Hastings Law Journal

Volume 8 | Issue 1 Article 7

1-1956

Criminal Jurisdiction over Civilian Components and Accompanying Dependents of the Armed Forces in Foreign Countries

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CRIMINAL JURISDICTION OVER CIVILIAN COMPONENTS AND ACCOMPANYING DEPENDENTS OF THE ARMED FORCES IN FOREIGN COUNTRIES

By CHARLES V. STONE

The legality, constitutionality, and the wisdom, or lack of wisdom, of the NATO Status of Forces Agreement[1] has been debated in the House and Senate;[2] commented on in the daily newspapers and periodicals; mooted, bruited, criticized and praised by statesmen and politicians, lawyers and laymen alike. It has been characterized as a "great boon to our servicemen,"[3] and as "absolutely unthinkable."[4] This Comment is not intended to add to the storm of praise and abuse but rather to examine the statutory and constitutional basis for criminal jurisdiction over civilian components and accompanying dependents of the armed forces while stationed in friendly foreign countries. Foreign court jurisdiction over *military* personnel will be alluded to only as a background for a more complete understanding of the Status of Forces Agreement as it is applied to those *civilians* accompanying the armed forces.

Alternative Criminal Jurisdiction

Criminal jurisdiction over civilians accompanying the armed forces into overseas areas is on an alternative basis. In countries which are *not* signatories of the NATO Status of Forces Agreement or some similar agreement, jurisdiction rests in military courts-martial pursuant to Article 2 (11) of the Uniform Code of Military Justice (1951).[5] Article 2(11) provides in part:

> The following persons are subject to this chapter: . . . (11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party to or any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States . . . .

In those countries that *are* signatories of the NATO Status of Forces Agreement, jurisdiction may reside either in the national court of the particular country or in military court-martial according to the nature of the offense.[6] This jurisdiction is expressly vested by the terms of the Status of Forces Agreement.[7]

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[1] *Agreement Regarding Status of Forces of Parties to the North Atlantic Treaty.* 4 U.S. Treaties & Other Int'l Agreements 1792, T.I.A.S. No. 2846 (cited in subsequent footnotes as NATO SOFA). See also *Hearings before the Senate Foreign Relations Committee on the Agreement Regarding Status of Forces of Parties of the North Atlantic Treaty,* 83d Cong., 1st Sess., 97 *et seq.* (1953).

[2] 99 CONG. REC. 9024–9083 (1953).

[3] American Mercury, April 19, 1956, p. 111.

[4] *Id.* at 112.

[5] 64 STAT. 109 (1950), 50 U.S.C. § 553 (1952). The Uniform Code of Military Justice will hereinafter be referred to as the U.C.M.J. (1951).

[6] NATO SOFA, Art. VII, ¶¶ 2–3.

[7] *Id.* at ¶ 1.

Foreign Court Jurisdiction in the Absence of Treaty

It is axiomatic in international law that a citizen of one country who commits a local crime in another country is amenable to the laws and the courts of the latter. In the absence of treaty such a wrongdoer is not entitled to a claim of immunity due to his alien status. The United States gives no protection to persons accused of committing local crimes in foreign countries. The Status of Forces Agreement is an affirmation of this principle.

In contrast to the clear cut principles of international law regarding sojourning civilians who run afoul of the law, there are as many differing views on the status of an army while visiting a friendly foreign land as there are armies. They range from the American view which favors a complete immunity for the forces of the sending state, to the conservative British view which has traditionally asserted that the receiving state retains the right to punish offenses against its law, except for crimes committed within a military installation.[8]

No international tribunal has passed upon the precise question of the immunity enjoyed by friendly troops stationed on foreign soil. To resolve these divergent views the NATO Status of Forces Agreement became a necessity with American Forces and their dependents being based in practically every country of the free world.

Criminal Jurisdiction Under the Status of Forces Agreement

The NATO Status of Forces Agreement is a multilateral reciprocal treaty designed to implement the provisions of the North Atlantic Treaty.[9] The Agreement was signed in London on June 19, 1951, and duly ratified by the Senate of the United States on July 15, 1953.[10] The purpose of the treaty is to establish and set forth the terms and conditions that will determine the rights, duties, privileges and immunities of the forces of one country sent into or stationed in the territory of another country, where both countries are parties of the agreement.[11]

Jurisdiction as to Persons

Article VII, paragraph 1, contains a basic grant of power and describes the persons subject to the treaty provisions.

(a) The military authorities of the sending State have the right to exercise, within the receiving State, all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State. This section is an implementation of Article 2(11) of U.C.M.J., aforementioned.

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[8] For a comprehensive analysis of the American view, see 36 AM. J. INT'L L. 559; 40 *id.* 257. For the British view, see Barton, *Foreign Armed Forces: Immunity,* 27 BRITISH Y. B. INT'L L. 186. Barton concluded that members of visiting forces are completely subject to the jurisdiction of the local courts and that any exception must be traced to express privilege or concession.

[9] 63 STAT. 2241, T.I.A.S. No. 1964.

[10] See 99 CONG. REC. 9088 (1953).

[11] 50 N.W. U. L. REV. 349, 350.

(b) The authorities of the receiving State shall have jurisdiction over members of a force or civilian component and their dependents with respect to offenses committed within the territory of the receiving State and punishable by the laws of that State.

Jurisdiction as to the Offense

Article VII (2) prescribes the circumstances under which the receiving or sending State will have exclusive jurisdiction to try offenders.

(a) The sending State has exclusive jurisdiction over persons subject to the military law of that State with respect to offenses punishable by the law of the sending State but not by the law of the receiving State. An example of this would be the failure to obey an order or regulation which is a court-martial offense under Article 92 of the U.C.M.J.

(b) The receiving State has exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offenses punishable only by the laws of the receiving State and not by the laws of the sending State. Traffic violations come under this category.

If an offense violates the laws of both the sending and receiving States, both States may have jurisdiction.[12] The State that has the right to try the offender in the first instance is deemed to be the State having the "primary" jurisdiction and has the prior or superior right to try the offender. This does not mean that the person will be twice put in jeopardy within the same territory. Paragraph 8 of Article VII expressly provides:

> Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offense within the same territory by the authorities of another Contracting Party.

Rules for the determination of which State has "primary" jurisdiction, where jurisdiction is concurrent, are set out in Article VII, paragraph 3. When there is concurrent jurisdiction the military authority of the sending State shall have primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to:

(a) Offenses done in the performance of official duty.

(b) offenses solely against the property or security of the sending State, or offenses solely against the person or property of another member of the armed forces of the sending State or of a dependent.

In the case of any other offense the receiving State shall have primary jurisdiction.[13] The last provision has prompted the Bricker Amendment[14]

[12] NATO SOFA, Art. VII, ¶ 3.

[13] *Id.* Art. VII, ¶ 3(c).

[14] See 99 CONG. REC. 4818–34 (1953); 99 *id.* at 9024–83 (daily ed. July 14, 1953); 99 *id.* at 9086–93 (daily ed. July 15, 1953). Senator Bricker proposed a reservation to the Agreement which provided that the military authorities of the United States should retain exclusive jurisdiction over members of its force or civilian component and their dependents with respect to all offenses committed within a receiving State.

and the controversy referred to above. The opponents of the Agreement claim that Article VII has ceded American sovereignty.

Not in all cases though, will the State having primary jurisdiction proceed to bring the offender to trial. The Agreement makes provision for a waiver of jurisdiction.[15] If the State having primary right to jurisdiction decides not to exercise its right, it must notify the authorities of the other State as soon as is possible. If this is done, then the State of secondary jurisdiction may prosecute.

A State having primary jurisdiction may receive a request from the other State for a waiver of its right to try the offender and

> . . . the authorities of the State having the primary jurisdiction 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.[16]

Such waivers are granted in the majority of the cases where requested by American military authorities. In over 90% of the cases of off-duty offenses the receiving State has waived jurisdiction.[17]

Procedural Aspects of the Agreement

If tried by the receiving State the accused will be tried according to the laws of the receiving State. Apart from this, paragraph nine of Article VII sets forth specific procedural safeguards that must be afforded the accused:

ARTICLE VII

9. Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled—

(a) to a prompt and speedy trial;

(b) to be informed, in advance of trial, of the specific charge or charges made against him;

(c) to be confronted with the witnesses against him;

(d) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of the receiving State;

(e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;

(f) if he considers it necessary, to have the services of a competent interpreter; and

(g) to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial.

The foregoing sets out, in the main, the provisions of the Status of

[15] NATO SOFA, Art. VII, ¶ 3(c).

[16] *Ibid.*

[17] 18 JAG J. 15, 16.

Forces Agreement treating with criminal jurisdiction over civilian components and dependents. As pointed out previously, foreign court jurisdiction over civilians has always been undisputed. The rights of civilians covered by the Status of Forces Agreement have been more fully protected through the procedural safeguards embodied in the agreement.

Questions of the constitutionality of Article VII are raised by the provisions of the agreement which allow the sending State to exercise court-martial jurisdiction over the accompanying civilians when the offense is purely military or when the receiving State has waived jurisdiction. This might appear to be an original grant of power to the military authorities over accompanying civilians except that paragraph 1(a) of Article VII limits coverage of the agreement to "persons subject to military law of that State..."

Criminal Jurisdiction Under the Uniform Code of Military Justice

Where jurisdiction has been waived by the receiving State and in countries which are not signatories of the Status of Forces Agreement or some similar agreement, criminal jurisdiction over accompanying civilians is exercised by the military forces under the provisions of U.C.M.J. (1951).

The Supreme Court of the United States in two decisions handed down last term, *Kinsella v. Krueger*[18] and *Reid v. Covert*,[19] proved Col. Winthrop, eminent authority in military law, to be a poor prophet. Col. Winthrop wrote in 1895:[20]

> "The provisions of . . . statutes . . . so far as they subject civilians to trial by court-martial are in the opinion of the author, clearly unconstitutional . . . in his judgment, a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."

Mesdames Smith and Covert were tried by military court-martial; pursuant to statute;[21] were convicted, and their convictions sustained by the United States Supreme Court.

Before examining the decisions of the Supreme Court in the *Smith* and *Covert* cases an inquiry should be made into the precise constitutional questions presented by court-martial jurisdiction over civilians.

Constitutional Law and Court-Martial Jurisdiction

The constitutional question presented can be stated as follows: Under the Sixth Amendment to the Constitution the accused is assured of the right to a public trial by an impartial jury; this right carries with it under the Fifth Amendment the protection of a presentment or indictment by a

[18] 351 U.S. 470 (1956).
[19] 351 U.S. 487 (1956).
[20] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920), 93, § 123.
[21] 64 STAT. 109 (1950), 50 U.S.C. § 553 (1952).

grand jury. These rights are fundamental to trial by a lawfully constituted civilian court. The question is then posed, if jurisdiction over civilians is vested in military court-martial, what is the constitutional authority for the jurisdiction and what are the limitations?

Article 1, Section 8 of the Constitution grants to Congress power to "make rules for the Government and Regulation of the land and naval Forces." This is the fundamental source for the grant of court-martial jurisdiction to the military. The Fifth Amendment expressly excludes "cases arising in the land and naval forces" from its scope. "These provisions show that Congress has the power to provide for the trial of military offenses in the manner then and now practiced by civilized nations, and that the power to do so is given without any connection between it and the Third Article of the constitution defining the judicial power of the United States, indeed that the two powers are entirely independent of each other."[22] This independent power must be looked to in determining whether court-martial jurisdiction is present, if either civilians or military personnel are on trial.

Court-martials are convened within the jurisdiction of military law and are purely creatures of statute;[23] with only special and limited jurisdiction.[24] They must be convened and constituted in entire conformity with the provisions of the statute or else the body is without jurisdiction.[25] Where justification is found for trial by court-martial it is not within the province of civil courts to interfere; but, if the military tribunal is brought into being without any basis in law or fact, civil courts must grant relief.[26]

Court-Martial Jurisdiction as to Persons

Unlike civil courts where, usually, the locus of the offense is all-important and the status of the accused is of secondary importance, under military law the reverse is true. Code provisions as to what persons in what status at what time are subject to military law are detailed and, broadly stated, cover military, quasi-military, and limited classes of civilians.

Congress, in its lively concern for the basic American principle of separation of powers in government, seems to have limited the peacetime jurisdiction of military tribunals over civilians to necessity situations; such as where the civil courts are not functioning, or where; by reason of location or due to accepted principles of international law or of treaty provisions, no American civil court has jurisdiction to adjudicate the cause.

Congress, in modeling American military law on that of the British, originally extended court-martial jurisdiction only over members of the armed forces and over such civilians as were serving in quasi-military

[22] Dynes v. Hoover, 61 U.S. (20 How.) 839 (1858).

[23] Wade v. Hunter, 72 F. Supp. 755 (F. D. Kan. 1947).

[24] Rosborough v. Rossell, 150 F.2d 809 (1st Cir. 1945).

[25] *Ex parte* Duncan, 66 F. Supp. 976 (D.C. Hawaii, 1944); *Ex parte* White, 66 F. Supp. 982 (D.C. Hawaii, 1944).

[26] *Ibid.*

capacity with troops in the theater of war, such as teamsters, watchmen, telegraphers and contract surgeons.[27] Non-military crimes by soldiers and civilians alike were dealt with by surrendering the accused to civil authorities.[28]

In the 1916 revisions of the Articles of War, Congress included another class to the civilian component of the Army subject to military law, viz, *"persons accompanying the armies of the United States."*[29] This revision replaced the old Article of War 63, and formed the basis for Article 2(11) of U.C.M.J. (1951). The 1916 change was adopted because the then existing provisions of the old Article of War 63 were defective in that they did not permit the disciplining of retainers, persons accompanying and persons serving with the armies in time of peace in places to which the civilian jurisdiction of the United States did not extend and where it was contrary to international policy to subject such persons to the local jurisdiction, and where, for other reasons, the law of local jurisdiction was not applicable, thus leaving those classes practically without liability to answer for their unlawful acts.[30]

Congress in 1943 expanded the application of the Articles of Government for the Navy to meet war-time conditions so as to subject to military law and trial by naval court-martial civilians serving with or accompanying naval forces who were either outside the territorial jurisdiction of federal courts or at a great distance from such courts.[31]

In the U.C.M.J. enacted in 1950, Congress adopted this 1943 expansion of jurisdiction and made it applicable in peacetime as well as war time, and thus made subject to military law, and to the jurisdiction of court-martial persons "employed by" as well as "those serving with" or "accompanying" the armed forces. Also, the territorial limitations on court-martial jurisdiction during peace-time were reduced to territories or parts thereof where the civil courts system was not readily available.

It took Congress from 1775 to 1951 to grant to the military the jurisdiction to try by court-martial a restricted class of civilian whose presence with the military materially affects the efficiency and morale of the armed forces: the families of the servicemen who accompany them on assignments to overseas areas. It is apparent from the discussions in the sub-committee of the Armed Service Committee, that Congress intended Article 2(11)

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[27] Article of War 63. Rev. Stat. § 1342 (1874). (Later repealed by (36 Stat. 619 (1916), 104 U.S.C. § 1473 (1916)). "all retainers to the camp, and all persons serving with the Armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

[28] Winthrop, *op. cit. supra* n. 20, at § 98.

[29] Article of War 2(d), 36 STAT. 619, 10 U.S.C. § 1473 (1916) "... all persons accompanying or serving with the armies of the United States, and in times of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States ... "

[30] S. REP. No. 130, 64th Cong., 1st Sess., Transcript annexed 30, 37, 38 (1916).

[31] SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE, § 713, p. 153 n. 280.

would render these dependents subject to military law and trial by court-martial; and that this jurisdiction should exist in peace as well as in war.[32]

Judicial Authority on the Amenability to Trial by Court-Martial of "Accompanying Civilians"

Prior to the 1916 revision of the Articles of War, civilians accompanying the armed forces in foreign countries were not subject to military law, and there was little significant judicial authority relating to the exercise of court-martial jurisdiction in peacetime over such accompanying civilians. The specific problem of military jurisdiction over accompanying dependents did not arise until after the close of World War II and the constitutional issues were never directly raised before that time.

Article 2(d) was never ruled on directly by the Supreme Court of the United States but the language of the Court in *Madsen v. Kinsella*[33] was favorable to the constitutionality of 2(d). In the *Madsen* case the Supreme Court found that the wife of a serviceman who lawfully entered the American Zone of Occupied Germany in 1949 with her husband, Lt. Madsen of the USAF, and who was residing with her husband when she shot and killed him, was a person "accompanying the armed forces" and was subject to military law under the 1916 revision of the Articles of War.

Since the enactment of the present Uniform Code of Military Justice there have been a number of cases before the Boards of Review of the military services and before the Court of Military Appeals in which Article 2(11) has received construction. Two of these cases have reached the Supreme Court of the United States where the constitutionality of 2(11) was affirmed.[34] These two cases are worthy of detailed examination.

The Covert *Case*

Mrs. Covert, the wife of a member of the United States Air Force, was transported to England as a dependent pursuant to military regulations. Mrs. Covert resided in public quarters assigned to her husband and received commissary and other privileges. On the 10th of March, 1953, Mrs. Covert "hatcheted" her husband to death. Under an agreement between the United States and Great Britain,[35] which provided the armed forces of the United States with exclusive criminal jurisdiction over members of the armed forces thereof and their dependents, she was subjected to trial by general court-martial and convicted of homicide.

The Board of Review in affirming the conviction[36] held that a wife who

[32] H. REP. No. 491, 81st Cong., 1st Sess. 11 (1949); S. REP. No. 486, 81st Cong., 1st Sess. 7-8 (1949).

[33] 343 U.S. 341, 361 (1952).

[34] See notes 18-19 *supra*.

[35] Visiting Forces Act of 1942, 5 & 6 Geo. 6, c. 31. This act has since been replaced by the Visiting Forces Act of 1952, 15 & 18 Geo. 6, 1 Eliz. 2, c. 67, the British implementation of the Status of Forces Agreement.

[36] 16 C.M.R. 465.

accompanies her husband to, or joins him at his duty station in a foreign country, is a person "accompanying the armed forces of the United States" within the meaning of Article 2(11), and consequently the court-martial which convicted her was with jurisdiction.

In answer to defense counsel's contention that the accused was denied due-process, the court answered:

> " . . . counsel's contention . . . may be answered by a simple restatement of the often quoted phrase that in the military or naval services of the United States, trial by military tribunal is due process . . . it necessarily follows from our determination that the accused was subject to trial by court-martial, that no presentment nor indictment by grand jury . . . was required."[37]

Mrs. Covert was returned to the United States and confined in the Federal Reformatory for Women, Alderson, West Virginia. On appeal, the United States Court of Military Appeals set aside her conviction, on grounds not material here,[38] and she was transferred to the District of Columbia jail to await a rehearing by court-martial at Bolling Air Force Base, Washington, D.C. While there she filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia, alleging that she was not subject to court-martial jurisdiction because Article 2(11) of the Uniform Code of Military Justice was unconstitutional. She also contended that whatever jurisdiction the military may have had to try her by court-martial under Article 2(11) was lost by her return to the United States and delivery to the custody of civilian authorities. The District Court ordered the writ to issue,[39] and the Government appealed directly to the Supreme Court of the United States. The Supreme Court postponed[40] the question of jurisdiction until a hearing was had on the merits and scheduled the case for argument with *Kinsella v. Krueger*.

Reid v. Covert was considered by the Supreme Court as a companion case to *Kinsella v. Krueger*. The Supreme Court, in reversing the District Court of Columbia, held that Mrs. Covert was continually under military jurisdiction; even during the time she was awaiting a rehearing after her sentence was set aside. The military courts have recognized rehearings to be but continuations of the original proceedings.[41] "Military jurisdiction, once validly attached, continues until final disposition of the case."[42] Mrs. Covert's principal contention on the merits was answered by the court's decision in *Kinsella v. Krueger*.

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[37] 16 C.M.R. 465, 475.

[38] 19 C.M.R. 175.

[39] U.S. *ex rel.* Clarice B. Covert v. Curtis Reid, Superintendent, 24 U.S.L. Week 2238 (D.D.C. Nov. 22, 1955).

[40] 350 U.S. 985 (1955).

[41] 351 U.S. 487, 491 (1956).

[42] *Id.* at 492.

Kinsella v. Krueger

In October of 1952 in occupied Japan, Dorothy Krueger Smith killed her husband, an Army Colonel, in their military residence in Tokyo. An Army general court-martial convicted her of premeditated murder and imposed a life sentence which action was affirmed by the Board of Review.[43] It was seriously contended by her defense counsel that the accused upon the death of her husband ceased to be a dependent and so at the time of the trial was not subject to court-martial jurisdiction, no longer being a person "accompanying the armed forces." In rejecting this contention the Board of Review relied on the *Madsen* case, and said Mrs. Smith's dependent status did terminate upon her husband's death, but, she remained a person "accompanying the armed forces . . . " within the meaning of the U.C.M.J. (1951). The true test, the court held, is whether the person, *when tried,* is still accompanying the armed force of the United States, regardless of a prior change in status. The court discussed several cases having to do with civilians who were tried by court-martial after having terminated their employment with the armed forces, and then concluded, "We perceive no distinction between termination of employment and termination of marital status by reason of the death of a spouse in the military service."[44] The accused entered Japan solely because of her marital status upon invitation of the United States and with permission of Japan. The Army was responsible for her throughout her stay in Japan and provided her with all the necessities of life. The accused was not allowed to merge with the civilian population upon the termination of her dependent status but was immediately taken into custody. For these reasons Mrs. Smith was considered to have continued a person "accompanying the armed forces."

Mrs. Smith's conviction was affirmed by the Court of Military Appeals;[45] and like Mrs. Covert she was returned to the United States and began serving sentence in the Federal Reformatory for Women, Alderson, West Virginia. A petition for a writ of habeas corpus was filed on Mrs. Smith's behalf by her father, General Walter Kruger, U.S. Army, retired. The petition alleged that the court-martial had no jurisdiction to try Mrs. Smith because Article 2(11) of the U.C.M.J. (1951) violates both Article III, section 2, and Amendment VI of the Federal Constitution, which guarantees the right to trial by jury to a civilian. The United States District Court for the Southern District of West Virginia issued a preliminary writ. After a hearing, which included the submission of briefs and unlimited oral argument, the writ was discharged and Mrs. Smith was remanded to the custody of the Warden.[46]

The decision of the District Court of Columbia is of particular interest

[43] 10 C.M.R. 350.
[44] 10 C.M.R. 350, 363.
[45] 17 C.M.R. 314; 5 USCMA 314.
[46] 137 F. Supp. 806 (S.D. W. Va., 1956).

and is presented in some detail here because it contains the only searching inquiry into the constitutionality of Article 2(11) that can be found. When Mrs. Smith's case eventually reached the Supreme Court of the United States, court-martial jurisdiction was sustained on the basis of procedural convenience without a close examination of Article 2(11).

In argument before the United States District Court counsel for petitioner admitted that the effort to secure release on habeas corpus stemmed from the recent decision of the Supreme Court in *U.S. ex rel Toth v. Quarles*,[47] and the action of the District Court of Columbia in freeing Mrs. Covert. The district court distinguished the *Toth* decision and the action of the court in the *Covert* case on the grounds that:

(1) Toth was a civilian residing in the United States when the charges were made.

(2) The *Toth* decision turned on the right of a person to claim the protection of those constitutional guarantees which secure to persons accused of crime in this country the traditional safeguards which accompany every criminal trial in the civil courts.

(3) Mrs. Covert, though convicted overseas, had her conviction reversed after her return to the United States and was no longer a person "accompanying the armed forces." (The court declined to comment on the merits of the Covert release.)

Mrs. Smith's situation differed in two significant respects from Toth:

(1) She was not living in the United States, nor present there when she was charged with the murder of her husband;

(2) She was connected with the army as a person "accompanying the armed forces without the continental limits of the United States;" both when she committed the act and when she was arrested and tried for it.

The court then turned to a careful examination of Article 2(11) to determine the jurisdiction of the court-martial.

[47] 350 U.S. 11 (1955). The *Toth* case became a cause celebre when military authorities apprehended Toth, an honorably discharged serviceman, and returned him to Korea to stand trial by court-martial, as a civilian, for the accused murder of a Korean national. While the accused was being held pending investigation, his sister filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia. The accused was returned from Korea, a hearing was held, and he was released. On appeal to the United States Court of Appeals for the District of Columbia by the Secretary of the Air Force the District Court was reversed and Toth was remanded to custody. On appeal, the United States Supreme Court again reversed the case. The Air Force based jurisdiction on Article 3(a) of the U.C.M.J. (1951) Article 3(a) grants to military and naval authorities a continuing court-martial jurisdiction over one who was once subject to the U.C.M.J. (1951) even after that person has severed all connections with the service. The jurisdiction is limited to crimes committed while the person was subject to the U.C.M.J. (1951) and punishable by five years or more and for which the person could not be tried in any State or Federal court. The Supreme Court of the United States declared Article 3(a) to be unconstitutional unless it was enacted pursuant to authority granted by some provision of the Constitution. The Court held that it was clear Article III did not confer such authority. The Court then looked to Article I, section 8; "The Congress shall have the power . . . (14) To make Rules for the Government and Regulation of the land and naval Forces." The majority concluded that Article I of the Constitution was not broad enough to sustain Article 3(a) of the U.C.M.J. (1951).

> Article 2(11) is not limited to a time of war or to the field of action. It purports to extend the coverage of the Code of Military Justice (and hence the jurisdiction of court-martial) to all persons 'accompanying the armed forces' abroad. This coverage, however, is conditional. If some treaty or agreement to which the United States is a party are applicable to a particular case, then by its own limitation Article 2(11) does not come into play . . . By an administrative agreement . . . the Japanese Government ceded to the United States, through its military courts and authorities, all jurisdiction to try offenses committed in Japan by dependents of members of the armed forces . . . Had this treaty been in effect at the time Article 2(11) of the Code of Military Justice was enacted, it might be cited as the source of Congressional power to pass this act; but it would scarcely be contended, I think, that a piece of legislation, if it were void for lack of constitutional authority when passed, could be validated by a later treaty, even though Congress might subsequently act freely in that field. However the treaty did remove the limitations which in its absence would have prevented Article 2(11) from taking effect, in that upon the ratification of the treaty there was no longer any 'accepted rule of international law' or any treaty to the contrary which interfered with its operation.[48]

The court concluded:

> "I cannot say with certainty that the power of Congress to provide for court-martial discipline of these civilians . . . is not necessarily and properly incident to the express power 'To make Rules for the Government and Regulation of the land and naval Forces' . . . I must uphold Article 2(11) of the Code of Military Justice in its entirety."[49]

The Government sought certiorari while an appeal was pending and the United States Supreme Court granted review[50] . . . "because of the serious constitutional question presented and its far reaching importance to our Armed Forces stationed . . . throughout the world."[51]

In *Kinsella v. Krueger* the Supreme Court, after determining that Mrs. Smith came within the terms of Article 2(11), limited its determinations to . . . "whether the civilian dependent of an American serviceman authorized to accompany him on foreign duty may constitutionally be tried by an American military court-martial in a foreign country for an offense committed in that country."[52]

The court directed its first inquiry to the question, whether, as a matter of constitutional right, an American citizen outside of the continental limits of the United States and in a foreign country is entitled to trial before a

[48] 137 F. Supp. 806, 810 (S.D. W.Va., 1956). The agreement the court made reference to may be found in 3 U.S. Treaties & other Int'l Agreements (Part 3) 3346, 3353–3356, T.I.A.S. No. 2492. This Security Treaty between United States and Japan was amended by 4 U.S. Treaties & other Int'l Agreements 1847, T.I.A.S. No. 2848. As amended the criminal jurisdiction provisions are substantially identical with those of the Status of Forces Agreement.

[49] 137 F. Supp. at 811.

[50] 350 U.S. 896 (1955).

[51] 351 U.S. 473 (1956).

[52] *Id.* at 474.

federal court for an offense committed within that country. The question was answered in the negative. Congress may establish legislative courts outside the territorial limits of the United States proper and the procedure in such tribunals need not comply with the standards prescribed by the Constitution of the United States for federal courts under Article III of the Constitution. In these legislative and consular courts, pursuant to treaty, American citizens may be tried for local offenses.

> "The power to create a territorial or consular court does not preclude, but must necessarily include, the power to provide for trial before a military tribunal unless that alternative is so clearly arbitrary or capricious that legislators acting reasonably could not have believed it necessary or appropriate for the public welfare."[53]

The Court, having determined that one in the circumstances of Mrs. Smith could be tried before a legislative court established by Congress, declined to examine the power of Congress "To make Rules for the Government and Regulation of the land and naval Forces" under Article I of the Constitution. "If it is reasonable and consonant with due process for Congress to employ the existing system of courts-martial for this purpose, the enactment must be sustained."[54]

The Court found it not unreasonable for Congress to conclude that both military personnel and civilian dependents should be governed by the same legal standard to the end that they receive equal treatment under the law. The destruction of effective law enforcement in overseas areas might result from the unrest and confusion that would accompany a double standard of courts for civilians and the armed forces, according to the majority opinion of the court.

The Court could find no constitutional bar to the power of Congress to enact Article 2(11) and the judgment of the lower court was sustained by a close margin. Chief Justice Warren, Justice Black and Justice Douglas dissented. The dissent, for lack of time, was not filed with the majority opinion; but will be filed in the present term of court. Justice Frankfurter wrote a reservation which was in the nature of a dissent.

Conclusion

As suggested by the foregoing there are few difficulties presented in the exercise of foreign court jurisdiction over sojourning civilians; the provisions of the Status of Forces Agreement in this respect are consistent with well established principles of international law. Difficulties are encountered when we consider court-martial jurisdiction over the accompanying dependent. That these difficulties are not easily resolved was reflected in the majority opinion of *Kinsella v. Krueger* and in the procrastination of the dissenting members of the Court. The uncertainty of the Court was indi-

53 *Id.* 478.
54 *Id.* at 476.

cated on the first day of the present term when the Justice Department was asked to give a ruling on the amenability of accompanying dependents to court-martial jurisdiction.

In the words of Justice Frankfurter, "Time is required not only for the primary task of analyzing in detail the materials on which the court relies. It is equally required for adequate reflection upon the meaning of these materials and their bearing on the issues now before the court. Reflection is a slow process. Wisdom, like good wine, requires maturing."[55]

[55] *Id.* at 485.