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Court Martial Jurisdiction Over Civilian Dependents Overseas - Unconstitutional - Reid v. Covert and Kinsella v. Krueger

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Court Martial Jurisdiction Over Civilian Dependents Overseas — Unconstitutional

Reid v. Covert[1] *and Kinsella v. Krueger*[2]

Mrs. Covert and Mrs. Smith were tried and convicted by courts-martial of the alleged murder of their respective husbands, members of the United States military forces stationed outside the continental limits of the United States. Both women were returned to the United States and confined at the Federal Reformatory for Women, Alderson, West Virginia. Mrs. Smith's conviction was affirmed by the Board of Review and the Court of Military Appeals, while Mrs. Covert's conviction was set aside by the Court of Military Appeals and she was transferred to the District of Columbia jail to await rehearing by court-martial at Bolling Air Force Base, Washington, D.C.

[1] 353 U. S. ..., 77 S. Ct. 1222 (1957).
[2] *Ibid.*

Petitions for writs of *habeas corpus* were filed in Mrs. Smith's behalf and by Mrs. Covert, contending the prisoners were not subject to court-martial jurisdiction because Article 2(11) of the Uniform Code of Military Justice[3] violated Article III, Section 2 and the Sixth Amendment of the Federal Constitution guaranteeing the right to trial by jury to civilians. Mrs. Covert's petition also contended that whatever jurisdiction the military may have acquired to try her under Article 2(11) was lost by her return to the United States and delivery to the custody of civilian authorities. The United States District Court for the District of Columbia ordered the writ to issue on Mrs. Covert's petition and the government appealed directly to the United States Supreme Court. The District Court for the Southern District of West Virginia issued a preliminary writ on the petition filed in Mrs. Smith's behalf, but after hearing, discharged the writ. While an appeal was pending before the Court of Appeals for the Fourth Circuit, the Government itself sought certiorari.

In the original hearing, the Supreme Court held the provision of the Code extending court martial jurisdiction to civilians accompanying armed forces abroad in peacetime did not violate the constitutional right to trial by jury, and further held that such jurisdiction, once validly attached, was not lost by the transfer of the civilian to a penal institution in the United States after her conviction.[4] Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas dissented, indicating a belief the majority opinion would give to the military "new powers not hitherto thought consistent with our scheme of government",[5] but postponed filing their dissents until the next Term of Court. In an unusual "reservation", Mr. Justice Frankfurter neither concurred with nor dissented from the majority opinion but, after strongly criticizing that majority opinion, reserved for a later date the expression of his views.

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[3] 70 Stat. 911 (1956), 50 U. S. C. A. §552 (11) (1956).
Persons subject to this chapter (Article 2):
"(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, Guam, and the Virgin Islands;"

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

[5] *Ibid, dis. op.* 485, 486.

Petition for rehearing in the cases as consolidated was granted[6] and counsel were invited to include discussion of four questions[7] relating to the practical necessity for and alternatives to court-martial jurisdiction over civilian dependents overseas, historical evidence bearing on the scope of court-martial jurisdiction, and the relevance of any distinction between civilian employees and civilian dependents and between major crimes and petty offenses. On the rehearing, the Court reversed its earlier decision,[8] *holding* Mrs. Smith and Mrs. Covert could not constitutionally be tried by military authorities and ordering their release from custody. Mr. Justice Brennan joined the three Justices who had dissented at the first hearing in the new majority opinion, and Mr. Justice Frankfurter and Mr. Justice Harlan concurred in separate opinions. Mr. Justice Clark and Mr. Justice Burton dissented.

In its first decision, the Court conceded that trial by court-martial of a civilian entitled to trial in an Article III court would be a violation of the Constitution,[9] but it found the Constitution does not require trial before an Article III court in a foreign country for offenses committed there by an American citizen. Relying on the decisions in *In re Ross*[10] and the "Insular Cases",[11] the Court stated that Congress had the power to establish legislative or consular courts and, since the choice among different types of legis-

[6] 352 U. S. 901 (1956).

[7] *Ibid.*:

"'1. The specific practical necessities in the government and regulation of the land and naval forces which justify court-martial jurisdiction over civilian dependents overseas; the practical alternatives to the exercise of jurisdiction by court-martial.

"'2. The historical evidence, so far as such evidence is available and relevant, bearing on the scope of court-martial jurisdiction authorized under Art. I, §8, cl. 14, and the Necessary and Proper Clause, and bearing on the relations of Article III and the Fifth and Sixth Amendments in interpreting those clauses. In particular, the question whether such historical evidence points to the conclusion that the Art. I, §8, cl. 14, power was thought to have a fixed and rigid content or rather that this power, as modified by the Necessary and Proper Clause, was considered a broad grant susceptible of expansion under changing circumstances.

"'3. The relevance, for purposes of court-martial jurisdiction over civilians overseas in time of peace, of any distinction between civilians employed by the armed forces and civilian dependents.

"'4. The relevance, for purposes of court-martial jurisdiction over civilian dependents overseas in time of peace, of any distinctions between major crimes and petty offenses'."

[8] *Supra*, n. 4.

[9] *Ibid*, 474, citing Toth v. Quarles, 350 U. S. 11 (1955).

[10] 140 U. S. 453 (1891).

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

lative tribunals "is peculiarly within the power of Congress",[12] the power to establish such courts necessarily includes the power to provide for trial before a military tribunal if that choice is "reasonable and consonant with due process".[13]

In the second hearing, the Court could find no constitutional basis for military trial of the prisoners but rather "under our Constitution courts of law alone are given power to try civilians for their offenses against the United States".[14] Justices Frankfurter and Harlan concurred on the narrow ground that the constitutional bar applied to the trial by court-martial in capital cases of civilian dependents accompanying members of the armed forces abroad in peacetime. The reversal resulted from an analysis — actually, three separate analyses — of the power of Congress under Article I, Section 8, Clause 14, of the Constitution " 'to make Rules for the Government and Regulation of the land and naval Forces' " — a power the Court found "no need to examine" in its first opinion.[15]

Civilian courts are the normal repositories of power to try persons charged with crimes against the United States and the Constitution has provided a number of specific safeguards to protect persons brought before these courts.[16] The jurisdiction of military tribunals, in the words of the four Justices joining in the Court's opinion, is a "very limited and extraordinary jurisdiction"[17] arising out of the Article I power, the scope of which cannot be so extended by the "Necessary and Proper" Clause[18] to permit military jurisdiction over any other group of persons than those literally in the land and naval forces.[19] "Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14".[20]

Neither the concurring Justices nor the dissenting Justices could find such rigid confines on the power of Congress to make rules for the government and regulation of

[12] *Supra*, n. 4, 478.
[13] *Ibid*, 476.
[14] 353 U. S. ..., ..., 77 S. Ct. 1222, 1243 (1957).
[15] 351 U. S. 470, 476 (1956).
[16] *Supra*, n. 14, ..., 1232-3, citing Article III and the Fifth, Sixth and Eighth Amendments.
[17] *Ibid*, 1233.
[18] Art. I, §8. cl. 18.
[19] Although the Court recognized "there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform." *Supra*, n. 14, ..., 1233.
[20] *Ibid.*

the land and naval forces. The power cannot be looked at in isolation as "[t]he Constitution is an organic scheme of government to be dealt with as an entirety".[21]

Thus viewed, Justice Frankfurter stated the question:

> ". . . whether these women dependents are so closely related to what Congress may allowably deem essential for the effective 'Government and Regulation of the land and naval Forces' that they may be subjected to court-martial jurisdiction in these capital cases, when the consequence is loss of the protections afforded by Article III and the Fifth and Sixth Amendments."[22]

In reaching a negative answer, he emphasized that the Court was only dealing with the trial of civilian dependents in capital cases in time of peace. Unable to accept the theory that the Article I power is incapable of expansion under changing conditions, Justices Harlan, the only Justice reversing his view between the first and second opinions, found a rational connection between the court-martial jurisdiction invoked and the Article I power supplemented by the "Necessary and Proper" Clause but found capital cases to be on sufficiently different footing from those involving other offenses to warrant the full protection of trial by an Article III court.

The dissent[23] referred to the Court's decision in the *Toth* case[24] where "Art. I, §8, cl. 14 was 'given its natural meaning' and 'would seem to restrict court-martial jurisdiction to persons who are actually members *or part* of the armed forces'." Reviewing the practical situation which exists at military bases throughout the world and the "effect of such a double standard on discipline, efficiency, and morale", and the impracticality or undesirability of the alternatives to court-martial jurisdiction, Justices Clark and Burton concluded that the provision of the Code establishing the military jurisdiction is reasonably related to Congress' power to make Rules for the Government and Regulation of the land and naval Forces.

In reversing the earlier decision, the four Justices composing the Court did not overrule *In re Ross*[25] and the "Insular Cases",[26] which provided that earlier decision's

[21] *Supra*, n. 14, *conc. op.* ..., ..., 1243, 1245.
[22] *Ibid.*
[23] *Supra*, n. 14, *dis. op.* ..., ..., 1262, 1266.
[24] Toth v. Quarles, 350 U. S. 11 (1955).
[25] 140 U. S. 453 (1891).
[26] Downes v. Bidwell, 182 U. S. 244 (1901); Hawaii v. Mankichi, 190 U. S. 197 (1903); Dorr v. United States, 195 U. S. 138 (1904); Balzac v. Porto Rico, 258 U. S. 298 (1922).

precedents, but it relegated those decisions to the limbo of obsolescence: "At best, the Ross case should be left as a relic from a different era",[27] and "it is our judgment that neither the (Insular) cases nor their reasoning should be given any further expansion".[28] Again, both Justice Frankfurter and Justice Harlan, though concurring, join the dissenting Justices in attempting to preserve the validity of the Ross and the Insular Cases decisions, at least to the extent of their narrow, specialized settings. In fact, Justice Harlan cites these much-battered decisions as authority in his concurrence.

Probably the two most pertinent criticisms of the decision of the Court are those raised by the dissent. In reversing two prior majority decisions in these cases, the Court does not do so with a majority opinion. Rather, it delivers three opinions which are farther apart in some ways than the concurring opinions and the dissent. Four Justices see the Bill of Rights as a "bulwark" against Congressional power to make Rules for the Government and Regulation of the land and naval Forces. Justice Frankfurter views the power and the rights as co-equal threads from the same Constitutional fabric, while to Justice Harland the value of the Article III rights increases or decreases when measured against the Congressional power, depending on the gravity of the offense or the possible punishment involved.

But the most serious criticism raised by the dissent is that the Court "gives no authoritative guidance as to what, if anything, the Executive or the Congress may do to remedy the distressing situation in which they now find themselves".[29] The geographic and numerical extent of United States military installations and personnel abroad requires the hiatus created by this decision be filled — a repair job which could much more satisfactorily be done had the Court at least indicated which materials might be acceptable.

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[27] 353 U. S. ..., ..., 77 S. Ct. 1222, 1228 (1957).
[28] *Ibid*, ..., 1229. Parenthetical material supplied.
[29] *Supra*, n. 27, *dis. op.*, ..., 1262.