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Constitutional Law - Courts - Martial - Power of Congress to Provide for Military Jurisdiction Over Retired Servicemen

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CONSTITUTIONAL LAW—COURTS-MARTIAL—POWER OF CONGRESS TO PROVIDE FOR MILITARY JURISDICTION OVER RETIRED SERVICEMEN—A retired naval officer was charged with violations of the Uniform Code of Military Justice¹ based upon acts of sodomy occurring after his retirement.² At arraignment he challenged the jurisdiction of the military tribunal on the ground that Article 2(4) of the U.C.M.J.,³ providing for court-martial jurisdiction over retired servicemen, contravenes the Fifth Amendment.⁴ The court-martial and the board of review overruled this objection, and the accused was convicted and sentenced.⁵ On appeal, *held*, while jurisdiction is proper, reversed on other grounds for further proceedings. A retired member of the armed forces who is entitled to pay is a part of "the land or naval forces" and is therefore subject to military jurisdiction within the exception to the Fifth Amendment. *United States v. Hooper*, 9 U.S.C.M.A. 637 (1958).

Congress may provide for military jurisdiction pursuant to the exercise of its power "To make Rules for the Government and Regulation of the

¹ Articles 125, 133 and 134 of the U.C.M.J., 10 U.S.C. (Supp. V, 1958) §§925, 933, 934. Art. 125 defines and prescribes the punishment for sodomy, Art. 133 the punishment for conduct unbecoming an officer and a gentleman, and Art. 134 the punishment for conduct of a nature to bring discredit upon the armed forces.

² Accused was transferred to the Regular Navy retired list in 1948 after 20 years active service with the rank of Rear-Admiral but with retired pay based on his former rank of Captain in accordance with 60 Stat. 27 (1946), 34 U.S.C. (1952) §410b, and 61 Stat. 874 (1947), 34 U.S.C. (1952) §410n.

³ "The following persons are subject to this chapter: . . . (4) Retired members of a regular component of the armed forces who are entitled to pay. . . ." 10 U.S.C. (Supp. V, 1958) §802.

⁴ "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces*. . . ." U.S. CONST., Amend. V. Emphasis supplied.

⁵ The sentence of dismissal included forfeiture of retirement benefits.

land and naval Forces.”⁶ It had generally been assumed that this power was limited by the Fifth Amendment to “cases arising in” the land or naval forces.⁷ Since 1955, however, a majority of the Supreme Court has cast doubt upon this assumption.⁸ This majority, speaking through Justice Black, expressed the view that the power to govern the armed forces is not limited by the Fifth Amendment, because that amendment excepts from its operation the Article I power.⁹ Despite the general judicial practice of liberally construing Article I powers which do not come in conflict with the Bill of Rights, the majority construed the Article I power to be limited to “persons in” the armed forces. This strict construction was justified on the ground that otherwise the power would deprive individuals of constitutional rights which would be afforded them under alternative modes of prosecution.¹⁰ Justice Harlan, however, has insisted upon the earlier view which likewise justifies a strict construction, but on the significantly different ground that the exception to the Fifth Amendment limits the power without reference to preferable alternatives.¹¹ Despite this basic difference in approach, the proponents of both views utilized essentially the same substantive tests in examining the appropriateness of court-martial jurisdiction. Of foremost

⁶ U.S. CONST., Art. I, §8, cl. 14. See, e.g., *Dynes v. Hoover*, 20 How. (61 U.S.) 65 (1858); *Ex parte Reed*, 100 U.S. 13 at 21 (1879).

⁷ Although the Supreme Court had not yet passed definitively on the question of what is the proper relationship in this connection between the Art. I power and the Fifth Amendment, lower courts had agreed that the Fifth Amendment operated directly upon the Art. I power by way of limitation. See, e.g., *United States ex rel. Flannery v. Commanding General*, (S.D. N.Y. 1946) 69 F. Supp. 661; *Terry v. United States*, (W.D. Wash. 1933) 2 F. Supp. 962; *In re Bogart*, (C.C. Cal. 1873) 3 Fed. Cas. 796, No. 1,596. This was the view adopted by the court in the principal case, at 642 et seq.

⁸ See *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (denying military jurisdiction over an ex-serviceman for crimes alleged to have been committed while the accused was still in service), and *Reid v. Covert*, 354 U.S. 1 (1957) (denying military jurisdiction over civilians living with servicemen on a military base).

⁹ This construction is supported by the similarity between language found in Art. I, §8, cl. 14, and that in the exception phrase of the Fifth Amendment. For a prior indication of this construction, see *Kurtz v. Moffitt*, 115 U.S. 487 at 500 (1885).

¹⁰ E.g., the right to grand jury indictment and trial by jury in federal criminal proceedings.

¹¹ See his concurring opinion in *Reid v. Covert*, note 8 supra, at 65. As to the interpretation of the words “cases arising in” contained in the Fifth Amendment there is a split of authority, some courts construing these words to mean “events arising in” and other courts construing them to mean “persons in” the armed forces. Compare *Terry v. United States*, note 7 supra; *In re Bogart*, note 7 supra, with the principal case at 642 et seq.; *United States ex rel. Flannery v. Commanding General*, note 7 supra. See WINTHROP, *MILITARY LAW AND PRECEDENTS*, 2d ed., 106 (1920). The latter interpretation would be somewhat strained in the setting of numerous decisions which have upheld, in special circumstances, military jurisdiction over civilians. E.g., *Madsen v. Kinsella*, 343 U.S. 341 (1952); *Ex parte Quirin*, 317 U.S. 1 (1942); *Perlstein v. United States*, (M.D. Pa. 1944) 57 F. Supp. 123; *McCune v. Kilpatrick*, (E.D. Va. 1943) 53 F. Supp. 80. The former interpretation, while recognizing the importance of the relationship of the accused to the armed forces, permits a more flexible consideration of the effect of the crime upon the proper functioning of the military.

importance in this examination were the relationship of the accused to the armed forces, and, to a lesser extent, the effect of the crime upon the proper functioning of the military. When these substantive tests are applied to the exercise of military jurisdiction over retired officers, a contrary conclusion to that reached in the instant case is indicated. The relationship of a retired officer to the armed forces is perfunctory. The principal argument made in support of his amenability to court-martial is based upon the sizable retirement pay to which he is entitled.¹² In so far as this argument suggests a contractual basis, it suffices to say that such jurisdiction goes to the subject matter¹³ and therefore cannot be conferred by consent.¹⁴ Even if the contractual argument were otherwise permissible, it would seem that retirement pay is a substantial inducement to enlistment for a military career, and is thus in the nature of a deferred compensation or pension. In addition, if a retired officer is amenable to military jurisdiction, it would mean that one who enlists with a view toward a career in the armed forces surrenders his right to civil trial for the rest of his life unless he resorts to the undesirable alternative of resignation and the accompanying abandonment of retirement benefits; such terms of service would seem onerous indeed. Furthermore, a retired officer may not be recalled to active duty without his consent except in time of war or national emergency,¹⁵ and therefore is further removed from actual military service than the average civilian.¹⁶ It is difficult, also, to sustain this jurisdiction on the ground that it is essential to the proper functioning of the military. Although crimes by retired officers are likely to have some effect upon the discipline and morale of the active troops, this effect is probably less than that produced by the denial of military jurisdiction over discharged servicemen for crimes committed while still in the active service.¹⁷ It seems, also, that jurisdiction over civilian dependents or employees living in military camps abroad¹⁸ is more

¹² See principal case at 645. Retirement pay may be as high as 75% of the pay to which the officer would have been entitled if he had continued in active service in the grade at which he was retired. 10 U.S.C. (Supp. V, 1958) §1401.

¹³ *VerMehren v. Sirmyer*, (8th Cir. 1929) 36 F. (2d) 876.

¹⁴ *McClaghry v. Deming*, 186 U.S. 49 at 66 (1902).

¹⁵ 10 U.S.C. (Supp. V, 1958) §672.

¹⁶ Many draft-eligible men may be called to active duty without their consent at any time. In addition, members of the Ready Reserve and Standby Reserve, who are not generally subject to court-martial, must be called before the members of the Retired Reserve in case of war or national emergency. 10 U.S.C. (Supp. V, 1958) §672(a).

¹⁷ *United States ex rel. Toth v. Quarles*, note 8 supra.

¹⁸ See *Reid v. Covert*, note 8 supra, denying such jurisdiction over civilian dependents at least in capital cases, and *United States ex rel. Guagliardo v. McElroy*, (D.C. Cir. 1958) 259 F. (2d) 927, cert. granted 27 U.S. LAW WEEK 3231 (1959), denying military jurisdiction, in a non-capital case, over a civilian employee attached to the armed forces. But compare *Grisham v. Taylor*, (3d Cir. 1958) 261 F. (2d) 204, and *United States ex rel. Wilson v. Bohlander*, (D.C. Colo. 1958) 167 F. Supp. 791, both allowing military jurisdiction over civilian employees serving with the armed forces overseas. The *Grisham* case involved a capital offense while the *Wilson* case involved lesser offenses.

intimately connected with the proper functioning of the military than is jurisdiction over retired officers leading a private life in the United States. In addition, the offense of sodomy goes less to the core of military discipline than does, for example, insubordination;¹⁹ while offenses like insubordination are solely punishable by the military, sodomy is cognizable in civil courts.²⁰

It would seem that the proponents of both views would favor a strict construction of the Article I power in the principal case. Application of the Black view, however, presents a special problem. Justice Black would consider the safeguards guaranteed by the Constitution if alternative modes of prosecution were followed.²¹ In the principal case, the existing alternative to military jurisdiction is jurisdiction by the state in which the offense was committed.²² While Justices Black and Douglas have taken the position that the Fifth and Sixth Amendments in their entirety restrain state as well as federal action,²³ the other justices have not. For them, the argument that these safeguards would be available in the alternative mode of prosecution could not be made.²⁴ They would then be faced with the desire strictly to construe the Article I power but seemingly without an established basis for doing so.

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¹⁹ Cf. *Closson v. United States ex rel. Armes*, (D.C. Cir. 1896) 7 App. D.C. 460.

²⁰ Justices Frankfurter and Harlan, concurring separately in the Reid case, note 8 supra, limited their opinions to capital cases and might be willing to distinguish, in certain circumstances, between crimes which may and may not be tried by court-martial. Perhaps the line could be drawn between crimes which are punishable solely by the military and those which are cognizable in federal or state courts. The President has authority to strike retired officers from the rolls for convictions in state or federal courts. 10 U.S.C. (Supp. V, 1958) §1163b(2). Thus, the punishment prescribed in the principal case could be accomplished in this manner without subjecting retired officers in future cases to the possibility of more serious punishment without the benefit of a non-military trial.

²¹ The degree of reliance which is placed on the constitutional alternatives argument is especially well illustrated by the Reid case, note 8 supra, where the impracticality of providing any other mode of punishment would seem otherwise to have led to the conclusion that court-martial jurisdiction was necessary to the proper functioning of the military. See Reid v. Covert, note 8 supra, at 76, n. 12.

²² It is conceivable that Congress could constitutionally provide for the trial of retired officers in federal courts, but it would seem that somewhat the same considerations which militate against the power of Congress to provide for military jurisdiction would prevent its providing for federal court jurisdiction. If the federal jurisdiction were made exclusive, it would be open to the additional objection that it encroaches upon state power to define and punish crimes.

²³ See their dissenting opinion in *Adamson v. California*, 332 U.S. 46 at 68 et seq. (1947). See also *Rochin v. California*, 342 U.S. 165 at 177 et seq. (1952).

²⁴ It is possible that the Black view might be construed as resting upon a broader basis of any preferable alternatives, whether constitutional or otherwise. It could be argued that state trial is a preferable alternative to court-martial jurisdiction because of the fact that the states characteristically ensure greater safeguards than does the military. However, this argument is open to the objection that this preferable procedure

is subject to change. Justice Black observed in response to the argument that military justice has undergone substantial reforms, "Moreover the reforms are merely statutory; Congress and perhaps the President can reinstate former practices, subject to any limitations imposed by the Constitution, whenever it desires." *Reid v. Covert*, note 8 *supra*, at 37. This would also seem to be true of the states.