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## CONSTITUTIONAL LAW - COURT OF CLAIMS - SEPARATION OF POWERS

Benjamin M. Quigg, Jr. S.Ed.  
*University of Michigan Law School*

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## RECENT DECISIONS

This section is divided into two parts: notes and abstracts. The abstracts consist merely of summaries of the facts and holdings of recent cases and are distinguished from the notes by the absence of discussion.

## NOTES

CONSTITUTIONAL LAW — COURT OF CLAIMS — SEPARATION OF POWERS — Plaintiff sued the United States Government for breach of its contract for construction of a water supply tunnel, and in 1932 recovered judgment in the court of claims<sup>1</sup> for approximately one-seventh of the amount sued for. Motions for new trial were denied and the Supreme Court refused to grant a writ of certiorari.<sup>2</sup> In 1942 plaintiff secured the passage of a special act of Congress<sup>3</sup> conferring jurisdiction on the court of claims to render judgment on plaintiff's claim in accordance with the mode of calculation set forth therein, waiving any defenses which the government might have in respect thereto, and further providing that a writ of certiorari to the Supreme Court for a review of the judgment rendered might be applied for. Plaintiff thereupon filed a petition to recover additional compensation under the contract in accordance with the special act of Congress. *Held*, the special act of Congress giving the court of claims jurisdiction to hear a claim against the United States, notwithstanding previous determination by that court, and directing that court how to decide the case was unconstitutional as an invasion of the prerogatives of the judicial department. Congress cannot by its legislative act decide a law suit pending in the court of claims, nor does Congress have power to set aside a judgment of that court and direct a contrary decision. *Pope v. United States*, (Ct. Cl. 1944) 53 F. Supp. 570.

The doctrine of separation of governmental powers was one of the fundamental concepts which the members of the Constitutional Convention insisted upon writing into the Federal Constitution.<sup>4</sup> The Constitution does not contain a specific clause directing separation of powers, but its equivalent is found in separate articles stating that legislative, executive and judicial power shall be vested in a congress, a president, and a federal court system, respectively.<sup>5</sup> The judicial power, although separate, is not entirely independent of the other branches of government: Congress has been given power to establish "inferior courts"<sup>6</sup> and to determine the number of Supreme Court judgeships,<sup>7</sup> and the

<sup>1</sup> 76 Ct. Cl. 64 (1932).

<sup>2</sup> 303 U.S. 654, 58 S. Ct. 761 (1938).

<sup>3</sup> 56 Stat. L. 1122 (1942).

<sup>4</sup> 4 WORKS OF JOHN ADAMS, C.F. Adams ed., 284, 309, 382, 398, 429 (1851); THE FEDERALIST, Nos. 47-51 (1802); 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, pp. 108, 254, 288, 511 (1911). Some writers have questioned the value and desirability of the separation of governmental powers: LASKI, AUTHORITY IN THE MODERN STATE 70, 71 (1919); GOODNOW, COMPARATIVE ADMINISTRATIVE LAW 20 (1893).

<sup>5</sup> U.S. Const., Arts. 1, 2 and 3, respectively.

<sup>6</sup> Id., Art. 1, § 8, and Art. 3.

<sup>7</sup> 36 Stat. L. 1152 (1911).

President, with the approval of the Senate, has power to appoint judges to the courts of the federal system.<sup>8</sup> By virtue of its power to create inferior courts Congress has established a system of so-called "constitutional courts."<sup>9</sup> In 1828 our ideas regarding separation of powers became somewhat clouded by the invention of the concept of a "legislative court,"<sup>10</sup> a judicial body created by Congress under granted powers<sup>11</sup> other than the power to create inferior courts. The jurisdiction of constitutional courts is limited to matters involving a case or controversy;<sup>12</sup> therefore, they cannot render decisions which are subject to revision by any legislative or administrative body, and cannot hand down administrative rulings or advisory opinions.<sup>13</sup> Legislative courts, on the other hand, may perform these functions which are beyond the jurisdiction of constitutional courts.<sup>14</sup> The court of claims is now held to be a legislative court, and, as such, it has a more varied role than a constitutional court and is subject to greater congressional control.<sup>15</sup> The statute involved in the principal case is

<sup>8</sup> U.S. Const., Art. 2, § 2.

<sup>9</sup> Which includes federal district courts and circuit courts of appeals, and, with some dispute as hereinafter noted, the courts of the District of Columbia.

<sup>10</sup> *American Insurance Co. v. Canter*, 1 Pet. (26 U.S.) 511 (1828).

<sup>11</sup> U.S. Const., Art. 4, § 3, has been the basis of authority for establishing legislative courts in the territories; courts for the District of Columbia have been created by virtue of authority granted under Art. 1, § 8, cl. 17; the court of claims was created under the inherent power of a sovereignty to waive its exemption from suit, *Beers v. Arkansas*, 20 How. (61 U.S.) 527 (1857). *United States v. Shaw*, 309 U.S. 495, 60 S. Ct. 659 (1940); the authority for the establishment of the court of customs and patent appeals is found in Art. 1, § 8, cls. 1 and 8; and the tax court is likewise based on authority found in Art. 1, § 8, cl. 1.

<sup>12</sup> U.S. Const., Art. 3, § 2.

<sup>13</sup> *Hayburn's case*, 2 Dall. (2 U.S.) 409 (1792); *United States v. Fiereira*, 13 How. (54 U.S.) 40 (1851); *Muskrat v. United States*, 219 U.S. 346, 31 S. Ct. 250 (1910).

*O'Donoghue v. United States*, 289 U.S. 516, 53 S. Ct. 740 (1933) declared that the courts of the District of Columbia were an unique exception to the general rule inasmuch as they were constitutional courts which might validly perform certain advisory or administrative functions.

<sup>14</sup> *Gordon v. United States*, 117 U.S. 698 (1864); *Butterworth v. Hoe*, 112 U.S. 50, 5 S. Ct. 25 (1884); *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 43 S. Ct. 445 (1923); *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 47 S. Ct. 284 (1927).

The precise status of courts of the District of Columbia from time to time has been disputed. They have been treated as constitutional courts: *Cross v. United States*, 145 U.S. 571, 12 S. Ct. 842 (1892); but by reason of Congress' dual authority over the district certain legislative functions may be delegated to those courts which are denied to other constitutional courts, *Keller v. Potomac Elec. Co.*, 261 U.S. 428 (1923) mentioned supra, same note. *Dicta in Ex parte Bakelite Corp.*, 279 U.S. 438, 49 S. Ct. 411 (1929) stated that the District of Columbia courts were legislative courts, but this language was expressly refuted in *O'Donoghue v. United States*, 289 U.S. 516 (1933), and in *Williams v. United States*, 289 U.S. 553, 53 S. Ct. 751 (1933).

<sup>15</sup> The court of claims was once held to be a constitutional court, *United States v. Union Pacific R.R. Co.*, 98 U.S. 569 at 603 (1878); cf. *United States v. Klein*, 13 Wall. (80 U.S.) 128 (1871); but that holding was overruled and the court is now

declared unconstitutional on the ground that it is an attempt by Congress to exercise unauthorized control over the decisions of the court of claims, and is an invalid extension of legislative power into the field of the judiciary; the court said, ". . . we are no more acting as a mere agent or arm of the legislature, when we decide our cases in the first instance, than is the Supreme Court, when it, . . . decides them finally."<sup>16</sup> The legislative history of the creation of the court of claims shows that this body was at first little more than an investigating and advisory body established to hear claims against the United States referred to it by Congress;<sup>17</sup> that gradually its powers were increased so that it became vested with real judicial power and its decisions were recognized as judicial decisions entitled to finality and appealable to the Supreme Court.<sup>18</sup> The power to hear and allow claims against the United States is a function which belongs primarily to Congress, but is one which it has discretion either to exercise directly or to delegate to another agency.<sup>19</sup> Congress has chosen to delegate this power to the court of claims; but just as it has power to delegate the function so might Congress at any time withdraw the consent of the United States to be sued and thus terminate the authority of the court of claims.<sup>20</sup> The mere fact that at one time Congress determined that certain claims against the United States should be handled by the judicial process does not mean that it may not thereafter direct that the court of claims shall act as an administrative body in a particular case.<sup>21</sup> Assuming that Congress intended in the present case to employ the court of claims as a judicial body, nevertheless, it would appear that Congress had the power to control a decision in a court which it was using to perform one of its own functions. There are numerous instances where the power of Congress to grant a right to a second action, or to waive possible defenses to an action against the United States, has been recognized.<sup>22</sup> The court of claims has

recognized to be a legislative court, *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), *O'Donoghue v. United States*, 289 U.S. 516 (1933), and *Williams v. United States*, 289 U.S. 553 (1933). This holding of the Supreme Court has been criticized in two excellent articles, Brown, "The Rent in Our Judicial Armor," 10 *Geo. Wash. L. Rev.* 127 (1941) and Watson, "The Concept of the Legislative Court," *id.*, 799 (1942).

<sup>16</sup> Principal case at 573.

<sup>17</sup> 10 Stat. L. 612 (1855).

<sup>18</sup> 12 Stat. L. 765 (1863); 14 Stat. L. 9 (1866); 24 Stat. L. 505 (1887); 43 Stat. L. 936 at 939 (1925).

<sup>19</sup> *Ex parte Bakelite*, 279 U.S. 438 (1929).

The court of claims is vested with jurisdiction to hear only those claims specifically authorized by Congress; it has no general jurisdiction to hear all claims against the United States, *Thurston v. United States*, 232 U.S. 469, 34 S. Ct. 394 (1914).

<sup>20</sup> *Beers v. Arkansas*, 20 How. (61 U.S.) 527 (1857); *Schillinger v. United States*, 155 U.S. 163, 15 S. Ct. 85 (1894).

<sup>21</sup> The court of claims as now constituted is prepared to perform functions other than judicial functions. 28 U.S.C.A. (1926), §§ 254, 257.

<sup>22</sup> *Nock v. United States*, 2 Ct. Cl. 451 (1866); *United States v. Grant*, 110 U.S. 225, 3 S. Ct. 585 (1884); *Cherokee Nation v. United States*, 270 U.S. 476, 46 S. Ct. 428 (1926). It was the position of the dissenting judge in the instant case that the statute in question constituted nothing more than waiver of defenses, and was therefore within the constitutional powers of Congress.

There appears to be some doubt as to whether Congress may direct the court of

heretofore admitted, "The authority of Congress . . . to prescribe the conditions under which a citizen may be compensated for losses suffered under a contract, or even where no contract exists, or to create a liability on the part of the Government when no legal liability in fact exists and to waive any legal defense on the part of the Government, is no longer subject to question."<sup>23</sup> Thus the argument of the court in the present case that the statute constitutes an encroachment "by one of the three independent branches of the government upon another" does not appear to be valid: historically the court of claims began as a mere agent of Congress to investigate claims against the United States; functionally it operates to perform a task primarily imposed upon Congress itself; and as a matter of sound public policy it would seem undesirable to impose refined jurisdictional limitations upon the free exercise by Congress of its power to permit suits against the government.<sup>24</sup>

*Benjamin M. Quigg, Jr., (S.Ed.)*

claims to grant a new trial, *Pocono Pines Assembly Hotels Co. v. United States*, 73 Ct. Cl. 447 (1932); but quaere whether in the light of the subsequent Supreme Court cases of *O'Donoghue v. United States*, 289 U.S. 516 (1933), and *Williams v. United State*, 289 U.S. 553 (1933), holding the court of claims to be a legislative court and subject to legislative control, the court can now properly say that Congress may not exercise control over the court of claims to the extent of ordering a new trial.

<sup>23</sup> *Edwards v. United States*, 79 Ct. Cl. 436 at 445 (1934). It would seem that the court of claims therein had recognized that it was an agent of Congress to perform functions delegated to it in whatever manner directed.

<sup>24</sup> In opposition to the position here taken a rather strong public policy argument might be made to the effect that all persons having claims against the United States, either on contract or in tort, should have the opportunity of a judicial hearing free from legislative control, and that the court which handles such matters should be recognized as a constitutional court, but such a doctrine probably could be introduced only by constitutional amendment withdrawing the governmental immunity from suit; as the Constitution now stands and as the agencies of our government are presently constituted it would seem more desirable to maintain a flexible conception of the extent of legislative control over the court of claims.