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I. Introduction

The United States Supreme Court during the twentieth century has developed several theories for analyzing the reach of the Constitution beyond the borders of the United States. The first theory, which appeared in the Insular Cases[1] in the early part of the century, imposed geographical, territorial limits on the reach of the Constitution. The issue in the Insular Cases was imperialism and the extension of the political power of the United States. The Court evinced little concern for the question of protecting individuals from government itself. By mid-century, territoriality had become irrelevant and government had assumed much wider scope. The question of the reach of the Constitution arose again in *Reid v. Covert*[2] after the dependent of an American serviceman was court-martialed abroad. The Court's decision in *Reid* propounded the second and third theories of the reach of the Constitution. The *Reid* Court separately marshalled the concepts of due process and constitutional rights to extend the reach of the Constitution. None of the opinions in *Reid* directly addressed the issue of the propriety of particular governmental acts. Instead, *Reid* invoked the Insular Cases in a situation that was inapposite to the theory set forth in the Insular Cases. In subsequent years, neither the due process nor the constitutional rights theory in *Reid* received universal acceptance; each led to a separate line of cases.[3]

In addition, the Supreme Court indirectly considered the reach of the Constitution during and after World War II in the context of the United States' participation in international war tribunals and the exercise of United States military jurisdiction in occupied lands.[4] The Court avoided jurisdiction in cases involving the international tribunals; it placed some reliance on constitutional authority and due process in the occupation cases after World War II. Although the challenge to the validity of the postwar occupations might

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1 The Insular Cases, which deal with duty on merchandise from island territories, include, Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901); Dooley v. United States, 183 U.S. 151 (1901); Huus v. New York and Porto Rico Steamship Co., 182 U.S. 392 (1901) (vessel engaged in trade); Downes v. Bidwell, 182 U.S. 244 (1901) (oranges); Armstrong v. United States, 182 U.S. 243 (1901); Dooley v. United States, 182 U.S. 222 (1901); Goetze v. United States, 182 U.S. 221 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901) (sugar). *See also* nontariff Insular Cases: Ocampo v. United States, 234 U.S. 91 (1914) (Philippines) (grand jury or petit jury); Dowdell v. United States, 221 U.S. 325 (1911) (Philippines); Rassmussen v. United States, 197 U.S. 516 (1905) (Alaska); Dorr v. United States, 195 U.S. 138 (1904) (Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (Hawaii). Finally, *see* Neely v. Henkel, 180 U.S. 109 (1901) which is not strictly an Insular Case since it involves a foreign country (Cuba).

2 354 U.S. 1 (1957).

3 *See* text accompanying notes 21-39 *infra*.

4 *See* text accompanying notes 80-110 *infra*.

have provided legal circumstances for analyzing the reach of the Constitution, the Supreme Court emphasized that it could not directly review cases arising under military jurisdiction. Consequently, the Court's analysis of the authority of the occupation courts provided little guidance.

Only recently, an occupation court established by the authority of the President as Commander-in-Chief provided a fourth theory of the reach of the Constitution in *United States v. Tiede.*[5] This new theory is based upon the duty of a government official at home or abroad to act only in accordance with the Constitution. It carries the due process and constitutional rights theories beyond the analysis in *Reid* and applies them to the issues that the Supreme Court did not address in the Insular Cases and *Reid.* This fourth theory permits the Supreme Court to scrutinize officials' actions more closely in the future. American participation in international tribunals and American occupation courts and official action abroad under all circumstances would be subject to review based on constitutional standards. The new theory of official action as a measure of the reach of the Constitution can be fruitfully analyzed in the context of the earlier Supreme Court theories of the reach of the Constitution.

II. The Insular Cases and *Reid v. Covert*

The American acquisition of territory from Spain by treaty[6] following the Spanish-American War of 1898 presented the first opportunity for the Supreme Court to consider the reach of the Constitution. This seriously divided the Supreme Court in a long series of cases (the Insular Cases)[7] beginning with the Court's 1900 term. It was not resolved with unanimity until more than twenty years later in *Balzac v. Porto Rico,*[8] when the Court ostensibly laid this controversy over the territorial reach of the Constitution to rest by giving recognition to the "incorporation"[9] theory as a constitutional doctrine.

The divisions among the Justices appeared in the first Insular Case, *De Lima v. Bidwell.*[10] *De Lima* considered the validity of import duties on sugar from "Porto Rico" after its cession to the United States by treaty in 1899. The Attorney-General argued that Congress had "extended" the Constitution to the territories by legislation and that the Constitution did not apply of its own force to the territories. The Attorney-General concluded that Congress should remain free to legislate for the territories without judicial review. The govern-

5 United States v. Tiede, __ F.R.D. __ (U.S.C.B. 1979), was decided by the United States Court for Berlin which was established in 1955. The judge appointed to the court was United States District Judge Herbert J. Stern of the District of New Jersey.

6 Treaty of Peace, December 10, 1898, United States-Spain, 30 Stat. 1754, T.S. No. 343. The treaty is discussed in De Lima v. Bidwell, 182 U.S. 1 (1901).

7 *See* note 1 *supra.*

8 Unanimity was reached in Balzac v. Porto Rico, 258 U.S. 298 (1922). Only Mr. Justice Holmes differed by concurring in the result without writing a separate concurrence.

9 "Incorporation," as the word was originally used regarding the Louisiana purchase in the passage quoted by Mr. Justice White in *Downes,* 182 U.S. at 325, appeared only to promise ultimate statehood. All the land contemplated by the term "incorporation" in 1803 was contiguous to the United States. "Incorporation" assured Louisana of future statehood. Mr. Justice White, however, took the word to mean an intermediate stage between acquisition and statehood. "Incorporated territory," might or might not become a state and was not contiguous to the existing United States.

10 182 U.S. 1.

ment's view was accepted only by Mr. Justice Gray,[11] who thought that the question was political rather than legal, thus requiring the courts to follow the government's lead in the matter. The other Justices approached territoriality as a constitutional question to be treated in accordance with their general attitudes toward the Constitution.

Mr. Justice Harlan's "simple, old-fashioned view of the Constitution"[12] was in essence that the Constitution

> contained, in great measure at least, not merely relative wisdom based upon the political experiences of English speaking peoples, but fundamental and absolute principles of justice from which there could be no deviation if the United States were to remain in the path traced by the founders.[13]

Diametrically opposed to this fundamentalist view was Mr. Justice Brown's "relative view" that the Constitution had "great but limited social value."[14] Mr. Justice White struck a middle ground by proposing the vague, but flexible "incorporation" theory which applied the Constitution in principle but not necessarily in such specifics as right to trial by jury. Mr. Justice White set forth the best-known statement of the theory of territorial "incorporation" in his concurrence in *Downes v. Bidwell.*[15] "In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable."[16] The compromise position of territorial incorporation recognized the political reality that the strength of the United States did not extend to all governmental aspects of life in its newly acquired territories. This first theory on the reach of the Constitution, proposed by Justice White, did not focus on the specifics of American officials performing duties in the territories. It thus left open for the future any consideration of how the actions of American officials would be fitted into this territorial theory.

Some fifty years later, the flexible approach of Mr. Justice White in *Downes* was the subject of revived interest after it was approvingly cited by concurring Justices in the analysis of an entirely different issue by a divided court in *Reid v. Covert.*[17] *Reid* gave rise to the second and third theories of the reach of the Constitution and to two lines of cases, one based on the due process ap-

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11 Downes v. Bidwell, 182 U.S. at 344 (Gray, J., concurring). Coudert, *The Evolution of the Doctrine of Territorial Incorporation,* 26 COLUM. L. REV. 823, 826 (1926). *See also* Littlefield, *The Insular Cases,* 15 HARV. L. REV. 169 (1901).

12 Coudert, *supra* note 11, at 842.

13 *Id.* at 826.

14 *Id.*

15 182 U.S. 244 (1901).

16 *Id.* at 292. *See* Fairman, *Some New Problems of the Constitution Following the Flag,* 1 STAN. L. REV. 587 (1949).

17 351 U.S. 470 (1956), *rev'd on rehearing,* 354 U.S. 1 (1957). Article 2 (11) of the Uniform Code of Military Justice, 50 U.S.C. § 552 (11) (1951), held unconstitutional in *Reid,* is the successor provision to Article of War 2(d) enacted by Congress in 1916. *See* text accompanying notes 98-99 *infra.* After *Reid,* several more cases came before the Supreme Court raising the issue of court-martial of civilians in the following circumstances: McElroy v. Guagliardo, 361 U.S. 281 (1960) (civilian employee, noncapital offense); Grisham v. Hagan, 361 U.S. 278 (1960) (civilian employee, capital offense); Kinsella v. Singleton, 361 U.S. 234 (1960) (civilian dependent, noncapital offense). In all, defendants were held entitled to trial by jury.

proach of the second Mr. Justice Harlan, the other on constitutional rights, espoused by Mr. Justice Black.

In *Reid,* Mrs. Covert, an American civilian on a military base in England, was tried and convicted by court-martial for the murder of her Air Force sergeant husband under a provision of the Articles of War enacted in 1916 and carried over into the Uniform Code of Military Justice. Covert claimed her court-martial violated the constitutional right to trial by jury. The issue in *Reid* was military trial versus civilian trial by jury. The divisions among the Justices over the applicability of the Insular Cases to American bases in foreign countries rather than to United States territories resulted in a very narrow holding in *Reid.* The Court held unconstitutional so much of the provision of the Uniform Code of Military Justice that permitted peace-time court-martial for capital offenses by civilian dependents accompanying the armed forces overseas.[18]

The Insular Cases figured prominently in Justice Harlan's concurrence in *Reid.* Justice Harlan cited the flexibility of the Insular Cases as the hallmark in dealing with any question of constitutional rights abroad, quite apart from considerations of territorial incorporation. He reduced the question of which constitutional safeguards apply in any given situation overseas to "the issue of what process is 'due' a defendant in the particular circumstances of a particular case."[19] Mr. Justice Harlan's position was that each problem of action abroad by the government should be treated as, in effect, a new Insular Case in which the Court would decide whether the Constitutional provision relied upon is applicable.

Mr. Justice Black in the plurality opinion in *Reid* reacted against Mr. Justice Harlan's use of the Insular Cases. The plurality cited the Insular Cases only for the proposition that "constitutional limitations apply to the government when it acts outside the continental United States."[20] Thus, the territorial reach of the Constitution and the areas outside the United States in which the government acts were considered to be coextensive. Justice Black interpreted the Insular Cases as imposing constitutional limitations on government officials. This view, however, represented only dictum since a citizen was claiming constitutional rights denied her by congressional enactment rather than by the action of an American government official abroad.

Mr. Justice Black rejected the proposition read into the Insular Cases by Mr. Justice Harlan "that only those constitutional rights which are 'fundamental' protect Americans abroad." Instead, he found "no warrant, in logic or otherwise for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments."[21] *Reid* did not present the issue of what restrictions the Constitution imposed on governmental action abroad.

Due process and constitutional rights, as the concepts were used in *Reid,* became the watchwords in later cases dealing with the reach of the Constitution

18 354 U.S. at 40-41.
19 354 U.S. at 75 (Harlan, J., concurring).
20 *Id.* at 8.
21 *Id.* at 8-9.

in the context of extensive governmental action abroad. Direct application of these concepts with little new analysis characterize the two post-*Reid* lines of cases. These two lines of cases indicate the need for a cogent, unified analysis to deal directly with the myriad problems arising from the expansion of governmental activities abroad.

Mr. Justice Harlan's analysis of due process has been applied to unincorporated territory in two recent cases in the District of Columbia Circuit. In *King v. Morton,*[22] the court considered whether an American citizen charged with a crime in violation of the laws of "the unincorporated territory of American Samoa" was entitled under the Constitution to trial by jury. The court interpreted the language of Mr. Justice White in *Downes* on the applicability of particular provisions of the Constitution to mean that the "contexts in which the cases were decided" were more important than the particular holdings of the Insular Cases. In this way, the principles of the Insular Cases could be freely applied "to the situation as it exists in American Samoa today," namely, to the facts of the "present legal and cultural development of American Samoa."

On remand, the Court considered the feasibility of the Samoan people fulfilling the requirements necessary to make the jury system operable.[23] It heard testimony and received briefs on whether the Samoan people could be objective in convicting members of their own kinship group and whether the Samoan class culture would accommodate trial before one's peers. In addition, the Court considered the practicality of instituting the jury system, given the geography of the islands, the available population pool and the extent of democratic participation in government by the Samoan people. In light of these factors, the court held that King was entitled to a trial by jury in American Samoa. This use of the due process theory of *Reid* required detailed factual studies but no refinement of the due process theory of the reach of the Constitution appeared in *King.*

In a somewhat more theoretical application of the approach set forth by Mr. Harlan in *Reid,* due process was held in *Ralpho v. Bell*[24] to apply to administrative tribunals established under article IV of the Constitution, which empowers Congress to make rules and regulations for the territories. In the unincorporated trusteeship of Micronesia, the United States Claims Commission, an administrative tribunal, withheld its schedule on the valuation of property from Ralpho. Without access to the schedule and its basis, Ralpho could not rebut the applicability of the schedule to his claim for the destruction of his property.

After holding that the fifth amendment "binds the commission and Ralpho is entitled to demand its protections,"[25] the District of Columbia Circuit stated: "[I]t is settled that 'there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of

22 520 F.2d 1140 (D.C. Cir. 1975).
23 King v. Andrus, 452 F. Supp. 11 (D.D.C. 1977) (on remand).
24 569 F.2d 607 (D.C. Cir. 1977).
25 *Id.* at 618. Under Balzac v. Porto Rico, 258 U.S. at 309, the status (as American citizens or not) of the people in the territories does not affect the applicability of the Constitution.

law . . . ."[26] This statement constitutes the only post-*Reid* expansion of the due process theory of the reach of the Constitution. Unlike the detailed factual application of the due process theory to American Samoa in *King v. Morton,* the *Ralpho* court treated due process as a principle of law. By focusing attention on governmental authority and applying constitutional standards to that authority, *Ralpho* contributes a new principle to the due process theory of the reach of the Constitution. The *Ralpho* court directly confronted the issue of protection from governmental authority itself which was only implicitly treated in *Reid.*

On petition for rehearing,[27] the commission claimed that only constitutional violations which impair "extremely significant" personal interests are judicially reviewable.[28] The *Ralpho* court held that no constitutional claim could be placed "beyond the pale of judicial review" and that constitutional claims would be protected even when the constitutional interests were not extremely significant personal interests. As a corollary to the direct confrontation of the issue of protection from governmental authority, the *Ralpho* court, considering the petition for rehearing, rejected the government's contention that the issue was political rather than legal and, therefore, beyond judicial review. *Ralpho* stands for heightened protection of individual interests by emphasizing (1) the obligations owed by governmental authority to those affected by governmental actions, and (2) the role of the courts in reviewing arbitrary governmental action violative of constitutional rights. Justice Harlan's concurrence in *Reid* gave the Insular Cases renewed vitality[29] by focusing on due process. *King* and *Ralpho* extended stricter scrutiny under the Constitution to the actions of the United States in unincorporated territories and abroad than had appeared possible when the Insular Cases first arose. These cases applied the second theory of the reach of the Constitution, the due process approach developed in the concurrence in *Reid.*

During the early 1960's, a line of cases based on the plurality opinion in *Reid* guaranteed the constitutional right to trial by jury in the then-American-occupied Ryukyu Islands. The United States occupied the Japanese-owned Ryukyus (of which Okinawa is the largest island) in the course of the offensive against Japan during World War II. Since the Ryukyus provided a strategic military base for the protection of American interest in Asia, the United States continued to occupy the Ryukyus for twenty years after signing the peace treaty with Japan in 1952. The American authorities established a civil administration court in the Ryukyus but did not provide for trial by jury. After *Reid,* several defendants who were tried in the Ryukyus without a jury sought habeas corpus relief in the federal district court in the District of Columbia. The district court never directly addressed the denial of constitutional rights by governmental action, but simply applied the third theory of the reach of the Constitution.

In *Ikeda v. McNamara,*[30] the defendant was charged in the United States

26 569 F.2d at 618-19 (footnote omitted).
27 Ralpho v. Bell, 569 F.2d 636 (D.C. Cir. 1977).
28 *Id.* at 637.
29 Torres v. Puerto Rico, 442 U.S. 465, 469 (1979), follows the Insular Cases in holding that the fourth amendment applies to Puerto Rico.
30 No. 416-62 (D.D.C. Oct. 19, 1962).

Civil Administration Court of the Ryukyu Islands with fraud under Article 46 of the Penal Code of Japan for operating without a foreign investment license from the Chief Executive of the Ryukyu Islands. While confined for trial by the civil administration court, he sought habeas corpus relief in the District of Columbia District Court; Ikeda claimed that the denial of a trial by jury violated his constitutional rights. The court concluded that Ikeda's constitutional rights under article III, section 2, clause 3 had been violated by the denial of a trial by jury. The judges in the Ryukyuan civil administration court were not federal judges appointed under article III of the Constitution. The court, however, refused to hold that a trial before a court established by Congress in accordance with article III, section 1 of the Constitution was necessary.[31] No change in the nature of the Ryukyuan occupation court itself was required to guarantee petitioner's constitutional rights. The civil administration court did not need to have article III judges appointed to it. To satisfy the Constitution, only trial by jury had to be implemented.

In *Nicholson v. McNamara,*[32] both parties assumed that the nature of the Ryukyuan court as an occupation court would be the decisive factor in whether petitioner was entitled to a trial by jury.[33] Mrs. Nicholson was confined pursuant to an information charging her with murder. No grand jury indicted her and she was tried by the civil administration court without a jury. The parties assumed that if the civil administration court were an occupation court, no trial by jury could be provided. The District of Columbia District Court, however, did not attempt to interpret the status of the occupation. Instead, the court held simply that the lack of indictment by grand jury and trial by petit jury violated her rights under article III, section 2, clause 3 and the fifth and sixth amendments to the Constitution.[34]

The petitions by Ikeda and Nicholson prompted McNamara to take action extending constitutional rights to all persons appearing before the Ryukyuan civil administration court. The Secretary of Defense, on March 8, 1963, proposed occupation legislation through the Ryukyuan civil administration to comply with *Reid.*[35] The legislation provided for indictment by grand jury and trial by petit jury. Ryukyuans were made eligible for jury service, but the local legislation could, of course, not change the nature of the occupation courts by reconstituting them under article III, section 1 of the Constitution. *Reid* required only indictment by grand jury and trial by petit jury, as *Ikeda* and *Nicholson* made clear. By directly applying constitutional requirements to the form of trial allowed in the Ryukyus, the District of Columbia District Court followed Mr. Justice Black's constitutional rights approach to the reach of the Constitution.

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31 The court specifically struck out four references to petitioner's request for a trial before a court established by Congress in accordance with article III, section 1 of the Constitution.

32 No. 141-61 (D.D.C. Nov. 15, 1963).

33 Secretary of Defense's Points and Authorities in Support of Respondent's Motion for Summary Judgment at 11-12, 25-26, Nicholson v. McNamara, No. 141-61 (D.D.C. Nov. 15, 1963); Petitioner's Memorandum of Points and Authorities at 15, 30, Nicholson v. McNamara, No. 141-61 (D.D.C. Nov. 15, 1963).

34 Nicholson v. McNamara, No. 141-61, at 4.

35 George, *The United States in the Ryukyus: The Insular Cases Reinstated,* 39 N.Y.U. L. Rev. 785, 793, 794 n.54 (1964).

Thereafter, in *Rose v. McNamara,*[36] Eiko Uehara Rose, who was convicted in Okinawa after a trial by jury of evading local income taxes, argued that under *Reid* her rights to a trial in a court established by Congress were violated because "civil administration courts have no such derivation, but are, rather, an arm of the Executive."[37] In holding Mrs. Covert had a right to a trial by jury, Mr. Justice Black had stated only that constitutional limitations apply to the government when it acts outside the continental United States. The District of Columbia Circuit agreed with Rose's contention that the occupation court was not established under article III of the Constitution, but found that the result she sought was not compelled:

> In so maintaining, she misinterprets the *Reid* decision. While Mr. Justice Black held in *Reid* that Article III, *Section Two,* providing for a jury trial at the location of a crime, is a vital constitutional protection which the United States cannot ignore when acting against its citizens abroad, nowhere did he accord the same status to Article III, *Section One,* which gives to Congress the power to establish courts and judicial positions.[38]

The District of Columbia Circuit held that the President's authority to establish and maintain occupation courts in the Ryukyus survived the peace treaty,[39] that the courts were not established under article III and that no violation of constitutional rights occurs when criminal defendants in the United States are tried by jury before non-article III judges.

Thus, on the strength of Mr. Justice Black's dictum in *Reid,* constitutional guarantees of indictment by grand jury and trial by petit jury were gradually extended to American citizen and noncitizen alike by case law and by occupation legislation in the Ryukyu Islands. These post-*Reid* developments exemplify the direct application of the constitutional rights theory without advancement in the theory itself. The issue of protection from government by requiring government to comply with the Constitution was not addressed in these cases.

The first theory of the reach of the Constitution, which emerged from the Insular Cases, emphasized that the Constitution is always operative in principle but its particular applicability is limited by territorial constraints. The concurrence in *Reid* interpreted the Insular Cases to require due process abroad. According to the plurality opinion in *Reid,* the Insular Cases stand for the proposition that constitutional limitations apply to the government when it acts outside the continental United States. Neither *Reid* nor its due process and constitutional rights progeny dealt fully with the modern ramifications of governmental action abroad. The concurrence and plurality opinions in *Reid* enabled subsequent case law to extend the applicability of particular constitutional provisions in unusual circumstances. Nevertheless, subsequent courts have failed to propose an analysis for limiting governmental action abroad in accordance with constitutional principles. Only *Ralpho v. Bell* hinted at wider application of

36 375 F.2d 924 (D.C. Cir. 1967).
37 *Id.* at 927.
38 *Id.* at 927 n.5.
39 *Id.* at 929.

the due process theory of the reach of the Constitution to impose constitutional limitations on governmental action abroad. Constitutional limitations on governmental action abroad were not central to the three Supreme Court theories of the reach of the Constitution.

III. *United States v. Tiede*

Against the background of the Supreme Court's pronouncements on the reach of the Constitution, an American court sitting in West Berlin recently provided a fourth theory for analyzing the question. In status, the American court in Berlin is similar to the Ryukyuan occupation court. The present American expression of sovereignty in West Berlin stems from its wartime occupation of Germany, but continues only because of the inability of the Allies (the United States, Great Britain, France and the Union of Soviet Socialist Republics) to reach agreement on the reunification of Germany.[40] In 1955, the American occupation courts in Germany were dissolved.[41] The jurisdiction survived only in Berlin as the United States Court for Berlin.[42]

On August 30, 1978, two East Germans, Tiede and Ruske, entered the American zone of Berlin at Tempelhof Central Airport by diverting to West Berlin scheduled Polish Lot Airlines flight 165, which was originally en route from Gdansk, Poland, to Schoenefeld Airport in East Germany.[43] On the basis

40 When the occupation of the Federal Republic of Germany itself ended in 1955, the principles governing relations between occupied Berlin and the occupying powers were restated by the United States, Great Britain and France, which retained their rights in Berlin vis-a-vis the Soviet Union. Convention on Relations between the Three Powers and the Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 4251, T.I.A.S. No. 3425.

41 *See In re Kraussman,* 130 F. Supp. 926 (D. Conn. 1955). There the court held that although the United States High Commission (USHC) courts continued in existence to dispose of matters arising during the occupation, the USHC's request for extradition could not be granted. Because the extradition statute, 18 U.S.C. § 3185 (1976), required full exercise of governmental authority by the party requesting extradition, the court held that the USHC is not the "chief executive officer in control." Thus the position of the United States in Germany and Berlin did not amount to the level of occupation required for extradition. 130 F. Supp. at 928. The court interpreted the United States' retention of powers in 1955 to be "principally for the purpose of dealing with the Soviet Republics relative to the reunification of Germany and a peace treaty. . . . The Government has offered no proof that the situation in the American sector of Berlin is factually different from this." *Id.* at 929.

42 The United States Court for Berlin was established by USHC Law No. 46, April 28, 1955. The text of Law 46 appears as an Appendix to the opinion in United States v. Tiede, __ F.R.D. __ (U.S.C.B. 1979).

43 At about 9:45 a.m. on August 30, when Flight 165 was a few minutes from landing, passenger Hanes Detlev Alexander Tiede asked fellow passenger Ingrid Ruske to hand him her daughter Sabine's coat. In the girl's coat pocket was a "toy" teargas pistol. Tiede took the gun, went to the front of the plane and grabbed a stewardess by the hair. He put the gun to her head and forced her to the floor. Tiede told the stewards that he knew what Schoenefeld looked like and that if the plane did not land at Tempelhof, he would shoot the stewardess.

The pilot radioed that a hijacking was in progress and landed at Tempelhof. The American officer in charge of logistics at Tempelhof, Lt. Col. Brymer, talked to the copilot. With the assurance that all on board were safe, Brymer had the pilot shut down the engines. Tiede came to the side door of the plane, gun in hand. Brymer smiled, said "Welcome to free West Berlin" and asked Tiede to throw down the gun. Tiede smiled and did so. Tiede asked for the police and then called out "Does anybody else want to get off here?" Ingrid and Sabine Ruske and approximately eight other persons deplaned. The police came. Tiede, who applied a dozen times to leave East Germany, and the Ruskes were taken into custody by American officials. Transcript of record. at 23 ff. [hereinafter cited as Record].

The records of the court are kept in the United States Mission, Berlin, where they are, of course, public documents. Another copy of the records is available at the University of Chicago Law School. This description is based primarily on the testimony of Lt. Col. Goeller, commander of the United States Air Force Office of Special Investigation, at the preliminary hearing on probable cause for arrest. The Polish customs inspector, whose responsibility it is to check for smuggling, testified at a deposition read into the record at trial that Sabine Ruske's gun looked like a toy she had been shown a few days previously. Record, at 2076, 2083.

of the residual American jurisdiction over aviation in Berlin, the United States became responsible for trying the defendants. Accordingly, the United States Court for Berlin (the court) was convened for the first time in its twenty-four years of existence. The defendants were charged on information[44] and demanded a trial by jury.

A. *Does the Constitution Apply?*

The defendants' demand for a jury trial required that the court initially determine whether the Constitution applied at all. The government took the position that the reach of the Constitution is a political, rather than legal, question in the context of litigation in occupied territory. In the classic tradition of the State Department, the government urged that since the American position in Berlin was a matter of foreign affairs, the State Department had controlling authority to deal with any events concerning United States' interests in Berlin. The government contended that

> [A] defendant tried in the United States Court for Berlin is afforded certain rights found in the Constitution, but he receives these rights not by force of the Constitution itself (because the full range of substantive and procedural Constitutional safeguards applicable to a trial of a criminal case in a federal District Court in the United States does not apply in an occupation court such as this), but because the Secretary of State has made the determination that these certain rights should be provided.[45]
>
> There has been no judicial holding that the United States, in the course of exercising judicial powers in the occupation of Germany, must comport with all of the Constitutional restrictions applicable to the United States dealings at home. It is apparent from the few relevant cases that the conduct of occupation is a *sui generis* exercise of Constitutional authority, and one in which the full application of all Constitutional limitations cannot be presumed.
>
> The continuation of an occupation, and the degree to which occupation authority should be directly exercised are matters which involve delicate political questions . . . .[46]

The State Department treated criminal trials in a court established by the authority of the United States High Commissioner for Germany as political rather than judicial matters. If the State Department's position were correct, it would have the discretion to decide what "rights," if any, to accord the defen-

44 The information against Tiede, filed January 15, 1979, charged Tiede under the following five counts: 1) assault on air traffic in violation of the German Criminal Code (Strafgesetzbuch) § 316(c); 2) taking of hostages (in violation of § 239(b); 3) deprivation of liberty in violation of § 239; 4) assault in violation of § 233; 5) unlicensed carriage of firearms (a Brevettat Mondial Model 1900 .22 caliber teargas and blank pistol) in violation of §§ 14 and 26 of the Weapons Law (Waffengesetz) of March 18, 1938, as amended November 26, 1974, The Criminal Code of the Federal Republic of Germany applies in Berlin. The Weapons Law is still in force but only in Berlin as state law.

The information against Ingrid Ruske, filed January 15, 1979, has three separate counts charging Mrs. Ruske of acting jointly (§ 25 (2) of the Criminal Code (principals and participation)) with Tiede to divert the aircraft in violation of §§ 316(c), 239. The delay between August 30, 1978 and January 15, 1979 is accounted in large part by the political decision of the German and American governments concerning which jurisdiction would try Tiede and Ruske. During that time, Tiede was held at Moabit Detention Center in Berlin. Mrs. Ruske was also held in custody for part of that time.

45 Memorandum in Opposition to Defendants' Motion Regarding the Application of the Constitution of the United States to These Proceedings at 2 United States v. Tiede, Mar. 7, 1979 [hereinafter cited as Government's Memorandum].

46 *Id.* at 16-17 (footnotes omitted).

dants. In effect, the State Department was asking the court to espouse the position taken by Mr. Justice Gray in the Insular Cases.[47]

The State Department contended that the Constitution extended in Berlin only to authorize a military occupation by the executive under article II and that it did not govern the activities of the executive in conducting that occupation. On the basis of the absence of trial by jury in certain situations, the government argued, in effect, that the Constitution gave the executive carte blanche in the conduct of an occupation. The cases cited in support of the government's argument, which permitted deviation from the standard civilian trial by jury, were, however, not decided on the grounds that the Constitution was inapplicable.[48] Instead, the cases on executive authority cited by the government limited approval of governmental procedures only to constitutional exercises of authority by the executive. Prior decisions had sanctioned deviations from trial by jury when defendants allegedly violated the law of war, and when statute extended the scope of the constitutional exception from trial by jury for military jurisdiction. No claims for unlimited executive authority had been judicially sanctioned.

The breadth of the government's argument for executive discretion highlighted the need to protect persons from arbitrary exercises of the governmental authority. The court characterized the total discretion sought by the government as perhaps appropriate in dire emergencies, requiring the imposition of martial law under the Constitution, but inappropriate to other types of military jurisdiction such as an occupation.[49] The court refused to consider the question of the applicability of the Constitution in an occupied area as a political question. In doing so, the court relied on what it considered a subtle distinction: "the applicability of any provision of the Constitution is itself a point of constitutional law, to be decided in the last instance by the judiciary, not by the Executive Branch."[50] From this point of logic, the court held that whether the Constitution applies was properly a legal question.

The court's decision, that the question of the reach of the Constitution was a legal rather than a political question, comports with constitutional decisions extending back into the nineteenth century.[51] Mr. Justice Gray was alone when he took the position in *De Lima v. Bidwell* that territoriality was a political question. Since the time of the Insular Cases, the traditional reliance of the government on the political question doctrine has been seriously discredited. The effects of the doctrine of separation of powers on the relationship between the State Department and the courts have been analyzed in scholarly articles,[52]

47 *See* text accompanying note 11 *supra.* Downes v. Bidwell, 182 U.S., 344 (1901) (Gray, J., concurring).

48 Madsen v. Kinsella 343 U.S. 341 (1952). *Ex parte* Quirin, 317 U.S. 1 (1942). *See* text accompanying notes 86-92, 97-104.

49 Record, vol. 2, at 194.

50 Slip Opinion at 51.

51 *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

52 P. JESSUP, THE USE OF INTERNATIONAL LAW (1959); Bilder, *The Office of the Legal Advisers: The State Department Lawyer and Foreign Affairs,* 56 AM. J. INT'L L. 633 (1962); Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?* 48 CORNELL L.Q. 461 (1963); Moore, *The Role of the State Department in Judicial Proceedings,* 31 FORDHAM L. REV. 277 (1972); Note, *The Relationship between Executive and Judiciary: The State Department as the Supreme Court of International Law,* 53 MINN. L. REV. 389 (1968).

which suggest various methods for determining a line of demarcation between the political province of the State Department and judicial decisions of the courts. The following method for determining that line is suggested by a commentator[53] who endorses "the guiding principle of executive dominance in the conduct of foreign affairs":[54]

> it is right that legal notions of the political branches of government should be respected by the courts. On the other hand, there is no reason for the courts to abdicate their function in deference to this principle in those cases in which there is at stake no matter of international law substantially affecting the national interest. Particularly, the courts should restrict the tendency of the executive to take over, in proceedings which lack procedural safeguards, the determination of an entire case merely because the case happens to have an international law element.
>
> Finally, it is for the courts to decide whether or not to accept "suggestions," and to determine what effect to give these "suggestions." The courts should accede to such "suggestions" only where a sufficient reason—the safeguarding of the national interest by preservation of the United States' posture in international law—has been convincingly shown.[55]

On the one hand, according to this method, a judicial determination of whether an occupation is in progress could have international repercussions; in that case judicial determination is better avoided.[56] On the other hand, recognition that Germany and the United States are not enemies[57] is not only judicially proper, but any other judicial stance would contravene Congress and the proper executive control of foreign policy. A balancing test for identifying a political question in the area of foreign affairs has emerged: the need for the United States to present a unified position on sensitive issues of international law affecting our national interest must be weighed against the need to resolve disputes in accordance with the fundamental notions of fairness embodied in the Constitution. Under this test, the question of the reach of the Constitution is not a political question.

In deciding whether the Constitution applied in proceedings before it, the United States Court for Berlin stated the following propositions at the outset of its oral opinion delivered on March 14, 1979:

> For if the executive branch is not willing to accept the confines of the Constitution in all things, they may throw it off in all things.[58]
>
> [I]t is a first principle of American life, [n]ot only life at home but life abroad, that everything its public officials do is governed by, measured

53 Franck, *The Courts, The State Department and National Policy: A Criterion for Judicial Abdication,* 44 MINN. L. REV. 1101 (1960).

54 *Id.*

55 *Id.* at 1123.

56 "[I]n international law the admission that the former protagonists are at peace, even in the absence of a peace treaty, may make the occupying troops subject to the criminal and other laws of the defeated state." *Id.* at 1122. *See also* Madsen v. Kinsella, 343 U.S. 341 (1952). In Madsen, the Court stated that an occupation may survive a treaty of peace, citing numerous cases and W. WINTHROP, MILITARY LAW AND PRECEDENTS, at 801 (2d rev. ed. 1920). 343 U.S. at 360.

57 "[I]t would have been permissible for a court to find that the United States was no longer at war with Germany even prior to the joint resolution of Congress of October 19, 1951, which terminated the state of war with Germany." Franck, *supra* note 53, at 1119. *See also* Scharpf, *Judicial Review and the Political Question: A Functional Analysis,* 75 YALE L.J. 517, 572, 584 (1966).

58 Record, vol. 2, at 184.

> against, and authorized by the United States Constitution. And, if the authority for it is not found there, there is no authority for it at all.
>
> That is not to say that the Constitution requires the same thing no matter what the circumstances or what the condition is. It is a living document.[59]

The court cited *Ex parte Milligan,* in which the Supreme Court held that the "Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[60]

With the thought that the Constitution "was designed and made to be applied in changing circumstances, in changing conditions,"[61] the court distinguished the Insular Cases and *Reid v. Covert* from the present American position in Germany. The occupation of Germany was an assertion by military conquest of American sovereignty. American officials acting in Berlin pursuant to that sovereignty established an occupation court in 1955 with jurisdiction over Americans, Germans and, indeed, anyone in the American Sector of Berlin. The court emphasized that the position of the American official as one who has taken an oath to uphold the Constitution was the central factor in deciding whether the Constitution applied in the United States Court for Berlin in 1979. The oath taken by a government official such as the Secretary of State compelled the application of the Constitution.

This fourth theory of the reach of the Constitution focuses on the government official as the measure for the applicability of the Constitution. The official action theory expands the scope of the fundamental rights theory set forth in the plurality opinion in *Reid* by providing explicit protection against governmental violation of its own Constitution abroad. Mr. Justice Black's dictum in *Reid* that constitutional limitations apply to the government when it acts outside the continental United States is centrally important in *Tiede* in light of the government's claim to unlimited discretion in granting constitutional "rights" abroad. This theory of the reach of the Constitution removes the emphasis from the citizen claiming protection and places primary emphasis on the duty of the government to observe constitutional safeguards and limitations wherever it acts. The constitutional rights of the citizen in *Reid* are supplemented in *Tiede* by the corresponding governmental duty to act under the Constitution, no matter upon whom the impact of its action falls.

The criterion of the exercise of constitutional office obviates the necessity of a strong territorial connection virtually amounting to statehood as a prerequisite to the extension of all constitutional protections. It permits the United States to give equal treatment to all persons coming in contact with the sovereign power of the United States government, citizen and noncitizen alike. It vests American officials with the outward sign that they "may not do anything that violates the Constitution of the United States"[62] and holds them always and everywhere to the same high standards which the Constitution re-

59 *Id.* at 185.
60 *Ex parte* Milligan, 71 U.S. (4 Wall.) at 120-21.
61 Record, vol. 2, at 185.
62 *Id.* at 190.

quires of officials at home: "when the United States acts through its agents abroad it acts under the Constitution or not at all."[63]

On its face the court's holding that the Constitution applies in the United States Court for Berlin appears startlingly simple, right and in accord with all we have known and everything we have come to expect of constitutional safeguards and protections. Indeed, the court's decision accords even with the "method" outlined for judicial and executive interaction with regard to "suggestions": the government's memorandum did not show that any national interest would be harmed by the court's decision.[64]

The decision must be seen as courageous, however, for it raises again the fundamental questions at issue during the debates on the adoption of the Constitution itself, during the Civil War, over the issue of imperialism and the Insular Cases and, indeed, at all times of great constitutional crisis or upheaval. This is true even though *Reid, Rose, King* and *Ralpho* have provided precedents far advanced from the posture of the Insular Cases. The issue of whether the Constitution applies, each time it is raised anew, is an issue which naturally engenders controversy. The question is not likely to be treated as a matter of indifference by anyone. Our individual answers to the question of whether the Constitution applies in a new situation involve everything we believe about the nature of law and freedom. Do we wish to keep constitutional safeguards only for ourselves or do we see them as the embodiment of fundamental rights which cannot be denied to anyone over whom the sovereignty of the United States government is exercised? No matter how we answer the question, our individual answers are based on our sense of our own integrity and our most deeply held beliefs.

B. *Are Defendants Entitled to a Jury?*

The official action theory focuses on the duty of officials sworn to uphold the Constitution. The undisputed sovereign presence of the United States in West Berlin permitted this theory to be constructed in a political situation almost entirely opposite from that of the Insular Cases. In Berlin, the State Department argued that its jurisdiction obviated the application of Constitutional principles. In the Insular Cases, the sovereign power of the United States was itself unclear. The official action theory, rather than analyzing the concept of extending American political power over a new territory, addresses the obligations the Constitution imposes on American officials wherever they act.

Although the Constitution is directly applicable in the United States Court for Berlin because of the official American presence in Berlin, that presence and the official's duty to act in accord with constitutional limitations do not automatically require a trial by jury in every situation, just as a trial by jury is not invariably required in the United States. The court approached the issue of trial by jury separately:

63 *Id.*
64 *See* text accompanying notes 53-55 *supra.*

> The issue remains: in this court, in this place, at this time, under these circumstances, are these defendants charged with these crimes entitled to a trial by jury? And that is not an easy question to resolve. Only the most disingenuous would suggest that the law in this area has not been changing. Clearly, in 1890 we wouldn't have even asked the question. In 1901 we would have asked a different question. In 1944, we would have asked a third question. In 1957 perhaps a different one. Today it is asked again.[65]

The court analyzed "the nature of the crime charged, the legal status of the accused, and the circumstances of the occupation."[66] The "nature of the crime charged" in *Tiede* meant conduct that neither violated the law of war nor constituted an attack on the United States government. The accused were neither military personnel nor in belligerent status with the United States. They were simply foreign civilians from the German Democratic Republic, a country at peace with the United States. The purpose of the occupation of West Berlin, though military in origin, was, according to the German government itself, only "to ensure the city's freedom and viability. Occupation Powers had become Protection Powers."[67]

Case law provides two basic approaches to the issue of whether defendants are entitled to a trial by jury in the United States Court for Berlin. The first is the due process approach. Due process could focus on either the capability of the Germans to provide a trial by jury or on the rights of the individual defendant to have a trial by jury. The hearing on socio-cultural factors was used by the District of Columbia District Court in *King v. Andrus*.[68]

If the United States Court for Berlin relied upon this due process approach, evidence presented at the hearing would focus on lay participation in German criminal trials. The Germans have had a long tradition of lay participation in civil and criminal trials in the form of *"Schoffen,"* or lay judges. If this case were tried in a German court, three professional judges and two *Schoffen* would hear and decide the case. A vote of four would be necessary to convict so that agreement only by the three professional judges would be insufficient to convict. A study of lay participation in German trials by Casper and Zeisel[69] includes a comparison of disagreements between *Schoffen* and professional judges with the disagreements between juries and judges in Kalven and Zeisel's study of the American jury. Casper, in an affidavit submitted to the United States Court for Berlin, stated: "Our study clearly indicates that German lay judges exercise independent judgment in criminal cases, and do serve a societal purpose comparable to that of American juries—namely, injecting the values, experiences, and judgments of the lay community into the adjudication process."[70] Nevertheless, the court did not rely on this approach in deciding whether defendants would be tried by a jury.

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65 Record, vol. 2, at 227.

66 *Id.* at 237.

67 PRESS AND INFORMATION OFFICE, GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, THE BERLIN SETTLEMENT 127 (1972).

68 452 F.Supp. 11 (D.D.C. 1977). *See* text accompanying note 23 *supra.*

69 Casper & Zeisel, *Lay Judges in the German Criminal Courts,* 1 J. LEGAL STUD. 135 (1972). The Casper-Zeisel study, conducted over a three-year period, is the only known empirical study of the German lay-judge system.

70 Defendants' affidavit by Casper on February 23, 1979. Defendants' affidavit states that Gerhard

Nor did the court rely on the due process approach set forth in *Ralpho v. Bell.*[71] There the District of Columbia Circuit had held United States officials in Micronesia bound by the fifth amendment and Ralpho automatically entitled to its due process protection because of the "any person" language in the amendment. The issue of trial by jury is, however, more complicated than the due process required in *Ralpho.* A due process argument had, of course, been constructed by Mr. Justice Harlan in his concurrence in *Reid v. Covert.* Mrs. Covert had sought a trial by jury and Mr. Justice Harlan had agreed that she was so entitled on due process grounds. Once he had asked "what process is due," Mr. Justice Harlan still had to reach the issue of trial by jury.

A simpler, more direct approach is possible with the issue of trial by jury, namely, the direct application of the provisions of the Constitution and its amendments. The Supreme Court expanded the "fundamental rights" required by the Constitution to obtain in the fifty states of the United States. During the 1960's, almost all the provisions of the first ten amendments to the Constitution were held by the Court to be fundamental, incorporated in the fourteenth amendment and, therefore, applicable in the fifty states, just as the Bill of Rights must be observed in all actions by the federal government.[72] In 1968, the Supreme Court in *Duncan v. Louisiana*[73] held that trial by jury is a fundamental right in criminal cases. The Court described the safeguards provided by juries in terms of the empirical study by Kalven and Zeisel, which showed that juries understand evidence, come to sound conclusions and differ with the judge "usually because they are serving some of the very purposes for which they were created and for which they are now employed."[74] *Duncan,* when combined with the earlier requirement in *Reid* for trial by jury overseas, gave the United States Court for Berlin its first ground for holding Tiede entitled to trial by jury.

An even stronger ground than *Duncan* is the pre-*Duncan* precedent of the same direct application of the Constitution by the District Court for the District of Columbia to the occupation courts still operative in the Ryukyuan islands in the early 1960's. The Ryukyuan precedents are relevant to the United States Court for Berlin as the successor to the American occupation courts in Germany. The American occupation courts in Germany, in which juries were legislatively intended to be implemented when feasible,[75] did not continue to sit after 1955. The American occupation courts in the Ryukyuan islands, however, remained active after the American peace treaty with Japan was

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Casper, Dean of the University of Chicago Law School, was born and educated in Hamburg, Germany, where he studied law at the university and passed the Legal State Examination; in 1964, Casper was also awarded a doctor of law degree (Dr. iur. utr.) by the University of Freiburg, Germany.

71 569 F.2d 607 (D.C. Cir. 1977). *See* text accompanying note 24 *supra.*

72 *See generally* Henkin, *"Selective Incorporation" in the Fourteenth Amendment,* 73 YALE L.J. 74 (1963).

73 391 U.S. 145 (1968). The Supreme Court held that "[t]he guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Id.* at 155 (footnote omitted).

74 *Id.* at 157 (footnote omitted).

75 E. NOBLEMAN, MILITARY GOVERNMENT COURTS IN GERMANY 183 n.553 (1955) (Training Packet No. 52 prepared by the Provost Marshal General's School Mil. Gov't Dep't for Organized Reserve Corps Units) (citing OFFICE OF MILITARY GOVERNMENT FOR GERMANY, MILITARY GOVERNMENT INFORMATION BULL. No. 143 (September 7, 1948)) as the legislative history of the ordinances. At the time Nobleman was writing, in June, 1950, it was "difficult" to employ juries systematically.

signed in 1952 until the islands were returned to Japan in 1972.[76] Thus, the developments in the occupation courts in the Ryukyus during the 1960's illustrate what might have happened in Berlin, if the occupation court there had remained active. The two occupation court systems were similar in many ways,[77] except that the Ryukyuan occupation courts enjoyed a much longer active life than the German occupation courts. The Ryukyuan people were stated[78] to have been more resistant to American ways after 1952 than the Germans after 1955, since there was then no foreseeable resolution of the Ryukyuan status vis-a-vis the United States. Nevertheless, the District of Columbia District Court held that the Constitution required a trial by jury in criminal cases in this temporary occupation court in the Pacific.

If the occupation court in Berlin had been regularly convened after it was established in 1955, it is highly likely that during the 1960's a number of cases similar to the Ryukyuan cases would have arisen and that the legislative intent expressed at the end of the 1940's to provide for trial by jury would have been carried out in Berlin. Both "occupations" lasted far longer than usual occupations in earlier history. The peaceful and protective purposes of these two American occupations became their most outstanding characteristics.[79] The United States Court for Berlin, having been inactive for twenty-four years, faced in 1979 the situation which arose in the Ryukyus in 1962 and 1963. The United States Court for Berlin could not go back to 1955, however. The results in the Ryukyuan and Berlin occupation courts were the same: trial by jury is a constitutionally guaranteed right in a peace-time occupation court.

C. *Application of* Tiede *to Earlier Cases*

The usefulness of the *Tiede*'s official action theory as an analytical tool becomes apparent when applied in an examination of earlier cases involving the exercise of United States' military jurisdiction in occupied lands and United States' participation in international war tribunals. The soundness of the official action theory is demonstrated as much by the cases which would not have been decided differently as by the few that might have reached a different result if the official theory were available then.

The United States Supreme Court has recognized four types of military jurisdiction. The most familiar type of jurisdiction is *military law,* personal jurisdiction applicable by federal statute[80] to members of the armed services. Military law governs the court-martial of soldiers even during peace-time for

76 By the Nixon-Sato Agreement, June 17, 1971, United States-Japan, 23 U.S.T. 446, T.I.A.S. No. 7314, the Ryukyus were returned to Japan in May, 1972.

77 In its oral opinion, the *Tiede* court noted the similarities between the occupation courts in Berlin and Okinawa. Record, vol. 2, at 241.

78 "A substantial portion of the Ryukyuans are hostile and engage in activities calculated to subvert the position of the United States." Secretary of Defense's Points and Authorities in Support of Respondent's Motion for Summary Judgment at 12, Nicholson v. McNamara, H.C. No. 141-61 (D.D.C. Nov. 15, 1963).

79 *Id.* at 928.

80 The federal statute governing courts-martial, originally called the Articles of War (Pub. L. 242, 41 Stat. 807, (1920)) and now the Uniform Code of Military Justice, is to be found at 10 U.S.C. §§ 801-938 (1976). *See also* AYCOCK & WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE (1955); Mounts & Sugarman, *The Military Justice Act of 1968,* 55 A.B.A.J. 470 (1969); Wurfel, *Court Martial Jurisdiction Under the Uniform Code,* 32 N.C. L. REV. 1 (1953); Wurtzel, O'Callahan v. Parker: *Where Are We Now?,* 56 A.B.A.J. 686 (1970); Symposium, *Military Law,* 22 HASTINGS L.J. 201 (1971).

any offenses relating to military life. The second type of military jurisdiction has occurred only rarely in United States history; *military government* is a general territorial jurisdiction over occupied places "superseding, as far as may be deemed expedient, the local law and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress."[81] The predecessor courts to the United States Court for Berlin exercised such jurisdiction when the United States occupied Germany during and after World War II. *Martial law,* the third type of military jurisdiction, is emergency domestic territorial jurisdiction exercised by the military.[82] The newest type of jurisdiction is the *special military commission,* which may take action against any civilian persons accused of violating the law of war, whether American citizens, aliens or enemies.[83]

"Military commission" is a generic term.[84] These special military commissions do not differ in nature from general military commission courts established by an occupying military government, except that these special commissions are short-lived with jurisdiction limited to hearing accusations against particular persons of violations of the law of war.[85] General military government courts are expected to last somewhat longer and have a broader jurisdiction. Until after World War II, however, occupation courts did not have lives extending a generation or longer. Pre-World War II occupation courts were thus active only in the wake of the hostilities of war; their jurisdiction was soon terminated thereafter. The special commissions and the general military government courts raise the most relevant constitutional questions for testing the applicability of the official action theory.

Ex parte Quirin[86] provides an example of the operation of a special military

81 *Ex parte* Milligan, 71 U.S. (4 Wall.) at 142. it should be noted that the International Military Tribunal (IMT) charter did not interfere with the rights of the individual governments to try war criminals in any national or occupation court in Germany or in any allied territory.

82 For a discussion of martial law concepts, *see* C. FAIRMAN, THE LAW OF MARTIAL RULE (2d ed. 1943); Fairman, *Martial Rule, in the Light of* Sterling v. Constantin, 19 CORNELL L.Q. 20 (1933); Frank, Ex parte Milligan v. The Five Companies: *Martial Law in Hawaii,* 44 COLUM. L. REV. 639 (1944); Wiener, *Martial Law Today,* 49 MIL. L. REV. 89 (1970). In Sterling v. Constantin, 287 U.S. 378 (1932), the governor of Texas declared martial law in the oil fields to prevent oil production. Despite the executive decision, the Supreme Court reviewed the facts in accordance with the Constitution, holding that "the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Id.* at 401.

83 The first three types of military jurisdiction were described by Chief Justice Chase in his concurring opinion in *Ex parte* Milligan, 71 U.S. 2, 141-42 (1866). The fourth type, operative during and after World War II, received the recognition of the Supreme Court in *Ex parte* Quirin, 317 U.S. 1 (1942) and *In re* Yamashita, 327 U.S. 1 (1946). Justice Rutledge, in dissent, emphasized in a discussion of the history that "there is only one kind of military commission." 327 U.S. at 67-72.

84 Military commissions have a long history. Isolated instances of the military commission are found prior to the establishment of the military government courts that were commissioned during Polk's administration to try general crimes as well as offenses against the law of war: 1) in 1776, Captain Nathan Hale was charged with spying and was tried by a military court; 2) in 1780, Major John Andre' was similarly charged and tried; 3) in the same year, Joshua Kett (in complicity with General Benedict Arnold) was tried in a special court-martial pursuant to congressional resolution. *See* Green, *The Military Commission,* 42 AM. J. INT'L L. 832, 832-833 (1948), *citing* W. WINTHROP, MILITARY LAW AND PRECEDENTS (1920). *See also* American Ins. Co. v. Canter, 26 U.S. 511 (1828) for military tribunals established (by General Andrew Jackson at the direction of the President) in Florida, which in 1818 was a territory of Spain. *See also* VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY 106-31 (1957); Colby, *Occupation Under the Laws of War,* 25 COLUM. L. REV. 904 (1925) and 26 COLUM. L. REV. 146 (1926).

85 The Supreme Court in Madsen v. Kinsella, 343 U.S. 341 (1952) called United States occupation courts "courts in the nature of such [military] commissions." *Id.* at 346. The military government appoints the court.

86 317 U.S. 1 (1942).

commission. According to stipulated facts, in June of 1942, eight men wearing caps or uniforms of the German forces of the Third Reich landed by submarine at places on the east coast of the United States, buried their uniforms, and made their way into the interior of the United States. They soon were apprehended by agents of the F.B.I. When arrangements were made to try them by special military commission, they sought habeas corpus relief.[87]

Petitioners sought constitutional guarantees of trial by jury.[88] The government argued that "[c]ourts do not inquire into the Executive's determination on matters of the type here involved."[89] Despite the argument that the Supreme Court could not review the President's judgment except "in a case of grave and obvious abuse,"[90] the Supreme Court directly reviewed the President's authority to order the trial by military commission and upheld the President's authority so to act. The Court referred to its duty "to preserve unimpaired the constitutional safeguards of civil liberties"[91] even in wartime and specifically addressed the government's "insistence" that petitioners be denied access to the courts in accordance with presidential proclamation.

> It is urged that if they are enemy aliens or if the proclamation has force, no court may afford the petitioners a hearing.
>
> . .
>
> Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty. *Ex parte Milligan, supra,* 119, 132.[92]

Noting that the power of all three branches is derived from the Constitution, the Court not only traced the basis of the President's authority to order the Commission but also reached the due process issue and found that, even before the Constitution was adopted, disguised enemy belligerents on American soil, such as Major John Andre, were tried without a jury.

Would the application of the official action theory of the reach of the Constitution have mandated a trial by jury in *Quirin? Tiede* requires a two-step analysis of the facts in *Quirin*: (1) is the Constitution operative? (2) if so, is Quirin entitled to a trial by jury? No need to discuss the "reach" of the Constitution arises in *Quirin* because the enemy defendants had invaded the United States itself and the Constitution is automatically operative. *Quirin* was not tried in an occupation court but by special commission. The Supreme Court observed that the power of the executive to conduct the trial had to be derived from the Constitution. The Supreme Court's emphasis on the enemy-belligerent status of the defendants and the charge of crimes in violation of the law of war provide the basis for the second step of the analysis. Recognition of exceptions for the law of war and the military at the time of the adoption of the

87 For extensive treatment of the history behind *Ex parte* Quirin, *see* G. DASCH, EIGHT SPIES AGAINST AMERICA (1959); E. RACHLIS, THEY CAME TO KILL (1961).
88 317 U.S. at 14.
89 *Id.* at 16.
90 *Id.* at 17.
91 *Id.* at 19.
92 *Id.* at 25.

Bill of Rights permits the denial of a trial by jury in favor of a military trial in *Quirin*'s case. Thus, the two-step analysis would not have mandated a trial by jury in *Quirin* but it does illustrate the limited précedential value of *Quirin* to situations in which the defendant is charged with crimes in violation of the law of war.

The Supreme Court in *In re Yamashita*[93] upheld the basic principles it set forth in *Quirin* when the Japanese Commanding General in the Philippines, Tomoyuki Yamashita, applied for leave to file various petitions after he surrendered, was tried for violations of the law of war by a military commission of five army officers, found guilty and sentenced to be hanged. Yamashita questioned the authority of the commission which tried him *after* the cessation of hostilities between the United States and Japan.

The Court held that Congress had not foreclosed the right of enemy aliens

> to contend that the Constitution or laws of the United States withhold authority to proceed with the trial. It has not withdrawn, and the Executive branch of the government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.[94]

The Court upheld the appointment of the Commission as a constitutional exercise of the President's authority.[95] Unlike *Quirin,* however, there was no present military necessity or danger in *Yamashita,* since military hostilities had ceased, but no review of the due process issue was made by the Court. The dissent in *Yamashita* discussed at great length the evidentiary and procedural irregularities in Yamashita's trial.[96]

Here the official action theory might have offered some redress for the general's claims of denial of due process because it emphasizes the obligations of United States officials even in the Philippines to act in accordance with the Constitution. The official action theory protects individual rights as much by focusing on the official's actions and the integrity of government as it does by the second step of its analysis. The general's denial that he committed the crimes of war with which he was charged would not, however, have entitled him to a trial by jury under the official action theory. Under *Quirin,* the charge affects the type of trial available. Retrial by military commission on due process grounds may, however, have affected the outcome of Yamashita's trial.

93 327 U.S. 1 (1946).
94 *Id.* at 9.
95 *Id.* at 12.
96 Grave difficulties with the fairness of the trial in *Yamashita* appear in the record and form the basis for the lengthy dissents by Justices Murphy and Rutledge. "I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial." *Id.* at 81 (Rutledge, J., dissenting).

Quite apart from the question of the fairness of the trial the dissenting Justices had no dispute with the majority's assertion of jurisdiction. Justice Rutledge, commenting upon the government's argument that the trial was protected by military necessity and the authority of the President as Commander in Chief "subject to no judicial restraint on any account," *Id.* at 46, recognized the power to punish for crime under the laws of war or during a subsequent occasion. "The only question is how it shall be done, consistently with universal constitutional commands or outside their restricting effects. In this sense I think the Constitution follows the flag." *Id.* at 46-47. Justice Murphy termed the government's argument that trials of war criminals are "political matters completely outside the arena of judicial review" an "obnoxious doctrine" and stated that "commonly accepted juridical standards are to be recognized and enforced." *Id.* at 30.

In *Madsen v. Kinsella,*[97] the Supreme Court examined the fairness of the trial procedures used in American occupation courts in Germany and scrutinized the system under which Madsen was tried. Mrs. Madsen, living on an air base in the American Zone of occupied Germany in 1949, was charged under section 211 of the German Criminal Code with murdering her husband, an Air Force lieutenant, tried by the successor court to the United States Military Government Court,[98] convicted and sentenced to fifteen years in a federal prison. In a petition for habeas corpus, Madsen challenged the jurisdiction of the military commission court to try her and argued that she should have been court-martialed, since Article of War 2(d) applied to her. The district court discharged the writ and the Fourth Circuit affirmed. The Supreme Court granted certiorari because of "the importance and novelty of the jurisdictional issues raised."[99]

The Court examined the authority of the President to establish military commission courts in occupied territory.[100] The major issue in the case was the legality of the court system under which Madsen was tried.[101] The Court took pains to comment on the "confidence" expressed by the American government "in the fairness of those procedures" in the American military government courts in Germany.[102]

> The judges who served on the occupation courts were civilians. . . . Their constitutional authority continued to stem from the President. . . . In 1948, provision was made for the appointment of civilian judges with substantial legal experience. The rights of individuals were safeguarded by a code of criminal procedure dealing with warrants, summonses, preliminary hearings trials, evidence, witnesses, findings, sentences, contempt, review of cases and appeals.[103]

Thus, the Supreme Court was willing to scrutinize the fairness of the proceedings in the American military government courts in Germany before upholding the jurisdiction of these courts. The Court pointed out that there were no juries, because the exception of the fifth amendment for "cases arising in the land or naval forces" permitted such cases to be tried without indictment and trial jury.[104] By congressional enactment, Mrs. Madsen was subject to

97 343 U.S. 341 (1952).

98 As of January 1950, the occupation courts in Germany were called United States Court of the Allied High Commission for Germany. The President by Executive Order 10062, 14 Fed. Reg. 2965 (1949) transferred the authority of the United States military government from the armed services reporting to the Secretary of Defense to the United States High Commissioner for Germany reporting to the Secretary of State.

99 343 U.S. at 343.

100 *Id.* at 348.

101 One of the authors of the goverment's brief in *Madsen,* John Raymond, later wrote a case note in which he praised the Court's decision for upholding the "civilianized" military government court system. *See* Raymond, Madsen v. Kinsella—*Landmark and Guidepost in Law of Military Occupation,* 47 AM. J. INT'L L. 300, 305 (1953).

102 343 U.S. at 360.

103 *Id.* at 358-59 (citing the rights of the accused listed in United States Military Government Ordinance No. 2, Military Government Courts, 12 Fed. Reg. 2191 (1947)).

104 "They did not provide for juries. The presentment or indictment of a grand jury required in a federal capital case by the Fifth Amendment to the Constitution of the United States, under the terms of that Amendment, has no application to 'cases arising in the land or naval forces. . . .' The right of trial by jury required in federal criminal prosecutions by the Sixth Amendment is similarly limited." 343 U.S. at 360 n.26 (citations omitted). The Court did *not* apply the Insular Cases to the nonavailability of a jury to Mrs. Madsen in Germany.

court-martial as an overseas dependent of a serviceman. The validity of occupation courts was never successfully challenged after *Madsen,* but the applicability of Article of War 2(d) to civilians was soon thereafter held unconstitutional in *Reid v. Covert.*

Under *Tiede,* Mrs. Madsen herself could not have been tried by a jury in 1949 because of the applicability of the Articles of War to her. After *Reid,* Mrs. Madsen again petitioned for a writ of habeas corpus and her petition was denied.[105] Would the result be different under *Tiede?* Indications are that after the Uniform Code of Military Justice was held not to subject civilians to court-martial, *Tiede* would require a different result in Mrs. Madsen's second petition. *Madsen* is not factually identical to *Tiede* (less the applicability of the Articles of War) because the occupation was still in postwar stages when Mrs. Madsen was charged in 1949. Congress did not declare hostilities with Germany at an end until 1951.

Nevertheless, the legislative history of the occupation reveals an intent eventually to provide for trial by jury. During the summer of 1948, plans were made to civilianize the military government and the courts so that the Department of State could assume control from the Army.[106] By Ordinance No. 31, a new military government court system, patterned on the American federal judicial system,[107] was established.[108] It consisted of eleven judicial districts and a Court of Appeals with a Chief Judge and six associate judges. "The practice now followed conforms in every respect to that in use in American courts."[109]

> In connection with the concept of establishing a respectable judicial system, some of the planners of the new system felt that trial by jury should be included, and Ordinance No. 31 was so prepared as to allow for its ultimate inclusion."[110]

Under these circumstances, once the occupation became peaceful enough to contemplate the empaneling of German jurors, it is unlikely that *Tiede* would have withheld a trial by jury for civilians not excluded by the Articles of War.

Similarly, *Tiede* might have made some difference in the United States' participation in international military tribunals after World War II. The official action theory might have required prior clearance under the Constitution of standards to be applied in the international tribunal before the United States

105 Madsen v. Overholser, 251 F.2d 387 (D.C. Cir. 1958), *cert. denied,* 356 U.S. 920 (1958).
106 *See* note 75 *supra.*
107 *See* Fairman, *supra* note 16, at 610.
108 Office of Military Government, United States Zone, in its Ordinances Nos. 31, 32 & 33 (August 18, 1948) created the new system. 14 Fed. Reg. 124-33 (1949).
109 E. NOBLEMAN, *supra* note 75, at 178. Nobleman noted the similarity between the new military government court system and the American judicial system after discussing trial practice in the military government courts under the new ordinances. Particularly, he reviewed the applicability of American rules of evidence and criminal procedure, such as the privilege against self-incrimination and the defendant's election to testify during preliminary proceedings or at trial with no inference to be drawn from a defendant's election not to testify. In addition, the prosecutorial and judicial functions were separated by the creation of the Office of the Chief Attorney within the Legal Division of the Office of Military Government United States Zone. *Id.* at 160. Under Ordinance No. 31, the court system functioned as a separate unit of the Office of Military Government completely divorced from the executive division of the Office of Military Government based on the German States (Lander).
110 *Id.* at 183.

could participate. The most famous postwar courts were not the military commission predecessors of the United States Court for Berlin.[111] Instead, public attention focused on the international tribunals newly established to try those accused of major crimes during World War II. The two major international tribunals were the International Military Tribunal for the prosecution of major war criminals of the European Axis (IMT) and the International Military Tribunal for the Far East (IMTFE).

The IMT, which sat at Nuremberg from November, 1945, to October, 1946, was created on August 8, 1945, by the London Agreement among the United States, Great Britain, France and the Union of Soviet Socialist Republics to prosecute the major war criminals of the European Axis (the London Agreement).[112] Case No. 1 was the only case tried by the IMT. In one great trial Goering and other major war criminals were convicted of crimes against the peace, war crimes, crimes against humanity and membership in a group or organization declared criminal in the London Agreement.[113]

The Charter of the IMT, annexed to the London Agreement, provided for the establishment of successor tribunals in each zone of occupation to hear accusations of other major war crimes in Europe. Accordingly, after the IMT finished its work, a specialized tribunal was established on October 18, 1946, at Nuremberg in the same courthouse in which the IMT had convened.[114] The definitions of crimes set forth in the London Agreement were adopted for the new tribunal.[115] Habeas corpus relief was sought directly by more than one hundred of those convicted in this and a similar tribunal at Dachau, also in the American zone.[116] General Erhard Milch, who was convicted at Nuremberg and sentenced to life imprisonment for slave labor, war crimes and crimes against humanity, and Dr. Karl Brandt, Hitler's personal physician and Third Reich Commissioner for Health and Sanitation, convicted at Nuremberg of medical experimentation without the subjects' consent, moved directly in the United States Supreme Court to file petitions for habeas corpus.

In both Milch's and Brandt's cases, Justices Black, Murphy and Rutledge would have granted a hearing on jurisdiction.[117] Justice Douglas would have

111 The military commission courts were established in Germany by the United States after the end of World War II in accordance with traditions dating back to Generals Stephen Watts Kearny and Winfield Scott in the Mexican War. *See* Leitensdorfer v. Webb, 61 U.S. 176 (1957); Cross v. Harrison, 57 U.S. 164 (1853). For the activities of these military commission courts, see Clark & Goodman, *American Justice in Occupied Germany: United States Military Government Courts,* 36 A.B.A.J. 443 (1950); McCauley, *American Courts in Germany: 600,000 Cases Later,* 40 A.B.A.J. 1041 (1954); Nobleman, *Military Government Courts: Law and Justice in the American Zone of Germany,* 33 A.B.A.J. 777 (1947).

112 The text of the London Agreement was published in 13 DEP'T STATE BULL. 222 (1945).

113 *See generally* R. JACKSON, THE NUREMBERG CASE (1947); Glueck, *The Nuremberg Trial and Aggressive War,* 59 HARV. L. REV. 396 (1946); Meltzer, *A Note on Some Aspects of the Nuremberg Debate,* 14 U. CHI. L. REV. 455 (1947); Wechsler, *The Issues of the Nuremberg Trial,* 62 POL. SCI. Q. 11 (1947); Rheinstein, Book Review, 14 U. CHI. L. REV. 319 (1947).

114 The Office of Military Government, United States Zone, Title 23 Military Government Legislation 403, established the tribunal to succeed the IMT in its Ordinance No. 7, Organization and Powers of Certain Military Tribunals.

115 *See* Allied Control Council Law No. 10, of December 20, 1945, 15 DEP'T STATE BULL. 862 (1946) (adopting the framework of crimes against the peace, war crimes, crimes against humanity and membership in a group of organization declared criminal in the London Agreement).

116 HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 304 (2d ed., 1973). Many of the cases discussed in this article reached the Supreme Court by petitions for writs of habeas corpus.

117 Brandt v. United States, 333 U.S. 836 (1948); Milch v. United States, 332 U.S. 789 (1947); a later petition on behalf of 74 Germans convicted by the military government court at Dachau for crimes connected with the massacre at Malmedy, Belgium, during the Battle of the Bulge was denied for "want of

listened to an argument on jurisdiction in Milch's case, but not in Brandt's. The Court apparently assumed that it takes a majority to set argument on jurisdiction in such a motion, so that the motions were denied. Chief Justice Vinson and Justices Reed, Frankfurter and Burton must have believed that jurisdiction was lacking, although they gave no reason for the denials. Justice Jackson did not participate because he negotiated the London Agreement on behalf of the United States.

The second international tribunal, the IMTFE, was set up by the Supreme Commander for the Allied Powers, General Douglas MacArthur, in his capacity as agent for the Allied Powers. Former Japanese Premier Koki Hirota and other Japanese war lords convicted by the tribunal of war crimes moved in the United States Supreme Court for leave to file petitions for writs of habeas corpus.[118] The question of jurisdiction gave rise to the same divisions among the Justices as had occurred concerning the international tribunal in Germany. Since Justice Jackson had not been involved in the creation of the IMTFE, he filed a separate opinion to resolve the impasse. The Court then held that it lacked jurisdiction to review the conviction, since the IMTFE was "not a tribunal of the United States."[119]

American participation in international tribunals represented a departure from previous experience.[120] While the United States Supreme Court had no interest in looking into the conduct of the Allied Powers and no authority[121] to review the decision of an international tribunal, Justice Douglas[122] noted that the conduct of an American official was subject to review, depending on the nature of the official's authority:

> If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least, the Constitution follows the flag. It is no defense for him to say that he acts for the Allied powers. He is an American citizen who is performing functions for our government. If there is evasion or violation of its obligations, it is no defense that he acts for another nation.

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jurisdiction." Everett v. Truman, 334 U.S. 824, 824 (1948) (*per curium*). Petitioners made serious allegations that the prosecution was based on the systematic use of improper methods of interrogation. For a comprehensive review of the cases considered by the Supreme Court during its 1946, 1947 and 1948 terms, see Fairman, *supra* note 16.

118 Hirota v. MacArthur, 338 U.S. 197 (1948) (Douglas, J., concurring) (Douglas's concurrence was prepared later in 1949 and appears separately from the opinion); *see* note 124 *infra*.

119 338 U.S. at 198.

120 The proposal of an international criminal court was enthusiastically embraced following the publicity of the Nuremberg trial. *See* Ely, *The Treaty-Making Power: The Constitutionality of International Courts,* 36 A.B.A.J. 738 (1950); Finch, *An International Criminal Court: The Case Against Its Adoption,* 38 A.B.A.J. 644 (1952); Parker, *An International Criminal Court: The Case for Its Adoption,* 38 A.B.A.J. 641 (1952).

With regard to stationing troops abroad, some international cooperation came about on the basis of each cooperating nation's military jurisdiction to try its own accompanying civilians. *See* Administrative Agreement with Japan, Feb. 28, 1952, United States-Japan, 3 U.S.T. 3342, T.I.A.S. No. 2492; NATO Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846; Convention on the Rights and Obligations of Foreign Forces and Their Members in the Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 4278, T.I.A.S. No. 3425. *See also* Wilson v. Girard, 354 U.S. 524 (1957); Keefe v. Dulles, 222 F.2d 390 (D.C. Cir. 1954), *cert. denied,* 348 U.S. 952 (1955); Baldwin, *Foreign Jurisdiction and the American Soldier,* 1958 WIS. L. REV. 52; Schuck, *Concurrent Jurisdiction Under the NATO Status of Forces Agreement,* 57 COLUM. L. REV. 355 (1957); SCHWARTZ, *International Law and the NATO Status of Forces Agreement,* 53 COLUM. L. REV. 1091 (1953); NOTE, 70 HARV. L. REV. 1043 (1957).

121 The Justices found difficulty in deriving jurisdiction under article III, § 2, clause 2 of the Constitution to review alleged violations in international tribunals of defendant's constitutional rights.

122 Hirota v. MacArthur, 338 U.S. 197 (1948). The Court handed down its decision in Hirota on December 20, 1948. Justice Douglas took until June 27, 1949, to announce his concurring opinion in Hirota, perhaps indicating the difficulty of the issues with which he was grappling.

> There is at present no group or confederation to which an official of this Nation owes a higher obligation than he owes to us.[123]

Although the actions of American generals are subject to judicial review under the Constitution, Justice Douglas held with the majority that other considerations stood in the way of review. If a writ of habeas corpus were granted, the validity of the judgment rendered by the international tribunal would be indirectly challenged. The political question doctrine might perhaps, even under *Tiede,* prevent consideration of the due process issue, once the United States had actively participated in the tribunal. While it is much more likely that the *Tiede* theory would prevent American participation in an international tribunal, unless the tribunal agreed to conform to constitutional requirements, it is also possible that *Tiede* would have permitted review of the due process issue in *Hirota.*

The implications of *Tiede* for *Madsen* and *Hirota* indicate that little case law would be changed by application of the official action theory of the reach of the Constitution. *Madsen* would have had a different result after the Ryukyu cases; however, the United States is not likely to participate officially in international war tribunals again without some assurance of conformity to constitutional principles.[124] *Tiede* is, however, likely to make a difference in new types of cases arising more frequently today, in which the focus is on the duty of government officials to comply with the Constitution abroad as well as at home.

IV. Conclusion

United States v. Tiede is important as the latest analysis of the fundamental constitutional questions relating to the standards governing the activities of the United States abroad. The holdings by the United States Court for Berlin that the Constitution applied and that defendants were entitled to trial by jury are supported by both the direct application of the Constitution in *Reid* and by the due process analysis in Mr. Justice Harlan's concurrence in *Reid.* The Ryukyuan cases made it clear that constitutional rights must be guaranteed even in American-occupied areas.

Tiede recognizes that constitutional rights cannot be successfully guaranteed to individuals unless the United States government itself acts in accordance with the Constitution. *Tiede* thus ensures individual constitutional rights by focusing on the standards against which the actions of United States government officials must be measured.[125] As the presence of the United States is more frequently felt abroad, it will become increasingly necessary to have

123 *Id.* at 204.

124 *See* Ely, *supra* note 120.

125 On May 29, 1979, the Berliner Morgenpost carried the following editorial on the Court's decision:
"Sie sind ein freier Mann," sagte Stern nach dem Urteil zu Tiede. Mit seiner Unabhangigkeit und der Unerschrockenheit, mit der er das Verhalten der amerikanischen Anklager kritisierte, mit seinem unbestechlichen Gewissen und seiner tiefen Menshlichkeit hat Stern der Welt gazeigt, was ein wirklich freier Mann ist.
("You are a free man," said Stern after he imposed the sentence. Stern's independence and the fearlessness with which he criticized the tactics of the American prosecutors, his incorruptible conscience and his deep humanity have shown to the world what it truly means to be a free man.) (Translated by B.A. Ristau, Esq.)

standards against which to measure the conduct of United States officials toward American citizens abroad and toward any individual persons or governmental entities over which United States sovereignty is exercised. *Tiede* reminds us that no matter where the United States government is represented, the standards against which its actions will ultimately be tested are the highest standards of its own Constitution.