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bined with a notable lack of a definite conclusion, could lead to an interpretation that the case holds delivery removes an oral assignment from the operation of the statute. Such a proposition, however, would contravene the letter and purpose of the law,[26] and ignore the factual foundation for the instant decision. The Court was fully cognizant of the statutory intendment,[27] and to infer a holding which manifestly defeats this purpose would do a grave injustice to a court of the highest reputation.

The principal decision accomplishes substantial justice, but it does expose the statute to the danger of serious inroads. The case should be strictly limited and freely distinguished, in the absence of clear and convincing evidence of fraud, lest the statute be repealed by judicial fiat.

NATO STATUS OF FORCES AGREEMENT—SECRETARY OF STATE NOT BOUND TO EFFECT RELEASE OF FOREIGN-JAILED AMERICAN SOLDIER.—Relator petitioned for release of her soldier-husband from a French jail, alleging violation of his constitutional right against self-incrimination. Pursuant to treaty,[1] the American soldier had been sentenced by a French court upon a plea of guilty to a robbery charge. The Court of Appeals *held* that under the treaty the Secretary of State had no duty to negotiate for his freedom. *United States ex rel. Keefe v. Dulles,* 222 F.2d 390 (D.C. Cir. 1954), *cert. denied,* 75 Sup. Ct. 440 (1955).

Every citizen who enters the military is deprived of some constitutional protections previously enjoyed. Indictment by grand jury is a right expressly withheld from members of the armed forces by the Constitution.[2] Historically, other rights, such as trial by jury in military tribunals, have been judicially denied.[3] This is partially ex-

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[26] See Brief for the New York State Ass'n of Life Underwriters as Amicus Curiae, pp. 5, 6, 15, Katzman v. Ætna Life Ins. Co., 309 N.Y. 197, 128 N.E.2d 307 (1955); Superintendent of Insurance's Memorandum to Governor concerning Assembly Int. No. 473, Prt. 486, p. 1 (1943).

[27] See Brief for the New York State Ass'n of Life Underwriters, *supra* note 26.

[1] The treaty entitled "Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces" is found in 99 CONG. REC. 9024-29 (daily ed. July 14, 1953). This agreement, which regulates duties and immunities of troops of one member country stationed within another, is hereinafter referred to as "SOFA" in the interest of brevity.

[2] U.S. CONST. amend. V.

[3] *Ex parte* Quirin, 317 U.S. 1, 40 (1942) (dictum); United States *ex rel.* Innes v. Crystal, 131 F.2d 576, 577 n.2 (2d Cir. 1943) (dictum); see Note, 17 ST. JOHN'S L. REV. 29 (1942).

plained by the fact that the military law of the land antedated the Constitution.[4] The reality of the distinction between military and civilian rights was demonstrated in the recent case of *United States ex rel. Toth v. Quarles*.[5] There, the Supreme Court declared unconstitutional Article 3(a) of the Uniform Code of Military Justice which subjected civilians, who had been honorably discharged from the service, to trial by court-martial. The decision was based primarily upon the disparity of constitutional protections. ". . . [M]ilitary tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." [6] The question arises as to whether the "due process" clause of the fifth amendment is applicable to members of the armed forces. As outlined in *United States v. Clay*,[7] soldiers have certain safeguards, among them the right to be informed of charges, confrontation by adverse witnesses,[8] cross-examination, presumption of innocence and protection against self-incrimination.[9] The court stated that, in determining the scope of these protections, civilian cases in the federal courts should be consulted as guideposts.[10] Recent opinions, alluding to a serviceman's fundamental constitutional rights, reveal further attempts to equate military with civilian due process.[11] However, the Supreme Court stated nearly a century ago that ". . . the power of Congress, in the government of the [armed forces] . . . is not at all affected by the fifth or any other amendment," [12] and in a later case indicated that "military law *is* due process." [13] It was recognized in the *Clay* case that the court "need not concern [itself with] . . . constitutional concepts." [14] Thus, the rights which exist under the concept of military due process are basically statutory [15] whereas those

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[4] See Re, *The Uniform Code Of Military Justice*, 25 ST. JOHN'S L. REV. 155, 159 (1951).

[5] 24 U.S.L. WEEK 4005 (U.S. Nov. 7, 1955).

[6] *Id.* at 4007.

[7] 1 C.M.R. 74 (1951).

[8] These rights are also guaranteed by Section 9 of Article VII of SOFA.

[9] See United States v. Clay, *supra* note 7 at 77-78. Additional safeguards afforded by the Uniform Code of Military Justice, and not specifically provided for in SOFA, include appeal rights (U.C.M.J. Arts. 66-69) and the prohibition against cruel and unusual punishment (U.C.M.J. Art. 55).

[10] See United States v. Clay, *supra* note 7 at 78.

[11] See, *e.g.*, Burns v. Wilson, 346 U.S. 137 (1953); United States v. Ferguson, 5 U.S.C.M.A. 68, 87, 17 C.M.R. 68, 87 (1954) (concurring opinion); United States v. Deain, 5 U.S.C.M.A. 44, 17 C.M.R. 44 (1954); United States v. Kunak, 5 U.S.C.M.A. 346, 373, 17 C.M.R. 346, 373 (1954) (dissenting opinion).

[12] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 138 (1866) (concurring opinion).

[13] Reaves v. Ainsworth, 219 U.S. 296, 304 (1911) (emphasis added).

[14] United States v. Clay, 1 C.M.R. 74, 79 (1951).

[15] See McNiece & Thornton, *Military Law From Pearl Harbor To Korea*, 22 FORDHAM L. REV. 155, 166-68 (1953); Thornton, *Military Law*, 28 N.Y.U.L. REV. 128, 143 (1953).

afforded persons not subject to military law have a constitutional foundation.

The status of a serviceman's constitutional rights is further complicated by the fact that American soldiers are currently stationed in foreign lands. The general question of the efficacy of constitutional protections outside the geographical limits of the United States is not new. Shortly after the Spanish-American War, the Supreme Court ruled that fundamental due process guarantees were not applicable to crimes against laws of another country.[16] Thereafter, in *Dorr v. United States,*[17] the applicability of trial by jury was denied, but the Court indicated that some rights fundamental to the spirit of the Constitution would be effective beyond the continental United States. Recently, the United States Court of Claims held that the fifth amendment prohibition against confiscation of private property[18] protects a United States citizen whose property had been taken in Austria by American occupation forces.[19] In so concluding, the court rejected the government's contention that executive agreements between nations could supersede the constitutional rights of an American citizen.[20]

In international law the jurisdiction of a sovereign nation within its boundaries is exclusive and no exemptions exist except by consent.[21] It has been vigorously contended that, even in the absence of agreement, a waiver of sovereignty is presumed in favor of foreign forces and that the latter may exercise exclusive criminal jurisdiction over their personnel.[22] Most modern authorities, however, hold that there is no immunity in the absence of express compacts,[23] particularly in respect to off-duty crimes.[24]

The Status of Forces Agreement, which is in effect in NATO countries, is unprecedented in that it deals with criminal jurisdiction over foreign troops stationed locally during *peacetime.*[25] This treaty confers primary jurisdiction upon member nations to punish crimes committed within their boundaries by off-duty foreign soldiers.[26]

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[16] See Neely v. Henkel, 180 U.S. 109 (1901).

[17] 195 U.S. 138 (1904).

[18] ". . . [P]rivate property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

[19] Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955).

[20] *Ibid.*

[21] Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812) (dictum).

[22] See 1 WHARTON, INTERNATIONAL LAW DIGEST § 17a (2d ed. 1887); King, *Jurisdiction Over Friendly Foreign Armed Forces,* 36 AM. J. INT'L L. 539, 559 (1942).

[23] See Barton, *Foreign Armed Forces: Immunity From Criminal Jurisdiction,* 27 BRIT. Y.B. INT'L L. 186, 234 (1950); Re, *The NATO Status of Forces Agreement and International Law,* 50 NW. U.L. REV. 349, 392 (1955).

[24] See LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW § 107 (7th ed. 1923); 1 OPPENHEIM, INTERNATIONAL LAW § 445 (7th ed. Lauterpacht 1948).

[25] Re, *supra* note 23, at 351.

[26] See 99 CONG. REC. 9025 (daily ed. July 14, 1953).

However, minimal procedural safeguards must be accorded the accused.[27] The additional protections provided by the Senate through its reservation to ratification of the treaty require the military to request the "receiving state" to waive jurisdiction if the accused's constitutional rights are threatened.[28] Should such petition be denied, the State Department must be requested to press for the accused's release.[29] It was further provided that a governmental representative attend the trial to report treaty procedural violations.[30] In the instant case, there was no indication of governmental compliance with this latter requisite.[31] Relief was denied on the basis of a military representative's report that there were no constitutional irregularities,[32] and upon the Court's determination that the Secretary of State had no mandatory duty to negotiate.

The instant case is perhaps most noteworthy for this statement of judicial deference to the executive:

> . . . [T]he commencement of diplomatic negotiations . . . is completely in the discretion of the President and the head of the Department of State, who is his political agent. The Executive is not subject to judicial control or direction in such matters.[33]

While it is apparently true that the executive is the sole instrument of foreign relations,[34] it must be noted that judicial abstention from review has narrowed in scope.[35] For example, the granting of pass-

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[27] *Id.* at 9026.

[28] *Id.* at 9080-81 (Sections 2 and 3).

[29] *Id.* at 9080-81 (Section 3).

[30] *Id.* at 9081 (Section 4).

[31] The record reveals only that a representative of the Staff Judge Advocate attended the trial to report on *constitutional* safeguards, whereas Section 4 of the reservation requires a representative chosen by the Chief of the Diplomatic Mission to report any non-compliance with *treaty* provisions. The possibility of future conflict may be noted in that this section requires that a representative "will attend the trial of any such person," while Section 9(g) of Article VII of SOFA determines that the accused is entitled to have a representative present "when the rules of the court permit."

[32] See Department of the Army letter to relator, December 1, 1953, as reported in United States *ex rel.* Keefe v. Dulles, 222 F.2d 390, 393 (D.C. Cir. 1954), *cert. denied,* 75 Sup. Ct. 440 (1955).

[33] United States *ex rel.* Keefe v. Dulles, *supra* note 32 at 394.

[34] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (dictum). *Contra,* LÉVITT, THE PRESIDENT AND THE INTERNATIONAL AFFAIRS OF THE UNITED STATES 43 (1954). "This assumption is utterly erroneous. The powers to deal with international affairs are *not* completely given to the President *alone.*" *Ibid.* (emphasis added).

[35] See, *e.g.,* Artukovic v. Boyle, 107 F. Supp. 11 (S.D. Cal. 1952), *rev'd sub nom.* Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir.), *cert. denied,* 348 U.S. 818 (1954), 101 U. PA. L. REV. 688 (1953). In that case the district court held that termination of a treaty was a judicial question and found that a treaty was no longer in existence, in spite of the fact that the State Department regarded the treaty as of continuing effect. The reversal was based on a finding that the *facts* did not warrant such a determination, and the appellate *court* satisfied itself that the treaty was presently valid. *But see* Re, *Judicial*

ports, previously regarded as not subject to review by the judiciary, was recently critically examined [36] and the issuance to a specific individual effectively controlled.[37] The Constitution provides that "[t]he judicial Power shall extend to all Cases . . . arising under . . . Treaties . . . ." [38] Since this organic authority apparently allows review of all aspects of agreements such as SOFA,[39] the Court could have ignored the doctrine of judicial deference, if the facts of the case warranted relief. "Should the weakest branch of government on its own initiative weaken itself still further at the expense of the clear rights of citizens under the Constitution?" [40]

The instant case gives currency to demands that the Senate reevaluate the effect of its reservation [41] and possibly adopt a procedure providing for all servicemen to be returned to American military custody for disciplinary action.[42] Whatever doubts may exist as to the rights of soldiers under principles of international law and the Constitution, it was clearly the legislative intent [43] that an American soldier abroad be constitutionally protected to the same degree as he would be in the United States.[44] If the doctrine of judicial deference is applied, any protections are, in substance, illusory. "Nothing is so dangerous in a democracy as a safeguard which appears to be adequate but which is really a facade." [45]

Developments in Sovereign Immunity and Foreign Confiscations, 1 N.Y. LAW FORUM 160, 181-85, 205 (1955).

[36] See Shachtmen v. Dulles, 23 U.S.L. WEEK 2665 (D.C. Cir. June 23, 1955).

[37] See Dulles v. Nathan, 225 F.2d 29 (D.C. Cir. 1955).

[38] U.S. CONST. art. III, § 2, cl. 1.

[39] ". . . [T]he power to determine whether a [treaty] . . . exists, i.e., whether or not it is constitutional, and to interpret it, is a judicial power and rests solely in the courts with all the safeguards of review and does not lodge in the *ipsi dixit* [*sic*] of the Executive. . . ." Artukovic v. Boyle, *supra* note 35 at 22.

[40] VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 139 (1953).

[41] It is probable that the implications of United States v. Sinigar, 6 U.S.C.M.A. 330, 20 C.M.R. 46 (1955), will give impetus to any inquiry; for that decision demonstrated that a soldier, summarily jailed for contempt by a receiving state under the agreement, can be court-martialed upon return to military jurisdiction for the *same* illegal act.

[42] See 12 N.Y. COUNTY BAR BULL. 39 (1954).

[43] "If . . . there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States, the commanding officer shall request the authorities of the receiving state to waive jurisdiction. . . ." 99 CONG. REC. 9080 (daily ed. July 14, 1953).

[44] Although a locally stationed soldier's rights are not constitutionally based, the Uniform Code of Military Justice provides a framework to effect substantial justice. See McNiece, *Freedom and the Law,* in CONCEPT OF FREEDOM 172, 204 (Grindel ed. 1955); Re, *Uniform Code Of Military Justice,* 25 ST. JOHN'S L. REV. 155, 187 (1951).

[45] Wilkinson, Member of Parliament, as quoted in VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 85 (1953).