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Reid V. Covert Distinguished In District Court

Apparently, the factors favoring the intermediate approach were either summarily dismissed or never considered at all.

The danger of applying the majority rule arbitrarily to situations when subrogation is present is that unless the insured and the insurer cooperate, there will be a race to the courthouse, and the loser will be denied his day in court.[8]

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REID v. COVERT DISTINGUISHED IN DISTRICT COURT

In 15 Wash. & Lee L. Rev. 79 (1958), this writer commented on *Reid v. Covert,*[1] in which the Supreme Court declared article 2(11) of the *Uniform Code of Military Justice*[2] to be unconstitutional as applied to civilian dependents accompanying servicemen overseas in time of peace. Recently, in *United States ex rel. Guagliardo v. McElroy,*[3] a lower federal court was called upon to construe the same article of the Uniform Code. This time, however, civilian employees is the group within article 2(11) to be scrutinized.

Dominic Guagliardo, a civilian employee of the Air Force at Nauasseur Air Depot, Morocco, was convicted of larceny by a general court-martial at the Air Depot and confined at hard labor. Issue was joined in the District Court of the District of Columbia before Judge Holtzoff on a petition by Guagliardo for a writ of habeas corpus.

The position of civilian dependents being tried by court-martial, as illustrated by *Reid v. Covert,* is perhaps closer to that of civilian em-

[8]Cf. Levitt v. Simco Sales Service, 135 A.2d 910 (Del. 1957), a case of first impression which recognizes this possibility but rejects it. Significantly, the Delaware court relies on Mills v. DeWees as controlling. Moreover, its reasons for adopting the strict majority rule are fundamentally practical ones—i.e., infrequent injustice, public policy against multiplicity of suits, and crowded dockets. For an analysis of these practical considerations, see Note, 14 Wash. & Lee L. Rev. 114 (1957). It is submitted that the Levitt case dramatically points up the possibility of a race to the court house. There, the insured was sued for damages to the plaintiff's truck. Levitt, the defendant, was defended by his insurance carrier in his name, and a counterclaim was imposed by the insurance carrier for damage to Levitt's automobile. Verdict was for the automobile owner, Levitt, on the complaint and for the truck owner on the counterclaim. As a result, Levitt, ironically, was barred from pursuing an action for personal injuries. Could it not be said he lost the race to the court house?

[1]354 U.S. 1 (1957), reversing 351 U.S. 470 (1956).

[2]64 Stat. 109 (1950), 10 U.S.C. § 802 (Supp. V, 1952).

[3]158 F. Supp. 171 (D. D.C. 1958). [Ed. Note: After this note was written, case was reversed on appeal. 27 U.S.L. Week 2117 (D.C. Cir. Sept. 12, 1958).

ployees, illustrated by the case in comment, than Judge Holtzoff would lead one to believe. This is illustrated graphically as follows:

Operative Facts	*Reid v. Covert*	*Guagliardo v. McElroy*
person	civilian dependent	civilian employee
relation to service[4]	accompanying	employed
offense charged	murder	larceny
place	overseas	overseas
time	peace time	peace time

The principal case recognizes that the holding in *Covert* is limited to capital cases involving civilian dependents accompanying servicemen overseas.[5] The opinion in *Guagliardo* could have been limited to courts-martial of civilian employees for crimes less than capital but instead stated unqualifiedly that civilian employees may be tried by courts-martial. This is dictum. The holding of the case is necessarily limited to the facts presented, and since the crime involved is less than capital, the case can be cited for this only.

It is felt that Justice Frankfurter would concur in the result reached in the principal case although only to the extent that it involved a non-capital case.[6] Justice Harlan would certainly go at least this far.[7] As for Justice Black, on the other hand, it is doubtful whether he would consent to any such extension of military authority over civilians. Justice Black does not distinguish between capital and non-capital crimes, nor between times of peace and war, but boldly states that "military trial of civilians is inconsistent with both the 'letter and spirit of the constitution.' "[8] He does state in the *Convert* opinion that "We

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[4]Uniform Code of Military Justice, 64 Stat. 109 (1950), 10 U.S.C. § 802 (Supp. V., 1952):

"The following persons are subject to this chapter:

"....

"(11) 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...."

[5]Judge Holtzoff states that "the only point on which a majority of the Justices concurred is that in a capital case a civilian dependent of a member of the armed forces may not be tried by court martial. Six Justices joined in that view." 158 F. Supp. at 175 (D. D.C. 1957). Technecially, the further limitation in time of peace must be included in the holding of the majority of Justices. See Note, 15 Wash. & Lee L. Rev. 79 (1958).

[6]Justice Frankfurter adheres to the rule "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." 354 U.S. at 45 (concurring opinion).

[7]Justice Harlan states that in regard to requiring a full article III trial for dependents "at least for the run-of-the-mill offenses... such a requirement would be ...impractical...." Id. at 75 (concurring opinion).

[8]Id. at 22.

recognize that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even thoguh he had not formally been inducted into the military or did not wear a uniform."[9] This passage was quoted by Judge Holtzoff and cited for the proposition that members of the Supreme Court recognize a distinction between dependents of servicemen and civilian employees of the armed forces.[10] This seems to be a very dubious citation.

The significance of the above-quoted statement in the thinking of Justice Back on the subject of courts-martial of civilians is not clear. It is believed, however, that a person must be much more closely related to the military than just being a civilian employee for Justice Black to say he had lost his civilian status and his right to a civilian trial.[11] The "might" in Justice Black's quotation, it is submitted, was intended to be a large one.

Even though the decision in the principal case might not find favor with Justice Black, it is believed that the case is correctly decided and, in view of the reasoning of the concurring Justices in *Covert,* would be affirmed by a majority of the Justices of the Supreme Court should that Court review it. Civilian employees seem clearly to be "close enough"[12] to the land and naval forces, even in the light of the safeguards of the Bill of Rights so that their regulation is reasonably necessary and proper to the effective government and regulation of the armed forces.

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[9]Ibid.

[10]158 F. Supp. at 175.

[11]From the language used by Justice Black in the Covert case, it can be seen that there is contemplated by this Justice a great dividing line between military personnel and civilians. The following are illustrations: "But if the language of Clause 14 is given its natural meaning, the power granted does not extend to civilians...." 354 U.S. at 19; "But the Necessary and Proper Clause cannot operate to extend military jurisdiction to any group of persons beyond that class described in Clause 14...." Id. at 20; "We have no difficulty in saying that such persons [dependents] do not lose their civilian status and their right to a civilian trial because the Government helps them live as members of a soldier's family." Id. at 23.

[12]See Note, 15 Wash. & Lee L. Rev. 79 (1958), where the resolution of this "close enough" test is described as the crux of the split in the court.