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

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CONSTITUTIONAL LAW—COURTS-MARTIAL—POWER OF CONGRESS TO PROVIDE FOR MILITARY JURISDICTION OVER CIVILIANS—During the past term the Supreme Court decided three cases involving the constitutionality of court-martial jurisdiction over certain groups of civilians.[1] In *United States ex rel. Toth v. Quarles*[2] the Court held that Congress could not constitutionally provide for military trial of a discharged serviceman for offenses committed during his term of service. In two subsequent cases[3] the Court rejected the contention that the *Toth* decision announced a principle applicable to any exercise of jurisdiction over civilians by the military courts in upholding the provisions of the Uniform Code of Military Justice[4] for military jurisdiction over civilian dependents accompanying American servicemen abroad. This comment attempts to ascertain the principles upon which these decisions

1 Previous decisions of the Court had not spelled out the constitutional limits with any degree of definiteness, and the lower court decisions were not at all uniform. In Ex parte Quirin, 317 U.S. 1 at 46, 63 S.Ct. 1 (1942), the Court specifically reserved the consideration of the limits of the jurisdiction of military tribunals. On the very point involved in the *Toth* decision there was a definite split of authority which had aroused considerable controversy. Compare Terry v. United States, (D.C. Wash. 1933) 2 F. Supp. 962, with United States ex rel. Flannery v. Commanding General, (D.C. N.Y. 1946) 69 F. Supp. 661, reversed in unreported order of 2d Cir., No. 20235, April 18, 1946. See WINTHROP, MILITARY LAW AND PRECEDENTS 104 (1920).

2 350 U.S. 11, 76 S.Ct. 1 (1955).

3 Kinsella v. Krueger, 351 U.S. 470, 76 S.Ct. 886 (1956); Reid v. Covert, 351 U.S. 487, 76 S.Ct. 880 (1956).

4 64 Stat. L. 108 (1950), 50 U.S.C. (1952) c. 22 (referred to in succeeding references as Uniform Code).

were based, and to determine their effect on present and potential provisions for military jurisdiction.

I

The need for some provision for the trial of servicemen for crimes committed while in the armed forces, but which were not discovered until after their discharge, had been recognized for some time before the passage of the Uniform Code.[5] The need became particularly apparent when the Supreme Court held in 1949 that under the then existing military law, a person in the service could not be tried for an offense committed during a previous term of service.[6] This decision was not placed on constitutional grounds, but rather was based on the ground that, absent a provision by Congress for such trial, jurisdiction could not be inferred from the existing provisions.[7] Under the impression that there was no constitutional issue involved, Congress included such a provision when it passed a complete revision of the military laws the following year.[8] The provision was made as narrow as possible to meet the specific need. It provided for court-martial jurisdiction over an ex-serviceman only for more serious crimes (punishable by more than five years' imprisonment), and for offenses for which he was not subject to prosecution in the federal district courts.[9]

Toth was honorably discharged from the Air Force and then arrested five months later to be taken to Korea for trial by a court-martial for murder and conspiracy to commit murder while serving there.[10] In freeing Toth, the Court held that "Congress cannot subject *civilians like Toth* to trial by court-martial. They, *like other civilians,* are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution."[11]

5 See, generally, Myers and Kaplan, "Crime Without Punishment," 35 GEO. L.J. 303 (1947).

6 United States ex rel. Hirshberg v. Cooke, 336 U.S. 210, 69 S.Ct. 530 (1949), noted in 48 MICH. L. REV. 234 (1949). Note that article 3 (a) of the Uniform Code was made much broader than this case required. The provision may still be valid to permit the exercise of jurisdiction if the accused is actually in service, although during a subsequent term, when the charges are brought.

7 336 U.S. 210 at 215-216, 218.

8 95 CONG. REC. 5721 (1949); 96 CONG. REC. 1367 (1950).

9 Uniform Code, art. 3 (a). See Martin v. Young, (D.C. Cal. 1955) 134 F. Supp. 204.

10 Actual offenses charged were violations of Uniform Code, arts. 118 and 81.

11 United States ex rel. Toth v. Quarles, 350 U.S. 11 at 23, 76 S.Ct. 1 (1955) (emphasis added).

Congress' power to legislate in regard to the provision in question is derived, as the Court states, from its authority to "make rules for the government and regulation of the land and naval forces,"[12] together with the other more general constitutional provisions relating to the military establishment.[13] In the Fifth Amendment there is a specific exception made for "cases arising in the land and naval forces," so as to obviate the need for grand jury indictment and jury trial in such proceedings. Although it is possible to argue that this language was a limitation on the grant of power in Article I, that is, that the constitutionality of court-martial jurisdiction would turn on the interpretation of "cases arising in" the armed forces,[14] the Court in the *Toth* case followed a line of authority which holds that the purpose of the exception clause was to exempt specifically from the operation of these amendments whatever provisions Congress might make under its Article I power for regulation through military court proceedings.[15]

Both the majority and minority of the Court agreed that the decision as to the constitutionality of the particular jurisdictional provision must be based on an interpretation of the proper function of the military tribunal, based as it is on the congressional power to make rules for the regulation of the armed forces. Both agreed that its existence is predicated on the need to maintain discipline among the troops in active service, and that the scope of its jurisdiction is therefore limited by the end that it serves.

The majority of the Court, speaking through Justice Black, held that there was not a sufficient connection between the provision under question and the primary function of the court-martial for it to be upheld.[16] Justices Reed, Minton, and Burton, dissenting, felt that the Court went beyond its usual function of determin-

12 U.S. CONST., art. I, §8.

13 See WINTHROP, MILITARY LAW AND PRECEDENTS 16 (1920); ATKISSON, CONSTITUTIONAL SOURCES OF THE LAWS OF WAR (1917).

14 This was in fact the controversy in the two lines of lower court authority cited in note 1 supra.

15 United States ex rel. Toth v. Quarles, 350 U.S. 11 at 14, n. 5, 76 S.Ct. 1 (1955); Ex parte Milligan, 4 Wall. (71 U.S.) 2 (1866).

16 The majority stresses in this regard that any jurisdiction allowed the military tribunals is an encroachment on that of the Article III courts and, more particularly, a consequent deprivation of the jury trial guaranteed in those courts, and therefore even the specific grant of authority to Congress to regulate the armed forces must be construed as narrowly as possible. That a right which is not considered fundamental enough to be included in Fourteenth Amendment due process guarantees in state courts should be the controlling factor in the denial of military jurisdiction seems difficult to justify. See discussion in Palko v. Connecticut, 302 U.S. 319 at 325, 58 S.Ct. 149 (1937).

ing whether or not the means chosen by Congress are reasonably adapted to the end to be served. In addition to this general criticism of the basis of the majority opinion, the minority were willing to uphold the provision even under the strict standard laid down by the decision. They felt that the majority holding disregarded the fact that a limited provision for just such jurisdiction has been enforced as part of American military law since 1863,[17] and pointed out that there are similar provisions for military jurisdiction in most other countries with legal systems similar to our own.[18]

II

On the strength of this decision several civilians who had been convicted by military courts for crimes committed while accompanying the armed forces abroad sought to overturn their convictions, relying on the requirement in the *Toth* holding that any exercise of military jurisdiction be necessary to the maintenance of discipline among the troops in active service. They also cited the more general language of the court decrying the trial of civilians as a class by military tribunals since, the Court had pointed out, even the best of military courts were inherently less independent than the courts provided for in Article III of the Constitution.[19]

When confronted with these cases the Court, speaking through Justice Clark, attempted to clarify the *Toth* holding. That case, the Court said, called in question the scope of Congress' power to deprive a person of his right to grand jury indictment, jury trial, and the other constitutional safeguards, by the exercise of its authority to make rules for the regulation of the land and naval forces. Justice Clark said that since a citizen overseas could not claim these advantages as a matter of right, there was no question of whether or not the jurisdiction conferred in the case of dependents was authorized by Congress' military powers. Congress' power to legislate concerning Americans abroad is derived from

[17] Act of March 2, 1863, 12 Stat. L. 696, 697; similar provision re-enacted Art. of War 60, R.S. §1342 (1878); Art. of War 94 (1920), 41 Stat. L. 805; Art. of War 94 (1948), 62 Stat. L. 640; Articles for the Government of the Navy, Art. 14, (Eleventh), R.S. §1624 (1878).

[18] United States ex rel. Toth v. Quarles, 350 U.S. 11 at 29, n. 11, 76 S.Ct. 1 (1955). Dynes v. Hoover, 20 How. (61 U.S.) 65 at 78 (1857), defines Congress' power in terms of the manner then and now practiced by civilized nations.

[19] United States ex rel. Toth v. Quarles, 350 U.S. 11 at 17, 76 S.Ct. 1 (1955).

its authority in foreign affairs and its control of United States citizens, independent of any authority to regulate the armed forces.[20] Outside the territorial limits of the United States any particular grant of jurisdiction to the military courts is subject to attack on constitutional grounds only if it is wholly unreasonable in view of all the circumstances.[21]

The Court rested its holding in the *Krueger* and *Covert* cases on its earlier decision in *In re Ross,*[22] which approved the exercise by a consular court in Japan of criminal jurisdiction over an American citizen without the procedural safeguards required in Article III courts. This decision, together with a long line of cases upholding Congress' plenary power to legislate regarding American overseas possessions,[23] led the Court to the conclusion that persons situated as the military dependents were may be tried in legislative courts established by Congress.[24] In the Court's approval of the jurisdictional provision in question particular stress was placed upon the relation of the petitioners to the operation of the military establishment, the very criterion which had been suggested by the *Toth* decision. The investigation in the *Krueger* case, however, was not for the purpose of determining whether the jurisdiction was properly provided for in pursuance of Congress' power to regulate the military establishment, but rather whether the connection between the petitioners and the operations of the military was sufficient to reject any contention that the use of the military tribunal was arbitrary or capricious. That this connection was a significant factor in the present holding is emphasized by the Court's extended discussion of the nature and scope of our overseas military operations.[25] The Court said that it was not passing on the power of Congress to provide for similar trials for Americans sojourning, touring, or temporarily residing abroad, nor on the constitutional limitations on the juris-

20 See, generally, discussion of cases in Skiriotes v. Florida, 313 U.S. 69 at 73, 61 S.Ct. 924 (1941). See, generally, CORWIN, CONSTITUTION OF THE UNITED STATES 308, 309, 277-279 (1952). It was this general power of Congress, and no special power obtained by treaty, which was involved, as pointed out by the Court. Kinsella v. Krueger, 351 U.S. 470 at 480, 76 S.Ct. 886 (1956).

21 Kinsella v. Krueger, 351 U.S. 470 at 476 ff., 76 S.Ct. 886 (1956).

22 140 U.S. 453 at 464, 11 S.Ct. 897 (1891). See, generally, CORWIN, CONSTITUTION OF THE UNITED STATES 877 (1952). Cf. Neely v. Henkel, 180 U.S. 109, 21 S.Ct. 302 (1901); Madsen v. Kinsella, 343 U.S. 341, 72 S.Ct. 699 (1952). See, generally, Fairman, "Some New Problems of the Constitution Following the Flag," 1 STAN. L. REV. 587 (1949).

23 See cases cited in Kinsella v. Krueger, 351 U.S. 470 at 474, 475, 76 S.Ct. 886 (1956).

24 Id. at 476.

25 Id. at 477, n. 7.

diction of military courts sitting in this country.[26] While the Court approved the *Ross* holding in principle, it was not willing to go beyond the situations actually before it in the *Krueger* and *Covert* cases, in which there was a very close connection between the persons involved and the military establishment, in approving the use by Congress of the military courts to try civilians for overseas offenses.

III

The three decisions taken together lay down skeleton rules by which the constitutionality of the present jurisdictional provisions of the uniform code may be tested. They say that Congress can confer jurisdiction on military courts in derogation of a person's right to the kind of trial he would have in the federal courts only when such jurisdiction is necessary to maintain discipline among troops in active service. In addition, Congress can use the military courts as a means of exercising its jurisdiction over American citizens who are outside the territorial limits of the United States, perhaps subject to the limitation that the persons subjected to military jurisdiction have a certain connection with the operation of the military establishment.

The jurisdictional provisions of the Uniform Code, excluding the one invalidated in the *Toth* case, may be classified in two groups:

(1) Jurisdiction based on present or former membership in the armed forces:
   (a) All members of a regular component of the armed forces;
   (b) Personnel of the Coast and Geodetic Survey, Public Health Service, or other organization assigned to or serving with the armed forces;
   (c) Cadets and midshipmen;
   (d) Reserve personnel on inactive duty training, if under written orders voluntarily accepted by them specifying that they are so subject;
   (e) Members of Fleet and Fleet Marine Reserves;
   (f) Persons serving court-martial sentences in military custody;
   (g) Prisoners of war in military custody;

[26] Id. at 480.

(h) Retired reserve personnel receiving armed forces hospitalization;
(i) Retired regular personnel entitled to receive pay;
(j) Persons who have terminated their service status illegally:
(1) Deserters from the armed forces;
(2) Persons charged with having procured their discharge fraudulently.

(2) Jurisdiction over certain groups of civilians because of association with, or proximity to, the armed forces:
(a) In wartime, all persons serving with or accompanying the armed forces in the field;
(b) In war or peacetime outside the United States, Alaska, Puerto Rico, Canal Zone, and Hawaiian and Virgin Islands, all persons who are serving with, employed by, or accompanying the armed forces, or who are within an area under control of a Secretary of the Defense Department.[27]

Since the code is applicable in all places,[28] it is not the locus of the offense, but the status of the person as set out above which is the controlling element of military jurisdiction. Except for certain breaches of military discipline which can only be committed by military personnel, all of the above persons are subject to prosecution for all non-capital crimes and offenses for which they would be triable in a federal court[29] in addition to an exhaustive list of specified offenses, including all the more serious crimes.[30]

The Court has given no indication that it would limit court-martial jurisdiction by a denial of the right to try certain offenses, so the present consideration must be whether or not jurisdiction

27 Uniform Code, arts. 2, 3. These provisions are in addition to art. 3(a) involved in the Toth case. An additional provision, Uniform Code, art. 4, provides for a post-dismissal court-martial hearing on application of an officer, but this is not basically a criminal jurisdiction. See Wallace v. United States, 55 Ct. Cl. 396, affd. 257 U.S. 541, 42 S.Ct. 221 (1922). In addition to these more common provisions, the code provides that all persons shall be subject to court-martial jurisdiction for the commission of certain offenses: (1) aiding the enemy (art. 104); (2) spying in time of war (art. 106); (3) contempt of court-martial (art. 48). These provisions appear fully justified as an exercise of the war power, and of ordinary contempt powers.

Article 18 also includes a general provision for court-martial trial of all persons who are subject thereto by the law of war. Under the present view of the Court, this probably is no significant aid to extending jurisdiction. But see Ex parte Quirin, 317 U.S. 1, 63 S.Ct. 1 (1942).

28 Uniform Code, art. 5.

29 Uniform Code, art. 134. See MANUAL FOR COURTS-MARTIAL, UNITED STATES 383 (1951).

30 Uniform Code, arts. 80-132 inclusive. There is thus a duplication as to many offenses by specific enumeration and by incorporation by reference of the federal criminal code.

over each particular group of persons is justified by the need to maintain discipline among the active troops,[31] or by Congress' power to control American citizens overseas.

It seems advisable to determine first whether there are any provisions which must necessarily fall because of their similarity to the provision held unconstitutional in the *Toth* case. The only provision close enough to be affected necessarily by that decision is the one for trial of a fraudulent dischargee for his fraud in securing his discharge and for previously committed crimes. All connection with the military would have been severed, and he could be tried just as well for both the fraud and previously committed crimes in a civilian court.[32] In all the other jurisdictional groups there is some present relation to the military, even if it is only the receipt of retirement pay, so that in these instances any finding of unconstitutionality must come from an application of the more general standard suggested by the language of the *Toth* holding.

Two of the remaining categories of service-connected jurisdiction would be subject to the same criticism that the Court leveled against the result in the *Toth* case. In most instances, offenses committed by a retired regular army officer or a retired member of the reserve who is receiving armed forces hospitalization would be just as competently tried in a civilian court, and such trial would result in no disruption of any military routine. However, it is very likely that the military will be even more hesitant to exercise their potential jurisdiction in such cases now than they have been in the past, for they have shown that they are sensitive to popular sentiment and the practical difficulties involved.[33] Thus, the Court will probably have no opportunity to pass on the constitutionality of such provisions except in the rare case where the connection to military operations was so close as to lead to an assertion of jurisdiction, and this very fact would make it difficult for the Court to invalidate the provision.

The remaining service-connected jurisdictional classifications are generally consistent with a minimum conception of court-

[31] Of course, whenever the standard of the Toth case is applied to a jurisdictional category, it must be understood to be applicable only to persons within the territorial limits of the United States.

[32] It is possible to say that since the discharge was voidable, there was still a subsisting relation to the military, but in any case this provision would fall before the more general principle of the Toth case requiring an intimate present relation with military operations.

[33] The military opposed even the specific grant of jurisdiction in the provision held invalid in the Toth decision. See 96 CONG. REC. 1294 (1950).

martial jurisdiction, i.e., a parallel system of courts to provide for maintaining military discipline by an especially qualified tribunal, and for punishing criminal offenses where assertion of civilian jurisdiction and punishment would be inconsistent with the regime under which the persons involved are living.[34] As the Court itself has said, they belong to a "separate community recognized by the Constitution."[35]

The code provision for military jurisdiction over all civilians serving with or accompanying the armed forces in the field in wartime is hardly open to question, for it is one of the oldest provisions in our military law.[36] It is justified within the United States by the standard of the *Toth* case as well as by Congress' extensive war powers, and without the United States requires an even higher degree of association with military operations than the provision upheld in the *Krueger* decision.

34 1 (a) [The numbering is that used in the text, not that of the code.] The problems arising under this section are generally ones of statutory interpretation, not of constitutional limitation. The general rule is that servicemen are subject to military law from oath to discharge or separation. See Billings v. Truesdell, 321 U.S. 542, 64 S.Ct. 737 (1944); United States ex rel. Hirshberg v. Cooke, 336 U.S. 210, 69 S.Ct. 530 (1949); Hironimus v. Durant, (4th Cir. 1948) 168 F. (2d) 288, cert. den. 335 U.S. 818, 69 S.Ct. 40 (1948).

(b) Such persons are considered part of the branch of the service with which they are serving during the limited period for which they are attached.

(c) See Hartigan v. United States, 196 U.S. 169, 25 S.Ct. 204 (1905). As with the previous section, this jurisdiction has given rise to very little litigation in the federal courts.

(d) These persons are actually troops in active service at the time they are subject to the code. Congress inserted the special notice provision so as to remove any uncertainty as to when they were actually so serving.

(e) This is a special category, with no counterpart in the Army or Air Force, to which regulars may be transferred after long service. [See 52 Stat. L. 1178 (1938), 34 U.S.C. (1952) §854.] Since the language of the section is not limited to those who are on active or training duty, it is to this extent subject to constitutional attack. This jurisdiction terminates on retirement. SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE 126 (1953).

(f) This has been specifically upheld by the Court, Kahn v. Anderson, 255 U.S. 1, 41 S.Ct. 224 (1920), and was reaffirmed in Reid v. Covert, 351 U.S. 487, 76 S.Ct. 880 (1956).

(g) This is simply declaratory of international law, and is subject to applicable treaty provisions. See SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE 138 (1953).

(j) (1) This provision was prompted by a federal court holding that discharge from a subsequent term of service insulated the person involved from prosecution for desertion from a former term. Ex parte Drainer, (D.C. Cal. 1946) 65 F. Supp. 410. The ordinary deserter is adequately covered under other legislation which extends the person's period of service by the amount of absent time. 41 Stat. L. 809 (1920), 10 U.S.C. (1952) §629.

35 Carter v. McClaughry, 183 U.S. 365 at 390, 22 S.Ct. 181 (1902).

36 This is derived from the original 1775 code provisions. WINTHROP, MILITARY LAW AND PRECEDENTS 98 (1920). See also 96 CONG. REC. 1294 (1950). This jurisdiction was upheld in Perlstein v. United States, (3d Cir. 1945) 151 F. (2d) 167, cert. dismissed 328 U.S. 822, 66 S.Ct. 1358 (1946). It is, in effect, a very extensive grant of power in view of the interpretation given to the phrase "in the field." See Hines v. Mikell, (4th Cir. 1919) 259 F. 28 at 34, where it was applied to temporary training camp in the United States.

The *Krueger* decision appears to give almost unreserved approval to the remaining provisions for jurisdiction over civilians serving with, employed by, or accompanying the armed forces abroad, or who are within an overseas area under control of a Secretary of the Defense Department. The only provision which might be challenged consistently with the Court's opinion in the *Krueger* case would be that conferring jurisdiction over all persons within certain overseas areas without mention of their relation to the military. However, since these areas are those under the control of the Defense Department, a sufficient connection could well be found to meet the Court's test.

Conclusion

After rendering an opinion in the *Toth* case which appeared to undermine several major areas of court-martial jurisdiction, the Court in the *Krueger* case limited its earlier decision, and proceeded to reinforce on entirely separate grounds the grants of military jurisdiction which had been questioned on the authority of the *Toth* holding. Justices Reed, Minton, and Burton, who dissented in the *Toth* decision, were joined by Justices Clark and Harlan in reaffirming court-martial jurisdiction over a very large group of civilians, thus showing clearly that the *Toth* decision was not to be taken as indicating a general tendency on the part of the Court to confine military jurisdiction to the narrowest possible limits.

The extremely far-reaching principle underlying the *Krueger* decision, i.e., that an American citizen overseas cannot demand the same protection there in prosecutions in United States courts for federal crimes that he can while in this country, was not elaborated by the Court. It is entirely possible that the Court would in a later instance stress one of the particular factors of the situation involved in the *Krueger* and *Covert* cases, e.g., the voluntary nature of military dependents' sojourn abroad, or perhaps the really intimate connection of the persons here involved with the military establishment, and thereby in effect distinguish these cases and the earlier consular authority cases upon which they were based. For example, in a case in which continued employment with the government depended on accepting these conditions when an employee was transferred overseas, or if Congress found it expedient to provide for court-martial jurisdiction over all crimes committed by Americans abroad, the Court might well say that this was an unconstitutional condition to work or travel abroad.

This possibility is indicated by the Court's reservation in the *Krueger* case of the right to find certain grants of jurisdiction "arbitrary or capricious."[37] This is reinforced by the specific limitation of the *Krueger* holding to jurisdiction over military dependents, although on the surface the opinion appears to affirm beyond recall a principal of much broader application.

In the *Toth* case the Court announced a standard which may be applied to limit grants of court-martial jurisdiction in derogation of the right to trial in an Article III court, or at least indicated its general attitude toward the exercise of Congress' power to make rules for the regulation of the armed services. The *Krueger* opinion opened up a wider sphere of court-martial jurisdiction over civilians by affirming on independent grounds a grant made by Congress supposedly in pursuance of its military authority. If Congress seeks to exercise the power which the *Krueger* decision seems to affirm it possesses, the Court may well be called upon again to elaborate the principle upon which that decision was based.

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[37] Kinsella v. Krueger, 351 U.S. 470 at 478, 76 S.Ct. 886 (1956).