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Court-Martial Jurisdiction Of Civilian Dependents

CASE COMMENTS

COURT-MARTIAL JURISDICTION OF CIVILIAN DEPENDENTS

On June 10, 1957, the Supreme Court of the United States decided *Reid v. Covert*,[1] together with *Kinsella v. Krueger*, reversing its previous decisions of exactly fifty-two weeks' standing.[2] Both the defendants were convicted in court-martial proceedings of murdering their husbands, who were then in the military service overseas. The constitutionality of article 2(11) of the *Uniform Code of Military Justice*,[3] which authorizes court-martial jurisdiction over civilian dependents accompanying servicemen overseas, was thus put in issue. The answer given to the issue presented, however, was not as clear as one might have wished. Questions remain unanswered, problems unsolved, and the future uncertain. Before conclusions as to the ramifications of this case can be arrived at, it is first necessary to gain a clear understanding of the decision.

I.

Four Justices wrote opinions in this case. The most practicable method for examining their divergent approaches is a comparison. By this means the whole may be kept united while examining each view separately. First it is necessary to look at the position for which each of the opinions, standing alone, may be cited. The judgment of the Court was announced by Justice Black, with whom the Chief Justice and Justices Douglas and Brennan concurred. Justice Black says that civilian dependents accompanying servicemen overseas may not constitutionally be tried by court-martial for offenses committed while overseas. Justice Clark, joined by Justice Burton, maintains that such trials are constitutional. Justices Frankfurter and Harlan, while writing separate opinions, confine their concurrence with the decision of the Court to capital cases in time of peace. There was

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[1]354 U.S. 1 (1957). Hereinafter referred to as Covert or the Covert case.

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

[3]64 Stat. 109 (1950), 50 U.S.C. § 552 (1952):

"The follow persons are subject to this code:

"(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States. . . ."

no majority opinion as such. Only on the narrow ground stated by two concurring Justices, which is necessarily included in the opinion of the Court, can it be said that a majority of the Justices joined. What the result would be if a noncapital case, or one not arising in time of peace, were presented to the Court can only be speculated upon.[4]

In reaching their respective decisions, the Justices found it necessary to determine whether the constitutional guarantees, and more specifically whether those guarantees found in article III, section 2[5] and the fifth[6] and sixth amendments,[7] apply outside the territorial limits of the United States, and, if so, to what extent.

Justice Black takes the view that the United States, being entirely a creature of the Constitution and deriving all its authority from that instrument, may act only within all its limitations. Article III, section 2, the fifth and sixth amendments, continues Black, being all-inclusive in their language, apply wherever this country's authority is exercised. They cannot be disregarded merely because the subject of congressional regulation is in a foreign land. When the *Covert* case came to the Supreme Court the first time, the then majority relied heavily, but erroneously, says Justice Black, on *In re Ross*[8] and the *Insular Cases*[9] for the proposition that these guarantees do not apply to citizens abroad. The *Ross* case upheld the validity of consular court jurisdiction created by an act of Congress authorizing American consuls to try citizens in Japan for crimes allegedly committed while in that country. "The Ross approach that the Constitution has no applicability

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[4]Justice Whittaker took no part in this case.

[5]U.S. Const. art. III, § 2, cl. 3. "The Trial of all Crimes ... shall be by Jury."

[6]U.S. Const. amend. V. "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...."

[7]U.S. Const. amend. VI. "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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

[8]140 U.S. 453 (1891). Hereinafter referred to as Ross.

[9]The Insular Cases are a series of cases decided around the turn of the nineteenth century sustaining the "right of Congress to make laws for the government of territories, without being subject to all the restrictions which are imposed upon that body when passing laws for the United States, considered as a political body of States in union...." Dorr v. United States, 195 U.S. 138, 142 (1904). E.g., Balzac v. People of Puerto Rico, 258 U.S. 298 (1922); Perez v. Fernandez, 202 U.S. 80 (1906); Hawaii v. Mankichi, 190 U.S. 197 (1903); Downes v. Bidwell, 182 U.S. 244 (1901); American Ins. Co. v. Canter, 7 U.S. (1 Pet.) 685 (1828).

abroad has... been directly repudiated.... At best... [it] should be left as a relic from a different era."[10] Justice Black distinguishes the *Insular Cases* from *Covert* on the ground that they dealt with the power of Congress "to make all needful Rules and Regulations respecting the Territory"[11] of the United States whereas here the basis of power is citizenship.

Justice Clark's opinion, although not espousing a view diametrically opposed to that of Justice Black, states that citizens are not entitled as a matter of right to trial before an article III court[12] for crimes committed in a foreign country. The dissenting Justice does not contend that the Constitution itself is operative only within the geographical confines of the United States. It is, for him, a question of whether the guarantees in issue extend to these petitioners overseas. The answer given is that they do not. *Ross* was not cited for the proposition which was correctly criticized by Justice Black. Rather it was cited, as were the *Insular Cases,* for the contention that Congress is not hindered by these guarantees in legislating with respect to citizens outside the territorial limits of the United States.

Justices Frankfurter and Harlan rely on these cases for still a different proposition. They are cited for the proposition that the constitutional provisions relied upon by Justice Black do not *automatically* apply outside the territorial limits of the United States. It becomes a question of the applicability of these guarantees in the light of the circumstances, a problem closely akin to that of due process. Justice Frankfurter would agree with Justice Black that inasmuch as *Ross* stands for the proposition that the Constitution does not operate outside the United States the case is no longer authoritative on that point. Justice Black thinks this case has no further value as a precedent, while the two concurring Justices maintain that *Ross* is still relevant for the analysis employed in determining which should apply under the circumstances. The two Justices cite the *Insular Cases* for a proposition similar to *Ross,* thus again denying that these

[10]354 U.S. 1, 12 (1957).

[11]U.S. Const. art. IV, § 2, cl. 2.

[12]Ex parte Bakelite Corp., 297 U.S. 438, 449 (1929). "Those [courts] established under the specific power given in section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of Article III...."

cases flatly state that the protections in the Constitution do not apply abroad. The views expressed on these matters by Justices Frankfurter and Harlan seem preferable to those of Justice Black or Clark in that these cases, although distinguishable as to the actual constitutional power involved, are similar in approach to the problem here presented. They both involve a contrast of guarantees on the one hand with power on the other and should not be disregarded as mere relics of a bygone era or distinguished solely on the basis of the power involved.

Justice Clark, thus finding that Congress is not hindered by the guarantees expressed in article III, section 2, the fifth and sixth amendments when creating courts outside the United States, concluded in his 1956 opinion that there was no need to examine the power of Congress under article I to make rules for the government and regulation of the land and naval forces.[13] Here there is an evident inconsistency. Justice Clark's 1957 opinion incorporates his prior 1956 opinion.[14] Consequently, the two must be read together. His first opinion states that Congress may admittedly create legislative courts to try American citizens abroad; and since court-martial tribunals have already been created, these tribunals may be utilized to try citizens abroad without the necessity for justifying such jurisdiction under article I.[15] In his second opinion, however, court-martial jurisdiction is justified on the ground that the regulation of these dependents is reasonably related to the government and regulation of the land and naval forces under article I, section 8, clause 14. There is no explanation offered by Justice Clark for this inconsistency. The statement to the effect that there was no need to examine the power of Congress to enact article 2(11) is open to grave criticism, for in a government of enumerated powers such as ours, when an act of a legislative body is squarely before the court, it cannot be upheld if there is no power to enact it.[16] The question of power *must* be answered.

Justice Black, in answering that Congress lacks the requisite power, declares that only military personnel are included in article I, section 8, clause 14. That group is not to be expanded by means of the necessary and proper clause[17] to include persons other than those described

[13]Kinsella v. Krueger, 351 U.S. 470, 476 (1956).

[14]354 U.S. 1, 79 (1957). Justice Clark states in his 1957 opinion: "I remain convinced that the former opinions of the Court are correct and that they set forth valid constitutional doctrine.... We do not include a discussion of the theory upon which those former judgments were entered because we are satisfied with its handling in the earlier opinions."

[15]Kinsella v. Krueger, 351 U.S. 470, 476 (1956).

[16]Marbury v. Madison, 1 U.S. (1 Cranch.) 368, 388 (1803); Federalist, No. 78.

[17]U.S. Const. art. I, § 8, cl. 18.

within that clause. Congress may thus enact any legislation necessary and proper for the government and regulation of that group only. To allow military trials of civilians, according to Justice Black, would be "inconsistent with both the 'letter and spirit of the constitution,' "[18] since these military tribunals exercise an extraordinary jurisdiction. Jurisdiction of military tribunals should be strictly confined so as not to encroach upon that of the civil courts, which provide the usual preferred mode of trial.[19] The legal system of the military is characterized by Justice Black as a rough sense of justice which should be allowed no operation outside the limited confines of the land and naval forces.[20]

Justices Frankfurter and Harlan, on the other hand, take a different view of the power under article I. Although the result reached by these Justices is similar to that of Justice Black, their approach is substantially different. Disagreement with Justice Black is voiced in their interpretation of clause 14 as it is affected by clause 18, the necessary and proper clause. Construing these two clauses together, the two concurring Justices agree with Justice Black that the only persons who may be placed under court-martial jurisdiction are those who are close enough to the land and naval forces so that their regulation is necessary and proper to the government and regulation of the armed forces. This difference in interpretation of clause 18 is the crux of the split in the Court. Justice Harlan states: "I cannot accept the implication of my brother Black's opinion that this Article I power was intended to be unmodified by the Necessary and Proper Clause of the Constitution, and that therefore this power is incapable of expansion under changing circumstances. The historical evidence . . . shows quite the opposite."[21] On the same subject Justice Frankfurter says: "The Court's function in constitutional adjudications is not exhausted by a literal reading of words. It may be tiresome, but it is nonetheless vital, to keep our judicial minds fixed on the injunction that 'it is *a constitution* we are expounding'."[22]

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[18]354 U.S. 1, 22 (1957).

[19]Justice Black further contends that because "cases arising in the land or naval forces" were excepted from the fifth amendment (see note 6 supra), it is "persuasive" that the framers of the Constitution intended clause 14 to encompass only persons "in" the military. Military subordination to civilian authority which has been firmly implanted in the history of this country has continued through the expression of the framers of our constitutional government and is another reason why all jurisdictional extensions of the military should be opposed.

[20]But see Hamilton, Military Law: Drumhead Justice is Dead!, 43 A.B.A.J. 797 (1957).

[21]354 U.S. 1, 67-68 (1957).

[22]Id. at 43.

The Justices next determine whether these dependents are "close enough" to the land and naval forces so as to make them amenable to court-martial jurisdiction under article I, section 8, clause 14. Justice Clark, although not discussing the necessary and proper clause, does conclude that dependents bear sufficient relation to the military to be within the scope of clause 14. Justices Frankfurter and Harlan, because of their determination that the personal safeguards found in article III, section 2, the fifth and sixth amendments will or will not apply outside the United States according to the circumstances, resolve this "close enough" test in the light of these safeguards.

Their opinions are to the effect that dependents overseas, at least in capital cases in time of peace, cannot constitutionally be tried by court-martial. The reasoning of the two Justices is basically the same, but their approaches to the common end vary. Justice Frankfurter reasons that the determination of whether these dependents are "close enough" to the military to justify the enactment of article 2(11) of the *Uniform Code of Military Justice* must involve a consideration of the loss of certain safeguards enumerated in the Bill of Rights. When these consequences are considered, the trial of civilian dependents by court-martial, he concludes, "is hardly to be deemed, under modern conditions, obviously appropriate to the effective exercise of power to 'make Rules for the Government and Regulation of the land and naval forces'...."[23] Justice Harlan divides his reasoning on this point into two parts. In the first he maintains that article I, section 8, clause 14, examined apart from the rest of the Constitution, allows the court-martialing of dependents because of their close relation to the military and because of the propriety of their regulation in order "to insure the effective governance of our overseas land and naval forces."[24] In the second he says this jurisdiction nevertheless cannot be maintained if the defendants are guaranteed trial in an article III court. In view of the determination that the constitutional guarantees of article III, section 2, the fifth and sixth amendments do not automatically apply overseas, the decision as to which provisions should apply under the circumstances becomes a question of judgment, similar to that applied in due process cases. Looking at these circumstances, Justice Harlan concludes that in capital cases, where great procedural fairness is required, it is essential in time of peace that defendants such as these should be protected by article III, the fifth and sixth amendments.

The end result of this case is that article 2(11) of the *Uniform Code*

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[23]Id. at 46.
[24]Id. at 73.

of Military Justice is unconstitutional as applied to civilian defendants, at least in capital cases arising in time of peace. Congress has not repealed or altered this article, so, presumably, dependents accused of crimes less than capital may still be tried by courts-martial. This result is reached, as explained above, because of the limited concurrence of Justices Frankfurter and Harlan to Justice Black's opinion, which goes beyond the actual scope of the controversy presented.[25]

II.

The gravest problem to arise out of this decision is the jurisdictional status of a civilian dependent who has committed a crime while accompanying one of our servicemen overseas. The setting is somewhat changed from that existing when the crimes involved in *Covert* and *Krueger* were committed. At that time the United States had certain international agreements with Great Britain and Japan granting to our military courts *exclusive* jurisdiction over offenses committed in these countries by servicemen or their dependents.[26] Now, the North Atlantic Treaty Organization Status of Forces Agreement is in effect.[27] As between the member nations, this agreement grants to the military authorities of the sending State *primary* jurisdiction in a factual situation similar to the one presented in the *Covert* case.[28] After this case, however, we are left with a curious result. Not only is our primary jurisdiction nullified, but the receiving nation would now have exclusive jur-

[25]Compare Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-48 (1936), with United States v. Sullivan, 332 U.S. 689, 693 (1948).

[26]57 Stat. 1193 (Great Britain); 3 U.S. Treaties & Other Int'l Agreements 3341, T.I.A.S. No. 2492 (Japan).

[27]4 U.S. Treaties & Other Int'l Agreements 1792, T.I.A.S. No. 2846.

[28]4 id. art. VII. "1. Subject to the provisions of this Article, (a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;

(b) the authorities of the receiving State shall have jurisdiction over the members of the force or civilian component and their dependents with respect to offenses committed within the territory of the receiving State and punishable by the law of that State.

". . . .

"3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force of a civilian component in relation to

(i) offenses solely against the property or security of that State, or offenses solely against the person or property of another member of the force or civilian component of that State or of a dependent. . . ."

isdiction over these persons.[29] Since *Covert* can only be cited for its holding in relation to capital cases, presumably the United States still has primary jurisdiction when the crime is less than capital.[30] Since civilian dependents are not subject to military law in capital cases, this treaty does not protect them and they would be triable by the receiving nation under the rules of international law.

As a consequence of the ruling in *Covert,* what may this country do in order to regain at least the jurisdiction the treaty purported to extend? There are three possibilities.[31] In considering these alternatives, the provisions of the treaty between the NATO nations must be borne in mind.

First, the Constitution could be amended. The result desired, that of re-establishing jurisdiction of dependents overseas under the terms of the treaty, could be accomplished by declaring such civilian dependents subject to the laws made for the land and naval forces. This would remove the constitutional objection to article 2(11) of the *Uniform Code of Military Justice.* In considering this alternative it should be remembered, however, that the Constitution is not a prolix code but is rather an instrument setting forth broad principles to guide a nation.[32]

The second alternative which is available would have a very tenuous constitutional basis. Some other grant of power, such as the treaty power,[33] could be utilized to establish military jurisdiction over civilian dependents. A statute similar to article 2(11) of the Uniform Code, which would implement the treaty, might be framed. The only difference between article 2(11) and this proposed statute would be the source of federal power under which it would be enacted. It is doubtful, however, that this would lead to a different result from that

[29]In order for section 3, n. 28 supra, to apply, the sending and receiving States must have concurrent jurisdiction. Subsection 1(a), n. 28 supra, gives the sending State this jurisdiction. To qualify under subsection 1(a) the person over whom jurisdiction is to be exercised must be subject to the military law of the sending State. Covert declares that dependents who commit capital crimes in time of peace are not within article 2(11) of the Code and thus not "subject to the military law of that State" within the meaning of subsection 1(a) supra. This means that subsection 1(b) applies with the effect of granting the receiving State exclusive jurisdiction.

[30]Presumably subsection 1(a), n. 28 supra, still applies when the crime is less than capital.

[31]Justices Black and Frankfurter indicate that there are alternative non-military means by which dependents might be tried: See 354 U.S. at 14 (amend the Constitution), 33 (war power in time of war), 48 (amend NATO Status of Forces Agreement), 64 (consular courts). Justice Clark concludes that there are no practicable non-military means. Id. at 86-90.

[32]Cf. M'Culloch v. Maryland, 4 U.S. (4 Wheat.) 415, 422 (1819).

[33]U.S. Const. art. II, § 2, cl. 2.

reached in *Covert*. For this reason this alternative seems to be of dubious value.[34]

Thirdly, the Status of Forces Agreement could be amended. The quantum of authority which is granted to the sending State in this agreement is granted only to the *military* authorities of that State, not to the sending State as a whole.[35] Any amending treaty would thus require the substitution of sending State authority for sending State military authority. Also, since the terms of the agreement grant authority only over persons subject to the military law of the sending State, all persons contemplated to be subject to the treaty would have to be enumerated.[36] If these prerequisites to United States jurisdiction were attained, legislative courts could be set up to try these persons,[37] or they could be returned to this country and tried by article III courts.[38] Amendment of the Status of Forces Agreement seems to be the only practical solution to the problem caused by the ruling in *Covert*.[39]

The Supreme Court created a result in this case which is out of keeping with the very theme of its decision—safeguarding the rights of American citizens abroad.[40] The legislative history of the Uniform Code indicates that Congress intended to grant as many safeguards to the individual as possible.[41] These provisions are always subject

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[34]354 U.S. 1, 16 (1957). Justice Black states that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of government, which is free from the restraints of the Constitution." The scope of this comment does not permit a discussion of the limitations on the treaty-making power. See, e.g., Tucker, Limitations on the Treaty-Making Power (1915).

[35]See note 28 supra.

[36]Ibid.

[37]For the definition of a legislative court see note 12 supra. To satisfy Justice Black and those Justices who joined in the opinion of the Court, Congress must embody within these legislative courts safeguards stated in article III, § 2, the fifth and sixth amendments.

[38]A statute could authorize the return for trial of civilian dependents. See, e.g., 62 Stat. 826 (1948), 18 U.S.C. § 3238 (1951).

[39]Cf. Snee and Pye, Status of Forces Agreements and Criminal Jurisdiction 42-43 (1957).

[40]Snee and Pye, Status of Forces Agreements and Criminal Jurisdiction 44 (1957). "The Court, therefore, in the Covert and Krueger cases never faced the basic issue. The majority, as well as the concurring justices, failed to see that the fundamental choice was not between a federal civilian court and an American court-martial, but rather between an American court-martial and a foreign court. The high-sounding sentiments expressed in the majority opinion by Mr. Justice Black represent a pyrrhic victory: in denying to the United States the right to try these two overseas dependents by court-martial, the Court has for all practical purposes denied to other overseas dependents the possibility of trial by any American court, even a court-martial!"

[41]Hamilton, Military Law: Drumhead Justice is Dead!, 43 A.B.A.J. 797 (1957).