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# Military Jurisdiction To Try Civilians During Peacetime

Jersey encountered no particular difficulty in holding that the tavern-keeper's negligence could be the proximate cause of the accident and that a jury could find that Nichols' acts did not constitute a superseding cause.

Perhaps the most important underlying consideration in the *Rappaport* decision is public policy. The court said:

> "Liquor licensees, who operate their business by way of privilege rather than as of right, have long been under strict obligation not to serve minors and intoxicated persons and if, as is likely, the result we have reached . . . substantially increases their diligence in honoring that obligation then the public interest will indeed be very well served."[29]

The New Jersey courts have made similar statements in liquor license revocation suits, which admittedly differ in context from the one in question.[30] While these statements may be attacked as dicta, they do indicate the strict policy generally adopted toward the vendor of intoxicating beverages.

Although the decision in *Rappaport* is contrary to the weight of authority and is subject to the criticism of being judicial legislation,[31] it can be explained on the basis of New Jersey's judicial approach to the establishment of negligence, its definition of proximate and superseding cause, and its policy of carefully regulating the vendors of intoxicating liquors.

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## MILITARY JURISDICTION TO TRY CIVILIANS DURING PEACETIME

As a result of four recent Supreme Court decisions, Congress no longer has the constitutional right to subject civilians accompanying the armed forces abroad to military court-martial during peace time.[1] Military jurisdiction over civilians existed during the Revolu-

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[29]156 A.2d 1, 10 (1959).

[30]Essex Holding Corp. v. Hock, 136 N.J.L. 28, 54 A.2d 209 (Sup. Ct. 1947). In re Larsen, 17 N.J. Super. 564, 86 A.2d 430 (App. Div. 1952).

[31]A similar holding in Schcelin v. Goldberg, supra note 11, has been subjected to this same criticism.

[1]Civilians are subject to military jurisdiction during wartime. Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945); Hines v. Mikell, 259 Fed. 28 (4th Cir. 1919); In re Di Bartolo, 50 F. Supp. 929 (S.D.N.Y. 1943); Ex parte Gerlack, 247 Fed. 616 (S.D.N.Y. 1917).

tion,[2] and was first incorporated in the United States Code of 1920.[3] It was redelegated to the armed forces in the 1950 Uniform Code of Military Justice, article 2(11),[4] and by means of treaties and other agreements under which foreign lands agreed to waive jurisdiction over these civilians, the military was able to continue its jurisdiction as the area of operation of our armed forces expanded.[5]

The power of Congress to provide that the military could try accompanying civilians supposedly stemmed from article I, section 8, clause 14 of the Constitution,[6] which provides that Congress shall have the power to make rules for our land and naval forces. This seemingly all-inclusive power of Congress to promulgate regulations was first limited in 1955 by the decision in *United States ex rel. Toth v. Quarles*[7] when it was held unconstitutional to court-martial a discharged veteran for a crime committed during active service. Although a section of the Uniform Code other than article 2(11) was in dispute,[8] the *Toth* case indicated that the Supreme Court did not favorably regard military jurisdiction over American citizens in foreign lands.

The limitation imposed upon military jurisdiction in *Toth* was distinguished in the first hearing of *Reid v. Covert*[9] (hereinafter re-

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[2]"The American Revolutionary Army initially was governed by 'Articles of War' adopted by the Continental Congress on June 30, 1775. Nine of the original 69 Articles provided for the trial by court-martial of persons serving with the army but who were not soldiers.... In 1778, a relevant addition was made. It provided, in pertinent part: 'That every person employed either as Commissary, Quarter Master, forage Master, or any other Civil Department of the Army shall be subject to trial by Court Martial....'" Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 266-67 (1960) (dissenting opinion).

[3]Act of June 4, 1920, ch. 227, ch. II, § 1 Art. 2(d), 41 Stat. 787 (1920).

[4]"The following persons are subject to this chapter:

Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following [territories]...." 10 U.S.C. § 802 Art. 2 (11) (1958).

[5]57 Stat. 1193 (Great Britain); Administrative Agreement, Feb. 28, 1952, [1952] 3 U.S.T. & O.I.A. 3341, T.I.A.S. No. 2492 (Japan).

[6]"The Congress shall have Power ... To make Rules for the Government and Regulation of the land and naval Forces; ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers...." U.S. Const. art. I, § 8.

[7]350 U.S. 11 (1955).

[8]50 U.S.C. 553 (1951), now codified in 10 U.S.C. § 803 (1958). This section deals with the right of the military to return discharged service men to stand court-martial for crimes allegedly committed by them during active service.

[9]351 U.S. 487 (1956). Mr. Justice Black said in Covert II that the holding in this case was based upon In re Ross, 140 U.S. 453, 464 (1891), where the Court stated, "The Constitution can have no operation in another country." The Court also

ferred to as *Covert I*), when the Supreme Court sustained the constitutionality of military jurisdiction over civilian dependents accused of committing capital crimes while abroad. The basis for the decision was that constitutional guarantees, such as jury trial and grand jury indictment, do not extend abroad so as to cover the *Covert* fact situation. *Covert I* sustained the constitutionality of article 2(11) of the UCMJ, but within the year the case was reversed on rehearing.[10] This second case (hereinafter referred to as *Covert II*) held that *civilian dependents* accused of committing *capital crimes* abroad could not be subjected to military court-martial, thereby rendering article 2(11) unconstitutional in this situation.[11] Thus, *Covert II* established that the Necessary and Proper Clause will not expand military jurisdiction to cover these dependents during peace time, because there is a right under the Constitution to trial by jury in established constitutional courts.[12]

Military jurisdiction over civilians was limited by this decision, but the status of dependents accused of noncapital crimes and employees accused of any crime while abroad was not settled until January 18, 1960, when four decisions dealing with these persons were handed down by the Supreme Court. These cases were *Kinsella v. United States ex rel. Singleton*,[13] which held that a dependent abroad could not be court-martialed even though the crime was non-capital; *Grisham v. Hagan*,[14] which held that employees accused of committing capital crimes were not subject to military jurisdiction; and *McElroy v. United States ex rel. Guagliardo*[15] and *Wilson v. Bohlender*,[16]

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relied upon the Insular cases which decided that Congress had the right to make laws for the government of territories, without restrictions imposed upon that body when passing laws for the United States. E.g., Balzac v. People of Porto [sic] Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903).

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

[11]Id. at 19-40. For a detailed discussion of this case, see 15 Wash. & Lee L. Rev. 79 (1958). See also 7 Duke L.J. 155 (1958); 9 Hastings L.J. 85 (1957); 17 Md. L. Rev. 335 (1957).

[12]Courts established under Article III of the United States Constitution are called constitutional courts. They share in the exercise of the judicial power which is defined in that section with no power in Congress to provide otherwise, but those courts created by Congress under Article I are called legislative courts. The functions of these courts are directed to the execution of one or more of such powers and are prescribed by Congress independently of Article III. Ex parte Bakelite Corp., 279 U.S. 438, 449 (1929).

[13]361 U.S. 234 (1960).

[14]361 U.S. 278 (1960).

[15]361 U.S. 281 (1960).

[16]Ibid.

which held that employees accused of non-capital offenses were not under article 2(11) of the Uniform Code.

In *Singleton* a District Court of West Virginia granted habeas corpus to a dependent convicted of a *noncapital offense* on the ground that article 2(11) was unconstitutional, and therefore the military court had no basis of jurisdiction over the petitioner.[17] The court, referring to the decision in *Covert II,* stated that it could "think of no logical distinction, insofar as the constitutional power of Congress is concerned, between its asserted power, denied by the Supreme Court, to subject dependents of members of the armed forces overseas to the jurisdiction of courts-martial for capital offenses, and the like questioned power in cases of non-capital offenses."[18] This decision removed all dependents abroad from military jurisdiction. The government appealed this adverse decision to the Supreme Court but the lower court's decision was affirmed in a seven to two decision. The government argued that military jurisdiction over dependents committing noncapital crimes was a necessary and proper incident of the congressional power to make rules and regulations for the armed services, and should be continued since our government had entered into various international agreements and treaties providing for military jurisdiction over American citizens accompanying the armed forces in foreign countries.[19]

The court rejected these arguments and based its decision upon *Toth* and *Covert II.* In quoting from *Toth,* Mr. Justice Clark, writing for the majority, stated that military tribunals must be restricted "to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among the troops in active service."[20] The majority, relying heavily on *Covert II,* felt that the test was "military status"[21] rather than the offense committed, and that this had been the basis of military jurisdiction throughout history. The Court stated that this theory was reinforced by the "unambiguous language of Article I, section 8, clause 14...."[22] The Necessary and Proper Clause does not create power to circumvent the constitutional safeguards of civilians,[23] even though they live abroad. If the Necessary and Proper Clause does not expand clause 14 to include prosecutions of civilian dependents for

[17]United States ex rel. Singleton v. Kinsella, 164 F. Supp. 707 (S.D. W. Va. 1958).
[18]Id. at 709.
[19]361 U.S. at 238-39.
[20]Id. at 240.
[21]Id. at 241.
[22]Id. at 243
[23]Id. at 248.

*capital crimes,* then it likewise does not expand clause 14 to include military prosecutions of dependents for noncapital offenses.[24]

Having abolished all military jurisdiction over dependents,[25] the Supreme Court turned its attention to the question of the constitutionality of military jurisdiction over *employees* accused of committing capital and noncapital offenses while abroad. In *Grisham v. Hagan,*[26] an army employee convicted of a capital crime by a military court petitioned for a writ of habeas corpus. Petitioner had been convicted prior to the decision in *Covert II,* and it was on the basis of this decision that he sought his release. The District Court denied the writ,[27] and this denial was affirmed by the Court of Appeals for the Third Circuit.[28] In affirming, Judge Goodrich relied upon *Covert II,* and stated that Grisham "was in the position of the person described by Mr. Justice Black .... He had not been formally inducted, he did not wear a uniform, but he was as closely connected with the Army as though he had."[29]

Some writers had predicted this result,[30] but, contrary to their prediction, the Supreme Court reversed, and held that a writ of habeas corpus should be granted to Grisham, since article 2(11) was unconstitutional even as to an *employee* convicted of a capital offense. Mr. Justice Clark, again writing for the majority, stated that the decision in *Covert II* was controlling, for "the death penalty is so irreversible that a dependent charged with a capital crime must have the benefit of a jury. The awesomeness of the death penalty has no less impact when applied to civilian employees."[31] Thus, the Court of Appeals' distinction based on Mr. Justice Black's dictum was not followed. Justices Harlan and Frankfurter concurred, and in so doing re-emphasized the

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[24]Id. at 248.

[25]See 361 U.S. at 249-58. Justices Whittaker and Stewart concurred in the majority opinion. "Inasmuch as six members of the Court have held in Covert that Congress may not constitutionally provide for the court-martial trial and punishment of civilian dependents 'accompanying the armed forces' overseas in peacetime in capital cases, and because I can see no constitutional distinction between Congress' power to provide for the court-martial punishment of capital offenses, on the one hand and non-capital offenses, on the other hand, I conclude that the holding in Covert means that civilian dependents accompanying the armed forces in peacetime are not subject to military power, and that it requires affirmance of . . . the Singleton case." 361 U.S. at 263-64.

[26]361 U.S. 278 (1960).

[27]Grisham v. Taylor, 161 F. Supp. 112 (M.D. Pa. 1958).

[28]261 F.2d 204 (1958).

[29]Id. at 206-07.

[30]Note, 47 Geo. L.J. 411, 415 (1958); Note, 107 U. Pa. L. Rev. 270, 275 (1958); Comment, 15 Wash. & Lee L. Rev. 318, 320 (1958).

[31]361 U.S. at 280.

point made in *Singleton* that the test should be the type of crime committed, and not whether the individual is a dependent or an employee.[32]

On the other hand, Justices Whittaker and Stewart dissented, feeling this was too strict a limitation to place on military jurisdiction. Relying upon Mr. Justice Black's dictum in *Covert II,* they indicated that the power to make rules for the land and naval forces included the power to make rules governing civilian employees accompanying the armed forces.[33]

Since *Grisham* established that military jurisdiction over civilian employees accused of committing capital offenses while abroad was unconstitutional, the only remaining military jurisdiction was over civilian *employees* accused of committing *noncapital* offenses while abroad. In *McElroy v. Guagliardo* and *Wilson v. Bohlender,* the Supreme Court took the final step and granted habeas corpus to civilian employees convicted of noncapital crimes by military courts martial. These decisions were the most difficult for the Court to make, both being five to four.[34]

In *Guagliardo* the Court of Appeals felt itself bound by *Covert II,* and held that the Necessary and Proper Clause did not expand the power of Congress to make rules and regulations for the land and naval forces so as to cover those not formally inducted into the military.[35] The Supreme Court affirmed the lower court's decision. In *Wilson* the petitioner was not successful in the lower court.[36] In grant-

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[32]361 U.S. at 249.

[33]361 U.S. at 259.

[34]Justices Harlan and Frankfurter dissented on the ground that the offenses were noncapital, 361 U.S. at 250. Justices Stewart and Whittaker dissented because they thought civilian employees should be under military jurisdiction. Id. at 264.

[35]The District Court denied the writ of habeas corpus, 158 F. Supp. 171 (D.D.C. 1958); however, this court was reversed by the Court of Appeals which felt that Covert II was controlling, for article 2(11) of the UCMJ could not be separated into different classes, i.e., employees and dependents; thus the writ was granted to Guagliardo. 259 F.2d 927, 933 (1958). The severability basis used by the Court of Appeals as the grounds upon which to grant the writ was summarily reversed by the Supreme Court. The Act provided for the severability of the remaining sections if part of the Act was judged invalid. However, the Court of Appeals was affirmed in its decision. 361 U.S. at 283.

[36]United States ex rel. Wilson v. Bohlender, 167 F. Supp. 791 (D. Colo. 1958). The District Court in denying the writ of habeas corpus, relied upon Mr. Justice Black's dictum in Covert II where it was stated that one could be in the armed forces for the purpose of jurisdiction without wearing a uniform. Wilson, an employee of the Army, fell into this category. 167 F. Supp. at 797. The Supreme Court granted certiorari to Wilson before argument in the Tenth Circuit Court of Appeals was perfected.

ing habeas corpus, the Supreme Court, Mr. Justice Clark writing the opinion, admitted that there was some historical support for military jurisdiction over employees, but stated that these materials were "too episodic, too meager, to form a solid basis in history . . . for constitutional adjudication."[37] Justices Stewart and Whittaker dissented in both *Guagliardo* and *Wilson*. They agreed that dependents should not be under military jurisdiction,[38] but asserted that employees serving abroad were an integral part of the armed forces and should be under military control.[39]

It is now clear that our military forces no longer have court-martial jurisdiction over dependents or employees abroad during peacetime. Although constitutional protection has theoretically been expanded to include these persons, this protection has in reality been limited. Prior to these decisions the American military authorities had obtained the right to exercise primary jurisdiction over these civilians in certain instances through agreements or treaties with the host countries.[40] However, since United States military authorities can no longer constitutionally exercise this jurisdiction, jurisdiction reverts to the host country to try the offender.[41] This is true both under the Status of Forces Agreement and under principles of international law.

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[37]361 U.S. at 284.

[38]Id. at 264.

[39]"There is a marked and clear difference between civilian dependents . . . and civilian persons 'serving with [or] employed by' the armed forces . . . These civilian employees thus perform essential services for the military and, in doing so, are subject to the orders . . . of the same military commands as the 'members' of those forces . . . . They [employees] have the same contact with . . . the military operations as members of those forces and present the same security risks and disciplinary problems. . . . They are so intertwined with those forces . . . as to be . . . an integral part of them. On the other hand, civilian dependents . . . perform no services for the forces, present dissimilar security and disciplinary problems . . . [and] have only a few of the military privileges . . . ." 361 U.S. at 264-65.

[40]The best known of these agreements is the NATO Status of Forces Agreement, July 24, 1953 [1953] 2 U.S.T. & O. I. A. 1792, T.I.A.S. 2846 (effective Aug. 23, 1953).

[41]The NATO Status of Forces Agreement, ibid., provides follows: United States military authorities have exclusive jurisdiction over persons subject to military law for offenses punishable by United States law but not local law.

Local authorities (the foreign country) have exclusive jurisdiction over all persons for offenses punishable by local law but not United States law.

All other offenses ars subject to the concurrent jurisdiction of both parties subject to the following:

> United States military authorities have primary jurisdiction over offenses solely against the property or security of the United States or against the person or property of other United States personnel and offenses arising out of any act or ommission done in the performance of official duty.
>
> In all other cases the local authorities have the primary right to exercise jurisdiction.

Since the American military authorities can no longer court-martial these civilians, should they be turned over to the foreign country for trial?[42] If so, it seems quite ironic. The Supreme Court's denial of court-martial jurisdiction was based upon the absence in court martial procedure of certain protections guaranteed by the United States Constitution; namely, indictment by grand jury and trial by jury. However, these protections are absent from the legal systems of most of the host countries.[43] In support of the proposition that we turn over our civilian dependents and employees to the foreign country for trial, it may be noted that other non-immune government employees abroad are under foreign court jurisdiction and few incidents have been reported which show any fundamental unfairness in the trial procedures given to the American citizen. If the foreign country is allowed to try American civilian offenders, not only may diplomatic relations be improved, but the United States may well avoid the resentment and grave concern caused by the *Girard* case.[44]

If Congress prefers, however, to have our civilians abroad tried in the United States courts, can this result be accomplished in light of these decisions? Some writers advocate returning civilians to the United States for trial. From a practical standpoint, this solution seems quite undesirable. The Judge Advocate of the Navy has stated: "The disruption of duties within a command and the expense involved in shipping even nationals of the United States as witnesses to this country would place a burden on the Navy which would result in only unusually serious cases being tried."[45] Foreign witnesses cannot be compelled to go to the United States and their depositions cannot be used.[46] Also, no district court presently has jurisdiction

[42]The right to try the American civilian would revert to the local authorities by the terms of the above agreement; however, the discretion as to whether the offender will be prosecuted by the foreign country remains with the military authorities. According to the Judge Advocate General of the United States Navy, the present Navy policy is to make a case by case determination whether to turn over civilian offenders to the host country for trial in those cases where the United States has primary jurisdiction under the existing agreement. In addition, many of the lesser offenses are now handled administratively by the Navy. Letter from the Judge Advocate General of the Navy, March 24, 1960.

[43]American Bar Association, 1959 Proceedings, Section of International and Comparative Law, 123.

[44]Wilson v. Girard, 354 U.S. 524 (1957). Harrison, Court-Martial Jurisdiction of Civilians—A glimpse at Some Constitutional Issues, 7 Military Law Review 61, 83 n.180 (Department of the Army Pamphlet No. 27-100-7, January 1960).

[45]Letter from Judge Advocate General of the Navy, March 24, 1960.

[46]Fed. R. Crim. P. 15.

over ordinary offenses committed abroad; and therefore, additional legislation would be required to authorize this procedure.[47]

Another suggested method of providing for our civilians accompanying the armed forces abroad to be tried by Article III courts, is the use of a roving district court which would function like the early English tribunals. Since our forces are stationed in over forty different countries, this solution is not without its difficulties, but it is possible that many of these countries would cede primary jurisdiction to the United States civil courts in those situations in which the American military courts formerly had jurisdiction.

The final solution to the problem of where our civilan offenders abroad will be tried rests with Congress and with the President. In the interest of certainty some action should soon be taken, for these decisions leave too many unsettled problems for our military authorities, as well as for the host countries.

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[47]Civilian courts in the United States do not have jurisdiction over ordinary offenses committed abroad. United States v. Bowman, 260 U.S. 94, 98 (1922). A statute could authorize the return for trial of civilians. See 18 U.S.C. § 3238 (1958).