

THE GIRARD CASE: CONSTITUTIONALITY OF STATUS OF FORCES AGREEMENTS

Wilson v. Girard, 354 U.S. 524 (1957)

On January 30, 1957, Specialist Third Class William Girard was guarding a machine gun during maneuvers with his regiment in Japan. He killed a Japanese woman who was scavenging expended cartridge cases nearby, by firing a shell casing from his grenade launcher in her direction.

A protocol¹ between the two countries, made pursuant to the Security Treaty² by which Japan had allowed United States forces to remain within her borders, gave the United States primary jurisdiction over offenses committed by U.S. servicemen against American persons or property, or in the performance of official duties. Japan had primary jurisdiction over other offenses. The protocol also provided that either country could waive its primary jurisdiction.

A dispute arose in the Criminal Jurisdiction Sub-Committee of the Joint Committee established by the protocol to reconcile jurisdictional disputes. The Japanese agreed that Girard was on duty at the time of the incident, but asserted that the shooting was not in performance of his duty of guarding the machine gun.³

The Secretary of Defense and the Secretary of State authorized American representatives to waive jurisdiction, and Girard was held in American custody pending trial in the Japanese courts. The District Court, on Girard's application for a writ of habeas corpus, enjoined the Secretaries of Defense and State from turning Girard over to the Japanese authorities, on the ground that such action was unconstitutional.⁴ In reversing, the Supreme Court dismissed the question of the constitutionality of the waiver provision in a single sentence: "We find no Constitutional or statutory barrier to the provision as applied here."

The Japanese Peace Treaty⁵ restored Japan to full sovereignty. By "sovereignty" in its largest sense is meant supreme, absolute, un-

¹ 4 *U.S. Treaties and Other International Agreements* 1846; T.I.A.S. No. 2848, authorized by an Administrative Agreement, 3 *U.S. Treaties and Other International Agreements* 3341; T.I.A.S. No. 2492.

² 3 *U.S. Treaties and Other International Agreements* 3329; T.I.A.S. No. 2491.

³ Discussion in the Criminal Jurisdiction Subcommittee of the Joint Committee, *Wilson v. Girard*, 354 U.S. at 540 (1957). The Japanese position before this committee was that "the incident arose when Girard materially, deviating from the performance of such duty of his, willfully threw expended cartridge cases away towards Naka Sakai and Hideharu Onozeki, and thus inviting them to come near to him, he fired toward them." *Ibid.* at 540. An Army circular states that "a substantial departure from the acts a person is required to perform in a particular duty usually will indicate an act outside of his official duty." *Ibid.* at 542.

⁴ *Girard v. Wilson*, 152 F. Supp. 21 (D.C. 1957).

⁵ 3 *U.S. Treaties and Other International Agreements* 3169; T.I.A.S. No. 2490, 136 *United Nations Treaty Series* 45.

controllable power—the absolute right to govern.⁶ Jurisdiction is an incident of that right. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself.⁷ This conception is fundamental in international law and in normal circumstances would hardly be challenged. A Japanese tourist who committed a crime in the United States would certainly be subject to trial by an American court according to American procedures, and by the same token an American tourist who committed a crime in Japan would be subject to trial by a Japanese court, according to Japanese procedures.

Any exceptions to the full and complete power of a nation, within its own territories must be traced to the consent of the nation itself, but such consent to a restriction of its jurisdiction in favor of a foreign power may be implied in some circumstances.⁸ The Supreme Court has said that such consent will be implied where troops march through a country with the consent of its sovereign,⁹ but other authorities disagree, at least where a nation consents to receive foreign military forces for mutual protection in peace time.¹⁰ Whether the American view is correct or not, there is no room for dispute where the matter of jurisdiction is covered by express agreement, and here the limits of American and of Japanese jurisdiction are expressly stated.

The waiver provision is a part of the protocol and therefore a further limitation on Japan's consent to American jurisdiction. It is properly a right withheld from the United States by the protocol, not a right given up by it.

Two lines of cases illustrate by contrast the principles of sovereignty and consent discussed above. One is based on *In re Neagle*,¹¹ a decision relied upon by the District Court in enjoining Girard's delivery to the Japanese authorities.

Neagle, a deputy United States Marshal assigned to guard Supreme Court Justice Fields, shot David Terry, when Terry assaulted Fields. In freeing Neagle from the custody of California authorities the Supreme Court held that since he was acting in his capacity as a federal official, Neagle could not be tried in the California courts. Other cases cited by the District Court applied this principle to a mail truck driver,¹²

⁶ 1 STORY ON THE CONSTITUTION §207 (1873).

⁷ *Schooner Exchange v. McFaddon*, 11 U.S. 116, 135 (1812).

⁸ *Ibid.* at 136.

⁹ *Ibid.* at 138.

¹⁰ For an exhaustive discussion of this question in regard to the North Atlantic Treaty Organization Status of Forces Agreement, 4 *U.S. Treaties and Other International Agreements* 1792, T.I.A.S. No. 2846, see 99 CONG. REC. 3724.

¹¹ 135 U.S. 1 (1889).

¹² *Johnson v. Maryland*, 254 U.S. 51 (1920).

a Coast Guardsman,¹³ a shore patrolman,¹⁴ and a soldier.¹⁵ This immunity of federal officials acting under federal law to all but the federal courts was the basis for the District Court's injunction.

However, these cases involved a jurisdictional dispute, not between two sovereign nations, but between a state and the federal government, and this jurisdictional conflict was resolved solely on the basis of the constitutional supremacy of federal authority. The analogy between *In re Neagle* and *Girard* is as remote as the relationship between the United States and California is remote from that between the United States and Japan.

The companion cases of *Reid v. Covert* and *Kinsella v. Krueger*¹⁶ also illustrate by contrast the principles of sovereignty involved. The petitioners in these cases were wives of American servicemen stationed abroad. Both had shot their husbands and were tried by courts-martial. The Supreme Court reversed their convictions, holding that a trial by court-martial deprived them of their Constitutional rights. Mr. Justice Black stated both the doctrine and the reasoning behind it:

We reject the idea that *when the United States* acts against citizens abroad it can do so free of the Bill of Rights. The United States is a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.¹⁷

The italicized words emphasize one important qualification implicit in the reasoning. The Constitution affects only action by the United States, the government it created. The decision that petitioners were entitled to trial by an American civil court rather than an American court-martial has no relation to the question whether they might have been properly tried by the courts of England and Japan where the crimes were committed. If *Girard* had been tried by the United States, he would have been entitled to the protection of its Constitution, but Japan is not affected by the American Constitution. Its jurisdiction depends on its inherent power to control the land and people within its borders. Constitutional rights are not rights in the absolute sense, to be held against the world. They are simply limitations placed on the United States Government by the Constitution that created it. As against Japan, rights under the United States Constitution do not exist.

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¹³ *Brown v. Cain*, 56 F. Supp. 56 (E.D. Pa. 1944).

¹⁴ *Lima v. Lawler*, 63 F. Supp. 446 (E.D. Va. 1945).

¹⁵ *Colorado v. Maxwell*, 125 F. Supp. 18 (D. Colo. 1954); *In re Fair*, 100 Fed. 149 (C.C. D. Nebr. 1900).

¹⁶ 354 U.S. 1 (1957).

¹⁷ *Ibid.* at 4; italics added, Court's footnote omitted.