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CONSTITUTIONAL LAW--- STATUS OF COURTS OF DISTRICT OF COLUMBIA

CONSTITUTIONAL LAW — STATUS OF COURTS OF DISTRICT OF COLUMBIA — Plaintiffs, justices of District of Columbia courts, protested the application by the Comptroller-General of an Act of Congress reducing their salaries,[1] alleging that they felt it their duty to have the status of these courts defined. The majority of the Court, answering questions certified by the Court of Claims, *held* that section 1 of Article III[2] of the federal constitution applied to the Supreme Court of the District of Columbia and to the Court of Appeals of the District of Columbia, and forbade a reduction of the compensation of the justices thereof during their continuance in office, on the theory that these are constitutional courts, since in creating them Congress acted under the dual authority of Article III and of section 8, Article I.[3] Hughes, C. J., VanDevanter, and Cardozo, J. J., dissented. *O'Donoghue v. United States*, 289 U. S. 516, 53 Sup. Ct. 740 (1933).

Thus has it happened that a question which three years ago was said to have been "settled" one way has now been conclusively determined in exactly the opposite way.[4] And in order to do this, it was necessary for the majority squarely to over-rule an obiter dictum in one case,[5] to avoid the logical implications of a

[1] 47 Stat. 382 at 401 (1932).

[2] "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office."

[3] "The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States. . . . "

[4] W. G. Katz, "Federal Legislative Courts," 43 HARV. L. REV. 894 at 899 (1930): "Only recently has it been settled that all these courts are legislative courts created under the general power of Congress over the District."

[5] Ex Parte Bakelite Corporation, 279 U. S. 438, 49 Sup. Ct. 411 (1928).

second case,[6] and to "distinguish" a third case.[7] But Justice Sutherland, writing the majority opinion, was probably correct in saying that the question was not conclusively settled by prior adjudications. Most of the cases argued by counsel dealt with territorial courts; it is well settled that they are created by virtue of the plenary power congress exercises over the territories.[8] It is also clear that the ephemeral nature of the territorial courts distinguishes them from the courts of the District of Columbia which is the permanent abiding-place of the federal government.[9] Facing the question, then, untrammeled by troublesome authority, the majority predicated its judgment on the theory that in creating these courts Congress acted under a dual power: its power to establish district federal courts under Article III, and its power to govern the District under Article I. It was necessary to admit that Congress was acting under its plenary power, for otherwise Congress would have been without authority to vest the District of Columbia courts with the administrative functions which they already exercise.[10] It was necessary to find that Congress was acting likewise under Article III, to establish the claim of the plaintiffs that their salaries could not be reduced. This suggestion of the bifurcate source of the District of Columbia courts is not new;[11] it has been asserted in judgments of courts of the District, which have reached a result in accord with the principal case.[12] Aside from these cases, which were in a sense opinions of one of the litigants in the present controversy, the majority relied on cases holding that the courts of the District of Columbia exercise certain powers of Federal District courts[13]— cases in no way opposed to the minority view. Although the Court did not choose to cite them, various learned authors might have been quoted in support of the majority view.[14] The majority also relied on the circumstance that Congress has treated District of Columbia

[6] Postum Cereal Co. v. California Fig Nut Co., 272 U. S. 693, 47 Sup. Ct. 284 (1926). This case held that the Court of Appeals of the District of Columbia could exercise administrative functions, which it said could not be exercised if the court were created under Article III.

[7] Keller v. Potomac Electric Power Co., 261 U. S. 428, 43 Sup. Ct. 445 (1922).

[8] American Insurance Co. v. Canter, 1 Pet. (26 U. S.) 511 (1828); Romeu v. Todd, 206 U. S. 358, 27 Sup. Ct. 724 (1906), and cases therein cited. See the Constitution, Article IV, sec. 3, clause 2.

[9] McAllister v. United States, 141 U. S. 174, 11 Sup. Ct. 949 (1890).

[10] Postum Cereal Co. v. California Fig Nut Co., 272 U. S. 693, 47 Sup. Ct. 284 (1926).

[11] Stoutenburgh v. Hennick, 129 U. S. 141, 9 Sup. Ct. 256 (1888).

[12] Pitts v. Peak, 60 App. D. C. 195, 50 F. (2d) 485 (1931); In re MacFarland, 30 App. D. C. 365 (1908).

[13] Federal Trade Commission v. Klesner, 274 U. S. 145, 47 Sup. Ct. 557 (1927); Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382, 52 Sup. Ct. 440 (1931); Swift & Co. v. United States, 276 U. S. 311, 48 Sup. Ct. 311 (1927); Cross v. United States, 145 U. S. 571, 12 Sup. Ct. 842 (1892).

[14] BURDICK, LAW OF THE AMERICAN CONSTITUTION 92 (1922); DODD, GOVERNMENT OF THE DISTRICT OF COLUMBIA 136 (1909); 2 WATSON, THE CONSTITUTION OF THE UNITED STATES 1066 (1910); WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES, sec's 789, 250, 1074 (1929).

courts as created under Article III,[15] but whether the intention of Congress affects the question is open to doubt.[16] Opposing all the makeweight arguments of the majority, an eminently respectable group of *dissentientes* rejected the artificiality of the theory that Congress was acting under a dual power, pointing out that it could admittedly accomplish what has been done by virtue of its plenary power over the District. While no one knows, or ever can know, which opinion is "correct," any decision which reasonably increases the security of judicial tenure should be welcomed.[17]

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[15] See particularly Code of District of Columbia (1929) tit. 18, sec's 43, 47, 91, 31 Stat. 1199 *et seq.*, sec's 61, 62, 84 (1901).

[16] Mr. Katz, in "Federal Legislative Courts," 43 HARV. L. REV. 894 (1930), declares that, " . . . Congress can not, by granting tenure during good behavior and by intending to act under Article III, preclude itself from later shortening tenure, reducing salaries, or vesting the court with administrative functions." But Professor Shartel, in his article on "Federal Judges — Appointment, Supervision, and Removal — Some Possibilities under the Constitution," 28 MICH. L. REV. 485 (1930), shows that there is a well-recognized principle of constitutional construction that the legislative power to create an office implies power to determine the method of selection or appointment thereto. See Metropolitan R. R. v. District of Columbia, 132 U. S. 1, 10 Sup. Ct. 19 (1889); District of Columbia v. Woodbury, 136 U. S. 450, 10 Sup. Ct. 990 (1889); Barnes v. District of Columbia, 91 U. S. 540 (1875); Kendall v. United States, 12 Pet. (37 U. S.) 524 (1838).

[17] See the admirable discussion by Professor Shartel, cited in n. 17, in 28 MICH. L. REV. 485 (1930).