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SUPREME COURT OF THE UNITED STATES. ALBUQUERQUE NATIONAL BANK *v.* PEREA.[1]

Territorial Courts—Appointment of Judges for a Term of Years.

It was implied in the decision of the Court in this case that the territorial Supreme Court of New Mexico, established by Act of Congress, was a Constitutional Court of the United States, though its judges were appointed by the President for a term of years, and not during good behavior.

THE UNITED STATES TERRITORIAL COURTS AND THE TERM OF THE JUDICIAL OFFICE.

The principle stated in the above syllabus, which was implied in the decision, rather than expressly decided in the above case, has at the present time no direct practical interest. That judges of territorial courts do not have to be "appointed during good behavior," in order to make the territorial court constitutional, has been too long acquiesced in to be now disputed. Indirectly, however, an examination of the reasons which led the courts to declare territorial courts constitutional, even though the judges held office for a definite term of years, is of great practical importance in connection with the legislative question of how to improve the Interstate Commerce Commission. If the Commission should be given the functions of a court, would its members have to be appointed for life? It is taken for granted, in the discussions on the present powers of the commission, that if the commission should be made a court, then the life tenure of its judges would be a necessary consequence. Yet since we have before us the object lesson of territorial courts established by Acts of Congress, whose judges are appointed for a term of years, it would be well to pause and see if the same line of reasoning which makes territorial courts, constitutional in the eyes of the Supreme Court might not be also made to uphold the constitutionality of a commission turned into a court, although its judges only sat for a term of years.

The first section of the third article of the Constitution says: "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 behavior."

The validity of territorial courts

[1] 13 Sup. C. Rep., 194. Decided January 3, 1893. See Editorial Note, *infra*, 372.

was first involved in that celebrated decision by Chief Justice MARSHALL, which first upheld the power of the United States to acquire and govern territory. We mean the case of The American Insurance Company *v.* Canter, 1 Pet., 511. Goods had been sold under a judgment of a court created by the territorial legislature of Florida, which legislation was within the power vested by Congress in the territory. The judges were not appointed for life, as neither were the judges of the superior courts of Florida as established by Congress. Of the latter courts the Chief Justice says: "These courts, then, are not constitutional courts, in which the constitutional power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created by virtue 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 third 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." Then he adds: "Though admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third 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 State governments." The idea of MARSHALL was that the framers of the Constitution were in the third article only providing for the judicial power of the Federal as distinguished from the State governments, and that, while in providing that the United States could make treaties and carry on war, they impliedly permitted the Federal government to acquire and govern territory outside the States, nevertheless they failed to lay down any rule for the administration of the judicial functions of a government in such territory, and, therefore, Congress in providing courts for the territories was left free to make the tenure of the judicial office what they would.

This theory has been silently acquiesced in ever since. Besides, on rare occasions, when opportunity offered, members of the Supreme Court have expressly adopted the same reasoning. Thus in Brenner *v.* Porter, 9 How., 242, which was decided in 1850, Mr Justice NELSON says: "The distinction between Federal and State jurisdictions under the Constitution of the United States has no foundation in these territorial governments, and consequently no such distinction exists, either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts; Congress, in the exercise of its powers in the organization and government of the territories, combine the powers of both Federal and State authorities. . . They (the Territorial Courts) are not organized under the Constitution nor subject to its complex distribution of the powers of government."

And again: "The territorial courts were not courts in which the judicial power conferred by the Constitution could be deposited. They were incapable of receiving it, as the tenure of the incumbents was but for four years. Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body was *incapable of conferring upon a Court within the limits of a State.*"

So, also, Chief Justice CHASE, in Clinton *v.* Englebrecht, 13 Wal., 447 (1871), says: "There is no Supreme Court of the United States, nor is there any District Court of the United States, in the sense of the Constitution, in the Territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution on the general government. The courts are legislative courts of the territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the territories of the United States." In accordance with this opinion, we find that the learned jurist considers it would be perfectly consistent for Congress to permit the judges of the territorial courts to be elected by the people of the territory and commissioned by the governor. The court decided in this case that juries of territorial courts summoned under Acts which apply only to district courts of the United States are wrongly summoned, and a challenge to the array ought to be allowed. That territorial courts were not district courts was also held by Chief Justice WAITE in Reynolds *v.* United States, 98 U. S., of p. 154 (1878).

Of course, these territorial courts not only decide questions which arise under the acts of territorial legislatures, but also questions arising under the Constitution and laws of the United States, and also admiralty cases. And yet such jurisdiction is constitutional, because, as Mr. Justice CLIFFORD, in the "City of Panama," 101 U. S., 453 (1879), 460, says: "The jurisdiction with which they are invested is not a part of the judicial power defined by Article III of the Constitution, but is conferred by Congress under the power which the legislative department possesses, to make all needful rules and regulations respecting the public territory and the other public property."

Were the question an open one we would be strongly inclined to the opinion that territorial courts were courts of the United States within the restriction imposed upon Congress by Section 1, Article III, requiring that judges should be appointed during good behavior. The article opens thus: "The judicial power of the United States shall be vested, etc." There is no qualification or limitation. All the judicial power of the federal sovereignty is vested in "one Supreme Court and such inferior courts as Congress may from time to time ordain and establish." Chief Justice MARSHALL himself, in the very case in which he limited this article to the judicial power of the United States exercised in the States, pointed out that the right to govern a territory not included within the limits of any State was necessarily vested in the federal government, and contemplated by the framers of the Constitution. If this be so, they must have contemplated the exercise by the United States of judicial functions in the government of such ter-

ritory, and surely the fact that the Constitution omits to make any exception to the rule that judges should be appointed during good behavior, coupled with the fact that it is perfectly possible for judges to be so appointed in the territory, is strong presumptive evidence that such would have been the more consistent interpretation of the Constitution. Because, in the territories the central government combines the functions of the State and federal governments, and that does not make the laws of a territorial legislature, made in pursuance of the authority invested in them by Congress, any less laws of the United States.

True, it may be argued that if we think Congress cannot, in the territories, establish courts in any other manner than that required by Article III, so also we should deny to Congress the power of legislating in the territories in any other way than by direct acts passed by Congress, because the opening section of Article I is even stronger than the opening words of Article III in confining the legislative power of the United States to the Congress of the United States. There would be great force in such an objection if it was not a necessary rule of constitutional construction that the terms of the instrument should never be construed as mutually contradictory. In the power to govern a territory of the United States there is necessarily the power to govern it entirely and completely. That a Federal legislature can satisfactorily make police regulations for a locality cannot be admitted in interpreting the constitution of a county which is based on the idea that the locality, as far as consistent with the welfare of the whole people, should govern itself. Therefore, while Congress cannot delegate any of its authority to pass *general* laws to any other body, in as far as it has an authority to govern localities, it can provide for the creation of bodies which shall exercise the powers of local legislation.

If there was any reason, in the nature of things, why judges who held their office during good behavior could not exercise judicial functions in the territories, then, as the Federal government has the power to administer justice in the territories, and it was not possible to administer justice through courts whose judges held during good behavior, we should say it was necessarily implied that Article III did not deal with the exercise of judicial functions to be exercised in the territory of the United States. But there is no practical objection which would conclusively prevent a judge holding, for good behavior, from administering justice in the territories. It is true that when the territories become States the territorial courts, as such, are abolished. If the judge's office be taken away there is no office. But this is true of any court of the United States except the Supreme Court. Since Congress can "ordain and establish inferior courts," they can disestablish such courts.

The constitutional provision is only that, as long as the court continues, the judges cannot be removed in any other way except by impeachment. Whether the court remaining a court, one of its judges, as the office of presiding judge, can be abolished, is a mooted question into which we need not enter here. Of course, the abolition of a Federal court by Congress, and the immediate creation