AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 4: The Early National Era – Judicial Power and Constitutional Authority

United States v. Worrall, 28 F. Cas. 774; 2 Dall. 384 (C.C.D. Pa., 1798)

This case was decided in the Circuit Court of Pennsylvania by Justice Chase and District Judge Peters. Worrall was accused of attempting to bribe a federal official in Philadelphia, which was then the temporary home of the federal government. However, Congress had not yet passed a federal law making it a crime to bribe a federal official. To get around this inconvenience there was an attempt to bring the indictment under the system of English judge-made law known as the "common law," which (over many centuries) established precedents for treating bribery as a criminal offense even in the absence of a statute passed by a legislature. At issue in this case, then, was whether precedents in English common law should be considered a kind of "law" within the federal system, and (thus) whether "the judicial power of the United States" should be interpreted to include enforcement of these judge-made precedents. We know that Article VI of the Constitution declares, "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be Supreme Law of the land"; does this preclude recognition of a federal common law? As you read the views of the two judges, consider the relevance of federalism and the doctrine of enumerated powers in resolving the question. Does it make sense for states to treat common law as legitimate legal authority but not the federal government? What impact would a federal criminal common law have on the power of the federal judiciary? What would be the significance of adopting Judge Peters's view that "Whenever an offence aims at the subversion of any federal institution, or at the corruption of its public officers, it is an offence against the well-being of the United States"? On that point, note that three months after this decision, on July 14, 1798, Congress passed the Sedition Acts, making it a crime to publish "false, scandalous, and malicious writing" against the government or its officials.

JUSTICE CHASE. This is an indictment for an offence highly injurious to morals, and deserving the severest punishment; but, as it is an indictment at common law, I dismiss, at once, everything that has been said about the constitution and laws of the United States.

In this country, every man sustains a two-fold political capacity; one in relation to the state, and another in relation to the United States. In relation to the state, he is subject to various municipal regulations, founded upon the state constitution and policy, which do not affect him in his relation to the United States: For, the constitution of the Union is the source of all the jurisdiction of the national government; so that the departments of the government can never assume any power, that is not expressly granted by that instrument, nor exercise a power in any other manner than is there prescribed. Besides the particular cases, which the 8th section of the 1st article designates, there is a power granted to congress to create, define, and punish crimes and offences, whenever they shall deem it necessary and proper by law to do so, for effectuating the objects of the government; and although bribery is not among the crimes and offences specifically mentioned, it is certainly included in this general provision. The question, however, does not arise about the power; but about the exercise of the power: -- Whether the courts of the United States can punish a man for any act, before it is declared by a law of the United States to be criminal? Now, it appears to my mind, to be as essential, that congress should define the offences to be tried, and apportion the punishments to be inflicted, as that they should erect courts to try the criminal, or to pronounce a sentence on conviction.

It is attempted, however, to supply the silence of the constitution and statutes of the Union by resorting to the common law for a definition and punishment of the offence which has been committed:

but, in my opinion, the United States, as a federal government, have no common law; and, consequently, no indictment can be maintained in their courts, for offences merely at the common law. If, indeed, the United States can be supposed, for a moment, to have a common law, it must, I presume, be that of England; and, yet, it is impossible to trace when, or how, the system was adopted, or introduced. With respect to the individual states, the difficulty does not occur. When the American colonies were first settled by our ancestors, it was held, as well by the settlers, as by the judges and lawyers of England, that they brought hither, as a birth-right and inheritance, so much of the common law as was applicable to their local situation and change of circumstances. But each colony judged for itself what parts of the common law were applicable to its new condition; and in various modes by legislative acts, by judicial decisions, or by constant usage, adopted some parts, and rejected others. Hence, he who shall travel through the different states, will soon discover, that the whole of the common law of England has been nowhere introduced; that some states have rejected what others have adopted; and that there is, in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one state, is not the common law of another; but the common law of England, is the law of each state, so far as each state has adopted it; and it results from that position, connected with the judicial act, that the common law will always apply to suits between citizen and citizen, whether they are instituted in a federal or state court.

But the question recurs, when and how have the courts of the United States acquired a common law jurisdiction in criminal cases? The United States must possess the common law themselves, before they can communicate it to their judicial agents: Now, the United States did not bring it with them from England; the constitution does not create it; and no act of congress has assumed it. Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in England; or modified, as it exists in some of the states; and of the various modifications, which are we to select, the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?

Upon the whole it may be a defect in our political institutions, it may be an inconvenience in the administration of justice, that the common law authority, relating to crimes and punishments, has not been conferred upon the government of the United States, which is a government in other respects also of a limited jurisdiction; but judges cannot remedy political imperfections, nor supply any legislative omission. I will not say whether the offence is at this time cognizable in a state court. But, certainly, congress might have provided by law for the present case, as they have provided for other cases, of a similar nature; and yet if congress had ever declared and defined the offence, without prescribing a punishment, I should still have thought it improper to exercise a discretion upon that part of the subject.

JUDGE PETERS. Whenever a government has been established, I have always supposed, that a power to preserve itself, was a necessary and an inseparable concomitant. But the existence of the federal government would be precarious, and it could no longer be called an independent government, if, for the punishment of offences of this nature, tending to obstruct and pervert the administration of its affairs, an appeal must be made to the state tribunals, or the offenders must escape with absolute impunity.

The power to punish misdemeanours is originally and strictly a common law power; of which I think the United States are constitutionally possessed. It might have been exercised by congress in the form of a legislative act; but it may also, in my opinion, be enforced in a course of judicial proceeding. Whenever an offence aims at the subversion of any federal institution, or at the corruption of its public officers, it is an offence against the well-being of the United States; from its very nature, it is cognizable under their authority; and, consequently, it is within the jurisdiction of this court, by virtue of the 11th section of the judicial act.

THE COURT being divided in opinion, it became a doubt, whether sentence could be pronounced upon the defendant; and a wish was expressed by the judges and the attorney of the district, that the case might be put into such a form, as would admit of obtaining the ultimate decision of the supreme court, upon the important principle of the discussion: But the counsel for the prisoner did not think themselves authorized to enter into a compromise of that nature. The court, after a short consultation, and declaring that the sentence was mitigated in consideration of the defendant's circumstances, proceeded to adjudge,

That the defendant be imprisoned for three months; that he pay a fine of two hundred dollars; and that he stand committed until this sentence be complied with, and the costs of prosecution paid.