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Military Law--Courts-Martial--Jurisdiction to Try Discharged Servicemen (Talbott v. Toth, No. 11964, D.C. Cir., March 25, 1954)

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cause of the unjust conviction? Natural justice rebels at such a thought. Nevertheless, such a result would follow if coram nobis were unavailable as only a presidential pardon, an avenue discretionary if not doubtful, could erase the felonious brand.

Certain undesirable consequences are foreseeable as a result of the instant decision. Litigation often will not come to an end once and for all as it should. Many unfounded or fabricated petitions will undoubtedly find their way into the courts and serve to hamper the administration of justice. Notwithstanding these consequences, fundamental rights must be assured in criminal proceedings. One of these, the Sixth Amendment, is not a procedural formality and ". . . stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' " [50]

MILITARY LAW—COURTS-MARTIAL—JURISDICTION TO TRY DISCHARGED SERVICEMEN. — United States military authorities arrested the accused, an honorably discharged veteran, for the murder of a Korean national allegedly committed while the accused was in service. He was immediately flown to Korea, where the crime took place, to stand trial in a military court pursuant to Article 3(a) of the Uniform Code of Military Justice. The District Court for the District of Columbia, on petition, granted a writ of habeas corpus [1] and ordered his release.[2] Reversing this order, the Court of Appeals *held* that Article 3(a) is a valid exercise of the congressional power to enact rules regulating the armed services, and, further, that the due process clause does not require a hearing before the removal of the accused to the place of trial. *Talbott v. Toth,* No. 11964, D.C. Cir., March 25, 1954.

Originally, the United States Army,[3] Navy,[4] and Coast Guard [5] had separate systems of courts-martial. Under these systems, the military courts could not try a civilian not connected with the military, except during periods when martial law had been imposed upon a specific area.[6] Moreover, the courts' jurisdiction over a member of

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[50] *See* Allen v. United States, 102 F. Supp. 866, 868 (N.D. Ill. 1952).

[1] Toth v. Talbott, 113 F. Supp. 330 (D.D.C. 1953).

[2] Toth v. Talbott, 114 F. Supp. 468 (D.D.C. 1953).

[3] 41 STAT. 787 (1920), 10 U.S.C. § 1471 *et seq.* (1946) (Articles of War—also applicable, in amended form, to Air Force).

[4] 12 STAT. 600 (1862), 34 U.S.C. § 1200 (1946) (Articles for the Government of the Navy).

[5] 34 STAT. 200 (1906), as amended, 14 U.S.C. § 141 *et seq.* (1946) (Disciplinary Law of the Coast Guard).

[6] See *Ex parte* Milligan, 4 Wall. 2 (U.S. 1866).

the armed forces ceased with his honorable discharge.[7] Even re-entry of the individual into military service did not remove this immunity.[8] However, if a discharge were obtained by fraud,[9] or if the crime charged were defrauding the Government,[10] the military courts could entertain jurisdiction to prosecute these frauds.

In 1950, Congress enacted the Uniform Code of Military Justice,[11] which not only unified and codified the penal systems of the various services but also included some notable additions.[12] One of these, Article 3(a), extends the power of military courts to try a veteran for a crime committed while he was in service. Under this article, a veteran is subject to military prosecution provided: (1) the offense was committed while he was subject to the Code; (2) the federal, state or territorial courts do not have jurisdiction of the offense; (3) the offense is punishable by a sentence of at least five years;[13] and (4) the action is brought within the applicable period of limitations.[14]

The instant case decided that under Article 3(a) an accused ex-serviceman can be removed to the place where the offense was committed, without any preliminary hearing. The Court, rejecting the defendant's contention that such procedure violated due process, noted that although such a safeguard is sometimes provided for by statute,[15] it is not always required by the Constitution.[16] A further constitutional question raised was whether an accused was entitled to indictment by a grand jury before he could be tried.[17] However, the exception under the Fifth Amendment relating to "cases arising in the land or naval forces" was deemed applicable here. Following prior decisions,[18] the Court concluded that a "case arises" when the

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[7] See Mosher v. Hunter, 143 F.2d 745, 746 (10th Cir. 1944), *cert. denied*, 323 U.S. 800 (1945); *Ex parte* Drainer, 65 F. Supp. 410 (N.D. Cal. 1946), *aff'd mem. sub nom.* Gould v. Drainer, 158 F.2d 981 (9th Cir. 1947); United States *ex rel.* Viscordi v. MacDonald, 265 Fed. 695 (E.D.N.Y. 1920); United States *ex rel.* Santantonio v. Warden, 265 Fed. 787 (E.D.N.Y. 1919).

[8] United States *ex rel.* Hirshberg v. Cooke, 336 U.S. 210 (1949).

[9] 41 STAT. 805 (1920), 10 U.S.C. § 1566 (Supp. 1951), United States *ex rel.* Marino v. Hildreth, 61 F. Supp. 667 (E.D.N.Y. 1945).

[10] Kronberg v. White, 84 F. Supp. 392 (N.D. Cal. 1949), *aff'd sub nom.* Kronberg v. Hale, 180 F.2d 128 (9th Cir.), *cert. denied*, 339 U.S. 969 (1950).

[11] 64 STAT. 107 (1950), 50 U.S.C. § 551 *et seq.* (Supp. 1952).

[12] Under Article 27(b) it is required that both the trial counsel and defense counsel be lawyers. The Court of Military Appeals, the highest military tribunal, is to be composed of civilians (Article 67).

[13] 64 STAT. 109 (1950), 50 U.S.C. §553 (Supp. 1952).

[14] 64 STAT. 121 (1950), 50 U.S.C. §618 (Supp. 1952).

[15] FED. R. CRIM. P. 40.

[16] *See* United States *ex rel.* Kassin v. Mulligan, 295 U.S. 396, 400 (1935); United States *ex rel.* Hughes v. Gault, 271 U.S. 142, 149 (1926).

[17] U.S. CONST. AMEND. V.

[18] See Kronberg v. Hale, 180 F.2d 128 (9th Cir.), *cert. denied*, 339 U.S. 969 (1950); *In re* Bogart, 3 Fed. Cas. 796, No. 1596 (C.C.D. Cal. 1873); United States *ex rel.* Marino v. Hildreth, 61 F. Supp. 667 (E.D.N.Y. 1945);

crime is committed, and not when formal proceedings are commenced. Since the crime was committed while Toth was in the service, he was not entitled to the protection of the Fifth Amendment as applied to military personnel.

Quite apart from the merit of Article 3(a) as an expedient measure, and apart from trying, in a military court, a veteran who obtained his discharge through fraud, the constitutionality of the article is not well settled. The Court, in the instant case, must have thought that Article 3(a) is a valid and desirable extension of military jurisdiction, since the statute supplies a forum for the prosecution of alleged crimes which, under the old articles of war, would have been barred by the discharge of a person from military service.[19] However, even in relation to ex-servicemen, it is submitted that due process would require that they be given a preliminary hearing to determine whether they come within the scope of Article 3(a).[20]

TAXATION — TERMINABLE TRUST WITH VESTED REMAINDER INCLUDABLE IN GROSS ESTATE.—In an action for an estate tax refund, the executors contended that the Internal Revenue Commissioner erred, in that he included in decedent's gross estate the corpora of irrevocable trusts established by decedent. The beneficiaries had a vested interest in the trust principal, but the settlor, who was also the trustee, had the power to terminate the trusts prior to the expiration date. The Supreme Court, in affirming the Commissioner's determination, *held* that the decedent retained the power to "alter, amend or revoke" within the meaning of Section 811(d)(2) of the Internal Revenue Code, and hence the trust corpora were properly includable in the gross estate. *Lober v. United States,* 74 Sup. Ct. 98 (1953).

The present estate tax is derived from the Revenue Act of 1916,[1] which made only oblique reference to trusts, including in the gross estate any interest ". . . with respect to which . . . [the decedent] has created a trust . . . intended to take effect in possession or enjoy-

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Terry v. United States, 2 F. Supp. 962 (W.D. Wash. 1933); *Ex parte* Joly, 290 Fed. 858 (S.D.N.Y. 1922).

[19] See United States *ex rel.* Hirshberg v. Cooke, 336 U.S. 210 (1949).

[20] Senator McCarran, in March of 1950, introduced a bill to amend the Uniform Code of Military Justice which provided that a person arrested within the continental limits of the United States or its territories or possessions, shall be taken without delay to the nearest District Court for a removal hearing. Senate Introductory Bill, S. 3188. See Brief for Appellee, p. 14, Toth v. Talbott, No. 11964, D.C. Cir., March 25, 1954.

[1] 39 STAT. 756 (1916). Federal estate taxes had previously existed during periods of national emergency. See Knowlton v. Moore, 178 U.S. 41 (1900).