the Ordinance of 1787 for the Northwest Territorial Government (Northwest of the River Ohio)[36] prior to the adoption of the Constitution. Regardless of whatever else may be said, it must be

[33] This must be true under the reasoning of Chief Justice Marshall, *supra*, since the judges of these courts are appointed for periods of less than good behavior.

[34] 3 U. S. STATE DEPARTMENT, *op. cit. supra* note 19, at 648-52.

[35] *Id.* at 650, 651.

[36] 1 U.S.C.A. Const 23.

conceded that the government created under the Constitution *at least* succeeded to all of the sovereignty possessed by the government existing under the Articles of Confederation. The framers of the Constitution therefore knew at the time of drafting the Constitution that the sovereignty of the United States would extend to territory not embraced within the sovereignty of the thirteen colonies. The framers of the Constitution weighed every word thereof and debated for several months. They created a very delicate system of checks and balances. Is it reasonable to suppose that after so much effort they intended to create a separate sovereignty applicable to the territories and endow the Congress with all of the executive, judicial and legislative power of such sovereignty by the mere use of fifteen words?[37] Is it not more reasonable to conclude that the framers intended the Constitution and laws of the United States to be coextensive with the sovereignty of the United States and that the provisions of article IV, section 3, were intended only to enable Congress to enact such *special* legislation applicable only to particular areas or territory as the exigencies of the situation might prescribe as "needful"? Certainly if they had intended to create a separate sovereignty in the territories vesting all executive, legislative and judicial power thereof in the Congress, those careful men would have used words of exclusion and limitation in connection with their definition that the judicial power of the United States should extend to all cases arising under "the Laws of the United States"[38] so as to exclude laws enacted by Congress under article IV, section 3.

The sovereignty of the United States is coextensive with the territory subject to the jurisdiction of the United States and either the Constitution, as the written expression of that sovereignty, extends in its entirety to all of such territory, or none of it does. Congress derives its entire authority solely from the Constitution. How can Congress purport to exercise authority over an area to which the Constitution does not apply? If Congress is there—the Constitution is there. And if the Constitution is there, the judicial power of the United States is there. If the judicial power of the United States is there, the judges who exercise that judicial power must be appointed for a term of good behavior.

The judicial power of the United States is coextensive with the sovereignty of the United States. Article III, section 2, recognizes no lesser limitation. Article IV, section 3, only empowers Congress to legislate with respect to the territories outside of the forty-eight states but such article *does not confer judicial power on the Congress.*

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[37] "The Congress shall have power to . . . make all needful Rules and Regulations respecting the Territory. . . ." U. S. CONST. art. IV, § 3.

[38] U. S. CONST. art. III, § 2.

Congress will still have the power under article III to create inferior courts in the territories but the judges thereof must be appointed to hold office during good behavior. Anything less presupposes the divisibility of our principle that the Federal Judiciary must be independent.

One of the bases of the Revolutionary War was that England denied to the people of the Colonies the rights which it accorded to free Englishmen in the Mother Country. If we continue to deny that the Constitution and laws of the United States apply to *all* of the territories of the United States, and if we continue to insist that only laws enacted under article IV, section 3, apply to such territories, we are no better than the England we revolted against.