

COMMENTS

CONSTITUTIONAL LAW: COURTS-MARTIAL LACK JURISDICTION OVER CIVILIAN DEPENDENTS ACCOMPANYING ARMED FORCES ABROAD

Reid v. Covert, Kinsella v. Krueger, 354 U.S. 1 (1957)

On May 5, 1950, Congress approved the Uniform Code of Military Justice which, under article 2(11), granted military courts jurisdiction over "persons serving with, employed by, or accompanying the armed forces" overseas.¹ By executive action this legislation became effective on May 31, 1951.² Shortly thereafter, the wife of an Army colonel stationed in Japan was charged with murdering her husband, and in England the wife of an Air Force sergeant was charged with having feloniously caused her husband's death. These women, both civilian dependents and not military personnel, were residing with their husbands on United States military bases at the time of the offenses charged. Each was tried by court-martial, found guilty of premeditated murder, and sentenced to life imprisonment. Upon completion of judicial review by military authorities³ the two convictions were contested in the federal courts through appropriate habeas corpus proceedings on the ground that the courts-martial lacked jurisdiction over the persons.⁴ The cases subsequently were consolidated and argued before the Supreme Court where the convictions were affirmed by a determination that article 2(11) of the UCMJ was not unconstitutional.⁵ After reargument the following term, however, the Court reversed its former decision and held that these two women could not constitutionally be tried for murder by courts-martial during time of peace.⁶

1. 64 STAT. 109 (1950), 50 U.S.C. § 552(11) (1952).

2. Exec. Order No. 10214, 16 FED. REG. 1303 (1951).

3. *United States v. Covert*, 16 C.M.R. 465 (1954), *rev'd and remanded re defense of insanity*, 6 U.S.C.M.A. 48, 19 C.M.R. 174 (1955); *United States v. Smith*, 10 C.M.R. 350, *aff'd*, 13 C.M.R. 307 (1953), *aff'd*, 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954).

4. Habeas corpus is the proper method for attacking jurisdiction of a military tribunal in a federal court. *Compare Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1886) (jurisdiction of military tribunal successfully contested through habeas corpus proceedings), *with Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863) (Supreme Court cannot review military proceedings by writ of certiorari). See also *MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951) § 214(b)* (finality of court-martial prevents direct review by writ of error or appeal). The scope of review is limited to ascertaining whether the court-martial had jurisdiction over the person and of the offense, and whether it had power to pronounce the sentence adjudged. *Collins v. McDonald*, 258 U.S. 416, 418 (1922); *Grafton v. United States*, 206 U.S. 333, 347-48 (1907); *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 82 (1857).

5. *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956).

6. *Reid v. Covert, Kinsella v. Krueger*, 354 U.S. 1 (1957).

The Constitution, by article III, § 2 and the sixth amendment, assures to all persons indicted in a federal court the right to trial by jury for any crime, except cases of impeachment.⁷ The fifth amendment, however, by specifying that "except in cases arising in the land or naval forces" the accused shall be presented before a grand jury for indictment,⁸ supplies an important qualification to this right. For, by implication, the exception in the fifth amendment applies also to the right of trial by jury and therefore permits trial by court-martial of persons in the armed forces who otherwise would be amenable only to civilian criminal courts." Hence the fifth amendment, together with article I, § 8, cl. 14 giving Congress express power to formulate rules and regulations for the land and naval forces,¹⁰ sanctions legislation authorizing trial of military personnel by court-martial without indictment by grand jury or trial by petit jury.¹¹

The constitutional issue that was present but avoided by the Supreme Court in its initial decision was whether Congress had authority under article I, § 8 to subject civilian dependents accompanying our armed forces overseas in time of peace to trial by court-martial.¹² Instead the Court, citing *In re Ross*¹³ and the "Insular" cases,¹⁴ reasoned that Congress, under its power to make rules and regulations for United States territories,¹⁵ could establish legislative courts for the trial of American citizens in foreign countries, and that these courts were not necessarily obligated to afford an accused trial by jury or

7. U.S. CONST. art. III, § 2 provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury . . ." U.S. CONST. amend. VI reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

8. U.S. CONST. amend. V provides: "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, or in the Militia, when in actual service in time of War or public danger . . ." The words "when in actual service in time of War or public danger" refer to the clause "in the Militia" only. *Johnson v. Sayre*, 158 U.S. 109, 115 (1895); see *Ex parte Mason*, 105 U.S. 696, 701 (1881).

9. *In re Waidman*, 42 F.2d 239, 240-41 (D. Me. 1930); *Welchel v. McDonald*, 349 U.S. 122, 127 (1950) (dictum); *Ex parte Quirin*, 317 U.S. 1, 43 (1942) (dictum); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 137-38 (1866) (concurring opinion) (dictum); *accord*, *Kahn v. Anderson*, 255 U.S. 1, 8 (1920).

10. U.S. CONST. art. I, § 8, cl. 14 gives Congress express power "To make Rules for the Government and Regulation of the land and naval Forces."

11. See *Dynes v. Hoover*, 61 U.S. (20 How.), 65, 78-79 (1857).

12. See *Kinsella v. Krueger*, 351 U.S. 470, 476, 480 (1956).

13. 140 U.S. 453 (1891), which upheld the conviction by a consular court in Japan of a sailor who committed murder on board an American vessel in the Far East. The *Ross* case broadly asserted that the immunities granted by the fifth and sixth amendments applied only to persons tried within this country, and that the Constitution could have no application outside the United States. *Id.* at 464.

14. *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). These cases, in upholding convictions secured without trial by jury in territorial courts, declared that only certain fundamental rights extended to persons within unincorporated territories of the United States.

15. U.S. CONST. art. IV, § 3.

other protections in the Bill of Rights. It therefore affirmed the convictions by concluding that legislation establishing *military* courts for trial of civilian dependents was a reasonable exercise of constitutional power, considering the nexus between these dependents and the military forces.¹⁶ Reservations and dissenting opinions filed, however, indicated that a substantial segment of the Court questioned whether *In re Ross*, the "*Insular*" cases, and the power of Congress to provide rules for United States territories, had any reasonable bearing on the constitutionality of article 2(11) of the UCMJ.¹⁷ Undoubtedly these reservations, together with retirement from the Court of two justices who had voted with the majority, prompted reargument the following term.¹⁸

Upon second presentment of the case, the Supreme Court reversed its former position in a decision marked by four separate opinions, none of which mustered a majority.¹⁹ These four opinions represented three fundamentally different approaches to the Constitution, that in turn resulted in three different conclusions regarding the applicability of article 2(11) of the UCMJ. To determine the present validity of article 2(11), it is necessary to examine the various approaches by which the Court reached its different conclusions.

The major opinion, declaring that the United States could *never* act against its citizens at home or abroad free of the Bill of Rights,²⁰ decided that the enumerated power authorizing Congress to "make rules for the government and regulation of the land and naval forces" could not be enlarged by the "necessary and proper" clause to subject civilian dependents to military law.²¹ Civilian dependents, it was reasoned, are not within the enumerated power because they are not persons "in the land and naval forces" by any permissible construction of that phrase.²² Moreover, the enumerated power cannot be extended by the "necessary and proper" clause to include civilian dependents be-

16. *Kinsella v. Krueger*, 351 U.S. 470, 476 (1956); see 354 U.S. at 65-66 (concurring opinion).

17. Justice Frankfurter, filing a reservation, felt that the cases had been decided hastily and without time for adequate reflection. He regarded it as significant that the Court had failed to ground its decision upon congressional power under article I, § 8 to regulate the land and naval forces. *Kinsella v. Krueger*, 351 U.S. 470, 482 (1956). The Chief Justice and Justices Black and Douglas dissented, but due to lack of time in the closing term, deferred writing their dissenting views. *Id.* at 485-86.

18. Those representing the majority were Justice Clark, who wrote the opinion of the Court, and Justices Reed, Burton, Minton, and Harlan. Justice Minton retired from the Court October 16, 1956, and Justice Reed retired on February 25, 1957.

19. Justice Black wrote the opinion of the Court, and was joined by the Chief Justice, Justice Douglas, and Justice Brennan. Separate concurring opinions were filed by Justices Frankfurter and Harlan. Justice Clark, joined by Justice Burton, wrote the dissent. Justice Whittaker took no part in deliberations.

20. 354 U.S. at 5-6

21. *Id.* at 20-21.

22. *Id.* at 22-23

cause this would encroach upon rights guaranteed in article III, § 2 and the fifth and sixth amendments,²³ e.g., trial by jury before an impartial judge with life tenure.²⁴ Legislation that purported to place civilians under military control was therefore an unconstitutional usurpation of power. It was evident, however, that the major segment was also concerned about establishment of a rival system of courts under military domination.²⁵ Hence its concern about encroachment on the Bill of Rights was not necessarily a decisive, although certainly it was a substantial,²⁶ factor in finding an absolute proscription against broadening the express power to include civilian dependents.

Two justices by individual concurring opinions agreed with reversal of the convictions on the narrow ground that articles 2(11) of the UCMJ, to the extent that it subjects to military trial civilian dependents who commit capital offenses while accompanying the armed forces overseas in time of peace, could not be validly sustained.²⁷ Rather than looking to particular sections of the Constitution as controlling, *viz.* absence of express power under article I, § 8 and absolute proscriptions in the fifth and sixth amendments, the concurring justices looked to the Constitution as a whole and reached their conclusions by a method not dissimilar to a determination under the due process clause, *viz.* a process of balancing and weighing all the factors involved.²⁸ On the one side, they found that subjection of civilian dependents to military jurisdiction might be reasonably related to the power of Congress to regulate the military forces under article I, § 8, as broadened by the "necessary and proper" clause.²⁹ On the other side, however, they found (1) specific procedural guarantees in article III, § 2 and the fifth and sixth amendments, (2) a capital offense, which of itself demanded the maximum of available safeguards for a criminal accused,³⁰ and (3) absence of wartime pressures. Weighing the two sides, they concluded that in *these particular circumstances* the "necessary and proper" clause could not extend the enumerated power under article I, § 8 to include *these particular defendants* and subject them to military law. Consequently, and to this limited extent, they declared article 2(11) of the UCMJ unconstitutional. It would appear that, given a close nexus between civilians and the military establishment, jurisdiction or no jurisdiction according to the concurring justices' analysis hinges upon the presence or absence

23. *Id.* at 21.

24. See *id.* at 37

25. *Id.* at 40-41

26. See *id.* at 39-40

27. *Id.* at 49, 65

28. See *id.* at 44, 75

29. See *id.* at 71-73 (Harlan).

30. See *id.* at 45-46, 77

in court-martial procedure of safeguards sufficiently consonant with concepts of fairness to permit civilians to be tried for murder during peacetime.³¹ Stated alternatively, jurisdiction or no jurisdiction turns upon the absence or presence of an offense of such severity that it warrants more procedural safeguards than presently are provided by court-martial trial.

The dissenting justices, in deciding that article 2(11) of the UCMJ was constitutional, pointed to historical precedent,³² and particularly to *Madsen v. Kinsella*,³³ as authority for granting court-martial jurisdiction over civilian dependents. They confined the issue before them strictly to the question whether article 2(11) of the UCMJ was reasonably related to congressional power under article I, § 8.³⁴ They reasoned that, since there was a close nexus between military personnel and civilian dependents abroad³⁵ and since there were no practical alternatives to military trial for disciplining civilians,³⁶ trial by court-martial was "the least possible power adequate to the end proposed."³⁷ Thus, finding that expansion of the enumerated power was both necessary and reasonable, they concluded that civilian dependents were within the scope of congressional power under article I, § 8. By making this determination, they were not called upon to take the

31. See *id.* at 47 (Frankfurter) ("The method of trial alone is in issue.").

32. The dissent referred to article of war 2(d), 39 STAT. 651 (1916), 10 U.S.C. § 1473(d) (1952) (the predecessor to articles 2(10) and 2(11) of the UCMJ), which subjected to military jurisdiction "all retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States . . ." However, the cases that arose under article of war 2(d) all dealt with offenses committed by civilians *during time of war*, and military jurisdiction over civilians rested at least in part upon a valid exercise of the "war powers" of Congress, *e.g.*, the power to raise and support armies. See, for example, *Grewe v. France*, 75 F. Supp. 433, 436-37 (E.D. Wis. 1948); *Ex parte Gerlach*, 247 Fed. 616, 617 (S.D.N.Y. 1917). Case precedent, therefore, is of limited value in deciding, under the power of Congress to regulate the land and naval forces, the validity of applying article 2(11) of the UCMJ to civilian dependents in time of peace. See also 354 U.S. at 33; WINTHROP, *MILITARY LAW AND PRECEDENTS* *144-47 (1886).

The only analogous case disclosed by research to arise *in time of peace* and to reach the federal courts was prosecuted not under article of war 2(d) but under article 2(11) of the UCMJ. *In re Varney's Petition*, 141 F. Supp. 190 (S.D. Cal. 1956). In this case (not cited by the dissent), the court sustained the conviction by court-martial of a civilian employee who had committed a non-capital offense in Japan and had sought review by habeas corpus in a federal court prior to completion of military review.

33. 343 U.S. 341 (1952). Here the Supreme Court upheld a civilian dependent's conviction secured in 1950 in a United States Court of the Allied High Commission for Germany for the murder of her husband, an Army lieutenant, within the United States Zone of occupied Germany. In so doing, the Court determined that jurisdiction of court-martial over petitioner was not exclusive, as contended by petitioner, but was concurrent with occupation courts.

34. 354 U.S. at 79-80.

35. See *id.* at 86.

36. *Id.* at 86-89.

37. *Id.* at 89.

further step of considering any barrier, or any balancing effect, of the Bill of Rights. This latter step would never be required according to the dissent's analysis, because persons either are subject to military jurisdiction and are not afforded the full Bill of Rights, or they are not subject to military jurisdiction due to lack of congressional power under article I, § 8.

The conflicting results reached by different segments of the Court, the fundamental differences in approach used by these segments to arrive at their conclusions, and the absence of a majority within any one group, promptly raise the question whether in the future civilians accompanying our military forces abroad can be subjected to court-martial jurisdiction during time of peace for *non-capital* offenses. As previously indicated, the four members of the Court comprising the major group found there was an absolute proscription during peacetime against trying civilian dependents by court-martial³⁸ and, therefore, they will not be able to differentiate between classes of offenses without upsetting their present reasoning. The two concurring justices, on the other hand, expressly limited their agreement to cases involving capital offenses.³⁹ While this fact alone is not determinative of how they will answer the problem of non-capital offenses should it arise in the future, their process of balancing all factors might easily lead them to conclude that trial by court-martial meets whatever process is "due" a civilian committing a non-capital offense.⁴⁰ The two dissenting justices, in upholding military jurisdiction over civilian dependents when the offense is *capital*, have thereby determined there also is jurisdiction when the offense is *non-capital*.

Assuming that in the future the two concurring justices find that Congress has the power to provide court-martial trial for civilians for *non-capital* offenses, and thereupon vote with the present dissenters, the outcome of any test case will hinge upon the vote of the remaining member,⁴¹ recently appointed to the Court. Any prediction, therefore, of how the Court will decide a non-capital case if presented is little more than guesswork; however, an evaluation of the distinction between capital and non-capital offenses can nevertheless be undertaken.

If the question is approached by weighing such factors as the number of countries within which our armed forces serve, the number of civilians involved, the multitude and variety of offenses committed, and the additional expenses in providing alternatives to courts-martial

38. See text at note 23 *supra*.

39. See text at note 27 *supra*.

40. See 354 U.S. at 76-77, particularly Justice Harlan's statement: "I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case." *Id.* at 77.

41. Justice Whittaker, who was commissioned to the Court on March 25, 1957, took no part in determination of the principal cases. See note 19 *supra*.

trial, against the right of civilians to *all* the procedural safeguards guaranteed by the Constitution, it might be easy to sustain the validity of trial of civilians by court-martial for non-capital offenses. It is submitted, however, that this differentiation between capital and non-capital offenses would overlook previous historical precedent. First of all, military jurisdiction has always been asserted over civilians because of their *status*, not because of the magnitude of the crime.⁴² Moreover, the Bill of Rights, as contrasted to the fourteenth amendment,⁴³ has never before been interpreted as making a distinction between capital and non-capital offenses when providing procedural safeguards for criminal trials.⁴⁴ It is believed that these legal traditions should not be lightly dismissed. Furthermore, in addition to legal arguments, inclusion of civilian dependents within the sphere of military jurisdiction for non-capital offenses could be the first step toward including them within the military for capital offenses at some later date, and ultimately could lead to increasing expansions of military power.⁴⁵ This, then, is another reason for concluding that a distinction between capital and non-capital offenses should not be read into the Bill of Rights—that a distinction between capital and non-capital offenses should have no validity in determining the constitutionality of article 2(11) of the UCMJ.

An additional problem in predicting article 2(11)'s future validity is whether persons "employed by," as contrasted to persons "accompanying," the armed forces abroad will be amenable to court-martial jurisdiction during time of peace. The *Covert* and *Krueger* decisions⁴⁶ had the limited effect of declaring article 2(11) unconstitutional as applied to civilian *dependents* committing capital offenses abroad. If, as was advocated earlier, military jurisdiction is determined by the *status* of the person, it is submitted that civilian *employees* have

42. See article 2 of the Uniform Code of Military Justice, 64 STAT. 109 (1950), 50 U.S.C. § 552 (1952). See also Mayhew, *Peacetime Jurisdiction of Courts-Martial Over Civilian Components of the Armed Forces in Foreign Countries: The Toth and the Covert Decisions*, 3 U.C.L.A.L. REV. 279, 281 (1956).

43. U.S. CONST. amend. XIV provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

44. The authority of *Powell v. Alabama*, 287 U.S. 45, 71 (1932) and *Betts v. Brady*, 316 U.S. 455, 471-72 (1942), relied upon by the concurring justices to illustrate that the Supreme Court has previously recognized such a distinction, are cases dealing with a state's obligation under the fourteenth amendment to afford legal counsel to a criminal accused. These cases concern themselves with the problem of what trial procedures are necessary to satisfy general requirements of due process imposed upon states. They do not treat a question of jurisdiction by considering whether specific constitutional proscriptions against the federal government apply or don't apply, nor are they cited for this purpose. At best, then, the cited authority supports the bare proposition that a distinction between capital and non-capital offenses has been drawn; it does not support the idea that this distinction is proper in a federal criminal case involving right to trial by jury.

45. See 354 U.S. at 39-40.

46. The principal cases, 354 U.S. 1 (1957).

sufficient nexus with the armed forces to be distinguished from civilian dependents. The presence of employees with the armed forces overseas is based on a different kind of voluntariness than that of civilian dependents; employees freely contract with the United States Government to acquire specific military positions, while dependents contract marriage with an individual who may or may not then be, or who may never be, in the armed forces; employees receive pay for their services; they have well defined duties to perform, similar to members of the armed forces;⁴⁷ and, in contrast to dependents, their relationship to the military is functional rather than familial. On these grounds it does not appear unreasonable to say that civilian employees overseas have in effect waived, by their voluntary association with the armed forces, any right they may have to *some* procedural safeguards guaranteed by the Constitution. Finally, the few cases which have treated the problem of military jurisdiction over civilians in peacetime could be used to support the application of article 2(11) to civilian *employees*.⁴⁸ The fact that in the principal cases the major segment expressly excluded from its decision civilians other than dependents⁴⁹ suggests that civilian employees will continue to remain subject to military law under article 2(11).

Now that civilian dependents who commit capital offenses abroad are no longer subject to military jurisdiction, and since this conclusion of the Court may well be broadened to include *all* dependents regardless of the magnitude of their offenses, it is necessary to find alternatives to court-martial for providing for the trial of these persons. There seemingly are only three methods possible: (1) trial in a district court in the United States, (2) trial in the foreign country by a United States court, or (3) trial in a court convened by the foreign sovereign. Each contains inherent infirmities, so, in order to find a suitable replacement for military trial of civilians, the strengths and weaknesses of each method should be examined.

There is no question that Congress could, under article III, § 2, designate an appropriate forum in this country for the trial of cases that arise outside the continental limits of the United States.⁵⁰ However, there is no federal common law of crimes giving federal courts

47. See Comment, 32 N.Y.U.L. Rev. 594, 599 (1957).

48. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955) ("the power granted Congress . . . would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." (Emphasis added)); *In re Varney's Petition*, 141 F. Supp. 190, 193 (S.D. Cal. 1956) ("An American citizen who, like the prisoner, goes voluntarily to a foreign country thereby surrenders, for the duration of his stay, the constitutional right to trial by jury." (dictum)).

49. See 354 U.S. at 22-23.

50. U.S. CONST. art. III, § 2, cl. 3 provides: "The Trial of all Crimes . . . when not committed within any State . . . shall be at such Place or Places as the Congress may by Law have directed."

power to punish wrongful conduct as criminal,⁵¹ and it is not certain, although international law presents no prohibition,⁵² that article III, § 2, nor any power enumerated in the Constitution, would authorize Congress to declare that an act committed by a United States citizen in a *foreign country* is a crime cognizable by *our* courts.⁵³ Hence, although the forum that Congress provided would be able to afford civilian dependents all procedural safeguards guaranteed by the Constitution, there is some doubt whether a civilian dependent overseas could commit a crime that would be justiciable by this court. If a solution to this problem can be found within the framework of the Constitution, there is the further question whether a foreign state would agree to waive its sovereign right to exercise jurisdiction over persons committing crimes within its boundaries⁵⁴ and consent to their removal to this country for trial. Assuming that foreign nations would be willing to grant this concession to the United States, any statute by Congress designed to implement a *uniform* policy for all civilian dependents committing offenses overseas must necessarily be based upon diplomatic negotiations and uniform agreement among sixty-three different countries in which our armed forces presently are serving.⁵⁵ When practical considerations, *i.e.* difficulties in obtaining witnesses, depositions, and documents without availability of compulsory process; distances between the locus of the offense and the place of trial; and cost in time, money, manpower, and effort, to transport all principals, witnesses, documents, and real evidence, to this country for trial, are added to the problems already mentioned,

51. See *Viereck v. United States*, 318 U.S. 236, 241 (1943); *United States v. Sutter*, 160 F.2d 754, 756 (7th Cir. 1947).

52. *United States v. Flores*, 289 U.S. 137 (1933); *United States v. Bowman*, 260 U.S. 94 (1922); see *The Case of the S.S. "Lotus," P.C.I.J., Ser. A, No. 10* (1927); 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 179-83 (1941); *cf.* *Blackmer v. United States*, 284 U.S. 421 (1932). *But cf.* *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

53. Authority to specify certain conduct committed by an American civilian in a foreign state as a crime amenable in a United States court could stem from various sources: from the treaty-making power of Congress under article I, § 10; from the power to regulate foreign commerce under article I, § 8, cl. 3; or from general powers retained by the national government to protect its citizens, when these powers are not expressly prohibited to it. See *Forbes v. Scannell*, 13 Cal. 243, 230-33 (1859).

54. According to international law, every sovereign nation has exclusive right to exercise criminal jurisdiction over civilians within its territory, unless it waives this right. *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). The United States has decided that this principle also applies to members of military forces visiting at the invitation of the territorial sovereign during peacetime. See *Wilson v. Girard*, 354 U.S. 524, 529 (1957); *Cozart v. Wilson*, 236 F.2d 732, 733 (D.C. Cir.), *vacated on cert. as moot*, 352 U.S. 884 (1956).

55. Figures cited by the dissent in the principal cases show that there are sixty-three foreign nations in which United States armed forces are presently serving. See 354 U.S. at 83. Although it would be desirable that dependents as a class be subjected to the same type of jurisdiction, *e.g.*, trial by a United States court, this is not necessary, and uniform agreement among all nations concerned need not be a condition precedent to legislation providing for jurisdiction over civilian dependents accompanying our armed forces overseas.

it becomes apparent that trial of civilian dependents in this country for offenses committed abroad presents many difficulties which may well be insurmountable.

A second possibility for exercising jurisdiction over civilian dependents is establishment of United States courts in foreign countries. Again, however, any uniform policy that might be implemented would hinge upon securing permission of every foreign state concerned.⁵⁶ Moreover, since exercise of judicial power is an act of sovereignty, there is the gravest doubt that *any* nation would permit creation of foreign courts within its territory and allow them to wield sovereign power. An entirely separate question, even assuming these courts could be established, is what procedural safeguards must be provided civilian dependents to satisfy constitutional requirements, *i.e.* must these courts afford civilian dependents all the rights in article III, § 2 and the fifth and sixth amendments, or may they function under lesser requirements, similar to legislative courts previously authorized under article IV, § 3? The conflicting results in determining the validity of article 2(11) in the *Covert* and *Krueger* decisions,⁵⁷ and especially the divergent opinions regarding applicability of *In re Ross* and the "*Insular*" cases,⁵⁸ indicate that the Court might be sharply divided as to the type of forum that must be provided. Supposing the most probable result, that an article III, § 2 trial with full procedural safeguards would be necessary, at least in capital offenses, and further supposing for hypothesis that a federal judge with life tenure were appointed, that some kind of grand jury were constituted, and that an impartial jury were found,⁵⁹ the question still remains how this court could compel witnesses to testify, subpoena documents, and otherwise conduct its judicial functions in another country. Then, added to all the foregoing problems, would be the drastic expense of creating and maintaining these tribunals in sixty-three nations. In summary, considering the collective difficulties inherent in establishing article III

56. *Ibid.*

57. See text at notes 19-36 *supra*.

58. The major segment, although not expressly overruling the *Ross* case, stated that at best it rested on the "fundamental misconception" that the Constitution could have no application outside the United States. See 354 U.S. at 10-12. The "*Insular*" cases were distinguished from the principal cases as having nothing to do with military trials of American citizens. *Id.* at 14. The concurring justices distinguished rather than criticized the *Ross* case, saying that it had to be viewed in its "historical context" in order to be properly understood. The "*Insular*" cases were held inapplicable in the present circumstances, but still valid as supporting the "fundamental right" test, *i.e.* that some, but not necessarily all, rights within the Constitution have extraterritorial application. *Id.* at 53, 56, 75. The dissent adhered to its former view that *Ross* and "*Insular*" were valid precedent supporting exercise of military jurisdiction over civilian dependents in the principal cases. See *id.* at 79; see also text at notes 13-14 *supra*.

59. The problem of empanelling an impartial jury from groups outside the military forces, *i.e.* from the native population, United States civilian employees, and other civilian dependents, has no easy solution.

courts in foreign countries, this substitute for court-martial trial seems entirely infeasible.

The remaining suggestion is that foreign nations exercise criminal jurisdiction over civilian dependents who accompany our servicemen outside the United States. A question immediately presented is whether a foreign state, which concededly has jurisdiction over crimes committed within its borders,⁶⁰ would assume the burden of adjudicating our disciplinary problems when the offense committed affects only the citizens or property of the United States, but is of sufficient magnitude that it cannot be handled administratively by our military authorities. If the crime is particularly serious or violent, such as arson or murder, the foreign sovereign might well concern itself, but what about offenses of negligent homicide, embezzlement of government funds, larceny from the post-exchange, falsification of official documents, and like offenses that civilians may commit? Furthermore, there is the question how to proceed, if at all, when the act alleged to be unlawful according to provisions of the UCMJ is not an offense under the laws of the foreign state.⁶¹ Still another problem, assuming the foreign state could and would take jurisdiction, is what degree of authority would it demand and would the United States be willing to grant, to perform investigations incidental to prosecuting offenses committed on military property occupied exclusively by United States personnel. Finally, consideration should be given to the disparity in the law among sixty-three different countries, particularly as regards variations in procedural safeguards afforded persons accused of a crime. If substantially equal treatment of our civilian dependents is desired regardless of where they may be situated, the United States may face a sizable diplomatic problem to secure essentially identical concessions from each country harboring our armed forces.⁶²

60. See note 53 *supra*.

61. See 354 U.S. at 80 (dissenting opinion).

It is doubtful whether this situation would arise frequently enough, if at all, to present a problem. The criminal codes of most civilized nations wherein our military forces are stationed probably make the same kinds of acts unlawful that are unlawful under United States laws. Certain acts contrary to moral standards of the United States, *e.g.*, adultery (punishable under article 134 of the UCMJ), might not be offenses under a foreign criminal code, but probably no civilian dependent would ever be tried by court-martial for this type of offense in any event. Other offenses, such as treason against the United States, falsification of official documents, or destruction of government property, conceivably could be perpetrated by civilian dependents; however, these acts seemingly would be infrequent, and susceptible of either being prevented altogether or punished through administrative action by military authorities. See text *infra*.

62. The NATO (North Atlantic Treaty Organization) Status of Forces Agreement, presently in effect between the United States and fourteen other member nations, requires each receiving state to assure certain procedural safeguards to United States citizens brought to trial in local courts. See NATO Status of Forces Agreement, June 19, 1951, 4 U.S. TREATIES & OTHER INT'L AGREEMENTS 1792, 1802, T.I.A.S. No. 2846. Similar provisions are contained in

In conclusion, it can be seen that there is no ready substitute for court-martial trial of civilian dependents overseas. At present, a majority of the Court has not yet invalidated military trial for dependents charged with non-capital offenses, with the result that these persons may still be tried by court-martial. But the possibility that the Court may abandon the distinction between capital and non-capital offenses in a future case should be considered in any proposal for replacing court-martial of dependents. It would appear that the best method for supplanting court-martial of dependents, considering all factors previously discussed, is to have the foreign sovereign prosecute the more serious crimes according to its own laws, and have the United States military authorities handle lesser offenses through administrative measures, e.g., by revoking base privileges, placing the individual on probation, or sending home repeated offenders. Since the number of dependents committing serious offenses would probably not be very many,⁶³ the proposed solution seems ade-

quately between the United States and nations which are not members of NATO. See, e.g., Administrative Agreement under Art. III of the Security Treaty Between the United States and Japan, Feb. 28, 1952, 3 U.S. TREATIES & OTHER INT'L AGREEMENTS 3341, 3353-56, T.I.A.S. No. 2492, as amended by Protocol, Sept. 29, 1953, 4 U.S. TREATIES & OTHER INT'L AGREEMENTS 1346, T.I.A.S. No. 2848. See also Agreement Regarding the Status of United Nations Forces in Japan, Feb. 19, 1954, 5 U.S. TREATIES & OTHER INT'L AGREEMENTS 1123, 1134-37, T.I.A.S. No. 2995.

There is a substantial possibility that the above treaty provisions will remain in effect, notwithstanding that as a result of the principal cases American courts-martial no longer have jurisdiction over civilian dependents. This would *not* be true if the treaty obligations imposed upon foreign states are construed as being contingent upon the ability of American military courts to exercise criminal jurisdiction over civilian dependents. However, a liberal and seemingly more reasonable construction would be that these provisions are independent promises made by the foreign nations, guaranteeing American citizens tried in a local forum certain procedural rights consonant with requirements of due process. If the latter construction prevails, civilian dependents tried by foreign courts will still be afforded the procedural safeguards outlined in the NATO Status of Forces Agreement.

Added problems will be raised by provisions in certain treaties that give American courts-martial exclusive jurisdiction, rather than concurrent with the foreign court, over United States citizens committing offenses on military property abroad (see, e.g., Agreement Between the United States and the United Kingdom of Libya, Sept. 9, 1954, 5 U.S. TREATIES & OTHER INT'L AGREEMENTS 2449, 2463-65, T.I.A.S. No. 3107), and by treaties that make no mention of criminal jurisdiction over American citizens by the territorial sovereign nor of procedural safeguards to be guaranteed American citizens tried by local courts (see, e.g., Agreement Between the United States and the Imperial Ethiopian Government, May 22, 1953, 5 U.S. TREATIES & OTHER INT'L AGREEMENTS 749, 756-58, T.I.A.S. No. 2964). These problems, however, do not appear to be extraordinary nor unmanageable. See text at note 65 *infra*.

63. Statistics regarding the variety and frequency of offenses committed by different classes of dependents are not available; however, it is probably true that as a matter of policy minor children generally have not been tried by court-martial for offenses they commit against the UCMJ, and it is also probably true that very few if any civilian husbands accompany their service-connected wives overseas. Therefore, wives of United States servicemen overseas would be the only group of dependents that need be considered when treating the problem of finding a suitable replacement for court-martial. It is believed that this relatively small number of persons, distributed over an unknown number of military

quate both to provide a ready forum for trial of serious crimes, and to permit our military commanders to retain general disciplinary control over lesser infractions that dependents may commit.⁶⁴

It would, of course, be advantageous to persons subjected to trial by foreign courts if uniform trial procedures consonant with concepts of due process could be secured by diplomatic negotiations and treaties. In the absence of uniform agreements, some variation in the manner of trial and procedural safeguards provided an accused is perhaps the minimum price the United States must pay to retain its armed forces in foreign countries. However, the treaties that have implemented article 2(11) of the UCMJ provide that foreign courts should grant our citizens rights generally consistent with due process⁶⁵

bases in sixty-three foreign nations, presents no unmanageable problem. For example, in the seven years 1950-1956 only thirteen civilians of *all* classes, including employees and dependents, were subject to indictment by Army court-martial for the offense of murder. See 354 U.S. at 47-48 (concurring opinion). See also the government's own figures in Supplemental Memorandum for the United States following Reargument, pp. 9-11, *Reid v. Covert*, *Kinsella v. Krueger*, 354 U.S. 1 (1957).

64. A major concern of the dissenting justices was that invalidation of court-martial for civilian dependents would prevent military commanders from exercising effective disciplinary control over this group, thereby disrupting morale and discipline throughout their commands. See 354 U.S. at 85-86.

65. The agreements between the United States and England and between the United States and Japan that were in effect when the principal cases arose gave *exclusive* criminal jurisdiction over American citizens stationed abroad to United States courts-martial. See Agreement Between the United States and the United Kingdom and Northern Ireland, July 27, 1942, 57 STAT. 1193, E.A.S. 355; Administrative Agreement Under Art. III of the Security Treaty Between the United States and Japan, Feb. 28, 1952, 3 U.S. TREATIES & OTHER INT'L AGREEMENTS 3341, 3353, T.I.A.S. No. 2492. Now, however, most agreements between this country and foreign nations furnishing bases for our armed forces abroad have provisions essentially similar to the NATO Status of Forces Agreement. See North Atlantic Treaty Status of Forces Agreement, June 19, 1951, 4 U.S. TREATIES & OTHER INT'L AGREEMENTS 1792, T.I.A.S. No. 2846; see also Rouse & Baldwin, *The Exercise of Criminal Jurisdiction under the NATO Status of Forces Agreement*, 51 AM. J. INT'L L. 29 (1957); note 62 *supra*. Under the NATO Agreement the sending and receiving states share *concurrent* jurisdiction over United States citizens committing offenses within the territory of the receiving state, and depending upon the circumstances, either the sending or the receiving state has primary right to exercise concurrent jurisdiction.

Whenever a receiving state exercises criminal jurisdiction over an American citizen subject to concurrent court-martial jurisdiction, the NATO Status of Forces Agreement requires that the accused be provided with certain procedural safeguards, *viz.* the right to a speedy trial, to be informed of the charges prior to trial, to confront all witnesses against him, to have compulsory process for obtaining witnesses in his favor, to have legal counsel and a competent interpreter, and to communicate with a representative of his government. See North Atlantic Treaty Status of Forces Agreement, June 19, 1951, 4 U.S. TREATIES & OTHER INT'L AGREEMENTS 1792, 1802, T.I.A.S. No. 2846. Rights not specifically granted by the NATO Agreement include: "jury trial, bail, presumption of innocence, public trial, and exemption from cruel and unusual punishments." Note, *Criminal Jurisdiction Under the NATO Status of Forces Agreement*, 9 U. FLA. L. REV. 82, 84 (1956). However, treaties with countries other than members of NATO often contain express provisions assuring an accused such additional rights as: protection from self-incrimination, presumption of innocence, and all rights prevailing under the constitution or laws of the receiving state. See, *e.g.*, Agreement Between the United States and the United Kingdom

and, considering this precedent, it is believed that mutual good faith on the part of the United States and those nations presently playing host to our military forces can produce results that do not conflict with American ideas of fairness.

LABOR LAW: POLITICAL EXPENDITURES OF LABOR ORGANIZATIONS

United States v. International Union United Automobile Workers, CIO, 352 U.S. 567 (1957)

Defendant labor union was indicted for expending union funds to sponsor commercial television broadcasts which were intended to influence a federal election, allegedly in violation of section 610 of the Federal Corrupt Practices Act.¹ The district court dismissed the indictment on the ground that the "expenditures" charged were not within the statutory prohibition.² On direct appeal³ the Supreme Court reversed, holding that the use of union dues to influence the public at large to vote for a particular candidate or political party in a federal election constituted an "expenditure" within the meaning of the statute.⁴

of Libya, Sept. 9, 1954, 5 U.S. TREATIES & OTHER INT'L AGREEMENTS 2449, 2464, T.I.A.S. No. 3107. Conversely, treaties with some nations make no mention of any procedural safeguards to be furnished an accused, but these same treaties contain provisions awarding the United States *exclusive* criminal jurisdiction over American citizens. See, e.g., Agreement Between the United States and the Imperial Ethiopian Government, May 22, 1953, 5 U.S. TREATIES & OTHER INT'L AGREEMENTS 749, 756-58, T.I.A.S. No. 2964; see also note 62 *supra*.

1. 18 U.S.C. § 610 (1952). The pertinent parts of the statute are as follows:

It is unlawful . . . for any corporation . . . or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices. . . .

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined . . . and every officer or director of any corporation, or officer of any labor organization, who consents to . . . violation of this section shall be fined . . . or imprisoned. . . .

For purposes of this section 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

2. *United States v. International Union United Automobile Workers, CIO, 138 F. Supp. 53 (E.D. Mich. 1956)*.

3. The United States may appeal directly from the district court to the Supreme Court in criminal cases which deal with the construction of a statute upon which an indictment or information is founded. 18 U.S.C. § 3731 (1952), *United States v. Borden Co.*, 308 U.S. 188 (1939).

4. *United States v. International Union United Automobile Workers, CIO, 352 U.S. 567 (1957)*. The Court construed the indictment as follows: "Thus, for our purposes, the indictment charged the appellee with having used union dues to sponsor commercial television broadcasts designed to influence the electorate to select certain candidates for Congress in connection with the 1954 elections." *Id.* at 585.