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Constitutional Law - Court-Martial Jurisdiction Over Civilian Military Defendents in Foreign Countries

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Due to its broadness, it fails to provide certainty in the determination of whether particular incidents are "accidental." However, it is submitted that a general test is the only practical one that could be adopted in view of the variety and complexity of factual situations which arise in this branch of the law.

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CONSTITUTIONAL LAW — COURT-MARTIAL JURISDICTION OVER CIVILIAN MILITARY DEPENDENTS IN FOREIGN COUNTRIES

Defendant, a civilian, was tried and convicted for the murder of her Air Force husband by a general court-martial.[1] The military court predicated its jurisdiction upon Article 2(11) of the Uniform Code of Military Justice,[2] and an executive agreement between England and the United States.[3] The conviction was affirmed by the Air Force Board of Review, but reversed by the Court of Military Appeals, because of prejudicial errors concerning the defense of insanity. After she was transferred to this country, and while awaiting a proposed retrial by court-martial, the defendant petitioned a federal district court for a writ of habeas corpus to release her on the ground that the Constitution did not permit her trial by military authorities. The district court granted the writ and ordered her released. The government appealed directly to the United States Supreme Court, which reversed the district court. On rehearing, the decision of the district court was *held,* affirmed. Justice Black, in an opinion in which three Justices joined, held that criminal action by the United States against a service man's overseas civilian depend-

1. Of course, jury trial is not within the scheme of courts-martial. Instead, the Uniform Code of Military Justice, art. 16, c. 169, 64 STAT. 113 (1950), 10 U.S.C. § 816 (Supp. V, 1958) provides that: "The three kinds of courts-martial in each of the armed forces are — (1) general courts-martial, consisting of a law officer and not less than five members; (2) special courts-martial, consisting of not less than three members; and (3) summary courts-martial, consisting of one commissioned officer."

2. Uniform Code of Military Justice, art. 2(11), c. 169, 64 STAT. 109 (1950), 10 U.S.C. § 802(11) (Supp. V, 1958): "The following persons are subject to this chapter:

". . .

"(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States."

3. 57 STAT. 1193, E.A.S. No. 355 (July 27, 1942). The appropriate forum for trying an accused dependent in England, as well as the other North Atlantic Treaty Nations, is provided for in the NATO Status of Forces Agreement, 4 U.S. U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846, June 19, 1951 (effective August 23, 1953).

ent in time of peace must be in accordance with the constitutional limitations of grand jury indictment and jury trial. Justices Frankfurter and Harlan, in separate opinions, concurred in the results, but upon very narrow grounds. They felt that Article 2(11) of the Uniform Code of Military Justice was unconstitutional *insofar* as it gives military courts jurisdiction to try civilian dependents for *capital* crimes in time of peace. Justice Clark, joined by Justice Burton, dissented, considering Article 2(11) as necessary to the power of Congress to provide for the government of the land and naval forces.[4] *Reid v. Covert*, 354 U.S. 1 (1957).[5]

The Constitution requires that the federal government afford a citizen accused of crime a grand jury indictment and a trial by a jury of his peers.[6] The Constitution dispenses with the requirement of grand jury indictment in "cases arising in the land and naval forces."[7] Congressional power to regulate the armed forces includes the power to provide for trial without jury.[8] A difficult problem, however, is that of determining what persons are subject to military justice. Article 32 of the American Articles of War of 1775 provided that: "All suttlers and retailers[9] [sic]

4. Justice Whittaker did not take part.

5. United States *ex rel.* Krueger v. Kinsella, 354 U.S. 1 (1957), was a companion case to *Reid v. Covert*. In the former case, Mrs. Smith was tried and convicted by general court-martial for the murder of her husband, an army colonel. The jurisdiction of the military court was purportedly based upon Article 2(11) of the UCMJ and a treaty between the United States and Japan, 3 U.S.T. & O.I.A. 3341, T.I.A.S. No. 2492, February 28, 1952 (effective April 28, 1952). Upon approval of the conviction by the Army Board of Review and the Court of Military Appeals, she was confined in a federal penitentiary in West Virginia. The defendant petitioned for a writ of habeas corpus, but the district court refused to issue the writ. United States *ex rel.* Krueger v. Kinsella, 137 F. Supp. 806 (S.D. W. Va. 1956). While the appeal was pending in the court of appeals, the Supreme Court granted certiorari. On first hearing, the Court affirmed the lower court. Kinsella v. Krueger, 351 U.S. 470 (1956). But on rehearing, the district court was reversed. Kinsella v. Krueger, 354 U.S. 1 (1957).

6. U.S. CONST. amend. V, VI.

7. *Id.* amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . ."

Id. art. III, § 2: "The Trial of all crimes, except in Cases of Impeachment, shall be by Jury; and such trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

Id. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

8. *In re* Waidman, 42 F.2d 239, 240-41 (D. Me. 1930); *Ex parte* Quirin, 317 U.S. 1, 43 (1942) (dictum); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 137-38 (1866) (concurring opinion) (dictum).

9. Article 32 was copied verbatim from the English Article of War of 1765, except for the word "retailer." This is apparently due to oversight, for it was corrected in the first revision to appear as "retainers."

to the camp, and all persons whatsoever, serving with the continental army in the field, though not enlisted soldiers, are subject to the articles, rules, and regulations of the continental army."[10] It was felt that since these persons were protected by the army, they owed to the army a duty of obedience.[11] Some retainers to the camp, such as telegraph operators and newspaper correspondents, were tried by courts-martial, but more often they were denied rations or summarily expelled from the camp.[12] Soldiers' wives came under the definition of "retainers," but there were only isolated instances of their being subjected to military justice.[13] The term "in the field" was not restricted to a period of war, in the technical sense, but it appears that it connoted an area where by the nature of the military position, and the absence of civil authority, military control over the whole camp was appropriate.[14] Shortly after the Civil War, the United States Supreme Court, in the case of Ex parte *Milligan*,[15] held that a *civilian* could not be subjected to court-martial so long as civil courts in the area were open. Following this decision, it was felt that military jurisdiction over civilians would be appropriate only in *time of war* in *theaters of war*.[16] It has been thought by some that the above restriction on military jurisdiction was limited in its scope of applicability to cases arising within the continental United States, since there was then no notion of United States troops going abroad.[17] Following the American intervention in Cuba in 1906-07, it was seen that provision should be made for jurisdiction over dependents following American troops outside the country. The Articles of War were revised in 1916, and jurisdiction was granted the military over dependents who *accompanied* the armed forces outside the country.[18] Subsequent revisions and codifications made no substantial change in the 1916 provision.[19]

The Supreme Court had no occasion to consider the constitu-

10. WINTHROP, MILITARY LAW AND PRECEDENTS 956 (2d ed. 1920).
11. *Id.* at 98.
12. *Id.* at 98-99.
13. *Id.* at 99.
14. Reid v. Covert, 354 U.S. 1, 70-71 (1957) (Harlan, J., concurring). See, in general, BLUMENTHAL, WOMEN CAMP FOLLOWERS OF THE AMERICAN REVOLUTION (1952). *Contra*, WINTHROP, MILITARY LAW AND PRECEDENTS 101 (2d ed. 1920).
15. 71 U.S. (4 Wall.) 2 (1866).
16. See Supplemental Brief for the Government, p. 41-42, Reid v. Covert, 354 U.S. 1 (1957).
17. *Id.* at 42.
18. 39 STAT. 651 (1916).
19. See note 2 *supra*, for statute in its present form.

tionality of military jurisdiction over dependents overseas in time of peace prior to the instant case. However, the Court has decided cases involving *similar* denials of the rights of grand jury indictment and jury trial by non-military courts created by Congress to try offenses arising outside the continental boundaries of the United States. In the case of In re *Ross*,[20] the defendant, an American seaman in Japan, was tried and convicted of murder by a "consular court,"[21] a court which had been created by Congress pursuant to a treaty with Japan. Here procedure provided for neither grand jury indictment nor trial by jury, but the Supreme Court held this to be inconsequential. The Court declared, without qualification, that those constitutional guarantees did not extend beyond the United States boundaries. In the *Insular* cases,[22] the Court upheld Congress' refusal to provide grand jury indictment and jury trial in territorial possessions.[23] There it was considered inexpedient to require grand jury indictment and jury trial in areas unfamiliar with the American system of justice.

On the first hearing of the instant case,[24] the Court relied heavily on the In re *Ross* and the *Insular* cases in reversing the district court's decision to release the defendant. These cases were cited as authority for the Court's holding that Congress' power to create legislative courts in areas where there were no federal courts included the power to provide for trial by court-martial, since the latter was "reasonable and consonant with due process." But on second hearing, Justice Black, writing an opinion in which three Justices joined, felt that the previous reliance on the *Ross* and *Insular* cases was misplaced. "At best," Justice Black stated, "the *Ross* case should be left as a relic from a dif-

20. 140 U.S. 453 (1891).

21. The consular court was a particular legislative court. The American consul in Japan was given authority to try offenses committed by Americans in that country by treaties of 1857, 11 STAT. 723, and 1858, 12 STAT. 1051, art. VI. The 1858 treaty with Japan was ratified in 1860, and in the same year Congress passed the act to carry this treaty into effect. REV. STAT. §§ 4083-4091 (1878). Pursuant to Section 4106, it was required that at least four American citizens of good repute be chosen by lot to assist the consul in judging capital cases. If the decision was not unanimous, the case was referred to the commissioner for his adjudication, either by entering judgment in the case, or remitting the case to the consul with instructions. The Congress has recently abolished the consular system of courts. 70 STAT. 773 (1956).

22. E.g., Balzac v. Porto Rico, 258 U.S. 298 (1922); Door v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Downes v. Bidwell, 182 U.S. 244 (1901).

23. U.S. CONST. art. IV, § 3, grants Congress power to make rules and regulations for United States Territories.

24. Reid v. Covert, 351 U.S. 487 (1956).

ferent era,"[25] and "neither the [*Insular*] cases nor their reasoning should be given further expansion."[26] Justices Frankfurter and Harlan agreed, in their concurring opinions, that the cases were not authority for denying grand jury indictment and jury trials in *capital* cases in military proceedings. However, both Justices defended the cases as practical solutions in their historical settings. Another great diversity of views in the second hearing centered around the interpretation of the congressional power to regulate the armed forces. Justice Black felt that this power must be restricted to those in uniform.[27] Neither did Justice Black think that the "necessary and proper" clause[28] could be used as a device for extending military jurisdiction over civilian wives and dependents in time of peace.[29] In his concurring opinion, Justice Harlan declared that the choice of military or civilian trials depended upon the particular circumstances of each case, and refused to go farther than to state that jury trial must be provided civilian dependents overseas in *capital* cases. Justice Frankfurter confined his opinion strictly to the *capital* offense which was before the Court, but did state that in future problems of this sort, the test should be whether the court-martial jurisdiction is so necessary for the governing of the armed forces that the accused must suffer the loss of grand jury indictment and jury trial.[30]

Apparently the only conclusion upon which a majority of the

25. 354 U.S. 1, 12 (1957).

26. *Id.* at 14.

27. Quoting Colonel Winthrop, Justice Black stated: "*A statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*" *Id.* at 35.

28. U.S. CONST. art. I, § 8, cl. 18.

29. "Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14." Reid v. Covert, 354 U.S. 1, 21 (1957). Justice Black did not think it had been the historical practice under Clause 14 to subject dependents to military jurisdiction in time of peace. Justice Frankfurter, viewing the history of Clause 14, stated: "What has been urged on us falls far too short of proving a well established practice — to be deemed to be infused into the Constitution — of court-martial jurisdiction, certainly not in capital cases, over such civilians in time of peace." *Id.* at 64. To the contrary, Justice Harlan, in his concurring opinion, stated: "[T]he historical evidence presented by the Government convinces me that, at the time of the adoption of the Constitution, military jurisdiction was not thought to be rigidly limited to uniformed personnel. The fact is that it was traditional for 'retainers to the camp' to be subjected to military discipline, that civilian dependents encamped with the armies were traditionally regarded as being in that class, and that the concept was not strictly limited to times of war." *Id.* at 71.

30. The approaches taken by Justices Frankfurter and Harlan are typical of the Court's "due process" cases. In fact Justice Harlan stated: "I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case." *Id.* at 77.

Justices in the instant case could agree is that overseas dependents of military personnel cannot be subjected to court-martial for capital offenses in time of peace. Still remaining unsettled is the question of the proper forum to try non-capital offenses committed by dependents,[31] and all offenses committed by civilian employees attached to the military.[32] If the military court on the overseas installation is powerless to try such cases, a practical problem of just where to try them results.[33] As a solution, Congress might create special courts within the United States to try these alleged offenders, since Article III, Section 2, of the Constitution authorizes the establishment of such courts.[34] However, there is no federal common law of crimes[35] and thus such courts would have no substantive law to apply, unless a substantive criminal code were adopted. Further, witnesses to the alleged crime could not be compelled to journey to this country to testify, and there would be difficulty obtaining documents abroad in the absence of compulsory process. A further possibility might be the establishment of courts providing full constitutional guarantees in the host countries, instead of in the United States, but it is doubtful that many foreign states would acquiesce to such a plan, since it would amount to a complete deprivation of their right to try persons for crimes committed within their territory. By conventions, the United States has been granted the right to establish courts-martial within the receiving states, but this is

31. The conclusion to be gleaned from Justice Black's opinion is that *no* civilian dependent is amenable to military law for any offense. Justice Frankfurter restricted his opinion solely to the capital case at bar, while Justice Harlan concluded that there might be a difference in what was "due" an alleged capital and non-capital offender. Justice Clark, dissenting, could find no distinction in the Constitution between capital and other cases.

32. A federal district court for the District of Columbia has subsequently held that a civilian employee, charged with larceny, and conspiracy to commit larceny, is subject to court-martial jurisdiction. *Reid v. Covert* was distinguished. United States *ex rel.* Guagliardo v. McElroy, 158 F. Supp. 171 (D.D.C. 1958). Justice Black recognized that "there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform." Reid v. Covert, 354 U.S. 1, 23 (1957).

33. If Justice Black's opinion is given its full meaning (civil trial for any offense committed by a civilian dependent), a serious problem is created because of the large number of persons affected. "Reliable figures show that our Armed Forces overseas are accompanied by approximately a quarter of a million dependents and civilian workers. Figures relating to the Army alone show that in the 6 fiscal years from July 1, 1949, to June 30, 1955, a total of 2,280 civilians were tried by courts-martial. While it is true that the vast majority of these prosecutions were for minor offenses, the volume alone shows the serious problem that would be presented by the administration of a dual system of courts." Kinsella v. Krueger, 351 U.S. 470, 477, n. 7 (1956).

34. See note 7 *supra*.

35. See Viereck v. United States, 318 U.S. 236, 241 (1943); United States v. Sutter, 160 F.2d 754, 756 (7th Cir. 1947).

altogether different from their permitting the operation of a complete American judicial process on their sovereign soil.[36] It would be possible to surrender the offender to the host country for trial, but his offense might not be considered criminal in the host country. If the host country had notions of justice contrary to those of the United States, a *release* of the accused to it for trial might encounter "due process" difficulties.[37] It is evident, then, that the instant case in effect has furnished a challenge to both Congress and the Executive to find some manner of trying the offenses of civilians connected with the military overseas.

A. Clayton James, Jr.

CONTRACTS — LACK OF KNOWLEDGE OF EXISTING ZONING ORDINANCE AS GROUNDS FOR RESCISSION OF OPTION

Plaintiff agency brought suit to recover a sum paid for an option to purchase a certain city lot. The neighborhood in which the property was located was apparently industrial. The lot itself contained a filling station and across the street was an iron works establishment. At the time the option was purchased plaintiff intended a particular commercial use for the property which was in keeping with the appearance of the neighborhood, but later learned that this use was prohibited by a zoning ordinance.[1] The lower court dismissed the plaintiff's suit. On appeal, *held,* reversed. In view of the character of the neighborhood and the fact that the vendor was aware of the use to which the plain-

36. The receiving state has retained its primary right to try offenses committed against its nationals by United States servicemen and their dependents. See 4 U.S.T. & O.I.A. 1792, art. IV, para. 3(b), T.I.A.S. No. 2846, June 19, 1951 (effective August 23, 1953). To say the least, it would be a considerable strain upon national pride to allow American judges, lawyers, and juries the power to function on foreign soil. Moreover, provision would have to be made for a criminal code, and it would not be possible to issue compulsory process against witnesses and documents. The difficult task of impaneling a jury would be ever present. If it were composed of foreign nationals, this would be little better than releasing the accused to the host country for prosecution. If civilian dependents compose the jury, might not the *possibility* of "command influence" be as prevalent as in courts-martial? See Reid v. Covert, 354 U.S. 1, 36 (1957).

37. "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. . . . 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." Note, 18 LOUISIANA LAW REVIEW 173, n. 20 (1957).

1. The area was zoned as "industrial non-conforming." The building could not be substantially changed for commercial purposes and after six months non-use would become a location for residential structures only.