

## COURTS-MARTIAL JURISDICTION AND CIVILIAN DEPENDENTS: CONSTITUTIONAL RESTRICTIONS

IN two recent cases, *Reid v. Covert* and *Kinsella v. Krueger*,<sup>1</sup> the United States Supreme Court has had occasion to re-examine the nature and scope of the constitutional guarantees<sup>2</sup> extended to American citizens in criminal cases arising outside the United States<sup>3</sup> and its incorporated territories.<sup>4</sup> There, speaking for a divided Court, Mr. Justice Black,

<sup>1</sup> *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Krueger*, 354 U.S. 1 (1957).

<sup>2</sup> “. . . The judges . . . shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.” U.S. CONST. art. III, § 1. “The judicial power shall extend to all cases . . . arising under this Constitution, the laws of the United States, and treaties made . . . under their authority. . . . The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.” U.S. CONST. art. III, § 2.

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. . . .” U.S. CONST. amend. V.

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . .” U.S. CONST. amend. VI.

<sup>3</sup> In cases arising outside the United States a citizen's right to indictment and a jury trial has historically been limited. Exemplary is *In re Ross*, 140 U.S. 453, 464 (1891), wherein the Court stated, “The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other.”

<sup>4</sup> Traditionally, territorial courts have been bound by all the provisions and limitations of the constitution. See *Thompson v. Utah*, 170 U.S. 343 (1898). However, during the period following the Spanish-American War it was held that every provision of the constitution did not extend to recently conquered territory until it had been technically incorporated into the United States. The first cases so holding were *Downes v. Bidwell*, 182 U.S. 244 (1901) and *Hawaii v. Mankichi*, 190 U.S. 197 (1903), the rationale being that a short period of time was necessary immediately following acquisition to give officials an opportunity to establish an orderly civil administration. In these two cases Mr. Justice Harlan, Mr. Justice Brewer, Mr. Justice Peckham, and Mr. Chief Justice Fuller dissented, holding that if part of the constitution applied to a person or to property, then the whole constitution had to be considered as applicable. The *Downes* and *Mankichi* rule was later extended to hold that jury trial was not applicable to an American citizen in Puerto Rico in 1922, some

who was joined by The Chief Justice, Mr. Justice Douglas, and Mr. Justice Brennan, held that civilian dependents accompanying military personnel overseas could not, in time of peace, be tried for capital offenses by courts-martial under article 2 (11) of the Uniform Code of Military Justice,<sup>5</sup> nor could Congress constitutionally so provide. Congressional authority to enact military law and to provide for its enforcement,<sup>6</sup> it was asserted, extends only "to persons who are members of the armed services," and the power to deny grand jury indictment and trial by petit jury before an impartial judge to military personnel is not enlarged by the "necessary and proper" clause to include civilian dependents.<sup>7</sup> Although it was conceded that some persons might be considered "in" the armed services for court-martial purposes even if they had not technically been enlisted or inducted,<sup>8</sup> it was held to be

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twenty-four years after the conquest. *Balzac v. People of Puerto Rico*, 258 U.S. 298 (1922).

<sup>5</sup> "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 Hawaiian Islands, Puerto Rico, and the Virgin Islands." 64 STAT. 109 (1950), 50 U.S.C. § 552(11) (1952).

<sup>6</sup> "The Congress shall have power to . . . make rules for the government and regulation of the land and naval forces. . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, . . ." U.S. CONST. art. I, § 8. Under its power to make rules for the government and regulation of the land and naval forces, Congress may provide for the trial and punishment of military and naval offenses in the manner practiced by civilized nations. This authority is apparently independent of the judicial power conferred by article three. *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858).

<sup>7</sup> The scope of the "necessary and proper" clause was established in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) wherein Chief Justice Marshall stated, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." In the instant cases article three as well as the fifth and sixth amendments concerning indictment, judges, and petit juries limit the government's power to provide any other type of trial for civilians, and because of them the necessary and proper clause cannot operate to extend military jurisdiction to any group of persons beyond that class described in article one, section eight, clause fourteen, as constituting "the land and naval forces."

<sup>8</sup> The test of military jurisdiction over service personnel seems to be whether the accused took the oath of allegiance customarily administered during induction. "However, under the Code, as under prior law, failure to take the oath will not keep military jurisdiction from attaching if the draftee goes ahead with life as a soldier without calling attention to the omitted formality." EVERETT, MILITARY JUSTICE 18

clear that the wives, children and other dependents of servicemen cannot be placed in that category.<sup>9</sup>

Mr. Justice Frankfurter<sup>10</sup> and Mr. Justice Harlan<sup>11</sup> concurred in the result but, relying on the narrow distinction drawn in *Powell v. Alabama*<sup>12</sup> between capital and noncapital crimes, explicitly reserved judgment as to whether Congress could constitutionally provide for the court-martial of civilian dependents on noncapital charges.

In dissent,<sup>13</sup> Mr. Justice Clark and Mr. Justice Burton concluded that article 2 (11) of the Uniform Code was a necessary and proper exercise of the power granted to Congress to govern and regulate the

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(1956). The court in the instant cases stated that the lower federal courts have upheld military trial of civilians performing services for the armed forces "in the field" during the time of war, and these decisions rest on the government's "war powers."

<sup>9</sup> The status of certain other civilians stationed with the military is apparently still to be resolved. Employees of the various branches of the service, technical representatives, school teachers, as well as dependents and all others charged with non-capital crimes, will have to seek a writ of habeas corpus in a federal district court to test the validity of court-martial jurisdiction over their person. In the *Toth*, *Covert*, and *Kreuger* cases the Court outlined its broad objections to trial of civilians by courts-martial: (1) absence of judicial tenure, (2) absence of protection for the judge's salary, (3) possible presence of executive department influence, (4) difference in trial by civilian jury and members of the military forces, (5) emphasis of summary procedures, (6) harshness of courts-martial penalties, (7) possible derogation of individual rights, (8) presence of command influence, (9) absence of indictment by a grand jury, (10) vagueness of military law, (11) presence of possible Presidential change in procedural and substantive laws, and (12) presence of possible encroachment upon the doctrine of separation of powers.

<sup>10</sup> 354 U.S. at 41.

<sup>11</sup> 354 U.S. at 65.

<sup>12</sup> 287 U.S. 45 (1932). Mr. Justice Frankfurter in *Covert*, stated that "the taking of life is irrevocable. It is in capital cases, especially, that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights. Thus, in *Powell v. Alabama*, 287 U.S. 45, 71 (1932), the fact above all that they stood in deadly peril of their lives led the court to conclude that the defendants had been denied due process by the failure to allow them reasonable time to seek counsel and the failure to appoint counsel. . . . I repeat. I do not mean to imply that the considerations that are controlling in capital cases involving civilian dependents are constitutionally irrelevant in capital cases involving civilians other than dependents or in noncapital cases involving dependents or other civilians. I do say that we are dealing here only with capital cases and civilian dependents." 354 U.S. at 45-46. Mr. Justice Harlan, concurring, states that, "so far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority. I do not concede that whatever process is 'due' an offender faced with fine or prison sentence necessarily satisfies the requirements of the constitution in a capital case. The distinction is by no means novel." 354 U.S. at 77.

<sup>13</sup> 354 U.S. at 78.

land and naval forces, even when applied to certain civilians. Furthermore, they reasoned that Congress could provide for the trial of citizens in foreign countries, without regard to article three and the fifth and sixth amendments of the Constitution, so long as the procedure established was reasonable and otherwise consonant with due process requirements, apparently recognizing no constitutional distinction between capital and noncapital<sup>14</sup> offenses.

The difficulty inherent in any attempt to demarcate a boundary between a "civilian" and a member of the "land and naval forces" is readily apparent, since each of the numerous classes of "military civilians" embodies its own peculiarity of definition. It would appear, therefore, that each individual case must be judged on the basis of its own particular facts, a perhaps unfortunate result in that it affords, at best, a tedious method by which military commanders may obtain authoritative guidance in the disposition of borderline cases.<sup>15</sup> Concomitantly, the immediate disciplinary needs of the services and their relations with foreign governments may be prejudiced, and overseas commanders who are charged with the deterrence of black marketeering, narcotics traffic, breach of security regulations, and other crimes may be denied adequate means of control over civilian personnel.<sup>16</sup>

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<sup>14</sup> Taken as a whole, the three opinions in the instant cases appear to stand only for the limited proposition that military tribunals may not try dependents accompanying military personnel for capital offenses overseas. See Brief for the Judge Advocate General of the Navy as Amicus Curiae, p. 4, *United States v. Bruce Wilson*, Docket No. 9638, Court of Military Appeals. Whether the court will so hold, however, remains to be seen and presents a conundrum which, perhaps, will be determined by the final ruling in the *Wilson* case. In the interim, some military authorities have taken the position that the instant opinions must be limited to the majority view and have, accordingly, instructed overseas commanders to the effect that court-martial policy remains unchanged, with the exception that no dependent will be tried for a capital offense. Letter from the Judge Advocate General of the Army to DUKE LAW JOURNAL, Dec. 4, 1957, on file in Duke University Law Library.

<sup>15</sup> The Court of Military Appeals is now faced with the problem of determining the proper disposition of certain cases of this type. In *United States v. Bruce Wilson*, Docket No. 9638, Court of Military Appeals, defendant, a civilian employee, was found guilty by a general court-martial sitting in Berlin, Germany of violations of Articles 125 and 134 of the Uniform Code of Military Justice and was sentenced to be confined at hard labor for ten years. In *United States v. Theodore S. Dyer*, Docket No. 10,061, Court of Military Appeals, defendant, a civilian employed by the Air Force in Japan, was found guilty by a general court-martial of violations of Article 121 of the Uniform Code of Military Justice and was sentenced to pay a fine of four hundred and sixty dollars and to be confined at hard labor for one year, the officer exercising general court-martial jurisdiction approving only so much of the sentence as provided for confinement at hard labor for one year.

<sup>16</sup> "In order to grasp the magnitude of the problem which faces the armed forces

If, however, as four justices imply, article 2 (11) is to be deemed constitutionally inapplicable to all "military-civilians," by what tribunal shall they be tried? Existing status-of-forces agreements expressly preclude the exercise of criminal jurisdiction in the receiving state by other than the "military authorities" of the sending state.<sup>17</sup> As defined, "military authorities" are "those authorities of the sending state who are empowered by its law to enforce the military law of that state. . . ."<sup>18</sup> This definition would appear sufficiently broad to include any civilian courts which might be created or empowered by Congress to fill the

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overseas, it is necessary to understand that civilians accompanying the armed forces in foreign countries involve rather large numbers. As of 31 December 1956 there were a total of 1,186,445 United States citizens working for or accompanying the Department of Defense in foreign countries, excluding territories and possessions. Of this total, 731,623 were military personnel and 454,822 were civilians. Of the total number of civilians 37,971 comprised such civilian components as departmental employees, technical representatives, contractor employees, USO employees, American Red Cross and so forth, and 416,851 were dependents. In brief, there are over a million people overseas of whom almost half a million are civilians, and the greatest portion of these civilians are dependents. It can be seen then that from the standpoint of the number of people involved alone, this is no small problem." Letter from the Judge Advocate General of the Air Force to *DUKE LAW JOURNAL*, Oct. 30, 1957, on file in Duke University Law Library.

<sup>17</sup> ". . . it should be noted that all cases involving offenses committed by members of the civilian component and dependents may be entertained by local courts immediately upon loss of court-martial jurisdiction over those persons, and without action of any kind on the part of the United States, with the following exceptions:

a. In the Federal Republic of Germany, offenses under the Bonn Conventions, offenses under German law committed by dependents or civilian employees against other than German interests may be transferred to the German courts with the consent of the German authorities.

b. In the Philippines, offenses committed on military bases by dependents or civilian employees will be subject to Philippine jurisdiction upon mere notification to the Philippine prosecutor of the intention of the United States not to prosecute.

c. In the leased Territories (Antigua, Bahamas, Bermuda, British Guiana, Jamaica, Santa Lucia, Trinidad, and the Turks and Caicos Islands), the United States enjoys concurrent jurisdiction only with respect to offenses committed within United States Military sites. The agreements provide that in the event the United States decides not to prosecute a given case, the local courts may do so, provided both governments agree that the offender should be tried." . . .

Thus, it would appear that "in the absence of legislation and of international agreements . . . the courts of the receiving States would have the exclusive right to exercise criminal jurisdiction, in all cases cognizable under local law, over all civilian personnel (civilian employees and dependents) to whom court-martial jurisdiction does not extend." Study prepared by the Committee of Military, Naval and Air Law of the Section of International and Comparative Law of the American Bar Association, entitled *Trial of Civilian Personnel by Foreign Courts*, pp. 1-2.

<sup>18</sup> 4 U.S. TREATIES AND OTHER INTERNATIONAL AGREEMENTS 1794 (1953).

vacuum produced by the instant decisions.<sup>19</sup> But there are several practical objections to this approach. Paramount among these is the fact that the use of extraterritorial courts has been deemed an affront to national pride,<sup>20</sup> and it is generally conceded that most foreign governments would not permit it.<sup>21</sup> Moreover, such a system would necessitate, *inter alia*, the use of grand juries, petit juries, and compulsory process for obtaining witnesses and jurors; and a jury composed of military personnel and their dependents would be susceptible to attack as being subject to command influence, thus failing to meet the objection of the Court.<sup>22</sup>

Other possible solutions include the establishment of additional article three courts or a separate judicial system directly connected with individual military commands.<sup>23</sup> The former, while apparently constitutionally possible, however, would encounter the same practical impediments as the extraterritorial civil courts. And the instant decisions would seem to prohibit the later if created pursuant to article one, rather than article three, of the Constitution.

But regardless of the form of the court employed, it is still possible

<sup>19</sup> See 46 GEO. L.J. 367 (1957).

<sup>20</sup> "It is one thing for a nation to allow court-martial to try an occasional civilian when the vast majority of the cases involve military personnel, but quite another to permit a formal United States court to sit within its territory for the sole purpose of trying civilian cases. The full panoply of American justice, including grand juries, United States attorneys, and jury trials, might be more than a country with even a modicum of national pride would be willing to accept. . . . But it must be remembered that the foreign sovereign usually has primary jurisdiction over dependents, and jurisdiction can be exercised over these people only with its consent in each case. Furthermore, insistence on this interpretation could jeopardize the status-of-forces agreements, as well as our foreign relations generally (Article XVI of the NATO Status of Forces Agreement provides that differences as to interpretation of the agreement are to be 'settled by negotiation . . . without recourse to any outside jurisdiction.' Differences which cannot be settled by direct negotiation are to be referred to the North Atlantic Council. Article XIX provides that the status-of-forces agreement can now be 'denounced' at will by any of the contracting parties.)" 71 HARV. L. REV. 724, 725 (1958).

<sup>21</sup> See note 18 *supra*.

<sup>22</sup> 354 U.S. at 87.

<sup>23</sup> Additional solutions might include: (1) trial of all dependents in foreign courts just as all tourists are subject to foreign court jurisdiction; (2) trial of dependents by federal district courts in the United States; (3) trial of dependents by federal district courts in foreign countries; (4) establishment of legislative courts under article one in foreign countries; (5) allowance of all dependents to choose, via waiver of jury trial guarantees, between a foreign trial and a trial by courts-martial; (6) declaration of all offenses committed by dependents to be noncapital; (7) bringing of all troops overseas home or disallowance of dependents to travel with them. See 71 HARV. L. REV. 712 (1958); 2 WAYNE L. REV. 205 (1956).

that military authorities, relying on the narrowest interpretation of the *Krueger* and *Covert* cases, can assume jurisdiction over civilians abroad by declaring a particular offense noncapital.<sup>24</sup> Such an approach would give a decided advantage to civilians with respect to offenses that would be capital if committed by servicemen. The significance of this distinction fades, however, when one considers the alternative of no jurisdiction at all over civilians. The Department of Defense, therefore, has resolved, for the present, to rely upon this narrow interpretation.<sup>25</sup>

It has also been suggested that since citizens can waive their right to indictment by grand jury and trial by petit jury,<sup>26</sup> they can, thus, elect whether to be tried by foreign courts or by courts-martial.<sup>27</sup> The absence of indictment and jury trial are not the only objections to trial of civilians by courts-martial, however; command influence, it is widely felt, and absence of life tenure for judges derogate from judicial independence.<sup>28</sup> Furthermore, if the foreign country refused to assume jurisdiction the civilian, under the proposed option, might conceivably escape trial. This possibility is minimized, of course, by the fact that absent jurisdiction of American courts,<sup>29</sup> civilian employees and dependents, will, under existing agreements, be subject to foreign criminal jurisdiction in all cases cognizable under foreign law.<sup>30</sup> Indeed, the NATO

<sup>24</sup> The distinction drawn between capital and noncapital offenses, which is presently being relied upon by the various branches of the services, is of doubtful validity since four Justices speaking for the Court foreclosed this distinction and the two dissenting Justices agreed that there was no valid constitutional distinction between capital and noncapital offenses, leaving only the two concurring Justices to give weight to this distinction, and one of them specifically reserved comment on the problem until such time as it was squarely presented to the Court. See 71 HARV. L. REV. 713 (1958).

<sup>25</sup> See note 14 *supra*.

<sup>26</sup> 71 HARV. L. REV. 713, 721 (1958).

<sup>27</sup> The voluntariness of any "waiver" signed by a dependent as a condition to accompany her husband overseas, or once overseas the voluntariness of "waiver" upon threat of foreign trial is questionable. See note 9 *supra*.

<sup>28</sup> 354 U.S. at 36.

<sup>29</sup> Until the decision in the instant cases it was probably contemplated by Congress, although perhaps somewhat erroneously, that under article 134 of the Uniform Code of Military Justice there would be few crimes indeed as to which the United States lacked concurrent jurisdiction. ". . . all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court." 64 STAT. 142 (1950), 50 U.S.C. § 728 (1952).

<sup>30</sup> North Atlantic Treaty, June 19, 1951, art. VII, 1(b), 2(b), 3, 4 U.S. TREATIES AND OTHER INTERNATIONAL AGREEMENTS 1800 (1953), T.I.A.S. No. 2846.

Status-of-Forces Agreement recognizes the possible lack of jurisdiction of some offenses in the state of domicile, in which event it was clearly contemplated that the host state would exercise jurisdiction.<sup>31</sup>

As matters now stand, however, unless the decision in *Krueger* and *Covert* is limited to its narrowest construction, military authorities overseas will be faced in peacetime with grave problems concerning the enforcement of purely military regulations, the violation of which may constitute no transgression of foreign law.<sup>32</sup> Moreover, dual forums applying variant law for trials of offenses committed jointly by civilian and military personnel would inevitably produce palpable inequities and discontent.<sup>33</sup> It thus becomes apparent that a plenary solution to the dilemma created by *Krueger* and *Covert* must be more imaginative and broader in scope than any of the possibilities heretofore mentioned.

The answer might lie in the creation of courts by an association of nations to have jurisdiction over all "military-civilians" of any member nation located within other member countries, although this suggestion, likewise, has many practical obstacles. First, granting jurisdiction over Americans to a supranational court would render inapplicable, at least partially, the provisions of the Constitution,<sup>34</sup> which might prove fatally defective. The usual objection to extraterritoriality would be less applicable, however, since each sovereign would surrender the same incidents of national sovereignty to the same supranational body.

Second, determination of applicable law poses a problem. A single standard code embodying the basic concepts of justice as recognized by the constitutions, customs, or statutory standards of other participating nations could be adopted. In the alternative, the choice of law might be made to depend on the nationality of the particular defendant, thus preserving to him a consistent standard of justice.<sup>35</sup>

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<sup>31</sup> *Ibid.* art. VII, 1(a), 2(a), (c).

<sup>32</sup> Examples of such problems are treason against the state, sabotage, espionage or violation of any law relating to official secrets of that state, black-marketing, use of military currency and the like.

<sup>33</sup> The problem would, however, be diminished or completely obviated in the event of actual warfare, or recent conclusion thereof, through substitution of martial law and the law of war for civil jurisdiction. EVERETT, *MILITARY JUSTICE* 19 (1956).

<sup>34</sup> It would seem that since a sovereign has jurisdiction over all persons within its borders and if a foreign sovereign should relinquish jurisdiction over Americans to a supranational court, the limitations the Constitution imposes upon United States courts, of indictment, jury trial and impartial judges of life tenure, would not be applicable, and at the most only those limitations of reasonableness and due process would be applicable.

<sup>35</sup> The supranational body could adopt such national legislation, of both substance

The final problem concerns the composition of a court to hear these cases. Regardless of objection by other countries, the United States would face the same constitutional obstacles presented in *Krueger* and *Covert* in removing its courts-martial system beyond the reaches of national sovereignty and incorporating it into an international system. A possible alternative would permit the supranational body to create its own independent judicial system within the framework of the treaty.<sup>36</sup> If such a court system were established, a United States civilian could be accorded an expeditious trial consonant with his constitutional rights, and this might, moreover, stimulate a greater degree of solidarity and understanding among the member nations.

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and procedure, as was not specifically excluded, similar to the American Assimilative Crimes Act of 1948, 62 STAT. 686 (1948), 18 U.S.C. § 13 (1952) which made applicable to federal enclaves unpreempted criminal statutes of the various states in which the federal enclave was located. See *United States v. Sharpnack*, 355 U.S. 286 (1958).

<sup>36</sup> It is possible that such a system could be composed of nationals of the host country with advisors serving on the court from each visiting country, and ultimate appeal lying to a composite body, of all participating nations, with permanent existence and situs.

