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Constitutional Law - Courts-Martial - Power of Congress to Provide for Military Jurisdiction Over Civilian Dependents

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CONSTITUTIONAL LAW—COURTS-MARTIAL—POWER OF CONGRESS TO PROVIDE FOR MILITARY JURISDICTION OVER CIVILIAN DEPENDENTS—Defendants, civilian wives of servicemen living overseas, were tried and convicted of murder by military court-martial under article 118 of the Uniform Code of Military Justice.¹ Their trials took place in the countries where they were living with their husbands. Defendants brought petitions for a writ of habeas corpus challenging the constitutionality of article 2(11) of the Uniform Code² authorizing their trials by court-martial. Initially the

¹ 64 Stat. 140 (1950), 50 U.S.C. (1952) §712. Murder is a capital offense under the Uniform Code.

² 64 Stat. 109 (1950), 50 U.S.C. (1952) §552(11).

United States Supreme Court rejected this contention.³ On rehearing, *held*, reversed, two justices dissenting. The guarantee of the right to jury trial contained in article 3, section 2, and the guarantees of the Fifth and Sixth Amendments restrict the government no matter where it is acting. Treaties and executive agreements cannot confer power upon Congress to provide for court-martial of dependents of military personnel in violation of the foregoing constitutional guarantees. The exception of "cases arising in the land and naval forces" to the Fifth Amendment right of indictment by grand jury does not include civilian dependents of servicemen with troops overseas, for they are not *in* the land and naval forces, and neither the power "to make Rules for the Government and Regulation of the land and naval Forces"⁴ nor the necessary and proper clause⁵ can include them within the exception.⁶ Chief Justice Warren and Justices Black, Douglas, and Brennan comprised the majority. Justices Frankfurter and Harlan concurred separately, refusing in capital cases to hold that dependents are so closely related to the armed forces as to make trial by court-martial essential to the effective "government and regulation of the land and naval forces." Justices Clark and Burton dissented, arguing that the prior hearings correctly decided that the power of Congress to establish legislative courts outside the United States made court-martial jurisdiction constitutional, and that in any case jurisdiction was constitutional under the power of Congress "to make rules for the government and regulation of the land and naval forces." *Reid v. Covert*; *Kinsella v. Krueger*, 354 U.S. 1 (1957).

The Court in holding such trials unconstitutional virtually overruled *In re Ross*,⁷ on which the holding in the original hearing had been based. That case had upheld trial by consular court of a seaman serving on an American ship for murder of a ship's officer. The rejection and overruling of that case is not surprising in view of the historical context in which it arose. The doctrine of extraterritoriality, popular at the turn of the century, is not accepted as desirable at the present time,⁸ and the Court's declaring it a historical relic⁹ is in keeping with the modern view. Although the "Insular Cases,"¹⁰ used to buttress the holding in the original hearing, were

³ *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956). See comment, 55 MICH. L. REV. 114 (1956).

⁴ U.S. CONST., art. I, §8, cl. 14.

⁵ U.S. CONST., art. I, §8, cl. 18.

⁶ It was accepted without question by the Court that the exception clause of the Fifth Amendment applies equally to the provisions of the Sixth Amendment although not specifically mentioned there. This construction has never been seriously questioned by the Court. See *Ex parte Milligan*, 4 Wall. (71 U.S.) 2 (1866); *Ex parte Quirin*, 317 U.S. 1 (1942).

⁷ 140 U.S. 453 (1891).

⁸ The remaining consular courts of the United States were abolished recently by Congress. 70 Stat. 773 (1956).

⁹ Principal case at 12.

¹⁰ *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). The

sharply criticized and limited in the principal case, the problem before the Court in those cases was so entirely different from that before the Court in the principal case that the rejection of them as not controlling should not be considered as a rejection of the "fundamental right" doctrine for which they stand. The language of the opinion¹¹ casts some doubt on the validity of the doctrine but the cases' relationship to the principal cases is so slight that it would be unwise to declare those cases overruled by the principal opinion. Further, both of the concurrences and the dissent state that the doctrine still has validity.¹²

Trial by court-martial (rather than by the courts of foreign countries) was authorized in both of the principal cases by executive agreements,¹³ and it was argued that the power of Congress to implement executive agreements¹⁴ made such court-martial jurisdiction constitutional. By rejecting this argument the Court clarified the relationship between treaties and executive agreements and the limits on congressional action imposed by the Constitution. Since *Missouri v. Holland*¹⁵ this relationship has been in doubt and this doubt was the propulsive force behind the Bricker Amendment.¹⁶ The holding does not conflict with the decisions in *Missouri v. Holland* or two subsequent cases¹⁷ dealing with executive agreements, because in none of those cases was the court faced directly with an international agreement which conflicted with a constitutional guarantee.¹⁸ If

Court held that "unincorporated" territories of the United States are not a part of the Union so that portions of the Constitution do not apply. Persons in those territories were held to be entitled only to those rights which are fundamental to this country's system of government, and the right to jury trial is not a fundamental right. The fact that these territories had entirely different systems of jurisprudence and different customs from the United States, making rapid conversion to American methods impossible or at least highly impractical, was the controlling factor in the decisions. Obviously this factor is not present in the military justice case and the cases should not be applied in this entirely different situation.

¹¹ Principal case at 14: "Moreover, it is our judgment that neither the cases nor their reasoning should be given any further expansion."

¹² Principal case at 53, 67, 74, 79.

¹³ England: Executive Agreement of July 27, 1942, 57 Stat. 1193 (1942); Japan: Administrative Agreement, 3 U.S.T. 3341 (1952). Both agreements provided that United States service courts would be willing and able to try and punish offenses against the laws of the foreign nation by members of the United States armed forces, civilian component, and their dependents.

¹⁴ 252 U.S. 416 (1920), holding that legislation implementing a treaty with Great Britain for the protection of migratory birds does not violate the Tenth Amendment.

¹⁵ Article 2(11) of the Uniform Code includes language indicating specifically that it is to implement treaties and administrative agreements.

¹⁶ See Bricker, "Constitutional Insurance for a Safe Treaty-Making Policy," 60 DICK. L. REV. 103 (1956).

¹⁷ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *United States v. Pink*, 315 U.S. 203 (1942).

¹⁸ In the principal case the Court was not forced to strike down legislation as to a currently operative international agreement as both agreements have been superseded by treaty provisions which do not specifically provide that service courts will be able to try offenses against the laws of foreign nations. See NATO Status of Forces Agreement,

this holding is followed in the future it will limit the treaty power to those areas in which the government is not prohibited from acting.¹⁹

The keystone of the Court's opinion is the interpretation given to the phrase "cases arising in the land and naval forces," for if defendants are not included in this exception to the Fifth Amendment, the necessary and proper clause cannot remove their right to trial by jury. This was the view taken in *United States ex rel. Toth v. Quarles*,²⁰ and the opinion in the principal case is merely an extension of that doctrine limiting the necessary and proper clause as it relates to military justice. It can be argued, however, as it was by Justice Reed in his dissent in the *Toth* case,²¹ that the interpretation given to the exception clause of the Fifth Amendment is too narrow, for the clause refers to *cases* arising in the land and naval forces and not to *persons* in the land and naval forces. Therefore, it should not be limited to persons actually in the military service, but should embrace persons closely related to the armed forces, including dependents overseas. The interpretation of the principal case,²² making trial of many offenses by civilian dependents practically impossible, creates many problems for the armed forces,²³ which lend force to the test proposed by the concurring justices. Under that test the Court would be able to analyze each case, much as it analyzes due process cases, to determine whether the method of trial established by Congress is sufficiently essential to the effective government of the armed forces to outweigh the deprivation to civilians of jury trial. In light of the varying views of the justices in the principal case it is difficult to determine the present limits of court-martial jurisdiction of civilians. While civilian dependents in a capital case clearly cannot be court-martialed, the Court specifically refrained from indicating the status of civilian employees of the armed forces overseas. Moreover, the capital

4 U.S.T. 1792 (1953); Amendment of Article XVII of the Administrative Agreement under Article III of the Security Treaty, 4 U.S.T. 1846 (1953). It is interesting to note that never has a treaty been struck down by the Court as contrary to the Constitution. In this area the Court is faced with the international problems resulting from the failure or inability of the nation to live up to its foreign commitments. See CORWIN, *THE CONSTITUTION OF THE UNITED STATES* 412-445 (1953); 70 HARV. L. REV. 1043 (1957).

¹⁹ Prior to 1900 there were several cases in which appeared dicta that a treaty could not override the specific provisions of the Constitution. See, e.g., *The Cherokee Tobacco*, 11 Wall. (78 U.S.) 616 at 620 (1870); *Holden v. Joy*, 17 Wall. (84 U.S.) 211 at 243 (1872); *Geofroy v. Riggs*, 133 U.S. 258 at 267 (1890). Until the principal case, however, such statements have never been necessary to the decision of a case.

²⁰ 350 U.S. 11 (1955). The Court held that a former serviceman who had been discharged from the service could not be tried by court-martial for crimes committed abroad during his term of service.

²¹ *United States ex rel. Toth v. Quarles*, note 20 *supra*, at 37.

²² The Court expressed a fear of military control of the civilian population and of military government. Much the same viewpoint is shown in the *Toth* opinion. In view of these pronouncements it is not surprising to find the justices strictly limiting the scope of the exception clause.

²³ The alternatives to court-martial of dependents are given in the principal case by Justices Clark and Harlan in their opinions. See principal case at 72 and 86 to 89.

and non-capital distinction²⁴ was so clearly defined by Justices Frankfurter²⁵ and Harlan²⁶ that it is not difficult to foresee both men supporting a court-martial should a non-capital case arise. They would be joined by Justices Clark and Burton, who support court-martial jurisdiction in any overseas military dependent case, so the Court would be evenly divided, with Justice Whittaker in the tie-breaking position. Trials of civilians connected with the military forces in wartime present an analogous but different problem, and jurisdiction of courts-martial in that situation is more easily supported under the war powers of Congress and the President.²⁷ The *Toth* case and the principal case have indicated that the Court will rather severely restrict court-martial jurisdiction over civilians. The extent to which it will be permitted can be determined only by subsequent decisions.²⁸ Since four justices would make the practicalities of the situation controlling,²⁹ it is doubtful that military jurisdiction will be much further limited.

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²⁴ This distinction has been used by the Court before. Compare *Powell v. Alabama*, 287 U.S. 45 (1932), with *Betts v. Brady*, 316 U.S. 455 (1942).

²⁵ Principal case at 45.

²⁶ Principal case at 65.

²⁷ See generally *Ex parte Quirin*, 317 U.S. 1 (1942); *Madsen v. Kinsella*, 343 U.S. 341 (1952). But see *Ex parte Milligan*, 4 Wall. (71 U.S.) 2 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

²⁸ See generally 55 MICH. L. REV. 114 (1956).

²⁹ Justice Frankfurter, principal case at 44; Justice Harlan, principal case at 75; Justices Clark and Burton, principal case at 83.