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Article 17

Constitutional Law--Courts-Martial--Trial of Civilian Employee of the Military Overseas by Court-Martial Held Unconstitutional (United States ex rel. Guagliardo v. McElroy, 259 F.2d 927 (D.C. Cir. 1958))

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that the Court has too lightly given approval to the use of that drastic measure here.[40]

In the light of *International Boxing Club,* it may be appropriate that the words of Judge Wyzanski be reiterated:

> In the anti-trust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law. . . . They would not have been given, or allowed to keep, such authority in the anti-trust field . . . if courts were in the habit of proceeding with the surgical ruthlessness that might commend itself to those seeking absolute assurance that there will be workable competition. . . .[41]

CONSTITUTIONAL LAW—COURTS-MARTIAL—TRIAL OF CIVILIAN EMPLOYEE OF THE MILITARY OVERSEAS BY COURT-MARTIAL HELD UNCONSTITUTIONAL. — Defendant, a civilian employee of the Air Force, was convicted of larceny by a military court-martial in Morocco. In granting the defendant's petition for habeas corpus the Court of Appeals for the District of Columbia Circuit *held* that article 2(11) of the Uniform Code of Military Justice[1] could not constitutionally bring civilian employees of the Armed Forces, stationed overseas during peacetime, under military jurisdiction. *United States ex rel. Guagliardo v. McElroy,* 259 F.2d 927 (D.C. Cir. 1958), *cert. granted,* 359 U. S. 904 (1959).

Article 2(11) provides for military jurisdiction over "all persons serving with, employed by, or accompanying the armed forces [overseas]. . . ."[2] The constitutionality of article 2(11) was passed upon by the Supreme Court in *Reid v. Covert.*[3] In that case the Court did not deny the exercise of military jurisdiction over accompanying civilians during time of war,[4] but held article 2(11) unconstitutional insofar as it applied to civilian dependents (by implication "persons accompanying") in capital cases during peacetime. The invalidation followed from the Court's holding that the civilian dependent was entitled to a jury trial as a matter of constitutional

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[40] International Boxing Club v. United States, *supra* note 36, at 265.

[41] United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954).

[1] 10 U.S.C. § 802(11) (Supp. V, 1958).

[2] *Ibid.*

[3] 354 U.S. 1 (1957), *reversing on rehearing* 351 U.S. 487 (1956), and Kinsella v. Krueger, 351 U.S. 470 (1956).

[4] Reid v. Covert, 354 U.S. 1, 33 (1957) (as exercise of governmental "War Powers"); *accord,* Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945), *cert. dismissed as moot,* 328 U.S. 822 (1946); Hines v. Mikell, 259 Fed. 28 (4th Cir.), *cert. denied,* 250 U.S. 645 (1919).

right.[5] The Court in the present case found that the ". . . considerations, set forth . . . in the opinions . . . in [*Covert*] . . ." [6] justified an extension [7] of that holding to strike down article 2(11) as it denied a jury trial to the defendant, an employee, in a non-capital case.

Mr. Justice Black, speaking for the Court [8] in *Covert*, rejected the idea that the United States Government could commit acts affecting its citizens abroad during peacetime, free from any of the constitutional limitations imposed on such acts when done in the United States.[9] Hence the jury trial provisions of the Constitution are applicable to citizens everywhere, except members of the Armed Forces, who are expressly excluded from such jury protections.[10] The Court refused to construe the "necessary and proper" clause in connection with the power given Congress to legislate for the government of the military,[11] so as to extend the class excepted from jury trial protection.[12]

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[5] See U.S. CONST. art. III, § 2(3): "The trial of all Crimes . . . shall be by Jury. . . ." The fifth and sixth amendments provide for grand and petit jury protections. These protections are not provided in courts-martial.

[6] United States *ex rel.* Guagliardo v. McElroy, 259 F.2d 927, 930 (D.C. Cir. 1958).

[7] The Court *did* extend the *Covert* holding despite its statement concerning its avoidance of a constitutional question. *Id.* at 932. The dissent reaches the same conclusion. *Id.* at 936, 940.

[8] There was no majority opinion. The Chief Justice and Justices Douglas and Brennan joined in Mr. Justice Black's opinion. Justices Harlan and Frankfurter concurred in the result in separate opinions. Mr. Justice Clark wrote a dissenting opinion in which Mr. Justice Burton joined. Mr. Justice Whittaker did not participate.

[9] Reid v. Covert, 354 U.S. 1, 6 (1957).

[10] 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. . . .*" (Emphasis added.) This exception is held to apply also to the requirement of jury trial in the sixth amendment ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. CONST. amend. VI). *Ex parte* Milligan, 71 U.S. (4 Wall.) 1, 138-39 (1866); *Ex parte* Quirin, 317 U.S. 1, 40 (1942) (dictum). See also Reid v. Covert, *supra* note 9, wherein Mr. Justice Black said that "there might be circumstances where a person could be 'in' the armed services for the purposes of [congressional power to make rules for the government and regulation of the land and naval forces] . . . even though he had not formally been inducted into the military or did not wear a uniform." *Id.* at 23 (dictum). It is felt that the circumstances described by Mr. Justice Black are quite limited. See Note, 71 HARV. L. REV. 712 (1957). *But see* Grisham v. Taylor, 261 F.2d 204 (3d Cir. 1958), where an Army employee was held to be "in" the military, within the meaning of the term as described by Mr. Justice Black.

[11] U.S. CONST. art. I, § 8, cl. 14 empowers Congress "To make Rules for the Government and Regulation of the land and naval Forces."

[12] "Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14." Reid v. Covert, *supra* note 9, at 21.

The *In re Ross* decision,[13] upon which the Court relied heavily in its first hearing of the *Covert* case, applied the concept of inapplicability of the Constitution outside the United States to sustain the jurisdiction of a consular court [14] over a seaman on an American merchant vessel. This thinking was rejected on the rehearing of *Covert* as ". . . a relic from a different era. . . ." [15] The Insular Cases [16] dealt with the applicability of constitutional provisions to "unincorporated" territories. They held that, although the Constitution was in force wherever the sovereign power of the United States was exercised, Congress could enact legislation, pursuant to its power to govern territory,[17] without certain constitutional limitations that the Court did not consider applicable.[18]

The Insular Cases were distinguished from the *Covert* case by Mr. Justice Black on the basis of the congressional power involved,[19] but in addition were also referred to as ". . . cases [whose] . . . reasoning should [not] be given . . . further expansion." [20] The departure of Mr. Justice Black from the theory of the Insular Cases may be highlighted by a comparison of his application of all constitutional provisions to citizens everywhere, with the view expressed by Chief Justice Taft in *Balzac v. Porto Rico*:

> The citizen of the United States living in Porto Rico can not there enjoy a right of trial by jury under the Federal Constitution, any more than the Porto Rican. It is *locality* that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it.[21]

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[13] 140 U.S. 453 (1891).

[14] These were legislative courts established to try American citizens in "non-Christian" countries. The last consular court was recently abolished by Congress. 70 Stat. 773 (1956).

[15] Reid v. Covert, 354 U.S. 1, 12 (1957).

[16] *E.g.*, Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Downes v. Bidwell, 182 U.S. 244 (1901).

[17] U.S. CONST. art. IV, § 3, cl. 2: "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States. . . ."

[18] Balzac v. Porto Rico, 258 U.S. 298, 312 (1922); Dorr v. United States, 195 U.S. 138 (1904). "[T]he power to govern territory . . . given to Congress in the Constitution . . . does not require that body to enact for ceded territory, not made a part of the United States by Congressional action . . . laws . . . [for] . . . trial by jury. . . ." *Id.* at 149.

[19] "The 'Insular Cases' can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern temporarily territories . . . whereas here the basis for governmental power is American citizenship." Reid v. Covert, *supra* note 15, at 14. The distinction can be criticized on the ground that in both situations Americans were subjected to trial without jury, in tribunals created pursuant to legislation enacted to achieve an enumerated power.

[20] Reid v. Covert, 354 U.S. 1, 14 (1957).

[21] 258 U.S. 298, 309 (1922). (Emphasis added.)

The concurring opinions of Justices Harlan and Frankfurter in the *Covert* case did not deal so harshly with the authority of the Insular Cases [22] on the extraterritorial applicability of constitutional provisions. They view the cases as upholding the proposition that all provisions of the Constitution are not everywhere and under all circumstances applicable.[23] The question of subjecting certain civilians to military law was seen as one of discretion, balancing the rights of individuals against the power given Congress by the Constitution to enact legislation necessary and proper for the effective government of the Armed Forces.[24]

Since the two conflicting rationales in *Covert* found themselves in agreement on the narrow ground of the facts before them, it can be seen that the fundamental basis for determining the constitutionality of article 2(11) was not decided.

The Court in the principal case, having been moved by the above considerations, invalidated article 2(11) as it conferred military jurisdiction over the class, "persons employed by." Yet it recognized the limitations placed upon the *Covert* holding by the narrow concurrence of Justices Harlan and Frankfurter, and refused to declare that no civilian could be court-martialed.[25] The Court felt it could not lay down a standard that would be both constitutionally [26] and legislatively [27] acceptable to sever [28] the valid portion, if any, of "persons employed by," from the invalid, and therefore struck down the classification in its entirety.

This case is distinguishable from *Covert* both in the relation of the defendant to the military and the nature of the offense involved.[29] These differences, together with the practicability of alternative

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[22] See note 16 *supra*.

[23] Reid v. Covert, *supra* note 20, at 54 (Frankfurter, J., concurring), 75 (Harlan, J., concurring).

[24] *Id.* at 44 (Frankfurter, J., concurring): "The issue in these cases involves regard for considerations not dissimilar to those involved in a determination under the Due Process Clause." See also *id.* at 77 (Harlan, J., concurring).

[25] "This is not to say that legislation bringing some civilian employees within court-martial jurisdiction for some offenses would *necessarily* be unconstitutional." United States *ex rel.* Guagliardo v. McElroy, 259 F.2d 927, 930 (D.C. Cir. 1958). (Emphasis added.)

[26] *Id.* at 932. "Four members of the Supreme Court in Reid v. Covert have said in effect that [civilians] . . . are not subject to [court-martial] . . . jurisdiction; and a majority of the court has not indicated that they are." *Ibid.*

[27] *Id.* at 932. "We do not know how to subdivide this provision as Congress might have done if Congress had known it could not be upheld as written." *Ibid.*

[28] The statute under consideration contains a severability clause. "If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications." 70A Stat. 640 (1956), 10 U.S.C. 293 (Supp. V, 1958).

[29] See United States *ex rel.* Guagliardo v. McElroy, *supra* note 25, at 934 (dissenting opinion).

methods of exercising jurisdiction over those now covered by article 2(11), are the considerations which the concurring opinions of Justices Frankfurter and Harlan in *Covert* would hold to be determinative of the court-martial question.[30] It is therefore felt that the facts in the present case provide the strongest ground upon which those Justices who hold the flexible view could take a position favorable to article 2(11). In order for such a position to be taken, article 2(11) would have to be found severable and valid as to those properly subject to court-martial jurisdiction.

Other federal cases[31] decided since the principal case have avoided the severability dilemma in which the present Court found itself by refusing to extend the *Covert* case beyond its holding of the invalidity of article 2(11) as applied to a dependent[32] (a "person accompanying"). Those courts then simply upheld military jurisdiction over the whole of "persons employed by" while discarding "persons accompanying." [33]

Regardless of which view prevails in the Supreme Court, the advantages of a determination on the constitutional merits, with a resultant clarification of the exact nature of the constitutional guarantees afforded Americans overseas, are obvious. Either a workable retention of military jurisdiction under article 2(11) will result, or remedial legislation with a definitive judicial guide as to the bounds of congressional power in the area can be attempted.

CONSTITUTIONAL LAW — WIRETAPPING — USE OF ELECTRONIC EAVESDROPPING DEVICE HELD NOT A VIOLATION OF FOURTH AMENDMENT OR SECTION 605 OF THE FEDERAL COMMUNICATIONS ACT.—

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[30] Reid v. Covert, 354 U.S. 1, 44-49 (Frankfurter, J., concurring), 75-77 (Harlan, J., concurring).

[31] Grisham v. Taylor, 261 F.2d 204 (3d Cir. 1958); *In re* Yokoyama, 170 F. Supp. 467 (S.D. Cal. 1959).

[32] Grisham v. Taylor, *supra* note 31, at 205. "Granted that authority compels the conclusion that a wife accompanying her husband abroad is not to be tried by court-martial, it does not follow that persons 'serving with' or 'employed by' the armed forces may not be so tried." *Ibid.* *Accord, In re* Yokoyama, *supra* note 31, at 471, 476. *But cf.* United States *ex rel.* Singleton v. Kinsella, 164 F. Supp. 707 (S.D.W. Va. 1958), where a *dependent* convicted of a *non-capital* offense was held not to be subject to trial by court-martial. In this case probable jurisdiction was noted. 3 L. Ed. 2d 569 (1959). The case was transferred to the summary calendar and set for argument immediately following the principal case. 27 U.S.L. WEEK 3236 (U.S. Feb. 24, 1959) (No. 571).

[33] Grisham v. Taylor, *supra* note 31, at 205; *In re* Yokoyama, *supra* note 31, at 476.