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Constitutional Law--Military Court Martial Jurisdiction Over Civilian Dependents Accompanying the Armed Forces Overseas in Time of Peace

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> "The policy on which the rule is based would be defeated if it were held that whenever an officer uses his office for a personal motive not connected with the public good he acts outside his power."[24]

But the policy on which the rule is based would be *furthered* if it were held that when public officials *conspire with outsiders* and use their office for a personal motive not connected with the public good, they are acting beyond the scope of their authority and are liable. In such a case, the officials concerned are deprived of the protection of the immunity rule and are liable because they *fail to meet a requisite of the immunity doctrine,* namely, that they act *within* the scope of their authority.

Our present vast administrative machine, run by countless officials with numerous duties, requires, more than ever before, that the immunity doctrine be strictly applied. Otherwise, a few unscrupulous officials may take the attitude that, regardless of what torts they might commit, they are assured of protection by the courts via the immunity doctrine. There is no need for the doctrine's extension every time a new case presents itself. *Hardy v. Vial* was one case where the court could have limited its application by recognizing an act beyond the scope of authority. It is indeed unfortunate the court failed to do so.

Robert M. Jakob

CONSTITUTIONAL LAW—MILITARY COURT MARTIAL JURISDICTION OVER CIVILIAN DEPENDENTS ACCOMPANYING THE ARMED FORCES OVERSEAS IN TIME OF PEACE

Normally, offenders against the laws of the United States are tried by civilian tribunal. There are circumstances, however, in which persons are triable by courts martial, but because of the great difference in form and procedure it is an exercise of extraordinary jurisdiction.[1] Is it possible to bring civilian dependents accompanying the armed forces overseas in time of peace within the ambit of military court martial jurisdiction? This was the issue presented to the Supreme Court of the United States in the cases of *Reid v. Covert*[2] and *Kinsella v. Krueger*,[3] which were combined in opinion because of the similarity of fact and issue. Both cases commenced in military courts convened in foreign countries under authority of article 2, section 11 of the Uniform Code of Military Justice (1951).[4] The provisions of this article subject all persons serving with, employed by, or accompanying the armed forces outside the continental limits of the United States and certain territories to prosecution by military authorities in military courts.

Mesdames Clarice Covert and Dorothy Krueger Smith, as wives of members of the armed forces, had been transported overseas by the United States government to join their husbands, who were stationed in foreign countries. While there, they resided in government quarters or within a community of American military personnel and their dependents. While so situated, each of these women killed her husband and was tried and convicted of homicide by a general court martial.

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[24] 48 Cal.2d at ....., 311 P.2d at 497.

[1] Reid v. Covert, 354 U.S. 1, 41 (1957).
[2] 354 U.S. 1.
[3] *Ibid.*
[4] 50 U.S.C.A. § 552.

Thereafter, they were returned to the United States to serve the prison terms imposed by the military courts.

While awaiting a rehearing before the United States Court of Military Appeals,[5] Mrs. Covert petitioned for a writ of habeas corpus in the United States District Court for the District of Columbia. She alleged that art. 2, sec. 11, U.C.M.J. was invalid because it contravened her constitutional right, as a civilian, to a grand jury indictment and trial by jury.[6] The writ was granted[7] to Mrs. Covert and the government appealed directly to the Supreme Court.

Following Mrs. Smith's return to the United States, she was confined in the Federal Reformatory for Women, Alderson, West Virginia. At that time, her father, acting in her behalf, filed a petition for a writ of habeas corpus with the appropriate Federal District Court making substantially the same allegations that were made in the Covert case. The writ, however, was denied;[8] and, while an appeal was pending, the government sought and was granted a writ of certiorari by the Supreme Court.

Both cases were decided in favor of the government,[9] but after rehearing, the Supreme Court reversed itself and ordered the release of the petitioners. The court declared that civilian dependents accompanying the armed force overseas in time of peace accused of capital crimes could not be tried by court martial.[10]

Since the ruling was so narrowly limited, the problem still remains as to whether or not civilian dependents accused of lesser crimes, or civilians otherwise connected with the armed forces overseas in time of peace can be tried by court martial. The answer cannot be found in the opinions delivered by the members of the Supreme Court since they were equally divided as to the reasoning supporting the ruling.[11] Four opinions were delivered: One, in which four justices joined, delivered the ruling; one, in which two justices joined, dissenting; and two separate opinions were delivered, concurring in the ruling, but parallel in reasoning to the dissent.

In attempting to solve the questions left unanswered by the Supreme Court, it will be found that the Legislative Department's authority for establishing courts martial is based on article I, section 8, clause 14 of the United States Constitution which empowers Congress to make rules for the Government and Regulation of the Land and Naval Forces.

Military courts created under authority of this article are creatures of Congress and are not in any way connected with the federal court system provided for in article III, section 2 of the Constitution.[12] The purpose of courts martial is to implement the government and regulation of the land and naval forces. So that the fulfillment of this purpose would not be unduly frustrated, military courts are expressly exempted by the fifth amendment from the requirement of a grand jury

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[5] The conviction had been set aside on grounds not pertinent here but reaffirmed after rehearing.

[6] U.S. CONST. art. III, § 2; U.S. CONST. amend. V; U.S. CONST. amend. VI.

[7] Reid v. Covert, 24 U.S.L. Week 2238 (DDC Nov. 22, 1955).

[8] Kinsella v. Krueger, 137 F. Supp. 806 (S.D.W.Va. 1956).

[9] Reid v. Covert, 351 U.S. 470; Kinsella v. Krueger, 351 U.S. 487 (1956).

[10] 354 U.S. 1.

[11] Mr. Justice Whittaker took no part in the decision.

[12] *Ex parte* Quirin, 317 U.S. 1, 39 (1942).

indictment,[13] and exempted by implication from the jury trial requirements of the sixth amendment.[14]

As creatures of Congress, the jurisdiction of military courts martial is not strictly limited and may be expanded or contracted, as Congress may provide. The only limitation would seem to be the scope of the purpose for which they were created, that is, the government and regulation of the land and naval forces. With respect to this purpose, the necessary and proper clause of article I, section 8,[15] must be considered. This clause provides that Congress shall have the power to make all laws which are necessary and proper to execute its specifically enumerated powers. The effect of the necessary and proper clause has traditionally been held to be expansive of the specific powers of Congress.[16] The logical conclusion would be that Congress may give military courts jurisdiction not only over military personnel, but also over civilians if it becomes necessary and is proper in the regulation of the land and naval forces.

This conclusion, however, has completely separated one section of the Constitution from the rest of that document, and therefore has presented a lopsided view of the problem. To decide the issue on this basis would be incongruous with the intent and meaning of the Constitution, which is, in its entirety, an organized scheme of government within which we must operate.[17] We therefore must consider the provisions of the Constitution which secure for civilians the right to trial by jury and grand jury indictment[18] and what effect, if any, they have upon the congressional power to legislate for the purpose of governing and regulating the armed forces.

We are concerned here with the rights of civilians outside the continental limits of the United States, since the provisions of art. 2, sec. 11, U.C.M.J. affect only civilians in that category. What rights do citizens thus affected have? One of the basic principles of international law is that a sovereign nation has exclusive jurisdiction over all civilians within its territorial limits.[19] Therefore, an American civilian within a foreign country does not have the protection of any right guaranteed to him by the United States Constitution. The foreign country can, however, relinquish its exclusive jurisdiction by consent.[20] This consent has been obtained by the United States so that art. 2, sec. 11, U.C.M.J. will be operative with respect to civilian dependents like Mrs. Covert and Mrs. Smith. Thus, if the United States government can acquire jurisdiction over American civilians in foreign countries, does the civilian affected automatically reacquire all his constitutional rights? Or to reverse the question, does the Constitution of the United States limit Congress when enacting legislation that affects these civilians over which it has acquired jurisdiction? The Supreme Court answered this question in part in the principal case when it declared that Congress could not subject civilian dependents to military trial when accused of capital crimes.[21] This ruling would seem to indicate that all of the applicable provisions of the Constitution should be considered; but the

[13] U.S. Const. amend. V.

[14] *Ex parte* Quirin, 317 U.S. at 40.

[15] U.S. Const. art. I, § 8, cl. 18.

[16] CONSTITUTION OF THE UNITED STATES OF AMERICA (annotated), art. I, § 8, cl. 18 (Corwin ed. 1952).

[17] 354 U.S. at 44 (concurring opinion).

[18] U.S. Const. art. III, § 2; U.S. Const. amend. V; U.S. Const. amend. VI.

[19] Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923).

[20] *In re* Ross, 140 U.S. 453 (1891).

[21] 354 U.S. 1.

ruling does not say that the Constitution of the United States automatically applies in its entirety outside the continental limits. The problem is analogous to cases dealing with territories of the United States. The court has uniformly held that while the "fundamental" principles of the Constitution extend to the territories not incorporated into the Union, Congress may reserve the right to trial by jury and grand jury indictment, if granting these rights would unnecessarily encumber the effective government and regulation of the territory.[22] In cases dealing with this matter, the reasons given for not extending these rights were that the sociological and political background of the indigenous peoples made their application impractical. Thus, United States citizens in certain of the territories today have no right to trial by jury.[23] The Supreme Court has never spelled out just what the "fundamental" rights are that do extend to these territories.

Thus it can be said that when congressional legislation affects citizens outside the continental limits of the United States all of the applicable provisions of the Constitution are considered but not strictly applied, because to do so would unnecessarily encumber the accomplishment of the legislative purpose.

Applying this reasoning to the problem of court martial jurisdiction over civilian dependents, it can be said that when the government and regulation of the armed forces necessitates such jurisdiction, the rights of the civilian can be subordinated to that need.

The judicial history of court martial jurisdiction clearly shows that civilians have at times become subject to military courts.[24] The prominent cases were concerned with civilians employed by or accompanying the armed forces in time of war. In determining whether or not courts martial had jurisdiction, it was necessary that the armed forces with which the civilians were connected be "in the field." However, the concept of "in the field" was not strictly limited to the time of formally declared war, but in general meant presence in training camps, maneuvering areas and concentration points used in preparation for possible or expected operations against hostile forces.[25] Also it was recently decided that a military commission, sitting in a foreign country as an arm of the military government of occupation four years after actual hostilities had ceased, had jurisdiction to try a civilian dependent for a capital offense.[26]

Court martial jurisdiction over civilian dependents accompanying the armed forces overseas in time of peace is not a recent development. Congress has felt since 1916 that it was necessary for the proper government and regulation of the armed forces deployed abroad.[27] Art. 2, sec. 11, U.C.M.J. is substantially the same as its

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[22] Balzac v. People of Puerto Rico, 258 U.S. 298 (1922); Downes v. Bidwell, 182 U.S. 244 (1901); Dorr v. United States, 195 U.S. 138 (1904); Mafnas v. Government of Guam, 228 F.2d 283 (9th Cir. 1955); American Pacific Dairy Products v. Siciliano, 235 F.2d 74 (9th Cir. 1956).

[23] Mafnas v. Government of Guam; American Pacific Dairy Products v. Siciliano, *supra* note 22.

[24] Perlstein v. United States, 151 F.2d 167 (3rd Cir. 1945); Hines v. Mikell, 259 F. 28 (4th Cir. 1919); *Ex parte* Jockin, 257 F. 200 (S.D. Texas 1919); *Ex parte* Falls, 251 F. 415 (D. N.J. 1918); *Ex parte* Gerlock, 247 F. 616 (S.D. N.Y. 1917); *In re* De Bortalo, 50 F. Supp. 929 (S.C. N.Y. 1943).

[25] 354 U.S. at 71 (concurring opinion).

[26] Madsen v. Kinsella, 343 U.S. 341 (1952).

[27] See Comment, *Criminal Jurisdiction Over Civilian Components and Accompanying Dependents of the Armed Forces in Foreign Countries,* 8 HASTINGS L.J. 75, 81 (1956).

predecessor,[28] but neither of these enactments has heretofore been tested in the civilian courts as applied to civilian dependents.

Historically, the federal courts have agreed with Congress that when it becomes necessary and proper to the government and regulation of the armed forces, civilians may be amenable to court martial jurisdiction.[29] In reviewing these cases, the courts inquired into the jurisdiction of the military courts and decided this point on the basis of whether or not the civilian was within the class designated by the act of Congress giving the military courts jurisdiction.[30] The *Covert* and the *Krueger* cases add the further requisite that the constitutional rights of the civilian must be considered. It is the opinion of this writer, however, that court martial jurisdiction over dependents may still be sustained in non-capital cases when it becomes necessary for the government and regulation of the armed forces. The *Covert* and *Krueger* cases can be justified on the ground that capital cases constitute an extremely small percentage of all the cases that involve dependents overseas[31] and that lack of jurisdiction in this small percentage of cases would not materially affect the morale and efficiency of the armed forces. Secondly, the civilian who is tried for a capital offense has his life in jeopardy and therefore what rights he has must be carefully safeguarded. Thus, lack of jurisdiction in capital cases does not substantially encumber the mission of the military, and therefore is not necessary and proper for the government and regulation of the armed forces.

Four members of the Supreme Court, who agree with the ruling, were opposed to the foregoing reasoning.[32] In their opinion, the words of the Constitution giving power to make rules for the government and regulation of the land and naval forces must be given a literal interpretation, and in no sense could "land and naval forces" include civilian dependents. The opinion further states that the necessary and proper clause cannot be expansive of the specific power of Congress when dealing with civilians, because civilians have a constitutional right to trial by jury and grand jury indictment. This interpretation, of course, would automatically extend the Constitution and all its provisions to civilian dependents in foreign countries over which the United States gains consensual jurisdiction.

Mr. Justice Black, the author of the opinion adopting the literal interpretation of the Constitution, feels that any extension of court martial jurisdiction is a dangerous encroachment upon the rights of civilians guaranteed by the Constitution. He relies heavily upon *Ex parte Milligan*,[33] *Duncan v. Kahanamoku*,[34] and *Toth v. Quarles*[35] for authority that the Supreme Court in the past has resisted strenuously any such encroachments. All three of these cases, however, may be distinguished by the fact that they concerned civilians who were tried and convicted by military courts within the territorial or continental limits of the United States. Also, in these cases the Supreme Court concluded that the military courts did not have jurisdiction because of the fact that there were civilian courts avail-

[28] 36 STAT. 619, 10 U.S.C. § 1473 (1916).
[29] Cases cited notes 24, 26 *supra*.
[30] *Supra* note 24.
[31] Reid v. Covert, Mr. Justice Black's opinion, n.73.
[32] 354 U.S. 1. Mr. Justice Black delivered the opinion in which the Chief Justice, Mr. Justice Douglas and Mr. Justice Brennan joined.
[33] 71 U.S. (4 Wall.) 2 (1866).
[34] 327 U.S. 304 (1946).
[35] 350 U.S. 11 (1955).

able, or that there were no practical reasons why they could not be made available. In the *Duncan* and *Toth* cases, the court expressly found that under these circumstances the lack of military jurisdiction would not have an adverse effect on morale and efficiency of the armed forces. Apparently, these cases stand for the positive proposition that civilians cannot be subjected to military jurisdiction when there are civilian courts of the United States available to perform the judicial functions. This proposition would not impair the authority of the previously noted cases that have sustained court martial jurisdiction over civilians.[36]

Mr. Justice Black, however, feels that all the cases that have sustained court martial jurisdiction over civilians must be justified under the "War Power." But the power to wage war must also include the power to make the necessary preparations for war.[37] The surest way to avoid war is to prepare for it in time of peace.[38] The reason for keeping a large military contingent in time of peace is only to be prepared for the eventuality of war. Thus, providing for the morale and efficiency of the overseas organization can be termed "preparations." For these reasons, even under the "War Power," civilians overseas can be brought within the jurisdiction of military courts in time of peace if it is found that the lack of such jurisdiction would substantially affect the morale and efficiency of the armed forces. Thus, whether or not the "War Power" is relied upon in order to justify military jurisdiction, the question still revolves around a weighing of what is necessary and proper against the rights of American civilians outside the continental limits.

The judicial weighing of these opposing interests was seemingly an untenable proposition to Mr. Justice Black. But a closer study seems to reveal that he conveys this impression only because he was of the opinion that civilian rights must be protected in time of peace regardless of the price paid in military efficiency.

Why then would Mr. Justice Black refuse to strike down the reasoning of the territorial cases previously noted that are authority for the proposition that the Constitution is not strictly applied outside the continental limits?[39] He would only limit these cases to their particular circumstances; but in fact there are several similarities between these cases and the cases concerning civilian dependents accompanying the armed forces overseas. The similarities are the need for effective control in order to carry into effect a specifically granted power of Congress and the practical impossibility of empaneling a civilian jury and thereby providing all the procedural safeguards we enjoy within the continental limits of the United States.

To deny civilian citizens of the United States residing in territories their constitutional right to jury trial requires a liberal interpretation of the Constitution. It also entails a balancing of the necessities of effective government against the right of the individual civilian outside the continental limits. Mr. Justice Black, however, would adopt a literal interpretation of the Constitution when the rights of civilians who are United States citizens in foreign countries are concerned.

The literal interpretation of the constitutional provisions concerning the powers of Congress is inconsistent with the historical application of those powers. As was noted above, the normal interpretation of the necessary and proper clause

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[36] Cases cited notes 24, 26 *supra*.

[37] Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 327-328 (1936).

[38] 2 STORY, COMMENTARIES ON THE CONSTITUTION, § 1185 (4th ed. 1873).

[39] *Supra* note 22.

has been expansive of the specifically granted powers.[40] The provision shows on its face that it was intended to allow Congress that discretion which would be necessary to carry into effect the powers which have been entrusted to it. But, Mr. Justice Black would not allow Congress this discretion because the framers of the Constitution were opposed to military jurisdiction over civilians. The men who wrote the Constitution lived in a time entirely different from the present day society we enjoy. They had fought for freedom from a government imposed upon them without adequate representation, and which imposed the will of a few upon many by the use of force. Under these circumstances, the framers of the Constitution were most concerned with ridding themselves of an oppressive rule. They had in mind the establishment of a permanent form of government and one that would endure into the indefinite future, but the vast possibilities and infinite circumstances which the future held could never have entered their minds.[41]

Today we are not threatened by military rulers. We have a representative form of government firmly established. Our national security is now threatened from without and Congress has deemed it necessary to the preservation of that security to maintain large military contingents overseas. Congress has further decided to allow civilian dependents to accompany these forces into foreign territory. Both the military and Congress feel that court martial jurisdiction over civilian dependents accompanying these forces is essential to the execution of the military mission. It is hard to deny that this jurisdiction has a substantial effect on the military when two members of the Supreme Court vigorously dissent to the striking down of any part of art. 2, sec. 11, U.C.M.J., and another two members of the court are unwilling to say that the military should not have jurisdiction over the great majority of the civilian dependent cases.

The Supreme Court has suggested no practical alternatives to military jurisdiction over civilian dependents. In fact, the dissenting opinion of Mr. Justice Clark presents a convincing argument that there are none which would not adversely affect the interest of the military.

In conclusion, it is this writer's opinion, that to draw a strict line of demarcation between the needs of the military in time of war and its needs in time of peace is a dangerous proposition. Technically, we are at peace, but the international tranquility and understanding implied by that term are far from realization. The nation through its representatives in Congress has dictated that a strong military force is the best way to provide for our security. High morale and efficiency of the military is essential to the effectiveness with which they can carry out their mission. The national security should be uppermost to all considerations and legislation enacted to implement the security should not be struck down unless it is clearly unnecessary for the accomplishment of that purpose. The means necessary to security of a nation are governed by the dangers which threatened it.[42] The Constitution of the United States can be interpreted to include military jurisdiction over civilians in time of peace when the situation necessitates. Until it is clearly shown that the lack of jurisdiction over civilian dependents overseas does not adversely effect the mission of the military, art. 2, sec. 11, U.C.M.J., should be sustained.

Tevis P. Martin Jr.

[40] CONSTITUTION OF THE UNITED STATES OF AMERICA (annotated), art. I, § 8, cl. 18 (Corwin ed. 1952).

[41] Downes v. Bidwell, 182 U.S. 244, 284 (1901).

[42] 2 STORY, COMMENTARIES ON THE CONSTITUTION, § 1185 (4th ed. 1873).