In the

Supreme Court of the United States

ROOSEVELT PALMORE,

Appellant,

v.

UNITED STATES,

Appellee.

No. 72-11

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Pages 1 thru 71

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ROOSEVELT F. PALMORE,

Appellant,

v. No. 72-11

UNITED STATES,

Appellee.

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Wednesday, February 21, 1973.

The above-entitled matter came on for argument at 10:42 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

FRANK F. FLEGAL, ESQ., Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, D. C., 20006; for the Appellant.

ERWIN N. GRISWOLD, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C., 20530; for the Appellee.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments now in No. 72-11, Palmore against United States.

Mr. Flegal.

ORAL ARGUMENT OF FRANK F. FLEGAL, ESQ.,

ON BEHALF OF THE APPELLANT

MR. FLEGAL: Mr. Chief Justice, and may it please the Court:

On February the first, 1971, the District of Columbia Court Reorganization Act became effective.

Among other things, that Act created the Superior Court of the District of Columbia, a court whose judges hold office for limited terms, and vested jurisdiction in that court to hear and determine certain felony charges brought by the United States of America against persons accused of violating acts of Congress applicable exclusively to the District of Columbia.

The courts below and the parties have tended to call such acts local statutes.

On February 23rd of 1971, appellant was indicted in the Superior Court for a violation of such a statute, the crime of carrying a dangerous weapon, in this case a gun without a permit having been issued in accordance with law.

Since appellant had previously been convicted of another and an unrelated felony, and that prior conviction is

not at issue here, the charge against him was a felony charge. If convicted, he stood to face imprisonment for up to 10 years.

Prior to trial, appellant challenged the jurisdiction of the Superior Court.

He claimed that he was entitled to have his case heard and determined by a Constitutional court, that is, of course, a court ordained and established in accordance with Article 3 and presided over by a judge holding office during good behavior.

Q And this claim was based upon the fact that this was a felony charge?

MR. FLEGAL: Yes, sir, it was.

Q In other words, he, at least implicitly, conceded that he could have been tried on a misdemeanor charge, is that right?

MR. FLEGAL: Yes, indeed so, sir.

We make a distinction here, and let me just briefly allude to it now, and then when we get to the argument address it in full.

Historically, as this Court has dealt with in the Article III jury trial cases, there has been a distinction between minor or petty cases.

Historically, as this Court pointed out in the Klawitz case, 300 United States, English judges, prior to the adoption of the Constitution -- judges not of the general jurisdiction

of England -- held and heard and determined minor matters involving up to one year imprisonment.

Congress has always assumed that to be the case in the District of Columbia and, indeed, now has magistrates in several States, non-Article III officers, hearing such minor matters.

For purposes of our argument, we assume that there is a class of matter, and we assume, although this Court has never decided, that a misdemeanor and one year is the appropriate constitutional judgment. There is a historical basis for that.

Q There may be a difference between a, quote, "petty offense," unquote, and a misdemeanor --

MR. FLEGAL: Indeed, there may, Your Honor.

Q But, in any event, whatever --

MR. FLEGAL: In any event, whatever -- a felony is our proposition in this case.

After that motion was overruled, the trial court proceeded to consider appellant's motion to suppress evidence, which was based upon appellant's Fourth Amendment contention that the method by which police officers obtained the evidence in this case, the gun, was a result of an unreasonable seizure of appellant's person.

The court heard evidence, and I put aside for a moment the details of that evidence so that it will be freshly

at hand when we turn to the Fourth Amendment argument, Fourth Amendment position, later in the argument, and, having heard that evidence, overruled appellant's objection.

Appellant elected to stand on the legal issue which had been raised and, trial by jury having been waived, the trial court found appellant guilty of the charge against him. He was subsequently sentenced to from two to six years in prison. Execution of the sentence was suspended, except for 180 days imprisonment, on condition of six years probation.

An appeal was taken to the District of Columbia Court of Appeals and that court affirmed the judgment.

Thereafter, appellate review was sought in this Court.

We sought a review by filing a notice of appeal in the District of Columbia Court of Appeals and docketing a jurisdictional statement in this Court.

On October 10, 1972, this Court entered an order placing this case on its hearing calendar but postponing the question of jurisdiction until the argument of the case on the merits.

Accordingly, I turn to that threshold question.

Strictly speaking, of course, it is not a question of this Court's appellate jurisdiction, for all parties concede that this Court has jurisdiction to review the judgment of the District of Columbia Court of Appeals in this case.

The question is, rather, a statutory question, the mode or the manner by which we should have invoked this Court's appellate jurisdiction.

It is our contention that when Congress, as it has done in the District of Columbia courts, creates a local court system and vests that local court system with jurisdiction to hear local matters and provides that appeals from the highest local court shall be taken to this Court in accordance with the general provisions of Section 1257 of the Judicial Code, locally applicable laws constitute a law of a State within the meaning of 1257, subdivision (2).

For that proposition, we place, of course, principal reliance on the analogous case of Balzac v. Porto Rico, decided 50 years ago, where Congress provided that judgments of the Supreme Court of Puerto Rico would be reviewed in this Court, in accordance with 1257.

And the issue in Balzac was whether or not a statute applicable exclusively to Puerto Rico was thereby deemed to be a statute of a State.

In a unanimous opinion written by Chief Justice Taft, this Court held that it was.

Now, it is quite true, as the Government points out, that the legislature that had enacted the statute in Balzac was a territorial legislature, not the United States Congress.

But that fact played no articulable part in this Court'

opinion. Rather, the Chief Justice focused on the manifest intent of Congress, a point, of course, which this Court reiterated just last month in the Carter case, the intent of Congress in enacting and providing for such a method of review.

For reasons set forth in Balzac and articulated in our opinion, we think this case is properly here on appeal.

At the outset, of course, by the filing of our jurisdictional papers and again in our brief, we have invoked in the alternative the certiorari jurisdiction of this Court in the event that we are wrong.

But, of course, having the case here, whether by certiorari or appeal, does not answer the question which was raised and overruled in the trial court: was appellant entitled to have his case heard and determined by a constitutional court?

Article III discussions tend frequently to become academic, and there are subtle nuances in Article III issues, and the parties have pursued those in their brief.

Q You don't submit, or do you, that the answer to the first question necessarily controls the answer to the second?

MR. FLEGAL: It has nothing to do with the answer to the second. The first question is purely a statutory construction issue.

Q Whether it is an appeal or certiorari?

MR. FLEGAL: Correct.

Q And that's basically a question unrelated to --

MR. FLEGAL: Completely unrelated. It is the mode of seeking review, the statutory mode, and it is purely a question of statutory interpretation.

On the merits, however, it --

Q Does it turn on whether or not the statute is deemed to be a statute of the State?

MR. FLEGAL: For purposes of a statute, Your Honor, not for purposes of Article III, Section 1, of the Constitution.

Q Nevertheless, that's the question.

MR. FLEGAL: That is the question, excuse me, of course, that is the question on the first proposition in the appeal as opposed to certiorari.

Q And you suggest you would get different answers under the two?

MR. FLEGAL: Indeed, I am, sir.

Q You do?

MR. FLEGAL: I do get different answers, and I say that because under the statute the question, of course, is purely one of statutory construction -- what did Congress intend under Article III of the Constitution?

We have, of course, a constitutional issue, what did the Framers mean?

And it is not conceded. The Government does not oppose the proposition that within the meaning of Article III

of the Constitution an act of Congress, albeit one applicable only to the District of Columbia, is, of course, a law of the United States.

That's the only basis by which this Court's appellate jurisdiction from the beginning of the Republic with respect to local District of Columbia matters, not otherwise involving a constitutional issue, can be sustained.

Our proposition is that the Article III protection for the independence of the Federal judge, that is the good behavior tenure and the associated constitutional restrictions, confer, of course, important rights on the judge, but principall and importantly and for purposes of this case, they also confer rights and benefits and safeguards on the litigants.

Now, that is a proposition which the Government contested at the outset of this case. At the threshold stage, the Government suggested that we did not have standing to raise this issue.

They've abandoned that in their brief, and I think properly so.

This Court has addressed the meaning of the Good Behavior Clause, as it affects litigants, time and again.

And, while I don't want to belabor the point, I want to emphasize two cases on which we principally rely, and that is, of course, the O'Donoghue case, where this Court traced the meaning of Article III with respect to litigants.

In O'Donoghue, this Court referred, for example, to one of the specific complaints which the Signers of the Declaration had made, the judges were being limited in their tenure and having their salaries reduced.

And, in O'Donoghue and again in Lurk and in the Court Martial cases and O'Callahan --

Q He was a judge, was he not?

MR. FLEGAL: O'Donoghue was a judge, Your Honor. However, Toth and O'Callahan were litigants, as was Lurk the litigant in the companion case, Glidden v. Zdanok.

And, in Lurk, this Court referred to the protection designed in part for the protection of the litigant.

And that's the protection which we sought.

Q That was Justice Harlan's opinion?

MR. FLEGAL: That was the plurality opinion, yes, Your Honor. The plurality opinion by Mr. Justice Harlan.

Q It was not a court opinion?

MR. FLEGAL: Not a court opinion in Lurk.

Of course, it is Mr. Justice Black's plurality opinion in Toth, a court opinion in O'Callahan, all dealing with litigants and all referring to the right conferred upon the litigant.

Now, of course, there can be no contention here, as was the issue in Lurk, that appellant did receive an Article III judge.

The judge that presided at our trial holds office for 15 years, not good behavior. He is not subject to protection from diminishment of his salary, and he is not answerable only to the other branches of Government through the impeachment process. He is answerable to a commission, the Commission on Judicial Disabilities and Tenure, which consists of five members Three of them are appointed by the President of the United States. The fourth by the Mayor-Commissioner of the District of Columbia who, in turn, of course, is appointed by the President. And the fifth, Chief Judge of the District Court.

Any four members of the Commission have power, after holding appropriate proceedings, to remove the judge, and if he is removed, if a Commission order is entered, his salary instantly stops, pending his resort to judicial review.

Q Is this statute somewhat like that of California and some of the other States?

MR. FLEGAL: Yes, quite like a State, Your Honor, but, of course, totally foreign to Article III, the review is sought by filing a notice of appeal with Your Honor who is thereupon called to designate a special three-judge tribunal consisting of Circuit and/or District judges to finally hear and determine.

So that's the right we claimed.

Q Are you suggesting that the Good Behavior language of Article III could be implemented only by the process of

impeachment?

MR. FLEGAL: At least with respect to the other two branches of Government, Your Honor.

It is not at issue in this case as to whether within the Judicial Branch there is some power of superintendence of the performance of lower court or inferior judges.

Our proposition is that the Impeachment Clause is the only way the other branches of Government can oversee the performance of judges.

Q That is a basically unanswered question, isn't it?

MR. FLEGAL: Oh, of course. Of course. And it is a question which is not raised in this case. There is no question here that the Judicial Disabilities and Tenure Commission is a body of "good behavior" judges, but our proposition turns on the other two branches of Government, not the Judiciary, Your Honor.

Q Well, even the first -- even vis-a-vis the other two branches of Government, it is not wholly established --

MR. FLEGAL: It is not a wholly established principal, that's right.

Q It is conceded that these are not Article III judges.

MR. FLEGAL: Precisely, Your Honor.

Q And, since it is conceded, there is not any need for you to spend any time proving it, I suppose.

MR. FLEGAL: The question then arises: are we entitled to this right?

If Article III safeguards and benefits mean anything, if the Founders did not accomplish a fruitless act, insofar as litigants are concerned, then, of course, we contend that the felony class of case has to be included within these protections.

In other words, if anyone is to get these benefits, other than, perhaps, judges, if any litigant is, a felony litigant must have them, because no other place that we can conceive would rise to greater constitutional dignity.

Perhaps others, perhaps constitutional questions would be similar, but nothing would be higher.

Then, why, according to the courts below and the Government, are we not entitled to this constitutional protection?

The Government suggests that there is no requirement in Article III that Congress afford this constitutional right to any litigant.

And the Government supports this proposition by suggesting that with respect to at least any one of the enumerated legislative powers of Congress, and this is an argument which is not limited to the District of Columbia, either in the District or in the several States, Congress may create a so-called legislative court, a non-constitutional court, and thereby deprive us of the benefits and safeguards to

which this Court has repeatedly referred.

Q Now, you emphasize these benefits and safeguards, but those are benefits and safeguards that most of the citizens of most of the States do not have.

MR. FLEGAL: Precisely. It is not a Fourteenth Amendment benefit and safeguard, at all, Your Honor, and we don't contend that it is.

Q That's what made me wonder about your great emphasis on it, since most of the 200 million people in the country are subject to it.

MR. FLEGAL: Right. Our contention, of course, is that the original Constitution and certain protections in the first ten amendments, for example, Grand Jury indictment, Article III and Sixth Amendment trial by jury, are, of course, rights which are afforded litigants when the Federal judicial powers are brought to bear, not necessarily required under the Fourteenth Amendment in the States.

We make no contention that there is anything fundamentally unfair in the Fourteenth Amendment sense about having judges with limited tenure.

Our proposition is the Framers gave a right in Article III beyond that which Fourteenth Amendment due process would require to be afforded.

Government says that because under the Supremacy Clause Congress could arguendo require State courts to hear and

determine Federal felonies, that's the end of the inquiry.

If they can require this case to be heard in a State court, the Government argues, then, of course, a State court judge, following up on Your Honor's proposition, would not hold life tenure, and why are we entitled to it?

I suggest the distinction which Your Honor's question focuses is precisely the falacy of the Government's argument.

In the first place, when a State court hears a case, whether or not that case arises under State law or arises out of an act of Congress which the State is enforcing under the Supremacy Clause, the State is exercising the State's judicial power, not the judicial power of the United States, and Article III, by its terms, is a limitation on Federal, not State, judicial power.

And, taking one step further, the proposition that was addressed by the Chief Justice's question, the Government's position puts Federal courts on the plane of the Fourteenth Amendment.

The Government's argument, carried to its logical extension, create a non-Article III court because you could require a State court to do it, means that any right that a Federal defendant has that a Fourteenth Amendment defendant in the State court does not have, could be deprived.

And I don't think that's the law. I don't think the Congress can deprive a Federal litigant of a Grand Jury

indictment, even though a State may not have to provide it, or of an Article III jury or of an Article III judge.

What, then, does the Government argue beyond that?

The Government relies, of course, on the Legislative court cases. The Government says that there is a judicial power outside of Article III which is coextensive with that conferred in Article III.

This Court has never so held. This Court has never so held.

In the permanent part of the United States, this Court has always carefully looked at the nature of the matter being adjudicated by the so-called Legislative court, and if that matter was a subject for which the litigant had no right to claim judicial determination, if it was subject to being disposed of by exercise of another power, Legislative or Executive, then the Court has said it is permissible to have the matter adjudicated in a Legislative court.

There has never been even a piece of dicta in one of this Court's Legislative court cases which would suggest that a non-Article III court could hear and determine a felony and impose a felony punishment.

Q Back in the days when what are now the interior States of the United States were territories, some of them, Utah, and so on, the territorial courts out there, of course, tried felonies, including capital offenses. Were those all

Article III judges?

MR. FLEGAL: It is an interesting question on theory, Your Honor.

Justice Harlan, in his plurality opinion in Glidden v. Zdanok, said yes they were, that they were Article III judges exercising Article III judicial power, but exempt, because of the peculiar temporary status of the territories, from Article III's tenure requirement.

Q What does that mean? Maybe I knew what it meant when I --

MR. FLEGAL: I think what it means, Your Honor -- I think what Justice Harlan had in mind was the nature of the matters they were determining were the kind of matters, including felonies, which could only be adjudicated by an Article III court.

Therefore, they had to be exercising the judicial power of Article III.

Q A circular argument, isn't it?

MR. FLEGAL: That's right.

He then said, however, because of the temporary status of the territories they were exempt from the "good behavior" clause, that more recently this Court in the Carter case and back in O'Donoghue said they weren't Article III judges at all. They were always Article IV judges exercising the power conferred upon Congress under the Territories Clause,

the Acquisition Clause, outside of, and this, we think, is the important point in this case --

Q How, in fact, were those judges nominated and appointed and what tenure did they have? And what guarantee did they have?

MR. FLEGAL: Various proposals had been used in the different territories, Your Honor. Sometimes the President appointed and Congress confirmed, and other times local legislatures or the territorial governor confirmed the territorial judges, but they all sat for limited terms of office.

At the present time, we have several kinds of territorial judges.

Those of Puerto Rico are appointed by the President with the advice and consent of the Senate and hold their offices during at least statutory good behavior, and, yet, as the Government has pointed out in its brief, out in Samoa, for example, the President of the United States appoints the officer or the official to exercise the judicial power.

But the critical point and why we distinguish the territorial court cases, is all of those have dealt with temporary necessity out in non-permanent parts of the Federal Union.

Q Like Samoa?

MR. FLEGAL: Yes, Your Honor.

Q When did we buy Alaska from Russia?

MR. FLEGAL: Oh, 'way back, Your Honor.

(laughter)

Q They continued in that temporary status for, what, 100 and some years?

MR. FLEGAL: Right.

Perhaps I should have prefaced my statement as constitutional temporary status. In other words, the first three Articles of the Constitution, which include the States and the District of Columbia, that's the permanent Union, then the territories may or may not join that Union, either as States or perhaps under some other arrangement, but until they do they are not constitutionally permanent. We can sell the territory, relinquish it, return it to another sovereign, and so forth.

Q Mr. Flegal, if you follow Justice Harlan's analysis in Glidden v. Zdanok, the litigant in these territorial courts -- I mean, presumably, the sentences imposed on them were rather permanent, rather than temporary, and --

MR. FLEGAL: Indeed so, Your Honor.

Q And they were exempt from having their rights enforced in those cases.

MR. FLEGAL: They, indeed, were, Your Honor.

The litigants in the territorial court cases did not get the constitutional benefit we seek here.

Now, this Court has rejected, however, the territorial court argument whenever it has been made to deprive a District of Columbia litigant of a constitutional right.

I go back, for example, to Callan v. Wilson, the first case in this Court dealing with the constitutional rights of the citizens of the District of Columbia.

That case involved Article III, Section 2's trial by jury, and the Sixth Amendment trial by jury, and the argument was made the District of Columbia is like a territory, there is plenary legislative power, you don't get the constitutional right.

This Court rejected that argment. It rejected the territorial analogy in holding that Judge O'Donoghue's salary could not be reduced during his tenure in office.

And, as recently as last month, this Court distinguished the territorial courts created under Article IV from the District of Columbia courts created under Article III.

Q That was for purposes of the Civil Rights Act.

MR. FLEGAL: Yes, yes. So that the point I am making is whether they were Article IV courts, exercising Article IV powers, and thereby the litigants were not entitled to claim an Article III right, or whether as Justice Harlan suggested in his plurality opinion in Glidden, they were exercising Article III power but exempt from the "good behavior" tenure. It does not have controlling bearing on this

case.

Now, what then is left?

What is left, of course, is the plenary legislative power of Congress over the District of Columbia.

And, in the course of discussing the territorial court cases, I have already outlined, of course, our position on that.

The District of Columbia is permanent. This Court has already held that each time a constitutional right was claimed to be denied because -- to a litigant -- because the District of Columbia was somehow unique, this Court has rejected that argument.

Q Is there an example of the territory other than the District of Columbia dispensing with a constitutional right that this Court has approved?

MR. FLEGAL: No, not that I know of, Your Honor.

Q Well, then, what's your point?

MR. FLEGAL: My point is that the District of Columbia has -- the citizens of the District of Columbia before the Federal Courts, have all of the rights of the original constitution and the amendments.

Whether or not the territorial litigants were deprived of the right we seek here, by virtue of a Fourth Amendment theory or an Article III temporary status theory, we don't think is determinative.

Q You still have -- and I suppose you will demonstrate

that the law that we have at issue here -- or that the statute that was being enforced is the law of the United States.

MR. FLEGAL: Yes, indeed so, because, of course, that is central to our proposition.

The Government has not argued otherwise, but let me just briefly address that right now, Your Honor.

The earliest --

Q This is to show that you are talking about an Article III power.

MR. FLEGAL: Article III power, of course. Because if our case did not arise under Article III, we haven't got any --

Q And to do that it has to arise under a law of the United States?

MR. FLEGAL: That's correct. The only power that we seek to invoke here is the law of the United States. So there is nothing to do with any other of the matters to which the judicial power extends.

It has been repeatedly held, both in decisions of this Court and in decisions of the early District of Columbia courts, going back as early as 1805, an opinion which Chief Justice Marshall participated while sitting on Circuit, that laws applicable exclusively to the District of Columbia are laws of the United States. Indeed, they must be so, or this

Court could not review a local matter, as it has historically done, that was not otherwise presented with a constitutional issue.

As recently, for example, as 1965, I believe it was, this Court decided, purely on a basis of statutory construction, a tax matter arising out of the District of Columbia taxing statutes.

Of course, the only power this Court would have to construe that statute -- and it was not a constitutional claim, it was a statutory claim -- would be if that statute was a law of the United States.

The first chief judge of the local courts in the District of Columbia, Chief Judge Cranch, --

Q Why do you say that?

MR. FLEGAL: Why do I say that this Court could not?

Because no other power in Article III would purport to give this Court the power to construe a statute that was not a statute of the United States, a law of the United States --

Q To construe it? What about in diversity cases?

MR. FLEGAL: Well, in diversity cases, of course, then you have a power -- the case arises -- the diversity of citizenship -- the status of the parties confers jurisdiction to deal with the case in controversy at issue between them regardless of the nature of the suit.

But the District of Columbia v. General Motors, which is the case I refer to, was not a diversity suit. It came to this Court with no other basis for Article III jurisdiction except the construction of the statute.

We have collected in our brief similar cases which go back through the 19th Century, and we have cited in our brief from the very first territorial court case, incidentally, American Insurance Company v. Canter, the statement of Mr. Justice Johnson, who sat on Circuit on that case, that if laws applicable exclusively to the District of Columbia are not laws of the United States, this Court, the Supreme Court, has no power to review them,

And, in the course of that argument, he rejected that proposition and said laws applicable exclusively to the District of Columbia are laws of the United States.

The question, then, finally arises: is there something in the plenary legislative power given Congress under Section 17, rather Clause 17, of the Article 1, Section 8, the so-called plenary power over the District of Columbia, that somehow relates to the constitutional right at stake here.

We say not. We say not for two reasons.

First, that plenary power is not limited to the District of Columbia. That's the power that provides not only for exclusive legislation over the seat of Government, but also,

of course, Federal enclaves and forts out in the several States.

So that this argument is not strictly limited to the District of Columbia.

Beyond that, this Court has always held -- and I think correctly -- that when you are dealing with the exclusive and the plenary legislative power of Congress, that may mean Congress is free of any other restriction in Article I, but it does not exempt Congress from other provisions in the body or the Bill of Rights of the Constitution.

Q Didn't the Framers go to some pains to single out the District of Columbia, the seat of Government, in defining the plenary powers that you are talking about?

MR. FLEGAL: Indeed, they do, sir.

And the pains they went to is embodied, of course, in Clause 17 of Section 8 of Article I, and that is the plenary legislative -- and I underline that word "legislative" power -- given Congress.

Q Now, when we think of a State having legislative power, does that not include the power to create courts?

MR. FLEGAL: Oh, clearly. If a State --

Q The legislative powers of the Congress include the power to create courts and define the jurisdiction of the courts.

MR. FLEGAL: Clearly.

Q And the tenure of the judges.

MR. FLEGAL: That's where we disagree. Our proposition

is the District of Columbia, of course, is not a State.

The seat of Government was a State at one time. It was Maryland and Virginia. It was seceded to and exclusive Federal jurisdiction attached in 1801 under the Secession Act.

At that point, Congress is not, strictly speaking, a State legislature.

This Court has already held that Congress is bound by provisions which don't bind a State legislature when dealing with local matters.

I refer again to the Fifth Amendment Grand Jury indictment and the Article III and the Sixth Amendment right to a jury trial.

A State legislature is not bound by those provisions.

Congress, when acting and legislating locally for the District of Columbia, is.

Q Well, what you are arguing now is that a defendant has the same right to an Article III judge on the same constitutional level as the right to be indicted by a Grand Jury and all the others?

MR. FLEGAL: Indeed, so.

We are claiming the same safeguard that this Court referred to in the Court Martial cases, starting with Toth, Callahan, Lurk, O'Donoghue.

This is a right of the Federal litigant. This is the

right we claim.

Indeed, we think the Colts case, which is 282 U.S., cited in our brief, is directly on point.

In that case, in a local case arising out of the District of Columbia, this Court squarely held that a local litigant was entitled to the safeguards of Section 2 of Article III, the jury trial.

There is no reference in the Colts case to the Sixth Amendment, purely Section 2, Article III.

Q Mr. Flegal, under your theory, could Congress vest the appointment of judges in the District of Columbia in anyone other than the President of the United States?

MR. FLEGAL: Yes, under the Constitution, Your Honor, the appointment of officers of the judges can also be vested in the President alone without confirmation or in the head of a department.

Q That is, if they are inferior officers under that Section of the Constitution? What leads you to say that such judges could be treated as inferior officers, as that term is used in Article II?

MR. FLEGAL: What leads me to say that, Your Honor, is there is nothing else in the appointing part of Article II that distinguishes judges from those inferior officers. In other words, Article II reads that "unless Congress shall by law otherwise provide" the President shall appoint and the

Congress shall give their advice and consent.

But, by law, Congress may vest the appointment of the inferior officers in the President alone or in the head of a department.

Now, the final, of course, question raised by this case is whether or not we were entitled to have our motion to suppress granted by a constitutional judge or by a non-constitutional judge.

That is a separate issue and it is an issue equally dispositive of this case, for on this record, without the evidence we sought to have suppressed, there is no evidence to support appellant's conviction.

That requires, of course, that we turn briefly to the facts. They are not in dispute.

At the trial court, appellant and his witness gave a different version of this encounter than did the police officer.

We have not contended on appeal, and we do not contend here, that the trial judge was bound to believe our witness.

Rather, our position is on the police officer's version of the events appellant's right to be free from unreasonable seizures was violated.

What were the facts?

Appellant was driving a car at about 8:00 o'clock in

the evening on the 600 block of T Street, in downtown Washington.

At that point in time, he had violated no law, no traffic ordinance. He had no apparent equipment defect, and there is no contention, there has been no contention in any court below and there is no contention here, that the officers were possessed of any articulable facts to show that he had been, was, or was about to be engaged in any criminal conduct.

This was a matter of a specific finding by the Court of Appeals.

Two plainclothes officers assigned to the Special Operations Division of the District of Columbia Police Department, decided that they would stop appellant for, what has been described in this record as a spot-check or a traffic check, or, in one place, a rental agreement check.

They turned on their red lights and their siren and they forced appellant to the side of the road.

Appellant produced a driver's license and was asked to return to the car and obtain a copy of his rental agreement form -- and I interject here the officers have claimed that they knew this was a rental agreement car, rather a rental car because of the special serial numbers on the license plate.

An officer was thereupon engaged in discussing with appellant an apparent discrepancy in the expiration date of his rental agreement when a fellow officer who had been on the

passenger side of the car shining a flashlight into the interior, discovered the gun, seized the gun and arrested appellant.

Our contention is at the moment appellant was stopped, at the moment he was stopped, for this license spot-check, his Fourth Amendment rights against unreasonable seizures had been infringed.

It is important to point out that in this case there is no Congressional statute which, on its face, purports to authorize police officers to stop citizens for purposes of inspecting either driver's licenses or motor vehicle registrations.

The statutes do require that citizens carry both of those documents while they operate a car and the driver's license statute does require that a citizen display that license to a police officer, but it does not specifically provide that the officer is entitled to stop in order to ask for the display.

Q You say the police officer could not spot-check for driver's licenses in the District?

MR. FLEGAL: Our position is that a police officer, acting without standards set out by somebody, either the legislature, perhaps the Commissioners of the District of Columbia, or at least the higher officials in the Police Department, he cannot be left to his own discretion to pick

anybody else that he wants out for a spot-check.

And I say that for this reason. On this record, the officer who made this spot-check said that "I have no basis, I have been given no instructions as to how or whom I should stop. I think it is up to me to pick people out and I pick rental cars, because I think a lot of them are overdue. I want to see if the man can prove that it is not overdue because it is a crime if it is overdue."

He also referred to the fact that on another occasion a fellow officer had found $6,000 worth of narcotics in a rental car.

Leaving it to the unfettered and unarticulated standards of the police officer on the corner simply poses too great and too unreasonable a restriction with the right of free movement.

We don't see, in contempoary urban society, any great difference between walking down the street and driving --

Q Except that you have to be licensed to drive down the street and you don't have to be licensed to walk.

MR. FLEGAL: Oh, clearly, clearly, but I am talking in terms of justifiable expectation of privacy.

You may well have to submit to reasonable and perhaps spot-checks, but the question is not is it a spot-check. That' where we think the court below made the mistake. The question is is this a reasonable spot-check?

And we say when it is done on an individual basis by a police officer given no standards by anybody, stopping them for his own reasons, that's what makes it unreasonable.

I think I should call to the Court's attention a case which was decided in the Supreme Court of Pennsylvania, and we were unable to include it in our brief, although we will shortly do so in a formal amendment -- we only got the opinion yesterday.

The Supreme Court of Pennsylvania, the case is Commonwealth v. Swanger, has since squarely so held.

It is simply unreasonable for police officers, acting on their own, to stop for spot-checks.

In the Pennsylvania case, if anything, there was a much more compelling State requirement, because Pennsylvania had a statute.

The case is based squarely on the Fourth Amendment, squarely on the principles in Terry.

Q Suppose the Police Department came to the conclusion there were a great many unlicensed drivers driving unsafe cars and so they decided to check every fiftieth car that a policeman could see during his hours when he wasn't otherwise engaged? Would you think that would be all right?

MR. FLEGAL: That gets to be a closer case to reasonable, Your Honor, because now you have had a responsible determination by the Police Chief or the Traffic Chief, whoever

he is. You have given the police officer on the corner a basis to do it, so he is not doing it because he thinks rental cars are overdue or because there might be narcotics, and you have told him how to do it.

Q But you think a random check is not permitted?

MR. FLEGAL: Not random where the basis for the random selection is left to the individual judgment of the officer. That is the narrow point we make on this case.

We have nothing to argue here about what would happen if the Police Chief said every fiftieth car, or today is yellow cars, or something of that nature.

That's the next case. But our case is leaving it to the unfettered judgment of the officer on the corner. And we think, and we think this record shows that it simply runs too high of a risk --

Q What if the Department said, "Check all rental cars because" -- let us assume they had concluded that rental agencies were being very lax about requiring people to produce a driver's license -- and so the order is, "Check all rental cars."

MR. FLEGAL: For drivers' licenses, and so forth?

Q For everything.

MR. FLEGAL: All right. That becomes a different case again. They've got a basis. They've given the officers some standards, and perhaps you would have a different case.

I think it is important here to add one other factor,

and that is that in this case the only safety matter,really, is the driver's license. It was not even set forth to the officer as a basis for the stop. That document was produced at the outset of the stop, returned and appellant was not free to go, at that point in time.

In other words, this officer, on this record, is using his power to make traffic checks to see whether or not you can prove a rental car is overdue, and, of course, as the officer has also conceded, they have a list of overdue and stolen cars, and this car was not on that list.

Q I suppose your position would have to be the same on the search and seizure, if upon stopping the car and finding -- coming close to it, they saw a small child bound and gagged in the back of the car. They couldn't seize the child and release it, could they?

MR. FLEGAL: Oh, of course. Our proposition in this case, Your Honor, is what they initially did. We make no contention that if they had a right to stop appellant under the circumstances shown on this record, that what they did thereafter made it unreasonable.

Our contention is they could not, under the circumstances of this case, stop him at the outset.

Q How is the gun that they found in the car any different from anything else they might find in the car?

MR. FLEGAL: I am sorry. Perhaps I didn't understand

Your Honor's question.

Q I said that when they ran his flashlight, if that's what it was, in the back seat, found that there was a person, a body, let's say the body of a dead person all tied up, on the way to Chesepeake Bay or some such thing.

Now, they can't do anything about that?

MR. FLEGAL: Your Honor, the Fourth Amendment doesn't say they can't do anything about it. It says that if you infringe the defendant's Fourth Amendment rights in getting to the position and stopping the car, then you can't introduce that piece of evidence.

It doesn't mean, of course, you can't release the child --

Q You can't introduce that body and charge this man with some crime?

MR. FLEGAL: My position would be the same. My position would be the same. The admission of the gun or the admission of the body does not make a distinction.

For this reason, it is our position that the judgment below should be reversed.

And, with the Court's leave, I'll save my remaining time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Flegal.

Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE APPELLEE

MR. GRISWOLD: Mr. Chief Justice, and may it please the Court:

As Mr. Flegal has indicated, there are three separate questions in this case, and I shall discuss them in the same order in which he did.

The first is the question of this Court's jurisdiction of the appeal which was taken here. That, I think, divides into two parts.

And I would make a somewhat different answer to Mr. Justice Stewart's question about this than Mr. Flegal did, because I think one of those parts is identical with the constitutional question presented with respect to the District of Columbia Court system.

For, if it should be concluded, as I hope it will not, that criminal cases in the District of Columbia can be heard only by Article III courts, then these tribunals are not courts, for they do not meet the requirements of Article III, particularly as to tenure.

The judges of these courts are appointed for 15 year terms. They don't serve during a period of good behavior.

This Court has only appellate jurisdiction in cases such as this, and if the tribunal below is not validly established it is not a court, and this Court has no

jurisdiction to review its decision.

The remedy in such a case would appear to be by writ of habeas corpus in the District Court of the United States for the District of Columbia.

But if the tribunal below is a court, then we have left the question which is discussed in the briefs.

Congress has power to regulate the appellate jurisdiction of this Court, and has done so in Section 1257 of Title 28 of the United States Code.

It is paragraph 2 which provides for appeal to this Court to review a decision, quote, "rendered by the highest court of a State," close quote, where there is, quote, "drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws, of the United States, and the decision is in favor of its validity."

Now, these words alone would, of course, not be sufficient to support jurisdiction here, for we had neither a decision of the highest court of a State nor do we have involved the validity of a statute of any State, since the court below is one established for the District of Columbia by the Congress, and the statute whose validity is questioned was not enacted by a State but by Congress.

The first of these matters is taken care of in the statute itself by an amendment which was enacted as a part of

the District of Columbia Court Reorganization Act of 1970, and it is printed on page 4 of our brief at the end of our printing of Section 1257. It added a paragraph there which provides that for the purposes of this section, the term "highest court of the State" includes the District of Columbia Court of Appeals.

So that half of the problem is resolved, but there still remains the question whether the decision below involves the validity of a statute of any State.

Can those words be construed to apply to a statute which was passed by both Houses of Congress, signed by the President, and was never considered by the legislature of any State or, indeed, of any territory?

If Congress meant that, it could have said so. It knew how to do that in this very Act, for it did provide in Section 172(c)(1) of the Act, adding Section 1363 to Title 28 of the United States Code, that laws applicable exclusively to the District of Columbia should not be considered, quote, "laws of the United States," close quote, or, quote, "acts of Congress," close quote, for the purposes of that provision.

Congress made no similar provision for a special modification of the plain words -- plain meaning of the words -- statute of any State -- in Section 1257(2).

Reliance is placed on this Court's decision in Balzac v. Porto Rico, decided in 1922 in an opinion by Chief

Justice Taft.

But that decision is clearly distinguishable. In the first place, there was a considerable history to the statutory provision involved there. It is too complicated to give in detail here, but it is readily apparent, from reading the opinion, the interrelation of then Sections 237 and 246 of the Judicial Code, the statute with respect to Puerto Rico was linked to the provision with respect to Hawaii, and Congress had said that it wanted review here which was comparable to that in cases coming from the States.

On that basis, a statute passed by the Legislature of Puerto Rico was held to be a statute of a State for the purpose of what is now Section 1257, taken in the light of other statutory provisions then in force.

But here, we do not have a statute passed by a territorial legislature or any other outside body. The statute here was passed by Congress itself, after extensive consideration there.

Congress has never provided for appeal from decisions sustaining the validity of its own statutes, and there is no reason for forcing a construction on the statute here to reach that result.

If that were done, defendants in the D.C. courts could question the validity of every provision in the D.C. Criminal Code. The validity of the statutory provisions against

murder or burglary, for example, and then when their contentions were denied by the court below, they would have a right of appeal to this Court, if the validity of the statute was sustained.

The position for which we contend seems to be sustained likewise by this Court's recent decision in Fornaris v. Ridge Tool Co. in 400 U.S. It begins on page 41, and the jurisdictional question is decided in a long footnote on page 42.

There are some things about that footnote which are not crystal clear to me, but, among other things, the Court did not cite the Balzac case, which would seem to have had some relevance, but the Court does make it perfectly plain that for purposes of appeal from the United States Court of Appeals, a statute of Puerto Rico is not a statute of the United States.

I should think, therefore, that the Fornaris case, together with the language of the statute itself, should lead to the conclusion that this Court has no jurisdiction of the appeal. If there is a court below which can be reviewed here, and I think there is, then the papers should be considered by the Court as a petition for certiorari.

I will turn next to the second, and in some ways the major question involved here, although all are important, the question of the constitutional validity of the District of

Columbia Court Reorganization Act.

In approaching this question as other questions, the Constitution should, of course, not be thought of as a mathematical equation or as some kind of a computer program.

As it has been said, in largest part, the Constitution is not a charter of liberties, but a blueprint for a Federal system of Government, and the District of Columbia is in some ways the keystone of the Federal system.

Marvelous as was the work of the Founding Fathers in Philadelphia in 1787, there were some things that they did not fully foresee or spell out in detail. And it has been this Court's task to work these problems out.

This particular area of the interplay of Article III and Article I has a sort of academic flavor to it, and it may be an understatement to say that it has not always received wholly consistent treatment from this Court.

Decisions have been made by divided Courts, sometimes without a majority, and statements can be found in the opinions to support almost any position.

I have, myself, been burned once in this area. In 1929, this Court decided Ex parte Bakelite Corporation in 279 U.S., a unanimous decision, with the opinion written by Mr. Justice Vandervanter who was an acknowledged authority on constitutional procedure, and I would have to differ with Mr. Flegal when he said there wasn't even a dictum which said

that there could be Article I courts in the District of Columbia, because that opinion discussed the opinion in extenso, and concluded that the courts of the District of Columbia were Article I courts.

Now, it is true that the issue in the case was the status of the then Court of Customs Appeals, and so it, therefore, is a dictum and not a decision, but it was the clearest sort of considered dictum.

These courts were then known as the Supreme Court of the District of Columbia and the United States Court of Appeals for the District of Columbia.

The case also considered the Court of Claims.

And, for clear and cogent reasons, based on long outstanding precedents, the court found that all of these tribunals were validly established under Article I of the Constitution.

It was only four years later that the case of O'Donoghue and of Williams came before this Court.

I was then a junior in the Department of Justice and was one of those who wrote the brief for the United States in these cases.

The question was whether the judges of these courts were protected by the provision in Article III which says that the salaries of the judges cannot be reduced during their term in office.

Under the circumstances, we did not brief the question extensively, but relied on the comprehensive treatment in the Bakelite case.

As things worked out, this Court's Bakelite decision proved to be a slender reed as far as the District of Columbia was concerned, for Judge O'Donoghue was held to be entitled to his salary.

Judge Williams was not so furtunate, but he was vindicated more than thirty years later with the aid of an intervening Act of Congress establishing both the Court of Claims and the Court of Customs and Patent Appeals as Article III courts.

The sands have been shifting in this area, but I do not think they have shifted enough, or that they should be shifted enough to invalidate the District of Columbia Court Reorganization Act.

The approach in this field, it seems to me, should be that suggested by Mr. Justice Harlan in an opinion he wrote in an analogous case.

The case was Reid v. Covert, involving the validity of a trial by Court Martial of a woman who had murdered her Air Force husband at an air base in England.

His words,which I do not cite as authority but only for their indication of an approach to this case, were directly applicable to trials overseas.

As applied to this case, they would read: "In other words, what Ross and the other cases hold is that the particular local setting, the practical necessities and the possible alternatives are relevant to a question of judgment on questions such as these."

And, he continued, "I think the above thought is crucial in approaching the cases before us. Decision is easy if one adopts the constricting view that these constitutional guarantees, as a totality, do or do not apply."

But for me, the question is which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternative which Congress had before it. The question is one of judgment, not of compulsion.

In considering this question of judgment, we note that there is surely no constitutional requirement that all Federal cases, all Federal criminal prosecutions, must be heard by Article III courts.

The Constitution establishes no inferior Federal courts at all, but leaves that entirely to Congress.

In Australia, for example, there are no Federal courts. All Commonwealth criminal prosecutions are conducted in the State courts. We might well have such a system here.

Except for a period of one year, Congress provided no Federal courts with Federal question jurisdiction until 1875.

Even today, many Federal question cases cannot be heard in Article III courts if they do not meet the jurisdictional amount established by Congress. That means that these cases must be heard by State courts, almost none of which meet the Article III test as to tenure and non-reduction of salary.

From the very earliest days of the Republic, Congress provided for the trial of many criminal cases in State courts. These are listed and cited in the two articles by Charles Warren, which appear on page 29 of our brief, and I would like to make a correction here.

Near the bottom of page 29 is cited the article of Charles Warren in 37 Harvard Law Review. It says page 49, and then on the next line 54-55.

When I came to look at page 54-55, I couldn't find anything about this, and the correct reference should be 70-71.

As recently as Testa v. Katt, decided shortly after World War II, the Court held that the States must entertain suits arising under a Federal statute, the Price Control Act.

As long ago as 1828, Chief Justice Marshall recognized the necessity of legislative courts. In American Insurance Co. v. Canter, that case involved the validity of a judgment rendered by a territorial court in Florida, the judges of which -- and they are referred to in the opinion as a notary and five jurors, but apparently the notary was appointed for four years.

The great Chief Justice held that the judgment was valid, saying that the Florida court could not receive Article III judicial power, but that it was a legislative court validly established by Congress under its power in Article I and in Article IV, Section 3, to make laws for the property and territory of the United States.

It was a necessary basis for this decision that the requirements of Article III are not applicable to such courts.

And in the intervening years, there have been many examples of such courts.

When the Territory of Orleans was established in 1804, its judges were given four-year terms, and this was generally the case during the whole process of developing the Western Territories of the United States.

This is true today of the Commonwealth courts in Puerto Rico, and of the local courts in Guam and the Virgin Islands.

In American Samoa and the Trust Territory of the Pacific, there are today judges for whom the statute simply says that they are designated by the President, and he can, and he recently has, simply changed the designation and put in another person as the judge in American Samoa.

This Court has many times entertained appeals from these outlying courts, without any question as to their valid establishment.

Reynolds v. United States, in 98 U.S., was on error to the Supreme Court of the Territory of Utah and the cruel and unusual punishment case, Weems v. United States, in 217 U.S., was on a writ of error to the Supreme Court of the Philippine Islands, not an Article III court.

Q Didn't we have a case within the last five or six years from the Canal Zone, involving a destruction of property down there?

MR. GRISWOLD: Yes, Mr. Justice, but the case was here on review of a judgment of the Court of Claims. The question arose in the Canal Zone but it -- if we are thinking of the same case -- it was a suit in the Court of Claims to recover from the United States on the ground that the United States had seized the building as part of the defense of the Zone.

Q During disorder down there.

MR. GRISWOLD: I have looked for cases from the Canal Zone that got to this Court. There are many which have come to the Fifth Circuit Court of Appeals, and a good many which were petitioned for certiorari and have been filed and denied, not on jurisdictional grounds, but I couldn't find one which had been entertained on the merits from the Canal Zone.

Q How are the judges in the Canal Zone? What is their tenure? How are they appointed?

MR. GRISWOLD: All I can tell you is it is not life

tenure.

Q I know they are usually from Kentucky.

(laughter)

MR. GRISWOLD: Whether it is four years or ten years --

Well, now, besides the territorial courts, there were for many years consular courts, held to be validly established in In re Ross in 140 U.S.

Now, very likely the Ross case would not be followed now because there weren't really judges there, just consular officers, and they acted as prosecutor, judge and jury, at least formally.

The objection to In re Ross is essentially one of due process, though, and not of Article III, and this was taken care of in 1906 when there was established a United States Court for China, with power to review consular decisions and to handle all of these cases for all of China.

The judge of this court, and I can tell you this, Mr. Justice, the judge of this court was appointed for ten years and he could be removed by the President for cause the statute said.

For many years, the judge was a man named Lubingeer and I used to see him from time to time in Washington. Apparently, he wasn't too busy in China. He did a good deal of legal writing, including some about the United States Court

for China.

I have not been able to find that any case from that court came to this Court for review, but there is at least one reported review of a criminal case in the United States Court of Appeals for the 9th Circuit, this is Biddle v. United States in 156 Federal, not F. 2nd, 156 Federal. It was a prosecution for taking money by false pretenses. The defendant was convicted and sentenced to a year in the jail in Shanghai and on appeal this was reversed, not because of any defect in the court but because the Appellate Court concluded that the facts alleged in the charge did not constitute false pretenses.

Now, these instances are enough to show that Federal questions, including criminal charges, need not be inevitably heard only by courts which are established with Article III guarantees.

State courts do not meet that test. There were United States criminal prosecutions in State courts in the very early days of the Republic.

Territorial courts do not meet that test.

Consular courts don't meet the test.

I might even add that regularly established United States courts do not meet that test when a judge sits under a recess appointment.

Yet, I am unaware of any decision which says that a judgment rendered in such a case is invalid because the Article

III guarantees have not been met.

Now, it can be said, well, there is a special constitutional provision about recessed appointments, but so is there a special constitutional provision with respect to the territories of the United States and with respect to the District of Columbia.

Q Does your position inquire of the overruling of O'Donoghue or not?

MR. GRISWOLD: No, not at all.

Q Because?

MR. GRISWOLD: Because we have today the United States District Court and the United States Court of Appeals for the District of Columbia Circuit, which not only are, undoubtedly, but as I will show a little later are by the express statement of Congress, Article III courts.

Q You say these are just different courts and judges than were involved in O'Donoghue?

MR. GRISWOLD: These judges,here, of the Superior Court are of a different court and of a different quality of judges than those involved in O'Donoghue.

In O'Donoghue, the District Courts of the United States for the District of Columbia, the judges perform essentially the same function that the District Court judges do throughout the country.

Q And you think that these particular courts and judges

involved here would have passed muster under O'Donoghue, if they had been before the court in O'Donoghue?

MR. GRISWOLD: I feel fairly sure of that, Mr, Justice, although it is a long time ago and it is a hard field to be sure of anything in. At the time O'Donoghue was decided, there was either the Municipal Court of the District of Columbia or the Court of General Sessions. I don't know when the transition was made to that which had extensive jurisdiction, including criminal jurisdiction --

Q Minor cases.

MR. GRISWOLD: I think limited to imprisonment for one year. But imprisonment for one year, as a number of this Court's decisions hold, is taken quite seriously, and there was no intimation that those courts were Article III courts, were anything but Article I courts.

Q My question doesn't go so far as Mr. Justice White's. Does your position require, do you think, at least some withdrawal from some of the language in O'Donoghue?

MR. GRISWOLD: No, Mr. Justice. I do not think so at all.

I don't think that O'Donoghue was dealing, A, with inferior courts in the United States, nor with courts which were given solely local jurisdiction.

Now, it is said by Mr. Flegal that this case is different from all the ones I have mentioned. It involves a

district, within the confines of the United States, now embracing an area which was once within the State of Maryland and subject to all the constitutional guarantees.

Of course, there was no guarantee in Maryland that the judges of the State courts, having jurisdiction over the general run of crimes, would have guarantees like those provided by Article III, and except for four States today, our State judges who handle all the ordinary criminal and civil business in the country, do not have such guarantees.

But the District is in the United States, not outside of it, and, therefore, it is said the Article III guarantees must apply.

I find it hard to see why there is any basis for a "therefore" there, because it is perfectly plain that the constitution is and always has been applicable to the incorporated territories, as so decided by this Court, and that many provisions of the Constitution are applicable to the unincorporated territories as was involved in Weem v. United States.

The insurer in the American Insurance case was an American corporation and it lost its cotton, and Reynolds was an American citizen, and he was convicted of bigamy by a court which did not have Article III guarantees, and that conviction was affirmed by this Court.

With respect to the --

Q Was bigamy a felony? I assume it was.

MR. GRISWOLD: Yes, Mr. Chief Justice.

With respect to the District of Columbia, it was for many years thought, and generally understood, and I say that without any hesitation, it was for many years and generally understood, I think right down to the day the O'Donoghue case was decided, that all of the courts here were established under Article I.

It was on that basis that they were given various administrative powers. It was felt, going back to the very earliest decisions of this Court, that Article III courts could not be assigned non-judicial functions, and it was on that basis that it was felt that all of the District of Columbia courts must be Article I courts because they appointed members of the school board and they reviewed decisions of the patent office which did not result in final judgments, and they did various things which it was then understood that Article III judges could not do.

Certainly this Court understood that they were all Article I courts when it decided the Bakelite case in 1929. Now, the Bakelite case is perhaps somewhat underplayed here. It is fairly far back in the stream of history on this thing, but the Bakelite case represented an understanding which, I think, was general over a period of 50 or 75 years.

It was only under the pressure of a salary reduction

question, which conceivably might have affected the result, that this Court saw a new light in 1933, and that light was not bright enough then to illuminate the Court of Claims.

Moreover, from the beginning, there have always been Article I courts and judges in the District, Justices of the Peace, Police Court, Municipal Court, and, more recently, the Court of General Sessions, courts with limited jurisdiction, to be sure, but surely exercising judicial power, including substantial jurisdiction in criminal cases.

And if the judicial power of the United States can only be given to Article III courts, those courts and all the acts under them were surely invalid.

It is said that the District is different from the territories because they were transitory, while the District is permanent.

It is not clear why this makes a difference under Article III. Article III doesn't say anything about transitory or permanent.

But as to the transitory nature of the territories, we have had Puerto Rico and Guam and American Samoa now for 75 years, and the Virgin Islands now for more than 55 years.

It is said that they are distant, but it takes only a couple of hours to get from here to -- get from Washington to Puerto Rico and the Virgin Islands, and there is instant communication with all of these places.

The people there are citizens of the United States, no less and no more than those of the District of Columbia.

Moreover, the Government of the District is not changeless. There is a great deal of current talk about home rule, and changes in Congress may mean that this is more likely than it once was.

There is also talk about Statehood. There would be a considerable problem in achieving changes such as these if it should be concluded that they should be brought about if more than 50 judges on the two courts below, in this case, had to be provided for life.

And it should not be overlooked that this statute was enacted by the Congress as a result of a clear crisis in the District Court of the United States for the District of Columbia, which was simply overwhelmed by the volume of its criminal business. Practically all of the judges were sitting on criminal cases all of the time and the ordinary work of the District Courts could not be carried forward, and the Congress provided this means greatly to expand the number of judges in the District of Columbia assigned to deal with local crimes and civil matters of the same sort that are dealt with by State courts in the States.

It would be a bit bizarre, if the District of Columbia became a State, to say that the 50 judges of these two courts below must be given life tenure if the State court judges

established by the State under Statehood, trying the same kinds of cases, would not have to have Article III guarantees.

The Congress expressly grants -- the Constitution expressly grants the Congress in Article I, Clause 17, power to exercise exclusive jurisdiction in all cases whatsoever. And, really, what could be more comprehensive? Exclusive jurisdiction, in all cases whatsoever, over the District that is accepted as the seat of Government of the United States.

This Court has said that this is a plenary power. There is no doubt that the District is different from other parts of the country, both legally and practically.

Until recently changed by Constitutional Amendment, residents of the District did not have that most elemental right in a democracy, the right to vote. They still have no representation in the Senate and no voting representation in the House, though these bodies pass the laws that govern the District and levy the taxes that are applicable here.

Congress has always had special powers here, and has always exercised them.

In this case, it moved expressly under Article I, the very first section of the District of Columbia Court Reorganization Act, Section 11-101, and this, unfortunately, us not printed in our brief. I think it should have been, and I want to bring it particularly to the Court's attention.

The very first section provides as follows --

Q May I have that number again?

MR. GRISWOLD: Section 11-101.

Q Thank you.

MR. GRISWOLD: Of the D.C. Code, that would be, of the Court Reorganization Act in the D.C. Code.

It provides that the courts of the District of Columbia are as follows:

"Established under Article III:

"1) The Supreme Court of the United States; 2) The United States Court of Appeals for the District of Columbia Circuit; 3) The District Court of the United States."

And, then continuing, quoting the statute:

"Established under Article I:

"1) The District of Columbia Court of Appeals; 2) The Superior Court of the District of Columbia."

Thus, Congress made it explicit that it knew it was acting under Article I, that it intended to act under Article I and that Article I was the basis for the authority which it was seeking to exercise in establishing the two courts below in this case.

(Whereupon, at 12:00 o'clock, noon, the oral argument recessed, to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, you may proceed.

MR. GRISWOLD: Before resuming the main thread of my argument, I would like to refer to a memorandum which Mr. Flegal has quite properly filed with the Court, calling attention to a new edition of the Hart and Weschler case book about Federal Courts and particularly to a paragraph of a note which appears on page 397 of that note.

I would like simply to suggest to the Court that they read the entire note and not just that paragraph on page 397.

Among other things, Mr. Battar, who is the author of this part, says, in paragraph 1, " Notice that the line of argument made above does not in itself assert that Congress has unlimited power to assign Federal judicial business to Federal legislative courts. It simply asserts that Article III does not rigidly preclude Congress from exercising some flexibility in allocating that judicial business and that Congress may make a particular allocation to a non-Article III tribunal if functional considerations serving a valid legislative purpose justify it, and it there is adequate provision for judicial review."

Well, here, there is provision for judicial review in all cases to this Court which is an Article III court.

And then, I would like to say that nothing in our position requires the Court to overrule or to disapprove anything decided in the O'Donoghue case. The courts there were held to be both Article III and Article I courts, but there was nothing there which held that Congress could not create courts, under Article I, to deal with local matters only.

Q This may be a reference to (inaudible), Mr. Solicitor General, but do you think the majority of the O'Donoghue court would have decided this case the way the District of Columbia Court of Appeals did?

MR. GRISWOLD: Mr. Justice, if I may put it this way, I think the majority of the court that decided the O'Donoghue case, if it were here in 1973, would decide this case the way that I suggest.

In 1933, when they were deciding it, they didn't have the history that had developed. The courts established the declaration of Congress that it was creating these courts under Article I.

If all of those provisions had been before the court in 1933, then my answer would be yes, that they would have accepted these.

Let me -- I mention some of the practical problems before Congress in legislating here, the difficulty of giving life tenure to 50 or 60 judges, which were needed, but there is also another practical problem, that of phasing in the

judges under the old system into the new.

The judges of the Court of General Sessions had not been appointed as Article III judges and a means of making the transition was to establish Article I courts.

And, then, we do not contend that Congress could create courts generally under Article I to sit all over the country, though I would refer to the United States Tax Court, which again, Congress has avowedly created under Article I, without life tenure, and it does sit all over the country, but it has no criminal jurisdiction.

Congress could not displace the Article III courts in the States by establishing Article I courts with general jurisdiction, or by a series of Article I courts under the Commerce power and the taxing power and other powers.

Our position is simply that Congress has broader powers over Governmental organization in the District than it has in the States.

Now, let me turn to the final subject involved in the case, the question of the seizure.

This is one of considerable importance to the Government, and I hope that I have not left it buried under a mass of technicalities in presenting the other questions involved.

The basic question is whether a policeman may make a selective stop of a motorist for the purpose of checking his

driver's license and registration certificates.

The District of Columbia law requires an operator to have these papers in his possession, or in the automobile, and that must mean something. It is not just ceremony that he is to have the papers in his possession. They are to be there so that they can be shown on proper occasions.

Unless they can be checked by police officers, there is no way to tell whether motor vehicles, which are surely dangerous instrumentalities, are being validly operated.

Here, the check was when the police officer could tell from the license plate that the car was a rental car. He knew that many rental cars were held overtime, which is unlawful, or were stolen.

In this case, the whole rental agreement did, indeed, indicate that the car was overdue, though this was straightened out when inquiry was made.

There is no allegation that the police officer acted improperly, that is, in a violent or a vicious manner.

Q Could the judgments of the Tax Court be reviewed here correctly?

MR. GRISWOLD: They could be since 1970 when it was established as a court.

Q Yes, but before that when it was an Article I court?

MR. GRISWOLD: It is an Article I court now and they can be reviewed here, just as territorial judgments can be

reviewed.

Q Because, even though it is not an exercise of Article III judicial power that they are exercising?

MR. GRISWOLD: The Court has always held that it is an exercise of judicial power in that there is appellate jurisdiction to review the decisions of the territorial courts established under Article I.

Q So, we have, then, we have jurisdiction here, then, over District of Columbia court judgments, whether those courts are exercising judicial power or not?

MR. GRISWOLD: No, only if it is exercising judicial power, but regardless of whether it is under Article III or Article I.

Q All right. Whether or not we are exercising an Article III judicial --

MR. GRISWOLD: That is correct.

Prior to 1971, Mr. Justice, the Tax Court -- in the first place, it was the Board of Tax Appeals, and then it was established as a Tax Court -- but because of a curious history, the statute expressly provided that it is an independent agency in the Executive Branch of the Government, and that lasted until 1970.

And, during that time, it was quite clear that this Court could not review a decision of the Tax Court. Indeed, there is a case back 30 years ago involving a certificate from

a Court of Appeals with respect to a question from the Tax Court, and, incidentally, I may say this Court was always very careful never to remand a decision to the Tax Court. It always remanded it to the Court of Appeals for remand to the Tax Court.

But, here, there was nothing discriminatory in this stop. Many citizens would welcome it as evidence that the police were doing their duty.

Incidentally, the Statute of the District of Columbia does not say that a policeman may stop a car, but it does say that expressly, that any individual to whom has been issued a permit to operate a motor vehicle shall have such permit in his immediate possession at all times when operating a motor vehicle in the District and shall exhibit such permit to any police officer when demand is made therefor.

This case, we think, is like the Biswell case where people were licensed to deal in firearms, and this Court held that they were subject to inspection, indeed, said that if it is to be effective and serve as a credible deterrant, unannounced even frequent, inspections are essential.

If a motorist chooses to drive pursuant to a license for which he has applied, he does so with the knowledge that he may be required at any time to establish that he is doing so in conformity with the law.

Under the circumstances, such checks pose; at most,

only limited threats to the motorist's privacy, and no threat which is not justified by his acceptance of the license and the operation under it.

I note that persons who wish to enter this courtroom have to submit themselves to an inspection which includes the opening of parcels and the opening of ladies' handbags.

I would not suppose there was any question about that, and I see no basis for question in the light of the District of Columbia Statute with respect to the request for licenses in this case.

If the stop was proper, the protective action of Officer Morrissette in looking to see if there were any weapons available, was clearly proper under the general rationale of Terry v. Ohio, and the search should be sustained.

If the Court reaches the merits of the case, the judgment of the District of Columbia Court of Appeals should be affirmed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Flegal, we will allow you six minutes, enlarging your time a little bit.

MR. FLEGAL: I appreciate that, Your Honor.

REBUTTAL ARGUMENT OF FRANK F. FLEGAL, ESQ.,

ON BEHALF OF THE APPELLANT

MR. FLEGAL: It seems to me that the one central point that is now involved in the case, as the positions of the parties have crystalized, is whether or not the citizens of the District of Columbia stand on a different footing, insofar as Article III safeguards and protections are concerned, from citizens in the several States.

We think the answer to that dispositive question is no.

We rely, first, upon the fact that the Constitution required the District of Columbia to be carved out of the several States.

Q The District does stand on a different basis with respect to the powers of Congress.

MR. FLEGAL: Oh, clearly, Your Honor.

The legislature which enacts the laws for the citizens of the District of Columbia and, of course, those who come into the District of Columbia, is Congress, or whatever local legislature --

Q And it is a question of how far that difference extends in this case, I suppose?

MR. FLEGAL: That is a legislative difference. We suggest it has no extension to Article III safeguards and protections.

As I was indicating, the District of Columbia had to be carved out of the several States.

That was a factor which this Court found dispositive in the O'Donoghue opinion upon which we place heavy reliance, and I would respectfully disagree with the Solicitor General, but I think if Appellant does not prevail in this case, at least some of the language, some of the Article III theory, of the rights and the benefits set forth in the O'Donoghue opinion, would have to be rejected or retreated from.

Q Did you read the seventeenth clause of Section 8, Article I, the legislative power of Congress over the District is narrower, is less broad, than the legislative power of a State in creating its own organs of Government?

MR. FLEGAL: Precisely, Your Honor.

And the difference is the difference between the Fourteenth Amendment which is the States' Federal constitutional restriction on a State legislature and the Bill of Rights and the original Constitution on Congress.

Q You say it is also narrower than the power over a territory?

MR. FLEGAL: Yes, indeed so, sir. Indeed so.

And I say that because this Court has so held.

Many rights which citizens of a State and which do not fetter a State's legislature's judgment, the Seventh Amendment right to a trial by jury in a civil case, the Sixth

Amendment, an Article III right to a jury trial in a criminal case, and the Fifth Amendment Grand Jury right, are applicable to local offenses in the District of Columbia.

To that extent, we submit --

Q And in the territories.

MR. FLEGAL: And in the territories, Your Honor, depending upon whether or not the territory has been incorporate or not and whether it is deemed fundamental, or not.

Those are --

Q With respect to territories, you needn't have an Article III court, is that it?

MR. FLEGAL: It has been assumed, Your Honor.

I know of no case in this Court which has ever squarely so held.

Q It still wouldn't make any difference to you?

MR. FLEGAL: It would make no difference to me, Your Honor. We would submit that the citizen before the Federal court in the District of Columbia charged with a felony is entitled to precisely the same constitutional rights and safeguards as a citizen charged for a Federal felony before a Federal tribunal in one of the several States.

And we think the Framers did accomplish something by the "good behavior" clause of the Constitution, something benefited to the litigants.

Q You are giving the residents of the District of

Columbia something more than residents of Maryland and Virginia.

MR. FLEGAL: I am giving the residents of the District of Columbia precisely the same as I would give the resident of Maryland, that is --

Q Let me put it to you this way, there are felonies in the State of Maryland or in the State of Virginia, as to which the residents of those States or any person apprehended there and charged, would not get an Article III court, isn't that true?

MR. FLEGAL: Correct. Indeed so, Your Honor.

Q So, in that sense, you are suggesting that the residents of the District of Columbia get something that residents of no other State have.

MR. FLEGAL: When tried before their State tribunals. They get precisely the same when tried before the Federal tribunals.

Q Except to the extent there is comparable tenure in Massachusetts and several other States.

MR. FLEGAL: Several other States. But that is a question -- a fact on which we place no reliance for our proposition.

What we are saying is the citizen in the District of Columbia gets rights which the State court would not have to afford him sitting in Maryland, the Grand Jury indictment, the

jury, and we submit the "good behavior" judge.

Q Or even if the State Court was trying for a Federal crime.

MR. FLEGAL: That's the arguendo assumption, Your Honor, of the Government's. We think that goes too far and that there are serious problems if Congress ever passed the hypothetical legislation that the Government State court argument rests upon.

This Court has confronted some of those problems in the Seventh Amendment context, with State courts trying Federal civil actions, and has, in some cases, the Federal Employer Liabilities Act, and so forth. He implied as part of the remedy some part of the Seventh Amendment jury protection, but that is not our argument.

We assume, arguendo with the Government, that if State Courts could constitutionally try Federal crimes, Fourteenth Amendment protections would apply.

Our proposition is purely a limitation on exercise of the Federal judicial power.

If the Court has no further questions, we submit that the judgment of the District of Columbia Court of Appeals should be reversed, either with directions to remand this case for a new trial before a constitutional court, or, in the alternative, to reverse and remand for either a new trial or a judgment of acquittal excluding the evidence which we challeng

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Flegal.

Thank you, Mr. Solicitor General.

The case is submitted.

(Whereupon, at 1:15 o'clock, p.m., the oral arguments in the above-entitled case were concluded.)