10-1972

Palmore v. United States

Lewis F. Powell Jr.

9/12/72 - JHN

Deny
or
appeal

If we treat this as cert we don't reach the issue

Involves attack on constitutional right of Congress to vest felony jurisdiction in D.C. Superior Court.

There is a legislatively created court under Art I - rather than a Court. Fed Court under Art III.

But Congress clearly has power to prescribe this jurisd.

No. 72-11
Palmore v. United States
~~Cert~~ appeal to DC Ct. of App.

Petr contends that the DC Superior Court lacked jurisdiction to try his prosecution for a felony under the DC code. Petr's arguement starts with the fact that the judges of that court by statute have limited tenure and no protection against reductions in salary, and that the Superior Court is a legislative court established under Article I of the constitution. The key contention , however, is that only a court established under Article III can be given jurisdiction to try a felony prosecution under an act of Congress which pertains exclusively to the DC.

(Justice Powell: I have included the relevant constitutional provisions for your reference on the last page.).

This contention is without merit. In a variety of instances Congress has held that legislative courts may be vested with judicial power, Williams v. United States, 289 U.S. 553. For example,

state courts lacking Article III protections of unlimited tenure frequently ~~dxix~~ decide the federal rights and obligations of litigants-- subject always to ~~as with the DC courts~~ to review up here.

The real issue in this case is whether the DC Sup. Ct. was properly within the Article I powers of Congress to "exercise exclusive Legislation in all cases whatsoever in the Dist. of Col." and to "make all laws which ~~xx xx xx~~ shall be necessary and proper to carry into execution the foregoing powers." This ~~xxxxxxx~~ issue has been decided against petr in National Mutual Ins. Co. v. Tidewater Transfer Co.337 U.S.582 where the Court said that Congress may confer judicial power upon the courts of the District of Col. in the exercise of its Article I powers over the District. As a practical matter, the Court of General Sessions has historically exercised ~~xx~~ jurisdiction over ~~xxx~~ acts made misdemeanors by act of ~~Xxxx~~ Congress.

Petr's reliance on O'Donoghue v. United States, 289 US 516 is misleading for the Court never suggested in ~~x~~ that case that Congress lacked power to establish ~~xxxxxxx x~~ an Article I court system for the District of Col.

~~Xxxxxxxxxxx~~ As I read Article I, the broad language of it confers on~~x~~ Congress total legislative authority over the District, should it ~~xxxxx~~ choose to use it. ~~X~~ Such sweeping authority cannot fail~~x~~ to include the power to establish a system of courts.

DENY JHW

P.S.--Petr brings up several search and seizure claims which appear without merit.

CONSTITUTIONAL PROVISIONS INVOLVED

Art. I, § 8 provides, in pertinent part:

> The Congress shall have the 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 * * *;
>
> And
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *.

Art. III provides, in pertinent part:

> Section 1. 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, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
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> Section 2. 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;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

No. 72-11 PALMORE v. UNITED STATES Argued 2/21/73

We received decision on Jurisdiction of Sup Ct. I agree with position of S.G. on issues (I) that this is pet. for cert - not an appeal as the statute of D.C. is not a "statute of a state."); and (II) that the Congress may validly create non-Art III Courts).

As to issue (III) (validity of the stop of this driver), case is very close. Ass't decision & further study.

Plegal (appellant). — 3 Qs well stated in Br - 2, 3.

Jurisdiction

Sec 1257(2)

We have reviewed judgments of Sup Ct of Puerto Rico

1st Q want - whether appeal or cert pet. — is purely a statutory quest.

2nd Q - whether Δ was entitled, since charged with a felony, to be tried by an Art III Court. Δ argues "yes" The set up in D. C. is now like that of most states.

× × ×

Δ argues he is entitled to appeal & that 4th Amend. claim is before us.

3rd Q - 4th Amend. claim.

DC statutes requires a driver to carry license & registration. But there is no statute in D C authorizing random selective check for license. This was unreasonable

Illegal (cont)

An systemized check - e.g. road block or even 50th car - OK, but not leave it entirely to officer judgment as to whom to check.

Concedes that if police had right to stop, officer was justified in looking for gun + making arrest. Issue is whether stop was valid

Griswold

Three Q's

I. Appeal or Cert Petn.? (Jurisdiction)

D C cts are not Art. III cts or judges are not appt for life. They would not be cts at all.

Congress has power to regulate jurisdiction of this Ct.

Here we have no state statute; nor do we have an appeal from a final action "highest ct of a state".

The words "statute of state" exclude the D.C.

9 agree

A statute passed by Puerto Rico was held to be a "statute of a state". But here, Congress passed the statute.

See Ridge Tool Co 400 U.S. 41, 42 (note)

S.C. (Cont.)

Then, we have no juris. on an appeal - but we may consider pet. as one for Cert.

II. Validity D.C. Reorg Act establishing a court system for D.C.

Art III has not received consistent treatment by this Court. SG relies upon full dictum by J. Sutherland in Bakelite 279 U.S. 438, 449.

Some have shifted but not enough to invalidate D.C. Act.

Sound approach

Approach stated by that of Harlan in Reid v Covert 354 U.S. 1. We must look at practical necessities & the feasible alternatives.

Court. establishes no inferior Fed Cts. ~~Even~~ Even today Art. III courts do not hear hear all federal cases (e.g. diversity)

We have frequently recognized necessity for legislatively created courts other than Art III courts many examples: In Guam, Virgin Islands, in Territories

S.G. (Griswold)

We have often entertained appeals from these non-Article III Courts

Besides Territorial Courts (In re Ross) some courts have functioned in foreign countries (e.g. China)

Fed Qs - including felony charges - need not be heard on in Art III courts.

Griswold says his position is not inconsistent with O'Donoghue v U.S. 289 U.S. 516.

For years all of D.C. cts were Art. I Courts - not Art III. They had administrative duties - e.g. appointing school bds, etc See Ex parte Bakelite 279 U.S. 438.

Q III - See SG's Brief - p 49 et seq.
See decisions of other courts cited pp 50, 51

Very imp. to Govt.
check here was no "whim" - many rental cars are stolen or over-due.
Nothing discriminatory in this stop.
This is like Biswell - dealing with firearms inspection.
Pose only limited threats to privacy & little or no inconvenience.

→ Read D.C. statute or to

Practical difficulties: giving life tenure to 50/60 judges.

No. 72-11 Palmore v. U.S. Conf. 2/23/73

DOUGLAS, J. Reverse
DC system of Cts is plainly unconst. See Gliddon
Agree this is a Cert.

MARSHALL, J. Reverse
Grant Cert. re all issues.
Only Art III courts can try felony cases. Then disagree with S.G.
Reverse on issues 2 & 3

BRENNAN, J. [redacted]. Clearly in a Cert; also Hunter D.C. courts are constitutional.
But would Reverse on 4th Amend. points.

BLACKMUN, J. Affirm
Grant Cert.
Affirm as to Art III points. We must write narrowly & confine to D.C.
Agree with White.
If we get to merits, would affirm. Bisnell helps.

STEWART, J.
Three issues:
1. Then is a Cert.
2. A man may be tried for felony in D.C. Ct. Agree with Chief as to Art III
3. As to 4th Amend, this is very close issue — tentatively would Reverse.

POWELL, J. Affirm
I'm with Harry on all issues.

WHITE, J.
1. Not a statute of a state & so is not an appeal. Then is a Cert, & would grant Cert on one point, only to decide Art III point.
2. As to Art III issue, write narrowly to sustain Govt position
3. Do not reach 4th Amend claims, as Cert. will be limited only to #2.

REHNQUIST, J. Affirm
Agree with Harry.

MEMO: C.J. Affirm
No Const. right to be tried by Const. Ct if one violates a Fed. statute. A recess appointee (an unconfirmed judge) is not an Art III judge. Nothing to Points I & II
As to Point III (Stopping car), then is not unreasonable in view of number of auto thefts - esp. of rental cars.
Stop is not unreasonable.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

April 4, 1973

MEMORANDUM TO THE CONFERENCE:

In due course I will circulate an opinion in dissent from Byron's in 72-11, Palmore v. United States.

WD

William O. Douglas

The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

1st DRAFT

Circulated: 4-4-73

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 72-11

Roosevelt F. Palmore, Appellant, *v.* United States. | On Appeal from the District of Columbia Court of Appeals.

[April —, 1973]

Received 4/4/73

Tentatively inclined to "join"

Joined 4/7/73

MR. JUSTICE WHITE delivered the opinion of the Court.

Aside from an initial question of our appellate jurisdiction under 28 U. S. C. § 1257 (2), this case requires us to decide whether a defendant charged with a felony under the District of Columbia Code may be tried by a judge who does not have protection with respect to tenure under Art. III of the Constitution. We hold that a defendant charged with violating a local District of Columbia criminal law has no more federal constitutional right than the citizen of any State, when charged with violation of a state law, to be tried by a judge with lifetime tenure; and that under its Art. I. § 8, cl. 17, power to legislate for the District of Columbia, Congress may provide for such trials before judges who, in accordance with the District of Columbia Code are not provided with life tenure.

I

The facts are uncomplicated. In January 1971, two officers of the District of Columbia Metropolitan Police Department observed a moving automobile with license tags suggesting that it was a rented vehicle. Although no traffic or other violation was then indicated, the officer stopped the vehicle for a spot-check of the driver's license and car-rental agreement. Palmore, the driver of

the vehicle, produced a rental agreement from the glove compartment of the car and explained why the car appeared to be, but was not, overdue. During this time, one of the officers observed the hammer mechanism of a gun protruding from under the armrest in the front seat of the vehicle. Palmore was arrested and later charged with the felony of carrying an unregistered pistol in the District of Columbia after having been convicted of a felony, all in violation of the District of Columbia Code, § 22–3204 (1967).[1] He was tried and found guilty in the Superior Court of the District of Columbia.

Under Title I of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 *et seq.* (Reorganization Act),[2] the judges of the superior

[1] The section provided:

"No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22–3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years."

[2] Before passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 et seq. (Reorganization Act), the local court system consisted of one appellate court and three trial courts, two of which, the juvenile court and the tax court, were courts of special jurisdiction. The third trial court, the District of Columbia Court of General Sessions, was one of quite limited jurisdiction, its criminal jurisdiction consisting solely of that exercised concurrently with the United States District Court over misdemeanors and petty offenses, D. C. Code § 11–963 (1967). The court's civil jurisdiction was restricted to cases where the amount in controversy did not exceed $10,000, and it had jurisdiction over cases involving title to real property only when it was part of a divorce action. *Id.*, at §§ 11–961 and 11–1141. The judgments of the appellate court, the District of Columbia Court of Appeals,

court are appointed by the President and serve for terms of 15 years. D. C. Code, §§ 11–1501 (a), 11–1502.[a] Palmore moved to dismiss the indictment against him,

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were subject to review by the United States Court of Appeals for the District of Columbia. *Id.*, at 11–321.

The United States District Court for the District had concurrent jurisdiction with the Court of General Sessions over most of the criminal and civil matters handled by that court, *id.*, at §§ 11–521, 11–522, and 11–523, and had exclusive jurisdiction over felony offenses, even though committed in violation of locally applicable laws, *id.*, at § 11–521. Thus the District Court was filling the role of both a local and federal court.

Seeking to improve the performance of the court system, Congress, in Title I of the Reorganization Act, invested the local courts with jurisdiction equivalent to that exercised by state courts. S. Rep. No. 91–405, *supra*, at 2–3; H. R. Rep. No. 91–907, *supra*, at 23–24.

The three former trial courts were combined into the new Superior Court of the District of Columbia, D. C. Code § 11–901, which was vested with minor exceptions with exclusive jurisdiction over all criminal cases, including felonies, brought under laws applicable exclusively to the District, *id.*, at § 11–923 (b). Its civil jurisdiction reached all civil actions and any other matter at law or in equity, brought in the District of Columbia, except those in which exclusive jurisdiction was vested in the United States District Court. *Id.*, at § 11–921. The local appeals court, the District of Columbia Court of Appeals, would ultimately not be subject to review by the United States Court of Appeals, *id.*, at § 11–301, and was declared to be the "highest court of the District of Columbia" for purposes of further review by this Court. *Id.*, at § 11–102.

In addition to the shift in jurisdiction, the number of local judges was increased, their tenure was lengthened from 10 to 15 years, and their salaries were increased and fixed at a percentage of that of judges of the United States courts. *Id.*, at §§ 11–703, 11–903, 11–904, and 11–1502. The Reorganization Act established a Commission on Judicial Disabilities and Tenure to deal with suspension, retirement, or removal of local judges, *id.*, at § 1521, *et seq.* It also provided for improved administration of the local courts, *id.*, at § 11–1701, *et seq.*, including authorization for an Executive Officer responsible for the administration of the local court system. *Id.*, at § 11–1703.

[a] The 15-year term is subject to the provision for mandatory retirement at age 70. D. C. Code § 11–1502.

urging that only a judge serving "during good behavior" as specified by Art. III of the United States Constitution could constitutionally preside over a felony prosecution under the District of Columbia Code. He also moved to suppress the pistol as the fruit of an illegal search and seizure. The motions were denied in the superior court and Palmore was convicted.

The Court of Appeals for the District of Columbia affirmed, concluding that under the plenary power to legislate for the District of Columbia conferred by Art. I, § 8, cl. 17, of the Constitution, Congress had "constitutional power to proscribe certain criminal conduct only in the District and to select the appropriate court, whether it is created by virtue of article III or article I, to hear and determine these particular criminal cases within the District." 290 A. 2d 573, 576–577 (1972). Appellant filed a notice of appeal with the Court of Appeals and his jurisdictional statement here, purporting to perfect an appeal under 28 U. S. C. § 1257 (2). We postponed further consideration of our jurisdiction to review this case by way of appeal to the hearing on the merits. 409 U. S. 840 (1972).

II

28 U. S. C. § 1257 [4] specifies the circumstances under which the final judgments of the highest court of a State may be reviewed in this Court by way of appeal or

[4] 28 U. S. C. § 1257 provides:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the

writ of certiorari. As amended in 1970 by § 172 (a)(1) of the Reorganization Act, 84 Stat. 590, the term "highest court of a State" as used in § 1257 includes the District of Columbia Court of Appeals. Appeal lies only where a statute of the United States is stricken down, 28 U. S. C. § 1257 (1), or where a statute of a State is sustained against federal constitutional attack, *id.*, at § 1257 (2). Because the statute at issue was upheld in this case, an appeal to this Court from that judgment lies only if the statute was a "statute of any State" within the meaning of § 1257 (2). Palmore insists that it is, but we cannot agree.

The 1970 amendent to § 1257 plainly provided that the District of Columbia Court of Appeals should be treated as the "highest court of a State," but nowhere in § 1257, or elsewhere, has Congress provided that the words "statute of any State," as used in § 1257 (2), are to include the provisions of the District of Columbia Code. A reference to "state statutes" would ordinarily not include provisions of the District of Columbia Code, which was not enacted by a state legislature but by Congress, and which applies only within the boundaries of the District of Columbia. The District of Columbia is constitutionally distinct from the States, *Hepburn* v. *Ellzey*, 2 Cranch 445 (1805), cf. *Mutual Insurance Co.*

Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

"For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

v. *Tidewater Co.*, 337 U. S. 582 (1949). Nor does it follow from the decision to treat the District of Columbia Court of Appeals as a state court that the District Code was to be considered a state statute for the purposes of § 1257. We are entitled to assume that in amending § 1257, Congress legislated with care and that had Congress intended to equate the District Code and state statutes for the purposes of § 1257, it would have said so expressly and not left the matter to mere implication.[5]

Jurisdictional statutes are to be construed "with precision and with fidelity to the terms by which Congress has expressed its wishes," *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U. S. 206, 212 (1968), and we are particularly prone to accord "strict construction of statutes authorizing appeals" to this Court. *Fornaris* v. *Ridge Tool Co.*, 400 U. S. 41, n. 1, at 42 (1970). We will not, therefore, hold that Congress intended to treat the District of Columbia Code as a state statute for the purposes of § 1257 (2).

Palmore relies on *Balzac* v. *Porto Rico*, 258 U. S. 298 (1922), where an enactment of the territorial legislature of Puerto Rico was held to be a statute of a State within the meaning of the then applicable statutory provisions

[5] An express provision would have been a simple thing, as demonstrated by specific provisions in the United States Code concerning the District of Columbia. Cf. 28 U. S. C. § 1363, added to the United States Code by § 172 (a)(2)(A) of the Reorganization Act, 84 Stat. 590, where for purposes of c. 85 dealing with the jurisdiction of the United States District Courts, it is provided that "references to laws of the United States or Acts of Congress do not include laws applicable exclusively to the District of Columbia." See also the treatment of the District of Columbia as a "State" for purposes of diversity jurisdiction, 28 U. S. C. § 1332 (d), and the equally discrete provision of 28 U. S. C. § 1451, added to the Code by § 172 (d)(1) of the Reorganization Act, 84 Stat. 591, which provides that for purposes of the removal provisions the Superior Court of the District of Columbia is to be considered a "State court" and the District of Columbia deemed to be a "State."

governing appeals to this Court. That result has been codified in 28 U. S. C. § 1258; but even so, the *Balzac* rationale was severely undermined in *Fornaris* where we held that a statute passed by the legislature of Puerto Rico is not "a state statute" within the meaning of 28 U. S. C. § 1254 (2), and that it should not be treated as such in the absence of more definitive guidance from Congress.

We conclude that we do not have jurisdiction of the appeal filed in this case. Palmore presents federal constitutional issues, however, that are reviewable by writ of certiorari under § 1257 (3); and treating the jurisdictional statement as a petition for writ of certiorari, ~~as required by~~ cf. 28 U. S. C. § 2103, we grant the petition limited to the question of whether Palmore was entitled to be tried by a court ordained and established in accordance with Art. III, § 1, of the Constitution.[6] It is to this issue that we now turn.

III

Art. I, § 8, cl. 17, of the Constitution provides that Congress shall have power "to exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia. The power is plenary. Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have

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[6] Because we postponed the question of our jurisdiction over this appeal to consideration of the merits, rather than entering an unrestricted notation of probable jurisdiction, there is no basis for inferring, from our finding this appeal improper, that our initial order must nevertheless be taken as having granted certiorari. Hence, our denial of the writ with respect to the Fourth Amendment claim, rather than a dismissal as improvidently granted. Cf. *Mishkin* v. *New York*, 383 U. S. 502, 512–513 (1966).

in legislating for state or local purposes. Congress "may exercise within the District all legislative powers that the legislature of a state might exercise within the state; and may vest and distribute the judicial authority in and among courts and magistrates and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States." *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 5 (1899). This has been the characteristic view in this Court of congressional powers with respect to the District.[7] It is apparent that the power of Congress under Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. I, § 8. See *Gibbons* v. *District of Columbia*, 116 U. S. 404, 408 (1886).

Pursuant to its Clause 17 authority, Congress has from time to time enacted laws that comprise the District of Columbia Code. The 1970 Reorganization Act amended the Code by creating the Superior Court for the District of Columbia and the District of Columbia Court of Appeals, the courts being expressly "established pursuant to article I of the Constitution." D. C. Code § 11–101 (2). See n. 2, *supra*. The Superior Court, among other things, was vested with jurisdiction to hear criminal cases involving alleged violations of the criminal laws applicable only to the District of Columbia, *id.*, at § 11–923, the District of Columbia Court of Appeals with jurisdiction to hear appeals in such cases. *Id.*, at § 11–821. At the same time, Congress exercised its powers under Art.

[7] *Kendall* v. *United States*, 12 Peters 524, 619 (1838); *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690 (1878); *Gibbons* v. *District of Columbia*, 116 U. S. 404, 407 (1886); *Shoemaker* v. *United States*, 147 U. S. 282, 300 (1897); *Atlanta Cleaners & Dyers* v. *United States*, 286 U. S. 427, 435 (1932); *O'Donoghue* v. *United States*, 289 U. S. 516, 518 (1933).

I, § 8, cl. 9, and Art. III to redefine the jurisdiction of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. §§ 11–301, 11–501, and 11–502. As the report of the Committee on The District of Columbia said, H. R. Rep. No. 91–907, 91st Cong., 2d Sess., 44:

> "This title makes clear (§ 11–101) that the District of Columbia courts (the District of Columbia Court of Appeals and the Superior Court of the District of Columbia) are Article I courts, created pursuant to Art. I, section 8, clause 17, of the United States Constitution, and not Article III courts. The authority under which the local courts are established has not been statutorily provided in prior law; the Supreme Court of the United States has not declared the local system to be either Article I or Article III courts, decisions having indicated that the District of Columbia courts are, in this respect, both fish and fowl. This expression of the intent of Congress clarifies the status of the local courts."

It was under the judicial power conferred on the Superior Court by the 1970 Act that Palmore was convicted for violation of § 22–3204 of the District of Columbia Code. The conviction was clearly within the authority granted Congress by Art. I, § 8, cl. 17, unless, as Palmore contends, Art. III of the Constitution requires that prosecutions for District of Columbia felonies must be presided over by a judge having the tenure and salary protections provided by Art. III.[8] Palmore's argument is straight-

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[8] Sections 1 and 2 of Art. III state:

"SECTION 1. 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, and shall, at stated Times, receive for their

forward: Art. III vests the "judicial Power" of the United States in courts with judges holding office during good behavior and whose salary cannot be diminished; the "judicial Power" that these courts are to exercise "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 . . . ."; the District of Columbia Code, having been enacted by Congress, is a law of the United States; this prosecution for violation of § 22–3204 of the Code is therefore a case arising under the laws of the United States, involves an exercise of the "judicial Power" of the United States and must therefore be tried by an Art. III judge.

This position ultimately rests on the proposition that an Art. III judge must preside over every proceeding in

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Services a Compensation which shall not be diminished during their Continuance in Office.

"SECTION 2. 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;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

"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."

which charge, claim or defense is based on an Act of Congress or a law made under its authority. At the very least, it asserts that criminal offenses under the laws passed by Congress may not be prosecuted except in courts established pursuant to Art. III. In our view, however, there is no support for this view in either the constitutional text or in constitutional history and practice.

Article III describes the judicial power as extending to all cases, among others, arising under the laws of the United States; but, aside from this Court, the power is vested "in such inferior courts as the Congress may from time to time ordain and establish." The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress. That body was not constitutionally required to create inferior Art. III courts to hear and decide cases within the judicial power of the United States, including those criminal cases arising under the laws of the United States. Nor, if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art. III. "The judicial powers of the United States . . . is [except in enumerated instances, applicable exclusively to this Court] dependent for its distribution and organization, and for the mode of its exercise, entirely upon the action of Congress, who possesses the sole power of creating the tribunals [inferior to the Supreme Court] . . . and of investing them with jurisdiction, either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degree and character which to Congress may seem proper for the public good." *Cary* v. *Curtis*, 12 Pet. 757, 721–722 (1838).[6] Congress plainly understood this, for until 1875

[6] This was the view of the Court prior to *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816). *Turner* v. *Bank of North America*, 4 Dall. 8 (1799); *United States* v. *Hudson and Goodwin*, 7 Cranch 32 (1812). And the contrary statements in *Hunter's Lessee*, *supra*,

Congress refrained from providing the lower federal courts with general federal question jurisdiction. Until that time, the state courts provided the only forum for vindicating many important federal claims. Even then, with exceptions, the state courts remained the sole forum for the trial of federal cases not involving the required jurisdictional amount, and for the most part retained concurrent jurisdiction of federal claims properly within the jurisdiction of the lower federal courts.

It was neither the legislative nor judicial view, therefore, that trial and decision of all federal questions were reserved for Art. III judges. Nor, more particularly, has the enforcement of federal criminal law been deemed the exclusive province of federal Art. III courts. Very early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protections prescribed for federal judges in Art. III. See Warren, Federal Criminal Laws and State Courts, 38 Harv. L. Rev., 545, 551–553, 570–572 (1925); Frankfurter and Landis, The Business of the Supreme Court, 293 (1928); note, Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism, 60 Harv. L. Rev. 966 (1947). More recently, this Court unanimously held that Congress could constitutionally require state courts to hear and decide Emergency Price Control Act cases involvinig the enforcement of federal penal laws; ". . . that Rhode Island has an established policy against enforcement by its courts of statutes of other States and the United States

at 327–330, did not survive later cases. See for example, in addition to *Cleary* v. *Curtis*, quoted in the text, *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 721–722 (1838); *Sheldon* v. *Sill*, 8 How. 441 (1850); *Case of the Sewing Machine Companies*, 18 Wall. 553, 557–578 (1874); *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233–234 (1922).

which it deems penal cannot be accepted as a valid excuse." *Testa* v. *Katt*, 330 U. S. 386, 391 (1947). Although recognizing the contrary sentiments expressed in *Prigg* v. *Pennsylvania*, 16 Pet. 539, 615 (1842), and some other cases, the sense of the *Testa* opinion was that it merely reflected long-standing constitutional decision and policy represented by such cases as *Claflin* v. *Houseman*, 93 U. S. 130 (1896), and *Mondou* v. *New York, New Haven & Hartford R. Co.*, 223 U. S. 1 (1912).

It is also true that throughout our history, Congress has exercised its power under Art. IV "to make all needful rules and regulations respecting the territory or other property belonging to the United States" by creating territorial courts and manning them with judges appointed for a term of years. These courts have not been deemed subject to the strictures of Art. III, even though they characteristically enforced not only the civil and criminal laws of Congress applicable throughout the United States, but also the laws applicable only within the boundaries of the particular territory. Speaking for a unanimous Court in *American and Ocean Ins. Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 546 (1828), Chief Justice Marshall held that the territorial courts of Florida, although not Art. III courts, could hear and determine cases governed by the admiralty and maritime law that ordinarily could be heard only by Art. III judges. ". . . [T]he 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. This has been the consistent view of this Court.[19] Territorial courts, therefore,

[19] *Clinton* v. *Englebrecht*, 13 Wall. 434, 447 (1871); *Hornbuckle* v. *Toombs*, 18 Wall. 648, 655 (1874); *Reynolds* v. *United States*, 98 U. S. (8 Otto) 145, 154 (1878); *The "City of Panama,"* 101 U. S. 453, 460 (1880); *McAllister* v. *United States*, 141 U. S. 174, 180–184 (1890); *United States* v. *McMillan*, 165 U. S. 504, 510 (1897);

have regularly tried criminal cases arising under the general laws of Congress,[11] as well as those brought under territorial laws.[12]

There is another context in which criminal cases arising under federal statute are tried and defendants convicted in non-Article III courts. Under its Art. I power "to make rules for the government and regulation of the land and naval forces," Congress has declared certain behavior by members of the Armed Forces to be criminal and provided for the trial of such cases by court-martial proceedings in the military mode, not by courts ordained and established under Art. III. Within their proper sphere, courts-martial are constitutional instruments to carry out congressional and executive will. *Dynes* v. *Hoover*, 20 How. 65, 79, 82 (1858). The "exigencies of military discipline require the existence of a special system of military courts in which not all of the special procedural protections deemed essential in Art. III trials need apply. *O'Callahan* v. *Parker*, 395 U. S. 256, 261 (1969); *Toth* v. *Quarles*, 350 U. S. 11, 17 (1955). And "the Constitution does not provide life tenure for those performing judicial functions in military trials."

"The same confluence of practical considerations that dictated the result in [*American and Ocean Ins. Co.* v. *356 Bales of Cotton, supra*], has governed the decision in latter cases sanctioning the creation of other courts

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Roneu v. *Todd*, 206 U. S. 358, 369 (1907); *Glidden* v. *Zadnok*, 370 U. S. 530, 544–548 (1962).

[11] See, *e. g.*, *Baker* v. *United States*, 1 Wis. 641 (1846); *United States* v. *Tom*, 1 Ore. 26 (1853); *Franklin* v. *United States*, 1 Colo. 35 (1867); *Pickett* v. *United States*, 1 Idaho 523 (1874); *United States* v. *Reynolds*, 1 Utah 226 (1875); *Fisher* v. *United States*, 1 Okla. 252 (1892).

[12] See, *e. g.*, *Territory of Oregon* v. *Coleman*, 1 Ore. 191 (1855); *Gile* v. *People*, 1 Colo. 60 (1867); *People* v. *Waters*, 1 Idaho 560 (1874); *People* v. *Shafer*, 1 Utah 260 (1875); *Ex parte Larkin*, 1 Okla. 53 (1891).

with judges of limited tenure," *Glidden* v. *Zadnok*, 370 U. S. 530, 547 (1962), such as the Court of Private Land Claims, *United States* v. *Coe*, 155 U. S. 76, 85–86 (1894); The Choctaw and Chickasaw Citizenship Court, *Stephens* v. *Cherokee Nation*, 174 U. S. 445 (1899); *Ex parte Joinves*, 191 U. S. 93 (1893); *Wallace* v. *Adams*, 204 U. S. 415 (1907); courts created in unincorporated districts outside the mainland, *Downes* v. *Bidwell*, 182 U. S. 244, 266–267 (1901); *Balzac* v. *Porto Rico*, 258 U. S. 298, 312–313 (1922), and the Consular Courts established by concessions from foreign countries, *In re Ross*, 140 U. S. 453, 464–465, 480 (1891).

IV

Whatever may be true in other instances, however, it is strongly argued that *O'Donoghue* v. *United States*, 289 U. S. 516 (1933), constrains us to hold that all of the courts of the District of Columbia must be deemed Art. III courts and that the judges presiding over them must be appointed during their good behavior in accordance with the requirements of Art. III. *O'Donoghue* involved the question whether the judges of the Supreme Court and the Court of Appeals of the District of Columbia were constitutionally protected from having their salaries reduced by an Act of Congress. This Court, over three dissents and contrary to extensive prior dicta, see *Ex parte Bakelite Corp.*, 279 U. S. 438, 450 (1829); *Butterworth* v. *Hoe*, 112 U. S. 50 (1884); *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428 (1923); *Radio Commission* v. *General Electric Co.*, 281 U. S. 464 (1930), held that the two District of Columbia courts under consideration were constitutional courts exercising the judicial power of the United States and that the judges in question were not subject to the salary reduction legislation as they would have been had they been judges of legislative courts.

We cannot agree that *O'Donoghue* governs this case.[18] The District of Columbia courts there involved, the Supreme Court and the Court of Appeals, had authority only in the District, but also over all those controversies, civil and criminal, arising under the Constitution and the statutes of the United States and having nationwide application. These courts, as this Court noted in its opinion were "of equal rank and power with those of other inferior courts of the federal system . . . ." *O'Donoghue, supra,* at 534. Relying heavily on congressional intent, the Court considered that Congress, by consistently providing the judges of these courts with lifetime tenure, had indicated a "congressional practice from the beginning [which] recognized a complete parallelism between the courts of the District [of Columbia] and the district and circuit courts of appeals of the United States." *Id.*, at 549. Moreover, these courts, constituted as they were, and being closer to the legislative department, "exercise a more extensive jurisdiction in cases affecting the operations of the general govern-

[18] We should note here that in *Glidden* v. *Zdanok*, 370 U. S. 530 (1962), it was urged that Art. III forbade the assignment of a judge of a Court of Customs and Patent Appeals to try a criminal case arising under the District of Columbia Code. The Court of Appeals ruled that even if the judge in question was not an Art. III judge, Art. I, § 8, cl. 17, was sufficient authority for his assignment to try cases in the District. The United States here urged that this was true at least with respect to laws arising under the District of Columbia Code rather than under a law of national application. Mr. Justice Harlan, for himself, and Justices BRENNAN and STEWART, found it unnecessary to reach this question but considered it an open one, for he expressly reserved "intimating [any] view as to the correctness of the holding below . . . ." *Id.*, at 538. Apparently, for him, *O'Donoghue* had not foreclosed the issue with respect to the trial of the criminal case under the District of Columbia Code. Mr. Justice Clark, for himself and the Chief Justice, also thought the question open. See 370 U. S., at n. 4, at 589.

ment and of its various departments," *id.*, at 535, and were the only courts within the District in which District inhabitants could exercise their "right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Art. III." *Id.*, at 540.

The case before us is a far cry from *O'Donoghue*. Here Congress has expressly created two systems of courts in the District. One of them, made up of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit are constitutional courts manned by Art. III judges to which the citizens of the District must or may resort for consideration of those constitutional and statutory matters of general concern which so moved the Court in *O'Donoghue*. The other system is made up of strictly local courts, the Superior Court and the Court of Appeals for the District of Columbia. These courts were expressly created pursuant to the plenary Art. I power to legislate for the District of Columbia, D. C. Code § 11–10 (2), and to exercise the "powers of . . . a state government in all cases where legislation is possible." *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 147 1889).

The *O'Donoghue* Court had before it District of Columbia courts in which the consideration of "purely local affairs is obviously subordinate and incidental," *O'Donoghue, supra,* at 539. Here, on the other hand, we have courts the focus of whose work is primarily upon cases arising under the District of Columbia Code and to other matters of strictly local concern. They handle criminal cases only under statutes that are applicable to the District of Columbia alone. *O'Donoghue* did not concern itself with courts like these, and it is not controlling here.

V

It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction. Rather, both Congress and this Court have recognized that state courts are appropriate forums in which federal questions and federal crimes may at times be tried; and that the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment. Here, Congress established one set of courts in the District with Art. III characteristics and devoted to matters of national concern. It also created a wholly separate court system designed primarily to concern itself with local law and to serve as a local court system for a large metropolitan area.

From its own studies, Congress had concluded that there was a crisis in the judicial system of the District of Columbia, that case loads had become unmanageable, and that neither those matters of national concern nor those of strictly local cognizance were being promptly tried and disposed of by the existing court system.[14] The

[14] The Senate Committee noted that though as many as 12 out of the 14 District Court judges had been assigned full time to the trial of the local felony offenses, the blacklog of criminal cases in the Federal District Court numbered 1,669 and the median time lapse from filing to final disposition in felony trials in that court was more than triple that in other district courts. The median time for civil jury trial in the District Court for the District of Columbia

remedy, in part, was to relieve the regular Art. III courts, that is, the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, from the smothering responsibility for the great mass of litigation, civil and criminal, that inevitably characterizes the court system in a major city and to confine the work of those courts to that which, for the most part, they were designed to do, namely, the trial of cases arising under the Constitution and the generally applicable laws of Congress. The other part of the remedy, equally essential, was to establish an entirely new court system with functions essentially similar to those of the local courts found in the 50 States of the Union with responsibility for trying and deciding those distinctive local controversies that arise under local law, including local criminal laws having little, if any, impact beyond the local jurisdiction. S. Rep. No. 91–405, 91st Cong., 1st Sess., 2–3, 5, 18; H. R. Rep. No. 91–907, *supra*, at 23–24.

Furthermore, Congress, after careful consideration, determined that it preferred, and had the power to utilize, a local court system staffed by judges without lifetime tenure. Congress made a deliberate choice to create judgeships with terms of 15 years, D. C. Code § 11–1502, and to subject judges in those positions to removal or suspension by a judicial commission under certain limited and defined circumstances. *Id.*, at § 11–1521 *et seq.* It was thought that such a system would be more workable and efficient in administering and discharging the work of a multifaceted metropolitan court system. See S. Rep. No. 91–405, *supra*, at 8–11; H. R. Rep. No. 91–907, *supra*, at 35–39.

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was nearly double that in other district courts. Though there had been an increase in the number of felonies committed in the District of Columbia, there was a concomitant decrease in the number of felonies prosecuted. S. Rep., *supra*, at 2–3.

In providing for terms of office, rather than for service during good behavior or lifetime tenure, the District of Columbia Court of Appeals noted that the Reorganization Act was consistent with the situation in 46 of the 50 States, 290 A. 2d, at 578 n. 5, and the provisions of the Act, with respect to court administration and to judicial removal and suspension, were considered by some as a model for the States with large, metropolitan judicial systems.

We do not discount the importance attached to the tenure and salary provisions of Art. III, but we conclude that Congress was not required to provide an Art. III court for the trial of criminal cases arising under its laws applicable only within the District of Columbia. Palmore's trial in the Superior Court was authorized by Congress' Art. I power to legislate for the District in all cases whatsoever. Palmore was no more disadvantaged and no more entitled to an Art. III judge than any other citizen of any of the 50 States who is tried for a strictly local crime. Nor did his trial by a nontenured judge deprive him of due process of law under the Fifth Amendment any more than the trial of the citizens of the various States for local crimes by judges without protection as to tenure deprive them of due process of law under the Fourteenth Amendment.

The judgment of the District of Columbia Court of Appeals is affirmed.

So ordered.

Memo to: Larry Hammond

From: Lewis F. Powell, Jr. April 5, 1973

No. 72-11 Palmore v. United States

Justice White's opinion is in accord with my views.

If you have a chance to look at this before I leave for El Paso on Monday, let me know what you think. I do not want you, however, to interrupt your work on the opinions assigned to us.

L. F. P., Jr.

LFP,Jr.:psf

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 5, 1973

RE: No. 72-11 Palmore v. United States

Dear Byron:

I agree.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 5, 1973

No. 72-11 - Palmore v. United States

Dear Byron,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

April 8, 1973

Re: No. 72-11 Palmore v. United States

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 9, 1973

Re: No. 72-11 - Palmore v. U. S.

Dear Byron:

Please join me.

Sincerely,

H.A.B.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 11, 1973

Re: No. 72-11 - Palmore v. United States

Dear Byron:

Please join me in your opinion for the Court.

Sincerely,

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 12, 1973

Re: No. 72-11 - Palmore v. U. S.

Dear Byron:

Please join me.

Sincerely,

T.M.

Mr. Justice White

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 20, 1973

Re: No. 72-11 - Palmore v. U. S.

Dear Byron:

Please join me.

Regards,

WEB

Mr. Justice White

Copies to the Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
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	3rd draft 4/19/73 4th draft 4/20/73			2nd draft 4/5/73 2nd draft 4/9/73				
				3rd draft 4/17/73 4th draft 4/20/73				
					No. 72-11	Palmore v. U. S.		