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Criminal Jurisdiction Over United States Civilians Accompanying the Armed Forces Abroad

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CRIMINAL JURISDICTION OVER UNITED STATES CIVILIANS ACCOMPANYING THE ARMED FORCES ABROAD

Under *Reid v. Covert*[1] and subsequent cases,[2] United States civilians accompanying the armed forces to United States military bases on foreign soil cannot be tried by court-martial[3] for criminal offenses. If a United States civilian is to be tried by United States authorities during peacetime,[4] he must receive the full benefit of constitutional guarantees regardless of the trial's locus.

In effect, these decisions deprive the United States of jurisdiction to try offenses committed by its civilians accompanying the armed forces abroad. Consequently, if the host country fails to prosecute the offenders, there will be no forum in which to bring suit. Except for a limited number of offenses,[5] these cases cannot be tried by United States courts because Congress has made no provision for conferring jurisdiction over them.[6] Cases will undoubtedly arise where the host country either cannot or will not prosecute,[7] and it contravenes the

1 354 U.S. 1 (1957). The Court held in this case that a civilian dependent accompanying the armed forces abroad and accused of a capital offense during peacetime could not constitutionally be tried by a military court-martial.

2 Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960), broadened *Reid* by removing from court-martial jurisdiction those dependents accused of non-capital offenses. Grisham v. Hagan, 361 U.S. 278 (1960), applied *Reid* to civilian employees accused of capital offenses. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960), extended *Reid* to employees accused of non-capital offenses.

3 The statute conferring court-martial jurisdiction over civilians before *Reid* is art. 2(11) of the UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. § 802(11) (1964).

4 The *Reid* line of cases apparently does not affect the jurisdiction of a military court-martial over civilians accompanying the armed services during a declared war or in an area of hostilities. 10 U.S.C. § 802(10) (1964). *Moyer v. Peabody*, 212 U.S. 78, 85 (1909), states the general rule that the substitution of executive for judicial power is warranted when the life of the state is threatened. Court-martial is probably applicable in an area of hostilities even where there is no declared war. *See* Wiener, *Courts-Martial for Civilians Accompanying the Armed Forces in Vietnam*, 54 A.B.A.J. 24 (1968).

5 *E.g.*, 18 U.S.C.A. § 2151 (Supp. 1968) (sabotage); 18 U.S.C. § 2381 (1964) (treason).

6 18 U.S.C. § 3238 (1964) provides that jurisdiction over offenses committed outside a district "shall be in the district where the offender is found, or into which he is first brought." The term "offenses," however, has been defined as offenses against the United States, and Congress has not placed crimes committed on foreign soil within this category. *See* 20 OP. ATT'Y GEN. 590 (1893).

7 *E.g.*, acts committed by one American civilian against another American on the military base may not be of sufficient gravity to threaten the security or order of the host country to warrant their prosecution. Certainly the United States might well desire to prosecute for such offenses. Nor would it seem to be a valid argument that since diplomatic officials are subject to sole jurisdiction of the host country, military employees and dependents should also be subject to this jurisdiction. The number of diplomatic

American sense of justice to permit these offenders to go "scot-free."[8]

Under existing concepts of jurisdiction, both domestic and international, Congress has the power to provide jurisdiction over United States civilians accompanying the armed forces abroad. Congress has the constitutional authority to create courts inferior to the Supreme Court,[9] determine their jurisdiction,[10] and determine the place of trial in criminal cases where the offense is not committed within any state.[11] Operating within this broad discretionary power, Congress has regulated the conduct of nationals overseas. Statutes have established United States consular courts,[12] given the federal courts power to subpoena United States citizens living overseas as witnesses,[13] developed the special maritime and territorial jurisdiction of federal courts,[14] and provided for the Uniform Code of Military Justice (UCMJ).[15] Although the Supreme Court has held courts-martial under the UCMJ violative of a civilian's constitutional guarantees,[16] it has never questioned the basic right of Congress to exercise extraterritorial jurisdiction within the constitutional framework.[17]

officials is a small fraction of the number of dependents. In addition they do not live in a community regulated by Americans, as do the civilians on army bases. Since they are selected officials, the number of crimes they commit is very small and well within the ability of the host country to handle.

8 106 CONG. REC. 726 (1960) (Remarks of Sen. Keating on the floor of the Senate on the day following the *Kinsella* decision).

9 "The Congress shall have power . . . To constitute Tribunals inferior to the supreme Court. . . ." U.S. CONST. art. I, § 8. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* art. III, § 1.

10 "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." *Id.* art. III, § 2.

11 "[B]ut when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." *Id.*

12 Act of June 22, 1860, ch. 179, § 2, REV. STAT. § 4084. These courts were established by treaty arrangements with several countries where the United States had ministers or consuls. The United States officials were empowered to arraign and try United States citizens, to issue process, and to pronounce sentences. The consular court system was abolished in 1956 when the consular court in Morocco was terminated. (Act of Aug. 1, 1956, ch. 807, 70 Stat. 773).

13 28 U.S.C. § 1783 (1964). "A court of the United States may order the issuance of a subpoena as a witness before it . . . a national or resident of the United States who is in a foreign country . . . ."

14 18 U.S.C. § 7 (1964). *See also* note 32 *infra.*

15 10 U.S.C. §§ 801-940 (1964).

16 In *Reid,* for example, the holding was not that Congress lacked the power to provide jurisdiction, but that the vehicle used was inappropriate because it failed to guarantee the trial by jury to those civilians brought before it.

17 In Blackmer v. United States, 284 U.S. 421 (1932), for example, the Court upheld the subpoena power of a United States court over an American citizen residing in Paris,

The "nationality principle" of international law recognizes that a sovereign has jurisdiction not only over conduct within its territory but also over its nationals wherever located.[18] The United States recognizes the applicability of this principle to its affairs in general,[19] although it has not traditionally exercised extraterritorial criminal jurisdiction.[20]

Treaties clarify the international law basis for the exercise of jurisdiction by the United States. After World War II, the United States, for the first time in peacetime, sent large numbers of American troops and civilians to overseas bases. The United States' nationality-based interest in having criminal jurisdiction over these persons conflicted with the host country's territorial basis of jurisdiction.[21] When such a conflict occurs in international law, the territorial sovereign has sole enforcement jurisdiction unless it consents to another country's exercise of extraterritorial jurisdiction.[22] Prior to *Reid,* consent was obtained in Status of Forces agreements with host countries for court-martial jurisdiction over civilians.[23] Under these treaties, the host country retained primary jurisdiction over United States citizens for most offenses[24] but permitted United States military authorities secondary jurisdiction if the host country waived jurisdiction.[25] With this consent from the host country to exercise secondary jurisdiction, the United States began routinely to request host country waiver of

stating: "By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country." *Id.* at 436.

18 *See, e.g.,* 2 J. MOORE, A DIGEST OF INTERNATIONAL LAW 255-56 (1906).

19 ALI FOREIGN RELATIONS LAW OF THE UNITED STATES § 16 (Tent. Draft No. 2, 1958):

(1) A state has jurisdiction to prescribe rules governing the conduct of its nationals wherever located.

(2) A state may not prescribe rules governing the conduct of aliens outside its territory merely because such conduct affects nationals of the state outside of its territory.

20 *Id.* § 31.

21 *Id.* § 11. "A state has jurisdiction to enforce in its territory rules of conduct which are validly prescribed."

22 *Id.* § 33. *See also Case of the S.S. "Lotus,"* [1927] P.C.I.J., ser. A, No. 10, at 18-19.

23 *See, e.g.,* Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1953, 4 U.S.T. 1792, T.I.A.S. No. 2846 [hereinafter cited as NATO Agreement]. Since the NATO Agreement covers more countries, has served as the model for later treaties, and is more generally known, it alone will be cited to illustrate issues raised in this note. Other important treaties include Military Bases in the Philippines: Criminal Jurisdiction Arrangements, August 10, 1965, 16 U.S.T. 1040, T.I.A.S. No. 5851; Agreement Under Article VI of the Treaty of Mutual Cooperation and Security: Facilities and Areas and the Status of United States Armed Forces in Japan, January 19, 1960, [1960] 11 U.S.T. 1652, T.I.A.S. No. 4510.

24 NATO Agreement, *supra* note 23, art. VII, ¶ 3(b).

25 *Id.* art. VII, ¶ 3(c).

primary jurisdiction. And in over two-thirds of all cases, the host country acquiesced.[26] Since *Reid*, however, there has not been a United States court with secondary jurisdiction over civilians.[27] Several proposals have been suggested to restore this secondary criminal jurisdiction over civilians.

To solve the problem of criminal jurisdiction over civilians abroad, we could return all dependents to the United States,[28] request that civilians waive their constitutional rights as a condition for going overseas with the armed forces,[29] or induct civilian employees into the armed forces.[30] None of these proposals is adequate. Two others, however, appear feasible at this time. Both require congressional action, because only Congress has the power to vest secondary jurisdiction in United States tribunals.

I

VEST CRIMINAL JURISDICTION OVER UNITED STATES CIVILIANS ABROAD IN THE UNITED STATES DISTRICT COURTS

A bill before the last Congress provided that existing United States District Courts would exercise criminal jurisdiction over civilian offenders abroad. Former H.R. 11244 would have amended section 7 of title 18 of the United States Code by providing another category of persons for inclusion within the special maritime and territorial jurisdiction of the United States:

> (b) For the purposes of this title, any act done outside the United States and its territories and possessions, within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Armed Forces of the United States, shall be deemed to have been done within the special mari-

26 Baxter, *Criminal Jurisdiction in the NATO Status of Forces Agreement*, 7 INT. & COMP. L.Q. 72, 79-80 (1958).

27 Of course, military personnel remain liable to court-martial.

28 Since Congress and the military authorities have deemed it necessary for reasons of morale to send dependents to overseas bases with military personnel, they will probably not give serious attention to this proposal.

29 Bill of Rights guarantees are personal rights and as such can be waived by an individual. Since such a proposal would amount to obvious coercion on the part of the military authorities, the suggestion would not pass muster under the *Reid* rationale.

30 McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 286 (1960). Mr. Justice Clark mentioned this as a possibility and listed supporting precedents, but such a suggestion would probably not be acceptable to the military. If they thought that their purposes could be better achieved by such a suggestion, they surely would have acted already to induct civilians into the armed forces. Furthermore, this does not solve the difficulty with respect to dependents.

> time and territorial jurisdiction of the United States if the act was done by any national of the United States employed by or accompanying the Armed Forces of the United States who is not a member of such Armed Forces. . . .[31]

As introduced, this bill would have partially filled the jurisdictional void. Only the few acts punishable in the special maritime jurisdiction[32] would be covered where the host country fails to prosecute for an act committed on the military base. The bill would have required no new substantive law, since the prohibited acts are already defined. In addition, existing United States tribunals would have tried the cases.

Despite these provisions, such a proposal raises serious problems. Undoubtedly, securing witnesses residing abroad is the greatest difficulty with criminal prosecution in United States District Courts. Compelling both American and foreign nationals to appear before United States courts will be difficult. The power of United States courts to issue subpoenas compelling citizens to return to the United States as witnesses[33] is not supported by an effective sanction.[34] A foreign court with territorial jurisdiction must order the witness to return to the United States in response to a letter rogatory, and such power may not exist in the foreign tribunal.[35]

Compelling members of the United States armed forces to testify in the United States may raise problems, especially if their skills are critically needed at the base. For civil proceedings, overseas military personnel normally need not testify. The power to grant permission is discretionary and is given only under "extraordinary circumstances."[36] For criminal trials in the United States, military personnel presumably could leave the base after completion of advance arrangements with the proper authorities.

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31 H.R. 11244, 90th Cong., 1st Sess. (1967).

32 The crimes included in the special maritime jurisdiction are found in 18 U.S.C. (1964). They include arson, § 81; assault, § 113; carnal knowledge of female under 16, § 2032; espionage, §§ 791-97; larceny, §§ 661-62; maiming, § 114; malicious mischief, buildings or property, § 1363; rape, § 2031; robbery and burglary, §§ 2111-17.

33 28 U.S.C. § 1783 (1964). *See also* Blackmer v. United States, 284 U.S. 421 (1932).

34 The sanction available to a United States court should a witness fail to respond to the subpoena is contempt of court accompanied by a fine. 28 U.S.C. § 1784 (1964). The fine is enforceable only in rem against the party's property in the United States.

35 In the reverse situation, United States courts are not authorized to compel foreign nationals in the United States to return to their country and appear as witnesses under a letter rogatory. See 28 U.S.C. § 1782 (1964) for powers of United States courts to respond to a letter rogatory from a foreign tribunal.

36 "Permission to appear in such cases [where a 'witness stationed outside the continental United States is requested to appear before a tribunal within the continental United States'] will be granted only under the most extraordinary circumstances." 32 C.F.R. § 516.4(d)(3) (1968).

If a foreign witness does not volunteer to testify in United States courts, he cannot be compelled to do so under the United States subpoena power.[37] And unless there is assistance from the country that has jurisdiction, United States courts may not act.[38] The use of depositions, however, will not be an adequate alternative; in criminal proceedings depositions are likely to violate the defendant's right of confrontation.[39]

Also, the expense and planning required by intercontinental transportation of the defendant, the witnesses, and the evidence may be prohibitive. The defendant must pay for the transportation and lodging of his witnesses,[40] and his lawyer will probably be required to travel abroad to investigate the case, locate witnesses, and compile evidence.[41] Unless the defendant is indigent,[42] the excessive costs may preclude an adequate defense.

Procedural problems, however, are not the only drawbacks in former H.R. 11244. Before *Reid*, both civilians and military men were governed by the same substantive criminal code. Under the bill, however, a serviceman accused of homicide would be tried for murder under the UCMJ[43] while a civilian who committed the same act in the same place would be tried for assault with intent to murder under the special maritime jurisdiction.[44] Although the necessity for discipline

37 The United States has neither of the traditional bases of jurisdiction (territory or nationality) over a foreign national and cannot, therefore, compel his attendance in the United States. *See, e.g.*, United States v. Best, 76 F. Supp. 138, 139 (D. Mass. 1948): "Aliens who are inhabitants of a foreign couutry cannot be compelled to respond to a subpoena. They owe no allegiance to the Uuited States."

38 United States courts have the power to issue letters rogatory requesting that a sovereign court compel a foreign witness to produce a document or to give a deposition. 28 U.S.C. § 1781(b)(2) (1964). Similarly, foreign tribunals have the power to compel their own citizens to produce information requested by another country's courts. *See, e.g.*, The Extradition Act of 1870, 33 & 34 Vict., c. 52, § 24; The Foreign Tribunals Evidence Act of 1856, 19 & 20 Vict., c. 113, § 1.

39 U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." *See also* Mattox v. United States, 156 U.S. 237, 242-43 (1895): "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . ." Because these rights are for the benefit of the accused, the defendant may use depositions of overseas witnesses for trial in the United States, even though they may not be used against him.

40 *See* 28 U.S.C. § 1821 (1964).

41 Attorneys occasionally travel abroad in domestic cases, but almost every trial under H.R. 11244 would require international travel.

42 *See* 28 U.S.C. § 1915 (1964).

43 10 U.S.C. § 918 (1964).

44 18 U.S.C. § 113(a) (1964). The maximum penalty for this offense is 20 years imprisonment, while the penalty for murder under the UCMJ is death or life imprisonment. 10 U.S.C. § 918 (1964).

often justifies harsher treatment for military personnel, this great disparity of treatment for essentially the same offense is unreasonable.

Further, Status of Forces agreements do not distinguish between acts committed on and off the military base. In each case the host country's jurisdiction is primary, and that of the United States authorities secondary. Although H.R. 11244 was intended to fill the jurisdictional void created by *Reid*, it failed to provide jurisdiction for acts committed off base. Cases might arise from off-base acts of United States civilians that the host country does not desire to prosecute but that the United States should handle.

Recent Supreme Court decisions in the area of criminal procedure raise the additional problem of guaranteeing constitutional protections to a defendant in the custody of the host country or United States military authorities. If a suspect is first detained by foreign authorities, what rights will he have? Must he receive the four-fold *Miranda* warning?[45] Will there be lawyers on the military bases in the event that a suspect requests one?

Also, there are no procedures for arrest and pre-trial removal of civilians from the host country. The arrest procedure for civilians under the Status of Forces agreements requires both countries to "assist" each other.[46] This cooperation has existed only within the framework of court-martial jurisdiction in the host country's territory. A foreign state might view a trial in the United States differently, and not agree to arrest civilian offenders in its territory.

More doubtful is whether the United States has the power to remove a United States civilian from a foreign country for trial in the United States. Present extradition treaties with foreign states do not appear to apply in this type of case. The premise in extradition proceedings is that a crime was committed within the territorial jurisdiction of the requesting country, that the accused moved or fled to the requested country, and that the return of the accused is for the purpose of having trial in the jurisdiction where the alleged act was committed.[47] Similarly, Status of Forces agreements apparently do not require a host

45 Miranda v. Arizona, 384 U.S. 436 (1966).

46 NATO Agreement, *supra* note 23, art. VII, ¶ 5(a).

47 *See, e.g.*, Extradition Treaty—Great Britain, Dec. 22, 1931, 47 Stat. 2122 (1932), T.S. No. 849 (effective Aug. 9, 1932); Extradition Treaty—Germany, July 12, 1930, 47 Stat. 1862 (1931), T.S. No. 836 (effective Apr. 22, 1931); Extradition Treaty—France, Jan. 6, 1909, 37 Stat. 1526, T.S. No. 561 (effective July 26, 1911).

Arguably a crime committed on an American military base is within the "territorial jurisdiction" of the United States. But this argument is inconsistent with international law which bases territorial jurisdiction on sovereignty. ALI FOREIGN RELATIONS LAW OF THE UNITED STATES, § 8, comment a (Tent. Draft No. 2, 1958).

country to permit the removal of a United States civilian.[48] In the absence of new agreements or voluntary permission in each case, removal of a United States civilian to the United States for trial might be impossible.

Most of these difficulties can be corrected either by congressional action or by treaty with the host country. The expenses involved in transporting persons and evidence to the United States can be met by a statute based theoretically on the in forma pauperis proceedings now applicable in federal courts.[49] How much of the cost should be paid by the government is a policy question lying within congressional discretion.[50]

Provisions for arrest of a United States civilian abroad could be made in the same bill that would grant jurisdiction to the district courts. Since military authorities are closest to an offender, they could be granted this arrest power. The State Department might also consider formal arrangements with the host countries to permit their arrest or detention of suspected offenders, under a plan similar to the Status of Forces agreements.[51] The procedures for obtaining a warrant or an indictment against an offender will also require some action by Congress.[52]

To return offenders to the United States for trial, formal treaty arrangements should be made with the several host countries where we have military bases. Amending the current extradition treaties would

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48 The host country may indirectly assist in the removal by requesting the removal or ordering the expulsion of an alien civilian on its territory. NATO Agreement, *supra* note 23, art. III, (5). In addition, if the trial is held on the military base, the host country may give "sympathetic consideration to a request from the authorities of the sending State for assistance in carrying out a sentence of imprisonment pronounced by the authorities of the sending State . . . ." *Id.* art. VII, (7)(b).

49 28 U.S.C. § 1915 (1964).

50 For example, should the lawyer's fee be included, and if so, should the government pay for his transportation abroad to investigate and question witnesses? How many defense witnesses will the government support? Should Congress delegate this discretion to the trial judge for an analysis of the needs of each case? In addition to congressional plans, constitutional requirements may also arise in light of Supreme Court decisions regarding the rights of indigents. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (lawyer); Griffin v. Illinois, 351 U.S. 12 (1956) (transcript).

51 NATO Agreement, *supra* note 23, art. VII, ¶ (5)(a).

52 If an indictment is not necessary to procure a warrant, issuance by a military official rather than by a commissioner in the United States would be effective and less time consuming. *See* FED. R. CRIM. P. 4(a). The designated official would have better access to facts, and he would be in a better position to ascertain the requirements of probable cause. Congress must decide whether the grand jury should be convened in the United States or overseas. From the viewpoint of witnesses and evidence, the latter would be preferable.

be the most expeditious manner to achieve this. The host country should not object to this idea because only cases in which the host country had waived its primary jurisdiction would be involved.[53]

Since this proposal is designed primarily to reach civilians excluded from court-martial jurisdiction, Congress might also consider extending jurisdiction to include off-base crimes covered by pre-*Reid* Status of Forces agreements. Limiting jurisdiction to acts committed on the base might make prosecution a little tidier, since the witness problem would not be so severe.[54] Assuring constitutional guarantees to the defendant might also be easier if apprehension took place on the base. However, two countervailing arguments appear in favor of extending jurisdiction to off-base crimes. First, the host country may appreciate the United States removing bothersome cases involving only Americans from its calendars. Second, in some cases the United States would have a special interest in prosecuting an offender.[55]

Prior to *Reid*, the Supreme Court in *United States ex rel. Toth v. Quarles*[56] held that ex-servicemen could not be prosecuted by court-martial for offenses committed while in the armed services overseas. Since this decision created a similar jurisdictional gap concerning American citizens, Congress should consider placing this group within a statute.[57]

Congress might also reconsider the wisdom of limiting the jurisdiction over civilians to those acts defined in the special maritime and territorial jurisdiction. The special maritime jurisdiction has the advantage of being existing substantive law. In addition, the enumerated crimes are relatively major, allowing the prosecution to concentrate on only the greater offenses. However, because of those circumstances where the special maritime jurisdiction is inadequate,[58]

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53 Although "political crimes" and other activities designated by the host country might be exempted from the removal process, *see, e.g.*, Extradition Treaty—Great Britain, Dec. 22, 1931, art. 6, 47 Stat. 2122 (1932), T.S. No. 849 (effective Aug. 9, 1932), the host country would probably agree to removal for most offenses since its interest would also be served in having criminal offenders removed from its territory.

54 Witnesses would less likely be foreign nationals not amenable to process.

55 For instance, a civilian employee or dependent might assault a United States serviceman off-base. This act may not sufficiently affect the host country to warrant prosecution, but the United States has an interest in prosecuting.

56 350 U.S. 11 (1955).

57 The Supreme Court in *Quarles* suggested that Congress take this step by stating, "There can be no valid argnment, therefore, that civilian ex-servicemen must be tried by court-martial or not tried at all. If that is so it is only because Congress has not seen fit to subject them to trial in federal district courts." United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 21 (1955).

58 Note 32 *supra.*

Congress should either increase the list of crimes in the maritime jurisdiction or use a more comprehensive substantive law.[59]

Finally, as indicated in *Reid*, constitutional guarantees follow the United States citizen overseas. The plan's administrators will thus be forced to establish due process safeguards for the early stages of detention. If United States authorities are involved with the arrest, the *Miranda* warnings must be given, and defendant must be furnished with legal counsel if requested. But what if foreign authorities arrest the offender? Arguably the exclusionary rules would apply in an appropriate situation.[60] This difficulty might be partially alleviated if the United States and the host country could agree to a speedy transfer of an offender to United States authorities as soon as the host country decided to waive its primary jurisdiction.

Thus, many of the flaws in former H.R. 11244 could be eliminated by statute or treaty. Unfortunately, this technique has little value in the area of obtaining witnesses to testify in the United States District Court. Because the availability of witnesses is crucial, and because some other difficulties may not be resolved, an alternative proposal should be formulated.

II

Vest Criminal Jurisdiction in an Overseas Civilian Court

Many of the difficulties raised by placing criminal jurisdiction in United States District Courts could be resolved by having a civilian judge hear cases against civilian dependents and employees at the overseas bases. At first impression, the idea of a globe-trotting judge may seem fanciful, but United States judges have traditionally ridden judicial circuits.

Overseas courts would possess certain advantages not present when trials are held in the United States.[61] Their primary advantage is the

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59 An appropriate model might be the provisions of the Canal Zone Code. *See* 6 C.Z.C. §§ 1-2601 (1963).

60 The Supreme Court has apparently never directly discussed the "silver platter" doctrine as it relates to evidence obtained by foreign officers and used in United States courts. In Brulay v. United States, 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967), the court of appeals admitted such evidence. For a critique of this case, see Note, *Searches South of the Border: Admission of Evidence Seized by Foreign Officials*, 53 Cornell L. Rev. 886 (1968).

61 Where the offender, as in *Toth v. Quarles*, is located in the United States at the time of trial, Congress should provide concurrent jurisdiction in continental United States District Courts.

ease of obtaining witnesses. Certainly a larger number of persons, including foreign witnesses, would be more likely to volunteer to testify at a nearby court. Absent the cost and inconvenience of transporting witnesses to the United States, both the prosecution and the defense would be aided. In addition, servicemen called as witnesses would be more accessible if military emergencies demanded their services.[62]

Compelling foreign nationals to testify at the trial under existing provisions is doubtful. Under the Status of Forces agreements, if a United States citizen is tried in a foreign tribunal, he has the right of compulsory process "for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State."[63] By a similar treaty arrangement permitting compulsory process by the United States civilian court, or by letters rogatory to a foreign tribunal, the problem of compelling foreign witnesses to testify could be solved. The host country would probably be more willing to aid in providing compulsory process if the trial took place on the military base rather than in the continental United States.[64]

One of the most compelling reasons for having an overseas court is that the size of the civilian population and the magnitude of the criminal problem do not readily lend themselves to being engrafted on the jurisdiction of district courts in the stop-gap fashion of H.R. 11244. The figures cited in the government's brief in the *Guagliardo* case indicated an overseas civilian population in 1959 in excess of 480,000.[65] This figure is larger than the respective populations of Alaska, Wyoming and Vermont.[66] Indeed, many of our foreign military

62 While some servicemen might be either transferred or discharged, their number would be small in comparison to those unavailable under the alternative plan.

63 NATO Agreement, *supra* note 23, art. VII, ¶ 9(d).

64 A treaty between the host country and the United States for securing witnesses could be patterned after the UNIFORM ACT TO SECURE THE ATTENDENCE OF WITNESSES FROM WITHOUT A STATE IN CRIMINAL PROCEEDINGS §§ 2-3. This act is in operation among many of the states in the United States and provides that the requesting state submit a petition to the state where the desired witness is located. Subsequently, a court from the sending state will summon the witness to appear before it. The sending state has the discretion to determine whether or not to compel its resident to appear before a tribunal in another state. Such factors as the witness's materiality and convenience are considered before an order is made.

65 As of March 31, 1959, there were 25,585 civilian employees and 455,086 dependents accompanying the armed forces overseas. Brief for Petitioners at 71, McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) [hereinafter cited as Guagliardo Brief]. By 1960 this population had grown to 35,325 and 505,752 respectively. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 11 (1968).

66 Alaska—272,000; Wyoming—315,000; Vermont—417,000. U.S. BUREAU OF THE CENSUS, *supra* note 65, at 12.

bases contain a civilian population commensurate with that of many American towns. In one four-year period before *Reid*, these civilians committed 5,026 offenses, 4,051 of which were handled by United States military authorities after the host countries waived jurisdiction.[67] Many required a criminal trial.

Another advantage of having an overseas trial would be the inclusion of lesser crimes within the jurisdiction of the court, *e.g.*, drunken or reckless driving. At present only foreign tribunals can prosecute such a case even if the offense occurs on a military base. Foreign courts are probably not interested in clogging their calendars with such cases. Nor is Congress likely to include such an offense within the jurisdiction of courts in the United States, since it is too bothersome to prosecute a minor offense thousands of miles from its locus. An overseas trial, however, makes prosecution feasible.

The difficulties in arresting and removing an offender to the United States would be no greater than under the alternative scheme. If anything, removal would be easier because a host country would probably be more willing to permit removal of a convicted offender. Procedures could be modelled after the Status of Forces agreements, where, after trial, an offender is sent to the United States for imprisonment.[68]

The existence of persons on foreign bases sufficient to compose

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[67] Guagliardo Brief, *supra* note 65, at 75. The four-year period was from December 1, 1954 to November 30, 1958. The offenses committed break down as follows:

Type of Offense	*Employees*	*Dependents*
Murder	1	2
Rape	3	1
Manslaughter	32	16
Arson	0	6
Robbery, larceny and related offenses	7	36
Aggravated assault	8	8
Simple assault	50	21
Offenses against economic control laws	231	54
Traffic offenses including drunken and reckless driving and fleeing scene of accident	2,566	1,791
Disorderly conduct, drunkeness, breach of peace, etc.	28	41
Other	36	88
Totals	2,962	2,064

[68] NATO Agreement, *supra* note 23, at art. VII, ¶ 7(b). Normally, civilians convicted by court-martial procedure under the Status of Forces agreements were sent to United States prisons rather than being punished in the host countries. Reid v. Covert, 354 U.S. 1, 4 (1957). Presumably the same arrangements could be continued under civilian trial procedures.

an impartial jury is essential to this proposal. On the larger military bases in Europe, there should be no difficulty finding a jury.[69] Furthermore, in the NATO countries and in others where United States businessmen and other United States civilians reside, the overseas court would probably have jurisdiction to require jury duty.[70]

On smaller bases, where the number of United States civilians available for jury duty is small, Congress might consider empaneling members of the armed forces. At present they are exempted,[71] although not excluded,[72] from jury service. Legislative history indicates that members of the armed forces would be able to serve in these circumstances.[73] And except for pilots and other persons with critical skills, the military authorities should not object to having servicemen sit on juries. The alternatives—no trial at all or trial in the United States (which might necessitate calling military witnesses)—seem less acceptable.

One further objection to this proposal is that a foreign sovereign would not permit a United States civilian court to hear cases on its territory; its national pride would be injured.[74] If a country's national pride survives a full-fledged military enclave of a foreign power on its soil, some additional civilian judges should not make much difference.[75] In addition, the foreign country would still retain primary jurisdiction over United States civilians. In cases where the host country would

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69 The civilian population in some of the NATO countries is quite large. *E.g.*, Germany 186,008; Great Britain 39,548. Guagliardo Brief, *supra* note 65, at 110-11.

70 *See* notes 17-19 *supra*. Normally these persons are excused from jury duty because of hardship or inconvenience. 28 U.S.C. § 1863 (1964). However, overseas trials would render these reasons less compelling.

One constitutional problem is whether these persons would be within the judicial district required by the constitution: "[w]hich district shall have been previously ascertained by law . . . ." U.S. CONST. amend VI. *See also* 28 U.S.C. § 1861 (1964). But since Congress has the power to determine the districts, it could include these civilians within the district for the purposes of jury duty.

71 28 U.S.C. § 1862 (1964).

72 28 U.S.C. §§ 1861, -63 (1964).

73 Members of the armed forces apparently were exempted from jury duty in federal trials solely because they were being excused en mass from serving in the interest of the public welfare. Reviser's note, 28 U.S.C. § 1862 (1964). There seems to be no other objection to having servicemen sit on juries since other government employees are permitted to do so. United States v. Knowles, 147 F. Supp. 19 (D.D.C. 1957).

74 Note, *Criminal Jurisdiction Over Civilians Accompanying American Armed Forces Overseas*, 71 HARV. L. REV. 712, 725 (1957).

75 However, there may be some undesirable effects when the United States tries to obtain the consent of the host countries for an overseas civilian court. For example, these countries may ask that the Status of Forces agreements be renegotiated in some of their aspects, and the United States may balk at such a proposal.

prefer not to prosecute, the United States court would actually be doing it a service.

There are three possible approaches to setting up an overseas court. A separate judicial district could be created with a new United States District Court hearing these cases. Under this approach, the entire overseas civilian population would be treated as a separate state for criminal jurisdiction purposes. Should Congress determine that there are not a sufficient number of cases to justify a separate judicial district, the military bases could be divided up among the existing judicial districts. The manner in which the districts would be enlarged to handle these cases depends on several policy factors such as geographical location, amount of judicial work in each district, and the availability of judges to travel to the overseas bases.

An alternative approach would be to create a separate and independent legislative court, the nature and scope of which could be determined by Congress under its article I powers.[76] There is ample precedent for such a court,[77] and it may have the advantage of being more acceptable to host countries. Instead of involving the entire United States judicial apparatus, it would be separately created for the sole purpose of disciplining and maintaining order among civilians accompanying the United States armed forces.

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[76] U.S. CONST. art. I, § 8. The power to create legislative courts can be found in any one of the enumerated powers taken together with the necessary and proper clause.

[77] United States consular courts, 22 U.S.C. § 142 (1964); Tax Court, 26 U.S.C. § 7441 (1964); United States District Court for the District of the Canal Zone, 3 C.Z.C. § 1 (1963). Despite its name, the Canal Zone District Court is a legislative court and not an art. III court. Wells v. United States, 214 F.2d 380 (5th Cir.), *cert. denied*, 348 U.S. 855 (1954). The district and magistrate's courts do not share jurisdiction with state courts and must have full power to deal with litigation in the Canal Zone, as determined by Congress.