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## COMMENTS

### Elimination of Peacetime Court-Martial Jurisdiction Over Military Dependents and Employees in Foreign Countries

As a result of several recent cases,<sup>1</sup> the United States Supreme Court has declared Article 2(11) of the Uniform Code of Military Justice unconstitutional. This provision granted jurisdiction to military courts-martial over "persons serving with, employed by, or accompanying the armed forces outside the United States."<sup>2</sup>

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1. *Grisham v. Hagan*, 80 Sup. Ct. 310 (1960); *McElroy v. United States ex rel. Guagliardo*, 80 Sup. Ct. 305 (1960); *Wilson v. Bohlender*, 80 Sup. Ct. 305 (1960); *Kinsella v. United States ex rel. Singleton*, 80 Sup. Ct. 297 (1960). See also *Reid v. Covert*, 354 U.S. 1 (1957).

2. UNIFORM CODE OF MILITARY JUSTICE art. 2(11), ch. 1041, 70A STAT. 37

It will be the purpose of this Comment to examine the historical background of military jurisdiction over these two classes of civilians in peacetime, and to explore the issues of constitutional law which are involved in the decisions, as well as the potential effects of the holdings.

HISTORICAL DEVELOPMENT OF ARTICLE 2(11),  
UNIFORM CODE OF MILITARY JUSTICE

The Constitution requires that an accused citizen be afforded a grand jury indictment and a trial by jury of his peers, except in "cases arising in the land and naval forces."<sup>3</sup> In several cases, the United States Supreme Court has held that the grant of power to Congress embodied in Article I, Section 8, Clause 14 (commonly termed the Clause 14 power) "to make rules for the Government and Regulation of the land and naval forces" includes the power to provide for trial without a jury.<sup>4</sup> The determination of precisely *which persons* were to be included in the group subject to military justice has caused much confusion in the past.

Whether or not civilians should be subjected to the jurisdiction of military courts has been a persistent problem since the formative years of the nation, and the attitudes and traditions operating on the development of this area of the law may be traced back to seventeenth century England. The Articles of War which authorized the trial of soldiers for non-military crimes by courts-martial were promulgated during this period.<sup>5</sup> This action hastened the drafting of the Bill of Rights,<sup>6</sup> which protected the right of trial by jury. Against this background, two of the greatest English jurists, Lord Chief Justice Hale<sup>7</sup> and Sir William Blackstone,<sup>8</sup> expressed sharp hostility to any

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(1956), 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 and outside the following: the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands."

3. U.S. CONST. amend. V.

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

5. WINTHROP, MILITARY LAW AND PRECEDENTS 920 (2d ed. 1920).

6. 1 Will. & Mar., ch. 2.

7. HALE, HISTORY AND ANALYSES OF THE COMMON LAW OF ENGLAND 40, 41 (1st ed. 1713).

8. 1 BLACKSTONE, COMMENTARIES \*413 (1766).

expansion of the jurisdiction of military courts. The generation that adopted the American Constitution was distrustful of the military;<sup>9</sup> but despite this feeling that the military should be kept subordinate to civil authority, there was recognized a need for control of certain persons serving with the Army who were not soldiers. The Articles of War of 1775,<sup>10</sup> under which the American Revolutionary Army was originally governed, provided for the trial by courts-martial of civilians serving with the army, and subsequent amendments gave expanded descriptions of these civilians.<sup>11</sup> There are numerous instances of trials of civilian servants such as "wagon-masters,"<sup>12</sup> "waggoners,"<sup>13</sup> and "express riders,"<sup>14</sup> detailed in Washington's writings. Probably influenced by these developments, the framers of the Constitution gave to the Congress the power "to make rules for the Government and Regulation of the land and naval forces."<sup>15</sup> The first complete enactment of the Articles of War was effected in 1806<sup>16</sup> and the enactment continued the jurisdictions over persons serving with the armies in the field even though they were not enlisted soldiers. At the time these Articles were enacted, there was no thought of deploying military forces beyond the boundaries of this country and it was felt that they were only applicable in the continental United States.<sup>17</sup>

The American intervention in Cuba in 1906 illustrated the need for an expansion of the jurisdiction of military courts over civilian dependents and employees following the armed forces in occupations of foreign territories.<sup>18</sup> The revision of the Articles of War in 1916 gave the military jurisdiction over "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."<sup>19</sup> (Emphasis added.) This Article remains substantially the same in its present form as Article 2(11) of the Uniform Code of Military Justice.

9. 1 WELLS, THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS 231 (1865).

10. WINTHROP, MILITARY LAW AND PRECEDENTS 956 (2d ed. 1920).

11. *Id.* at 963-64.

12. 10 WRITINGS OF WASHINGTON 359.

13. 11 *id.* at 487.

14. 20 *id.* at 24.

15. U.S. CONST. art. I, § 8, cl. 14.

16. Act of April 10, 1806, ch. 20, 2 STAT. 359.

17. See supplemental brief for appellant and petitioner on rehearing, p. 42, *Reid v. Covert*, 354 U.S. 1 (1957).

18. S. Rep. No. 130, 64th Cong., 1st Sess. 37-38 (1916).

19. 39 STAT. 651 (1916).

It has been held consistently that *in time of war* the military has jurisdiction over persons directly connected with the armed forces.<sup>20</sup> Although not in time of war, special circumstances necessitated the decisions in the cases of *Ex parte Reed*<sup>21</sup> and *Johnson v. Sayre*<sup>22</sup> which dealt with jurisdiction over civilian naval paymasters who committed offenses while on board ship, and in each the Supreme Court affirmed the military jurisdiction. In a similar vein are cases dealing with trials of military personnel by non-military courts created by Congress to try offenses in territorial possessions of the United States. The procedure of these courts calls for neither grand jury indictment nor trial by jury. In *re Ross*<sup>23</sup> involved an American seaman tried and convicted of murder by a non-military court in Japan; the United States Supreme Court held that the constitutional guarantee of grand jury indictment and trial by jury did not extend beyond the boundaries of the United States. This statement, however, has been repudiated by numerous cases.<sup>24</sup> In the *Insular* cases,<sup>25</sup> the Court upheld Congress' refusal to provide these constitutional rights in the territorial possessions, where it was considered inexpedient to require the procedure of jury trials in countries unfamiliar with the American system of justice.<sup>26</sup>

#### EFFECT OF INTERNATIONAL AGREEMENT ON MILITARY JURISDICTION OVER CIVILIANS OVERSEAS

Article 2(11) grants jurisdiction over civilians to the military courts in accordance with "any treaty . . . or agreement to which the United States is or may be a party." A brief examination of the provisions of such treaties as the NATO Status of Forces agreements will demonstrate their effect on this area of military jurisdiction prior to the decision of the recent cases.

A sovereign nation has the exclusive jurisdiction to punish

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20. In *Duncan v. Kahanamoku*, 327 U.S. 304, 313 (1946), the Supreme Court spoke of the "well established power of the military to exercise jurisdiction over members of the armed forces [and] those directly connected with such forces" in time of actual conflict. See also *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

21. 100 U.S. 13 (1879).

22. 158 U.S. 109 (1895).

23. 140 U.S. 453 (1891).

24. See cases cited in *Reid v. Covert*, 354 U.S. 1, 9, n. 10 (1957).

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

26. Note, 19 *LOUISIANA LAW REVIEW* 190, 193, n. 21 (1958).

offenses against its laws, committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction.<sup>27</sup> This consent has been granted through the various status of forces agreements now in force,<sup>28</sup> which accord United States military authorities the right to exercise jurisdiction over "persons subject to the military law."<sup>29</sup> The agreements grant the military primary jurisdiction over *employees* accompanying the military contingent overseas, for offenses arising out of the execution of official duty, or for those solely against American personnel or property.<sup>30</sup> The foreign sovereign has primary jurisdiction over *dependents*,<sup>31</sup> but the United States can exercise concurrent jurisdiction by securing a special waiver from the foreign sovereign. This distinction between dependents and employees apparently was drawn intentionally by the drafters of the agreement. Its net result is to grant the foreign sovereign jurisdiction over dependents for all offenses except those solely against the law of the United States, while giving the United States military authorities wider latitude over employees.<sup>32</sup>

#### THE RECENT DECISIONS

##### *Military Jurisdiction for Capital Offenses over Civilian Dependents Overseas*

In the companion cases of *Reid v. Covert* and *Kinsella v. Krueger*,<sup>33</sup> the United States Supreme Court was confronted squarely with the constitutionality of court-martial trials for capital offenses committed by civilian dependents on overseas bases. A divided court held that these dependents could not be tried by courts-martial for such offenses and that Congress was not empowered under Clause 14 to provide for such jurisdiction in the future. Writing for the majority of the Court, Mr. Justice Black discounted the previous reliance on the *Ross* and *Insular* cases, going so far as to say that "the Ross case should be left as a relic from a different era"<sup>34</sup> and that "neither the (*Insular*)

27. *Wilson v. Girard*, 354 U.S. 524 (1957); *Schooner Exchange v. M'Faddon*, 11 U.S. 116 (1812).

28. See *Agreement Among the Parties to the North Atlantic Treaty Regarding the Status of their Forces*, June 19, 1951, 4 U.S. TREATIES AND OTHER INT'L AGREEMENTS 1792, T.I.A.S. No. 2846.

29. NATO STATUS OF FORCES AGREEMENT art. VII, para. 1(a) (1953).

30. *Id.* art. VII, para. 3(a).

31. *Id.* art. VII, para. 3.

32. See SNEE & PYE, STATUS OF FORCES AGREEMENTS AND CRIMINAL JURISDICTION 34-40 (1957).

33. 354 U.S. 1 (1957).

34. *Id.* at 12.

cases nor their reasoning should be given any further expansion."<sup>35</sup> The opinion did not delineate between capital and non-capital cases but based the decision on the "status" theory, stating that "the authority conferred by clause 14 does not encompass persons who cannot fairly be said to be 'in' the military service."<sup>36</sup> It did not distinguish between different classes of civilians in similar situations, but broadly held that *civilians* could never be held amenable to military jurisdiction in time of peace. A salient feature of this opinion is that it refused to acknowledge that the necessary and proper clause, in conjunction with the Clause 14 power, could operate "to extend military jurisdiction to any group of persons beyond that class described in Clause 14 — 'the land and naval Forces'."<sup>37</sup> In an attempt to define the boundaries of the class which should be included in the "land and naval forces," the Court said that the wives of servicemen are definitely not to be included in this category, but there is language which indicates "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.*"<sup>38</sup> (Emphasis added.)

*Military Jurisdiction for Non-Capital Offenses over Dependents Overseas*

After the *Covert* decision, there remained unsettled the questions of military jurisdiction over civilian *dependents* accused of non-capital offenses, and the constitutionality of military trial of civilian *employees* charged with either capital or non-capital offenses committed overseas. These areas have been clarified by four companion cases, decided recently, which will be considered separately according to the classification of persons with which

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35. *Id.* at 14.

36. *Id.* at 22.

37. *Id.* at 21.

38. *Id.* at 23. Mr. Justice Frankfurter concurred on the narrow ground that the holding should be applicable only to the exercise of peacetime military jurisdiction over civilian dependents in capital cases. He also disagreed with the Court's discarding the *Ross* and *Insular* cases, and demonstrated by historical analysis that the holdings should still be regarded as vital when viewed in context with their own particular circumstances and settings. Mr. Justice Harlan's concurring opinion was similarly limited to capital offenses, and he criticized the Court's holding that the Necessary and Proper Clause could not be considered in conjunction with Clause 14 in a determination of the extent of military jurisdiction over civilians. Mr. Justices Clark and Burton, dissenting, felt that the wives of servicemen were "as much a part of the military installation as were their husbands," and that they should be considered a part of the "land and naval forces" for purposes of Clause 14 power.

they deal. In *Kinsella v. United States ex rel. Singleton*,<sup>39</sup> the Court held Article 2(11) of the UCMJ unconstitutional when applied to give courts-martial jurisdiction over civilian dependents charged with non-capital offenses.<sup>40</sup> As in *Covert*, the Court denied that the Necessary and Proper Clause could extend the Clause 14 power to include civilians charged with non-capital offenses. The Court in the *Singleton* case affirmed the status theory advanced in the *Covert* decision, holding that the accused was not in sufficient " 'proximity, physical and social, . . . to the 'land and naval Forces' . . . as reasonably to demonstrate a justification' " <sup>41</sup> for an extension of military jurisdiction in her case. The Government contended that the courts-martial should be accorded jurisdiction in this situation because of the need, from a morale standpoint, for dependents to accompany the forces overseas, and a concomitant need for a source of disciplinary control over these dependents. The Court discounted these contentions, quoting a statement from *United States ex rel. Toth v. United States* to the effect that no " 'considerations of discipline' could provide an excuse for 'new expansion of court-martial jurisdiction at the expense of normal and constitutionally preferable systems of trial by jury.' " <sup>42</sup> The Court was also reluctant to permit prosecution of non-capital offenses, while rejecting capital ones under *Covert*, because it felt that this would place "an unreviewable discretion to exercise jurisdiction over civilian dependents simply by downgrading the offense, thus stripping the accused of his constitutional rights and protections." <sup>43</sup>

Thus, it is clear from the *Covert* and *Singleton* cases that Article 2(11) of the Uniform Code of Military Justice is unconstitutional as applied to civilian dependents accompanying the armed forces overseas in peacetime, charged with either capital or non-capital offenses.

*Military Jurisdiction over Civilian Employees Overseas Charged with Capital and Non-Capital Offenses in Peacetime*

In *Grisham v. Hagan*,<sup>44</sup> the Court encountered the application of Article 2(11) to a civilian *employee* charged with the capital

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39. 80 Sup. Ct. 297 (1960).

40. It is interesting to note that Mr. Justice Clark, who dissented from the decision in the *Covert* case, wrote the majority opinion in this group of cases.

41. 80 Sup. Ct. 297, 301 (1960), quoting from *Reid v. Covert*, 354 U.S. 1, 46-47 (1957) (concurring opinion).

42. *Id.* at 300.

43. *Id.* at 302.

44. 80 Sup. Ct. 310 (1960).



offense of premeditated murder. He was found guilty of the lesser and included offense of unpremeditated murder, and sentenced to life imprisonment. While serving a reduced term, he petitioned for a writ of habeas corpus, claiming that Article 2(11) was unconstitutional as applied to him. After dismissal of the writ below,<sup>45</sup> the Supreme Court granted certiorari and held that the case was controlled by the rule of *Covert*. The Court stated that "continued adherence to *Covert* requires civilian employees to be afforded the same right of trial by jury"<sup>46</sup> as dependents have, in capital cases.

Article 2(11) was held unconstitutional when applied to civilian employees charged with non-capital offenses in the cases of *McElroy v. United States ex rel. Guagliardo*<sup>47</sup> and *Wilson v. Bohlander*.<sup>48</sup> The Court held that these cases were controlled by the decision in the *Singleton* case, holding that dependents are not amenable to military justice for non-capital crimes. Acknowledging the existence of historical evidence supporting the expansion of military jurisdiction to cover civilian employees, the opinion deems it insufficient to form a solid historical basis.<sup>49</sup>

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45. 161 F. Supp. 112 (M.D. Pa. 1958), aff'd, 261 F.2d 204 (3d Cir. 1959).

46. 80 Sup. Ct. 310, 311 (1960).

47. 80 Sup. Ct. 305 (1960). Respondent, while serving as a civilian electrical lineman with the Air Force in Morocco, was tried and convicted by court-martial of larceny and conspiracy to commit larceny. He filed a petition for writ of habeas corpus in the District Court for the District of Columbia, which was dismissed. 158 F. Supp. 171 (D.D.C. 1958). The court of appeals reversed the dismissal. 259 F.2d 927 (D.C. Cir. 1958). The Supreme Court granted certiorari, 359 U.S. 904 (1959).

48. 80 Sup. Ct. 305 (1960). Petitioner, a civilian auditor employed by the Army in Berlin, was tried and convicted by court-martial of sodomy. His petition to the United States District Court for Colorado for a writ of habeas corpus was dismissed. Appeal was perfected to the court of appeals, and the Supreme Court granted certiorari prior to argument. 359 U.S. 906 (1959).

49. 80 Sup. Ct. 305, 308 (1960), quoting from *Reid v. Covert*, 354 U.S. 1, 64 (1957) (concurring opinion). Mr. Justice Harlan, joined by Mr. Justice Frankfurter, dissented from the holding insofar as it withheld jurisdiction from military courts in non-capital cases, but concurred in the holding as applied to capital cases. He spoke of the Court's passing over too lightly "the awesome finality of a capital case," a factor which has induced the institution of special procedural safeguards for those charged with such offenses. The Court's definition of military jurisdiction in terms of "status" was criticized as being but one of several factors in a consideration of the exercise of such power, and one which should not be the sole determinative factor. Mr. Justice Harlan preferred the test of "closeness or remoteness of the relationship between the person affected and the military establishment," and applied that test to the persons in the non-capital cases to conclude that they should be amenable to military jurisdiction. The effect of the decisions on the nation's agreements with foreign countries in which troops are stationed was mentioned, the Justices expressing the fear that much of the jurisdiction which the government has over its overseas personnel under Status of Forces agreements will have to be relinquished. Mr. Justice Whittaker, with Mr. Justice Stewart, distinguished between *dependents* and *employees*, concluding that the former should not be subject to military jurisdiction, but that the latter should. While agreeing with the majority that there can be no valid distinction

It may be concluded from the holdings of the *Covert*, *Singleton*, *Grisham*, *Guagliardo*, and *Wilson* cases that Article 2(11) is unconstitutional as applied to either civilian dependents or civilian employees accompanying the forces to overseas bases in peacetime, who are charged with any offense, either capital or non-capital.

EVALUATION OF THE RECENT CASES IN RELATION TO  
THE NECESSARY AND PROPER CLAUSE

The Constitution gives Congress the power to enact all laws that are necessary and proper to execute its enumerated powers.<sup>50</sup> Chief Justice Marshall gave the Necessary and Proper Clause a broad interpretation in *McCulloch v. Maryland*<sup>51</sup> when he observed that Congress must be allowed the discretion which would enable it to perform the duties assigned to it in the way most beneficial to the people.<sup>52</sup>

This interpretation has served as a basis for a great expansion of governmental powers in time of war or armed rebellion. John Quincy Adams characterized the "peace powers" as being closely limited by constitutional and statutory regulations and the "war powers" as being limited only by the "usages of nations."<sup>53</sup> He termed the war power "tremendous" and felt that although it is within the constitutional limits of governmental power, it "breaks down every barrier so anxiously erected for the protection of liberty and life."<sup>54</sup>

This description of the war power has proven to be, in the most part, accurate. The Supreme Court, as early as 1871, sustained a manifestation of this broad power when it upheld the Civil War Confiscation Acts.<sup>55</sup> During World War I, it sustained the Selective Draft Law of 1917<sup>56</sup> and upheld government operation of all transportation systems.<sup>57</sup> During and after World

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between capital and non-capital offenses under Article 2(11), this opinion develops the history of military jurisdiction over civilian employees, and concludes that the drafters of the Constitution fully intended to include such persons within the purview of the Clause 14 power "to make rules for the Government and Regulation of the land and naval forces." Employees are viewed by Mr. Justice Whitaker as being "so closely related to and intertwined with [the military] forces as to make their government essential to the government of those forces."

50. U.S. CONST. art. I, § 8, cl. 18.

51. 17 U.S. 316 (1819).

52. *Id.* at 421.

53. Quoted in CORWIN, *TOTAL WAR AND THE CONSTITUTION* 78 (1948).

54. *Ibid.*

55. *Miller v. United States*, 78 U.S. 268 (1871).

56. *Arver v. United States*, 245 U.S. 366 (1918).

57. *Northern Pacific Ry. v. North Dakota*, 250 U.S. 135 (1919).

War II, courts upheld the power of Congress to govern commodity prices through the Emergency Price Control Act,<sup>58</sup> sustained the imposition of fines on conscientious objectors who refused to register for the draft,<sup>59</sup> and held the Housing and Rent Act of 1947 constitutional as a proper exercise of the war power.<sup>60</sup> In the so-called "Japanese Exclusion" cases, the Supreme Court upheld the establishment of a system of evacuation from designated military areas, applicable to persons of Japanese ancestry, and an accompanying measure which placed a curfew upon these persons while they remained in the military area prior to evacuation.<sup>61</sup> This substantial restriction of the personal liberty of citizens based upon race or ancestry was viewed by Mr. Justice Murphy as going to the "very brink of constitutional power,"<sup>62</sup> but he acknowledged that it was a proper exercise of the war power. In sustaining the power of Congress to control rents after the war, the court made it clear that the war power "does not necessarily end with the cessation of hostilities,"<sup>63</sup> provided it is employed to cope with a condition of which the "war was a direct and immediate cause."<sup>64</sup> Similarly, in 1949 the conviction of the wife of an Army lieutenant by a military commission in Germany for her husband's murder was upheld by the Court on the grounds that, although actual hostilities had ceased, the jurisdiction over the dependent was justified by the war power of Congress.<sup>65</sup> It was held that the need for the exercise of the war power still existed in Germany in 1949 because of the occupation then in effect in that area.

Congress has given the military full jurisdiction over all civilians with the forces "in the field" during time of war.<sup>66</sup> This grant has been repeatedly upheld by the courts as a constitutional exercise of congressional power.<sup>67</sup> However, the Court refused to take the position that this broad power was applicable in the instant cases. In *Covert*, the Court refused to acknowledge

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58. *Yakus v. United States*, 321 U.S. 414 (1943).

59. *United States v. Henderson*, 180 F.2d 711 (7th Cir. 1950).

60. *Woods v. Miller Co.*, 333 U.S. 138 (1948).

61. *Korematsu v. United States*, 323 U.S. 214 (1944).

62. *Id.* at 233 (dissenting opinion).

63. *Woods v. Miller Co.*, 333 U.S. 138, 141 (1948).

64. *Id.* at 144.

65. *Madsen v. Kinsella*, 343 U.S. 341 (1952).

66. UNIFORM CODE OF MILITARY JUSTICE art. 2(10), 10 U.S.C. § 802(10) (Supp. V, 1958).

67. *Perlstein v. United States*, 151 F.2d 167 (3d Cir. 1945), cert. denied, 327 U.S. 777 (1945), cert. dismissed, 328 U.S. 822 (1945); *McCune v. Kilpatrick*, 53 F. Supp. 80 (D.C. Va. 1943); *Ex parte Jochen*, 257 Fed. 200 (D.C. Tex. 1919); *Ex parte Falls*, 251 Fed. 415 (D.C.N.J. 1918).

that the Necessary and Proper Clause could be used to extend the Clause 14 power to provide jurisdiction over civilians. The reason given by Mr. Justice Black for this position was that "having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14."<sup>68</sup> This statement was severely criticized in all of the instant cases. Mr. Justice Whittaker illustrated, through an analysis of the language of the Fifth Amendment which excepts from its guarantees "*cases arising in the land or naval forces*" (emphasis added), that the operation of the Necessary and Proper Clause should not be rejected in such an important area of the law, because the framers did not intend the Clause 14 power to be restricted by the provisions of Article III<sup>69</sup> or the Fifth<sup>70</sup> and Sixth Amendments.<sup>71</sup>

In the light of the existing pressures of international tension, it would appear that Mr. Justice Whittaker's position is to be considered the more reasonable interpretation of the effect which the Necessary and Proper Clause should be allowed to exert in this area. As mentioned above, the "war power" of Congress has been allowed to operate freely, through use of the Necessary and Proper Clause, even after actual hostilities have ceased. It is difficult to perceive a rational reason for the Court's allowing the dependent in *Madsen* and *Kinsella*<sup>72</sup> to be tried by a military commission through the use of the "war power" rationale, while holding that the offender in *Kinsella v. Krueger*<sup>73</sup> could not be tried by military courts-martial when her crime occurred in Japan at a time when that country served as a logistics and aviation base for actual hostilities then being waged in Korea. In fact, it would appear that the situation in Japan in 1954 demanded the exercise of the war power much more than that existing in Germany in 1949.

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68. 354 U.S. 1, 21 (1957).

69. U.S. CONST. 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."

70. *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. . . ."

71. *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. . . ."

72. 343 U.S. 341 (1952).

73. 354 U.S. 1 (1957).

The ever-present threat of nuclear warfare, the increasing pressure of the missile race, and the various international diplomatic tactics have dictated the necessity of a far-flung military system, with forces stationed in foreign nations. These conditions demand maximum efficiency in the operation of these installations, and such efficient operation can be effected only if the military commander responsible for the satisfactory discharge of each unit's mission is accorded broad disciplinary and control powers. This authority is needed to govern such problems as dope traffic, black-market operations, on-base traffic control, emergency evacuations, and security violations, to enumerate only a few of the most critical areas.<sup>74</sup>

Hamilton once proclaimed that the Clause 14 power should be left to exist "without limitation" because of the impossibility of predicting future national "exigencies."<sup>75</sup> The exigencies now existing are of a seemingly potentially disastrous nature, but the Court's decisions in the instant cases have placed severe restrictions on Congress' capacity to deal effectively with these developments — restrictions which the framers of the Constitution sought to avoid.

#### POSSIBLE ALTERNATIVES TO MILITARY JURISDICTION OVER CIVILIANS OVERSEAS

Now that Article 2(11) has been declared unconstitutional as applied to offenses committed by civilians overseas with the military during peace time, there exists the problem of which forum will try these persons. Some suggested methods of solution to the unanswered problem will be enumerated and the objections thereto will be examined.

##### *Trial in the United States*

If Congress were to decide that these civilians were to be tried by a district court in the United States, the accused might be deprived of his Sixth Amendment right of "compulsory process for obtaining witnesses in his favor," as foreign nationals, absent a treaty arrangement, could not be compelled to leave their country to appear in a trial in a United States court, and such appearances would have to be on a voluntary basis.

74. See supplemental brief for appellant and petitioner on rehearing, *App. A., Reid v. Covert*, 354 U.S. 1 (1957). See, generally, *United States v. Burney*, 6 U.S.C.M.A. 776, 800, 21 C.M.R. 98, 122 (1956).

75. *THE FEDERALIST* No. 23 (Hamilton) (Tudor ed. 1947).

There is a further difficulty in the requirement of the Sixth Amendment that the accused have the right of confrontation of adverse witnesses. This right may be waived,<sup>76</sup> but if the offender declined to waive the right, depositions would be inadmissible, and the Government would be required to provide these witnesses at the trial, in some manner.

As the venue requirement of the Sixth Amendment has been held to have "reference only to offenses against the United States committed within a state,"<sup>77</sup> this provision would raise no constitutional problems, and the Congress would be empowered to direct the place of trial under the Constitution.<sup>78</sup>

Even if the constitutional objections to this alternative were resolved, there are other practical problems to be considered, such as the prohibitive cost of transporting evidence and witnesses to this country, the delays involved which would result in a dilution of the deterrent effect of the prosecution, and the impracticability of bringing to trial in the United States the large number of petty offenders such as black market operators. Both the constitutional and practical objections to the proposal make it appear unworkable.

#### *Trial by Special Federal Courts at Overseas Bases*

Under the power given Congress by Article III,<sup>79</sup> to establish inferior courts, it might be possible to establish a system of federal courts at overseas bases. This proposal is seriously defective because of the problem of impanelling an impartial jury, as required by the Sixth Amendment. If the jury were selected wholly from the personnel on the military installation, certain problems would immediately be presented. The Supreme Court has upheld a conviction of violation of a federal narcotics law by a jury composed entirely of government employees, two of whom were directly connected with the department responsible for enforcing this statute.<sup>80</sup> It is to be noted, however, that the panel of prospective jurors included an equal proportion of private citizens, who were all peremptorily challenged by the defendant.

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76. *Levine v. United States*, 182 F.2d 556 (8th Cir. 1950), cert. denied, 340 U.S. 921 (1950); *Kemp v. Government of Canal Zone*, 167 F.2d 938 (5th Cir. 1948); *Burgess v. King*, 130 F.2d 761 (8th Cir. 1942).

77. *Cook v. United States*, 138 U.S. 157, 181 (1891). See also *United States v. Dawson*, 56 U.S. 467, 487 (1853); *Chandler v. United States*, 171 F.2d 921, 931, n. 3 (1st Cir. 1948), cert. denied, 336 U.S. 918 (1949).

78. U.S. CONST. art. III, § 2.

79. *Ibid.*

80. *Frazier v. United States*, 335 U.S. 497 (1948).

Since all prospective jurors on the military base would be government employees, or dependents, there could be no such distribution.

If the jury were composed of military personnel and their dependents, its make-up would closely parallel that of a court-martial, subject to the same "command influence" of which the Court spoke in *Covert*.<sup>81</sup> Since most overseas bases are relatively small communities, the rate of social contact between the personnel, both military and civilian, is high. This situation could tend to diminish the possibility that a jury chosen from this community would be entirely free of bias or prior opinion as to guilt or innocence of the accused. Should the jury be selected from the citizens of the foreign country in which the offense occurred, such citizens probably could not be compelled to attend the trial, in the absence of new treaty negotiations. The problem of the language barrier would also be present.

If all these difficulties were solved in some manner, the cost of setting up a federal court at each of the bases in the sixty-three foreign countries where troops are stationed would be large. This cost element could be diminished by the institution of a traveling United States court with a federal district judge who could go "on circuit" as cases arose at the various military installations abroad. Of course, such a system would be encumbered by the same difficulties in the area of jury selection as would the system of individual courts at each military base. Furthermore, although the United States has been granted permission to utilize its *military* courts in the receiving states, there is a possibility that the national pride of a foreign sovereign would be offended by the presence of the complete American judicial process on its soil.

It would appear that this alternative would take away from the accused one of the most important constitutional rights which the court sought to protect in the present cases — that of trial by a fair and impartial jury. Due to this shortcoming, as well as other problems discussed, this proposal seems to be unacceptable under the present cases.

#### *Civilian Induction Program*

Mr. Justice Clark suggested in *McElroy* that all civilian employees be inducted into the service pursuant to a program such

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81. 354 U.S. 1, 36, 37 (1957). For a different view of the nature of court martial proceedings, see *Burns v. Wilson*, 346 U.S. 137 (1953).

as that used by the military to "draft" doctors and dentists.<sup>82</sup> This proposition is open to several objections. Such a plan as this would be merely a device of subterfuge, which would undermine the constitutional rights which the Court sought to secure by these decisions. It seems contradictory that the Court would sponsor such a circumvention of constitutional rights in an opinion the primary objective of which is to assure that these rights will not be violated. This is not an area in which artifices should be devised to evade the important problem thrust into being by these decisions, i.e., the manner in which the civilian may be accorded all the rights to which he is entitled under these rulings.<sup>83</sup>

The *McElroy* opinion alluded to another problem inherent in this alternative. Mr. Justice Clark stated that "some workers might hesitate to give up their civilian status for government employment overseas."<sup>84</sup> It is believed that many workers would refuse to give up their civilian status, if this program were administered on a voluntary basis, particularly in the light of the keen competition offered by private industry for highly skilled technical and scientific personnel. As this group of civilian employees is the one for which the most crucial need exists today, and would probably be most affected by this element of competition, this program might pose a much greater threat to the defense posture than the Court seemed willing to recognize.

Although Mr. Justice Clark only directed his suggestion at the problem of employees, there would also be a possibility of granting military status to dependents. This, of course, would be subject to all the above objections, along with problems peculiar to the dependent class of civilians, such as whether persons would be accorded pay and rank if granted military status and whether minor dependents could be made members of the military. Because of the problems inherent in this alternative, it seems that the civilian induction program is not feasible.

#### *Elimination of Overseas Dependent Travel*

It was suggested in *Singleton* that the answer to the disciplinary problem might be to disallow civilian dependents over-

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82. *McElroy v. United States ex rel. Guagliardo*, 80 Sup Ct. 305, 309 (1960). See 67 STAT. 89 (1953), 50 U.S.C.A. App. § 454(i) (1951).

83. It may also be asked whether the institution of such a program as this would be a violation of the Thirteenth Amendment's prohibition of involuntary servitude.

84. 80 Sup. Ct. 305, 309 (1960).



seas.<sup>85</sup> Because of the immense scope of overseas operations at the present time, a steadily increasing number of troops are being deployed to bases abroad. The value of these foreign bases is inestimable in this era of push-button warfare. Personnel who man these posts should not be deprived of the privilege of having their families accompany them to overseas duty; such a drastic measure would probably be detrimental to morale, and would seem unwarranted in view of the small number of offenses committed by dependents overseas.<sup>86</sup> Furthermore this plan gives no aid whatever in the problem of employees.

### *Waiver of Constitutional Rights*

The rights of indictment and jury trial are personal privileges which the accused may forego at his election,<sup>87</sup> thus presenting two possible methods of solution of the problem at hand. The military could require the execution of a waiver as a prerequisite to overseas travel by civilian employees or dependents. However, there are certain procedural restrictions on the use of the waiver technique that would raise serious objections to its validity. A waiver of indictment must be executed in *open court*, after the accused has been advised of the nature of the charge.<sup>88</sup> The same general rule has been held to apply in the waiving of a trial by jury.<sup>89</sup> If these safeguards are to be respected, any requirement of waiver as a prerequisite to overseas travel of civilians would be ineffective. A more feasible manner in which this waiver procedure could be handled would be to allow the civilian to choose between trial by court-martial or trial by the foreign sovereign after the commission of the offense. If the offender refused to relinquish his rights, the United States could refrain from requesting a waiver of jurisdiction from the foreign government, and the accused would be left to foreign justice.

Both alternatives in the waiver proposal have the advantage of avoiding the necessity of re-negotiation of treaties or institution of separate court systems. But, as in the case of the civilian

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85. 80 Sup. Ct. 297, 303 (1960).

86. See supplemental brief for appellant and petitioner on rehearing, App. B, *Reid v. Covert*, 354 U.S. 1 (1957).

87. *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942); *Barkman v. Sanford*, 162 F.2d 592 (5th Cir. 1947), cert. denied, 332 U.S. 816 (1947); *Simons v. United States*, 119 F.2d 539 (9th Cir. 1941), cert. denied, 314 U.S. 616 (1941). See *FED. R. CRIM. P.* 7(a), 7(b), 23(a).

88. *FED. R. CRIM. P.* 7(b).

89. *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942); *FED. R. CRIM. P.* 23(a).

induction program, those rights which the Court sought to guard in these cases will not be accorded to the civilians who choose to exercise the waiver. Those who refuse to waive their rights will be subject to the justice of the foreign country, an alternative which is frequently undesirable, as discussed below. Either alternative would operate as an avoidance of the rights of the civilians under the Constitution, as proclaimed by the instant cases, and would serve to subvert the intent of the Court.

### *Trial by the Foreign Sovereign*

The remaining alternative, one which Mr. Justice Clark dissenting in *Covert*, termed "the alternative that the Congress will now be forced to choose,"<sup>90</sup> is that of trial by the foreign country in which the crime was committed. By the terms of international agreements now in force, United States military authorities are granted the right to try only those "persons subject to the military law."<sup>91</sup> By this definition, all civilians are presently amenable only to the jurisdiction of the foreign country in which they are stationed. This development might bring about a loss of certain constitutional rights for the accused, and might in some cases result in subjecting citizens to the "cruel and unusual punishments"<sup>92</sup> which are condemned in the Eighth Amendment.<sup>93</sup> Further, there is a possibility that the foreign sovereign will not prosecute offenses involving only United States citizens. Another factor is that the foreign government will only prosecute offenses against its laws, thereby leaving unpunished crimes against the United States.<sup>94</sup>

### CONCLUSION

As a result of the instant cases, a quandary has been created as to the proper method by which to implement the Court's rulings. Furthermore, it is believed that the Court's refusal to consider the impact of the holdings on military discipline a "relevant consideration"<sup>95</sup> was inopportune in view of the necessity

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90. 354 U.S. 1, 88 (1957).

91. NATO STATUS OF FORCES AGREEMENT art. VII, para. 1(a) (1953).

92. "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, 177, n. 20 (1957).

93. U.S. CONST. amend. VIII.

94. A Senate Resolution (S. Res. 253) has been adopted which creates a select committee to study the problems presented by the instant cases. 106 CONG. REC. 623, 628 (daily ed. Jan. 19, 1960).

95. 80 Sup. Ct. 297, 302 (1960).

that foreign bases be manned in the most efficient manner. It is submitted that questions of discipline, as well as of morale and security, are relevant considerations in this area.

It appears that these decisions could have been avoided by using the Necessary and Proper Clause to sustain military jurisdiction over employees and dependents. The cases seem unfortunate when viewed against the lack of practicable answers to the problem of where these persons will be tried and the unsatisfactory consequences which will probably flow from the adoption of any of the available solutions.

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### The Wife's Cause of Action for Loss of Consortium

Prior to 1950 the right of a wife to recover for loss of consortium<sup>1</sup> resulting from the negligent injury of her husband by a third person was not recognized.<sup>2</sup> In that year, however, in the landmark case of *Hitafter v. Argonne Co.*,<sup>3</sup> the Court of Appeal for the District of Columbia recognized the wife's right to such recovery. This decision has resulted in an extensive re-examination of the question by courts in many other jurisdictions. It is the purpose of this Comment to determine the present status of this right and to examine the bases of the decisions.

The concept of consortium originated in the early common law as a right in the husband to the material services of his wife.<sup>4</sup> With the passage of time, this concept was expanded to include other components of the marriage relation—society, sexual relations, and conjugal affection.<sup>5</sup> At common law the husband's interest was protected against such interferences with the

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1. Consortium has been defined as "conjugal fellowship of husband and wife, and the right of each to the company, cooperation, affection, and aid of the other in every conjugal relation." BLACK'S LAW DICTIONARY (4th ed. 1957).

2. See note 15 *infra*.

3. 183 F.2d 811 (D.C. Cir. 1950), cert. denied, 340 U.S. 852 (1950). There were two major holdings of the *Hitafter* decision—(1) a wife has a cause of action for loss of consortium resulting from negligent injury of her husband by a third person, and (2) that this right was not barred by the "exclusive remedy" provision of the Longshoremen's and Harbor Workers' Compensation Act. The second holding has been overruled subsequently. See note 20 *infra*.

4. See 3 BLACKSTONE, COMMENTARIES \*139; Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1930).

5. See PROSSER, TORTS 683 (2d ed. 1955); Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 2 (1923); Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 662 (1930). These three aspects have been labeled the "sentimental components" of marriage.