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NOTES

CONSTITUTIONAL LAW — TRIAL OF A UNITED STATES SOLDIER BY A FOREIGN POWER

Respondent, while guarding equipment of the United States Army in Japan, shot and killed a Japanese civilian who was collecting expended cartridge cases. Under the Administrative Agreement[1] between the United States and Japan regarding criminal jurisdiction over American forces stationed in Japan, the Japanese Government sought and obtained a waiver of jurisdiction from the United States Government. However, the United States District Court for the District of Columbia granted an order restraining the surrender of respondent to the Japanese authorities.[2] On appeal to the Supreme Court of the United States, *held*, reversed. The Constitution contains no barrier to the surrender of a soldier to foreign jurisdiction for trial pursuant to a treaty. *Girard v. Wilson*, 1 L.Ed.2d 1544 (U.S. 1957).

1. Although the making of this arrangement for criminal jurisdiction took the form of an executive agreement, as opposed to a treaty, the Supreme Court viewed the agreement, popularly known as "Status of Forces Agreement," as a treaty. This is because the Senate had ratified the Security Treaty with Japan, April 28, 1952, [1952] 3 U.S. TREATIES & OTHER INT'L AGREEMENTS 3329, T.I.A.S. No. 2491, which treaty had called for an agreement which had in fact already been signed when the Senate ratified the Security Treaty. This latter agreement, Administrative Agreement Under Article III of the Security Treaty with Japan, February 28, 1952, [1952] 3 U.S. TREATIES & OTHER INT'L AGREEMENTS 3341, T.I.A.S. No. 2492, had provided for its own amendment by the adoption of such terms as would be agreed upon by the NATO countries. Later the Senate ratified the NATO Agreements, June 19, 1951, [1953] 4 U.S. TREATIES & OTHER INT'L AGREEMENTS 1792, T.I.A.S. No. 2846, which were the basis of the present agreement with Japan, Administrative Agreement Under Article III of the Security Treaty with Japan, Amendment of Article XVII, September 29, 1953, [1953] 4 U.S. TREATIES & OTHER INT'L AGREEMENTS 1846, T.I.A.S. No. 2848. Paragraph 3 of Article XVII of the Status of Forces Agreement with Japan dealt with criminal offenses in violation of the laws of both nations and provided:

"(a) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces or the civilian component in relation to

"(i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent;

"(ii) offenses arising out of any act or omission done in the performance of official duty.

"(b) In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.

"(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance."

2. New York Times, June 19, 1957, p. 6, col. 1.

The decision of the Supreme Court admits of two interpretations: (1) that the respondent had no constitutional right to trial by the United States authorities, or (2) that even if the respondent had a constitutional right to trial by the United States authorities, this right could be surrendered pursuant to a treaty.[3]

Under the Constitution there is no specific guarantee that a person accused of crime will be tried by the United States authorities. In general, criminal trials are conducted by the states in the exercise of their police power. The states may be deprived of this jurisdiction, however, where the accused is a federal agent acting in the fulfillment of his duties.[4] As to the armed forces there is a constitutional provision which grants to the United States the power to make rules for the regulation and government of them.[5] This grant allows the federal government to remove accused servicemen from the jurisdiction of state courts and to subject them instead to a trial by the federal authorities.[6] However, this removal from the jurisdiction of the states is not an individual constitutional right of a serviceman. It is the exercise by the United States of a constitutional grant to the United States.[7] That this is no personal right is shown by the

3. The opinion detailed the facts of the case, and then declared that a nation has exclusive jurisdiction to punish offenses committed within its territory unless it has given its consent that another sovereign should have jurisdiction. Then the Court said: "The issue for our decision is therefore narrowed to the question whether, upon the record before us, the Constitution or legislation subsequent to the Security Treaty prohibited the carrying out of this provision authorized by the Treaty for waiver of the qualified jurisdiction granted by Japan. We find no constitutional or statutory barrier to the provision as applied here. In the absence of such encroachments, the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches." Girard v. Wilson, 1 L.Ed.2d 1544 (U.S. 1957).

4. Ohio v. Thomas, 173 U.S. 276 (1899); *In re* Neagle, 135 U.S. 1 (1890); *Ex parte* Royall, 117 U.S. 241, 251 (1886) (dictum); *Ex parte* Siebold, 100 U.S. 371, 395 (1879) (dictum); *In re* Wulzen, 235 Fed. 362 (S.D. Ohio 1916); United States v. Lipsett, 156 Fed. 65 (W.D. Mich. 1907); *In re* Fair, 100 Fed. 149 (Neb. 1900); Annot., 65 A.L.R. 733 (1930).

5. U.S. CONST. art. I, § 8, cl. 1, 14.

6. Coleman v. Tennessee, 97 U.S. 509, 514 (1878) (dictum); Pappens v. United States, 252 Fed. 55, 57 (9th Cir. 1918) (dictum); *Ex parte* King, 246 Fed. 868 (E.D. Ky. 1917); MAYERS, THE AMERICAN LEGAL SYSTEM 505 (1955). *Contra*, Brown v. Cain, 56 F. Supp. 56, 58 (E.D. Pa. 1944) (dictum); United States v. Lipsett, 156 Fed. 65, 70 (W.D. Mich. 1907) (dictum); *In re* Waite, 81 Fed. 359, 363 (N.D. Iowa 1897) (dictum).

7. This point has been dealt with in relation to a federal agent, not a serviceman, who was arrested for an act committed in the pursuit of federal business. *In re* Neagle, 135 U.S. 1, 61 (1890), said: "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of 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 offense against the law of the State, yet warranted by the federal

fact that by statute the United States authorizes waiver of its right to try a serviceman, and allows the states to exercise criminal jurisdiction.[8] The decision to try by court martial or in a state court is an executive decision to be made by the appropriate Secretary.[9] The determining factor in his decision need be only national policy.[10] From this it follows that a soldier's trial by the federal government is no individual right, but rather a manifestation of federal sovereignty in a delegated field.[11]

The Supreme Court may have based its opinion on the belief that the treaty power was lawfully used in giving the Japanese jurisdiction over American soldiers stationed there. The treaty power is one constitutionally-authorized method of dealing with other nations.[12] In view of the flexibility and dispatch which is

authority they possess, and if the general government is powerless to interfere at once for their protection . . . the operations of the general government may at any time be arrested at the will of one of its members . . . . 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 the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. 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." Campbell v. Waite, 88 Fed. 102, 108 (8th Cir. 1898).

8. The Uniform Code of Military Justice, art. 14, 64 STAT. 112 (1950), as amended, 10 U.S.C. § 814 (Supp. IV, 1957) says that the accused "may" be delivered to the civil authorities in accordance with rules promulgated by the appropriate Secretary. A reason for the permissive nature of the surrender to the civilian authorities is found in WIENER, THE UNIFORM CODE OF MILITARY JUSTICE 62 (1950). The author says: "The present [1950, before U.C.M.J. went into effect] Army practice [compulsory surrender of a soldier to civil authorities under Article of War 74] was adopted at a time when the Army did not have authority to try its personnel for civil offenses in time of peace, so that if a man were not delivered up he would not be tried at all. Since the armed forces now have such authority, the mandatory feature of AW 74 is felt to be unnecessary."

9. The Uniform Code of Military Justice, Art. 14, 64 STAT. 112 (1950), as amended, 10 U.S.C. § 814(a) (Supp. IV, 1957). "Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial."

10. This follows from the fact that the statute sets up no criteria. The decision rests in the discretion of the Secretary or the subordinates to whom he delegates this authority.

11. International law seems clear in affirming the right of Japan to try the respondent. International law recognizes the supremacy of the laws of the nation in which the crime is perpetrated. Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 135 (1812) (dictum). The only way in which a sending country can refuse a receiving country any jurisdiction at all over the soldiers of the sending country is by virtue of express or implied consent of the receiving country. *Ibid.* When an agreement expressly allows the receiving country to exercise jurisdiction, there is no basis in international law for alleging an exclusive right to trial by the sending country, because international law recognizes the right of every sovereign to barter the rights of its citizens. MCNAIR, THE LAW OF TREATIES 335 (1938). In United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801), the court allowed a treaty to cancel rights of a citizen in property.

12. U.S. CONST. art. II, § 2, cl. 2.

often needed in international relations, it has been held that the executive department in handling foreign relations is not bound by constitutional restrictions to the same degree as it is when engaged in domestic activities.[13] However, this is not to say that a treaty cannot be unconstitutional. The court has repeatedly declared that the treaty power is limited,[14] but no treaty has ever been declared unconstitutional.[15] The precise limitations can only be guessed at by relying on such vague phrases as "not in violation of the Constitution,"[16] and "proper subjects for negotiation between governments."[17] Presumably, a treaty the effect of which is to abridge freedom of speech would be unconstitutional.[18] The rationale would probably be that the indefinite treaty power could not be said to impinge on a specifically guaranteed individual right. In less clear-cut cases it will be necessary to balance the authority granted by the treaty power against the rights of the individual. The outcome would turn on considerations such as the end for which the treaty power was used, the necessity for the treaty, and the individual right concerned. As for the instant case, there can be no doubt that the stationing of troops abroad in the interest of national defense is a legitimate function of the federal government.[19] It is gen-

13. United States v. Curtis-Wright Export Corp., 299 U.S. 304 (1936); United States v. Rosenberg, 150 F.2d 788 (2d Cir. 1945); United States v. Von Clemm, 136 F.2d 968, 970 (2d Cir. 1943) (dictum).

14. Reid v. Covert, 1 L.Ed.2d 1148, 1163 (1957) ("It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights . . . to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions"); Missouri v. Holland, 252 U.S. 416, 433 (1919) ("We do not mean to imply that there are no qualifications to the treaty-making power"); Downes v. Bidwell, 182 U.S. 244, 370 (1900) ("A treaty which undertook to take away what the Constitution secured or to enlarge the Federal jurisdiction would be simply void") (dissenting opinion); Geofroy v. Riggs, 133 U.S. 258, 267 (1890) ("It would not be contended that it [a treaty] extends so far as to authorize what the Constitution forbids"); Holden v. Joy, 84 U.S. 211, 243 (1872) (a treaty must be "not inconsistent with the nature of our government and the relation between the States and the United States"). See also notes 16 and 17 *infra*.

15. SVARLEIN, AN INTRODUCTION TO THE LAW OF NATIONS 266 (1955). No executive agreement has ever been declared unconstitutional either. Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 377 (1955).

16. The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620 (1870).

17. Asakura v. Seattle, 265 U.S. 332, 341 (1923); *In re* Ross, 140 U.S. 453, 463 (1890); Geofroy v. Riggs, 133 U.S. 258, 266 (1890); Holden v. Joy, 84 U.S. 211, 243 (1872).

18. In Geofroy v. Riggs, 133 U.S. 258, 267 (1890), the court said: "It would not be contended that it [a treaty] extends so far as to authorize what the Constitution forbids." In the First Amendment to the United States Constitution abridging the freedom of speech is specifically forbidden.

19. Selective Draft Law Cases, 245 U.S. 366 (1917); Story v. Perkins, 243

erally conceded that sending American forces abroad is a necessary part of the national defense effort. This is based on a belief that a strong and strategically placed military establishment is the best deterrent to foreign aggression. With these compelling considerations apparent, it would be unfortunate to insist on alleged rights which might impair the national defense. If the United States were to insist on complete jurisdiction over its soldiers abroad, the countries now receiving these troops might demand their withdrawal. Self-respect and a desire to redress wrongs done to the citizens of the receiving country make this position understandable. In view of this military situation, as well as the tendency of the court to allow greater executive discretion in foreign relations, it would seem proper to allow the treaty power to take precedence over what is at best an indefinite constitutional right. This analysis, however, must be qualified. If the receiving country has notions of justice which are radically different from the American view, the court might find that the treaty was unconstitutional as denying due process of law.[20]

Closely analogous to the present situation is the idea of extradition. When an American citizen commits a crime in a foreign country, and then flees from that jurisdiction and returns to the United States, this country may return the accused to the place of the alleged crime.[21] Based on international comity,[22] extradition treaties do not violate constitutional rights to trial by jury or other fundamental rights. The court has stated that constitutional guarantees have no relation to crimes committed

Fed. 997 (S.D. Ga. 1917), affirmed, 245 U.S. 390 (1917); United States v. Stephens, 245 Fed. 956 (D. Del. 1917), affirmed, 247 U.S. 504 (1917).

20. In Saudi Arabia the king has absolute power of life or death over the people. If an American soldier were "tried" in that country, it would be doubtful that a treaty authorizing the application of those standards of justice would find favor with an American court. It is interesting to note that the executive agreement between Saudi Arabia and the United States in Section 13 gives jurisdiction to Saudi Arabia over American military personnel who commit offenses outside certain designated limits. Agreement Concerning Air Base at Dhuhran, June 18, 1951, [1951] 2 U.S. TREATIES & OTHER INT'L AGREEMENTS 1474, T.I.A.S. No. 2290. That such an agreement could be considered invalid as a violation of due process is also advanced in Note, 70 HARV. L. REV. 1043, 1054 (1957). In view of the fact that Article 12 of the French *Code Penal* requires the use of the guillotine, it is interesting to speculate as to whether that instrument would meet due process requirements.

21. Neely v. Henkel, 180 U.S. 109 (1900); Argento v. Horn, 241 F.2d 258 (6th Cir. 1957), cert. denied, No. 183, U.S. Sup. Ct. Bull. Current Term, p. 8024 (October 14, 1957).

22. United States v. Rauscher, 119 U.S. 407, 414 (1886) (dictum). That extradition was a lawful exercise of the treaty-making power was declared in Terlinden v. Ames, 184 U.S. 270, 289 (1901), and in Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 569 (1840).

outside the jurisdiction of the United States against the laws of a foreign country.[23] American citizenship does not give an American immunity from prosecution for the commission of crimes in other countries, or entitle him to a trial in any other mode than that allowed to its own people by the country from the laws of which he has fled.[24] The only difference between a case of extradition and the instant case is that the respondent here is in military service. However, the fact that the respondent did not voluntarily leave the protection of continental United States law does not create in him a constitutional right which he had never had before, nor does it reduce the extent of the treaty-making power of the United States. The involuntary nature of a soldier's station is simply one more factor affecting the public opinion which the United States Government must consider in bargaining with another sovereign. It appears that the United States' adherence to comity in international relations is sufficient to justify a treaty by which American citizens are surrendered to foreign powers in derogation of what respondent would call his constitutional right to trial by the United States authorities. The extradition example of the needs of the sovereign as weighed against the rights of the individual would seem adequate precedent for a like result in the instant case. Therefore, it is submitted that the decision of the United States Supreme Court is legally sound.

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CONSTITUTIONAL LAW—VALIDITY OF LOUISIANA FAIR-TRADE LAW

Plaintiff sought to enjoin defendant from selling products bearing the plaintiff's brand at a price below the minimum which had been set in accordance with the Louisiana Fair-Trade Act.[1] Defendant challenged the constitutionality of the act, and particularly the "non-signer" clause which prohibited non-contracting retailers from wilfully selling plaintiff's products under

23. Neely v. Henkel, 180 U.S. 109 (1900); Argento v. Horn, 241 F.2d 258 (6th Cir. 1957), cert. denied, No. 183, U.S. Sup. Ct. Bull. Current Term, p. 8024 (October 14, 1957).

24. See note 23 *supra*.

1. La. Acts 1936, No. 13, p. 62, incorporated as LA. R.S. 51:394 (1950). The act consists of a contract clause providing that a contract shall not be invalid by reason of a stipulated minimum price, and the contested non-signer clause which states: "Wilfully and knowingly advertising, offering for sale or selling at less than the minimum price stipulated in any contract entered into pursuant to the provision of R.S. 51:392, whether the person so advertising, offering for sale, or selling is or is not a party to the contract, is unfair competition and is actionable by any person damaged."