AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 6: The Civil War/Reconstruction Era – Judicial Power and Constitutional Authority

Tennessee v. Davis, 100 U.S. 257 (1880)

James M. Davis was a federal tax collector who was indicted in Tennessee for the murder of J. B. Haynes, a suspected operator of "illicit distilleries." Davis requested that his trial be removed from the state court into a federal court on the grounds that, at the time of the killing, he was performing the duties of his federal office (by attempting to seize the whiskey still) and that he killed Haynes in self-defense after he was fired upon by a number of armed men. In support of this request, he noted that Congress had passed a law that allowed cases to be "removed" into the federal court "when any . . . criminal prosecution is commenced in any court of a State against any officer . . . acting by authority of, any revenue law of the United States . . . [or] on account of any act done under color of his office or of any such law.[1]" The issue was whether it was constitutional for Congress to authorize federal courts to halt a state criminal prosecution and order that the trial be held instead in a federal court, even when Congress has not made the underlying offense a crime under federal law.

There was no question that Davis had been charged with a crime under state law committed within the territorial jurisdiction of the state. The normal appeals process would allow possible errors in law, or uncertainties about the law, in the trial court to be heard by a higher court. Some kinds of legal questions could be appealed from the state supreme court to the U.S. Supreme Court. The removal power would allow the entire trial to be transferred from a state court to a federal court, to be heard before a federal judge and jury rather than a state judge and jury and appealed (if necessary) through the federal courts rather than the state courts. During the Civil War and Reconstruction, Congress had dramatically expanded the removal power in order to ensure that war-related and civil rights-related policies could always be heard in a friendly federal court, and the U.S. Supreme Court had upheld removal in cases involving federal law that happened to have been initiated in a state court. This case of the moonshine revenue collector tested whether the removal power could also be used to pull in cases of purely state law. As you read the case, consider not only the usefulness of the removal power for the implementation of federal policy goals in a federal system, but also what the limits of the removal power might be. Is this time period a special case for an expansive reading of the removal power?

JUSTICE STRONG delivered the opinion of the court.

The first of the questions certified is one of great importance, bringing as it does into consideration the relation of the general government to the government of the States, and bringing also into view not merely the construction of an act of Congress, but its constitutionality. . . .

. . . [If] the statute is to be allowed any meaning, when it speaks of criminal prosecutions in State courts, it must intend those that are instituted for alleged violations of State laws, in which defenses are set up or claimed under United States laws or authority.

. . . A more important question can hardly be imagined. Upon its answer may depend the possibility of the general government's preserving its own existence. As was said in *Martin v. Hunter* (1816), "the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet

[1] Revised Statutes of the United States, Sec. 643.

warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, -- if their protection must be left to the action of the State court, -- the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.

We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. . . . No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.

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The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since. The Judiciary Act of Sept. 24, 1789, was passed by the first Congress, many members of which had assisted in framing the Constitution; and though some doubts were soon after suggested whether cases could be removed from State courts before trial, those doubts soon disappeared. . . . The judicial power is declared to extend to all cases of the character described, making no distinction between civil and criminal, and the reasons for conferring upon the courts of the national government superior jurisdiction over cases involving authority and rights under the laws of the United States are equally applicable to both. . . . [S]uch a jurisdiction is necessary for the preservation of the acknowledged powers of the government. It is essential, also, to a uniform and consistent administration of national laws. It is required for the preservation of that supremacy which the Constitution gives to the general government by declaring that the Constitution and laws of the United States made in pursuance thereof, and the treaties made or which shall be made under the authority of the United States, shall be the "supreme laws of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." The founders of the Constitution could never have intended to leave to the possibly varying decisions of the State courts what the laws of the government it established are, what rights they confer, and what protection shall be extended to those who execute them. If they did, where is the supremacy over those questions vested in the government by the Constitution? If, whenever and wherever a case arises under the Constitution and laws or treaties of the United States, the national government cannot take control of it, whether it be civil or criminal, in any stage of its progress, its judicial power is, at least, temporarily silenced, instead of being at all times supreme. . . .

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It follows that the first question certified to us from the Circuit Court of Tennessee must be answered in the affirmative.

The second question is, "Whether, if the case be removable from the State court, there is any mode and manner of procedure in the trial prescribed by the act of Congress."

Whether there is or not is totally immaterial to the inquiry whether the case is removable; and this question can hardly have arisen on the motion to remand the case. The imaginary difficulties and incongruities supposed to be in the way of trying in the Circuit Court an indictment for an alleged offence against the peace and dignity of a State, if they were real, would be for the consideration of Congress. But they are unreal. . . . [T]he mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. . . .

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JUSTICE CLIFFORD, with whom concurred JUSTICE FIELD, dissenting.

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Questions of greater importance than those certified here by the Circuit Court could hardly be presented for discussion, as they involve the necessity of an inquiry into the nature, extent, and limitation of the judicial power both of the United States and of the circuit courts established by Congress. Judicial power, like other powers granted to the United States by the Constitution, is defined by the instrument making the grant. Governed by that rule, we find that the second section of the third article ordains that the judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority, which provision describes the whole extent of the judicial power of the United States conferred by the Constitution that it is necessary to examine in the present case. . . .

.. . Criminal jurisdiction is not by the Constitution conferred upon any court, and it is settled law that Congress must in all cases make an act criminal and define the offence before either the district or circuit courts can take cognizance of an indictment charging the act as an offence against the authority of the United States. Obvious and undoubted as the proposition is, it admits of but little illustration, and needs nothing more.

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Courts of the United States derive no jurisdiction in criminal cases from the common law, nor can such tribunals take cognizance of any act of an individual as a public offence, or declare it punishable as such, until it has been defined as an offence by an act of Congress passed in pursuance of the Constitution. Argument to show that Congress has never defined the act of murder, at a place within the exclusive jurisdiction of a State, as an offence against the authority of the United States, is certainly unnecessary, as no sane man will venture to advance such a proposition; nor will any one who ever looked into the record of this case deny that the place where the homicide which is the subject of inquiry was committed is in the exclusive jurisdiction of the State whose laws were violated by the perpetrator of the felonious act. None of these matters can be denied consistent with the truth of the facts as judicially known to every member of the court.

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. . . [I]t seems reasonable to conclude that Congress might define the malicious killing of a revenue collector with malice aforethought, while in the performance of his official duties, as murder, and might make provision for the trial and punishment of the offender, even though the homicide was committed at a place within the exclusive jurisdiction of the State. Congress may provide for the appointment of officers to collect the public revenue, and, if so, they may pass constitutional laws for their protection; but Congress has not defined the act charged in the State indictment as an offence against the authority of the United States, nor does any act of Congress prescribe the punishment to be inflicted for its commission, or declare what court shall have jurisdiction of the offence.

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Difficulties almost without number would arise if any attempt should be made to try such an [state] indictment in a [federal] circuit court.

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Service of process is often required in a criminal case, and the question would arise whether it should be made by the sheriff or marshal. Subpoenas must be issued, and the inquiry would arise whether they should be issued in the name of the State or of the President. Expenses must be incurred for the service of process and for the travel and attendance of witnesses, and it would at once become a question whether the amount would be chargeable to the United States or to the State, and if to the latter, may the State be compelled to respond to the claim.

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Examined in the most favorable light, the provision is a mere jumble of Federal law, common law, and State law, consisting of incongruous and irreconcilable regulations, which in legal effect amounts to no more than a direction to a judge sitting in such a criminal trial to conduct the same as well as he can. . . .

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