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Military Jurisdiction -- Ex-Servicemen -- Civilian Dependents

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interpretation of the statutes, it would appear impossible for a citizen to go to the clerk of the superior court and obtain a permit to purchase a target pistol of .22 caliber.

It is suggested that the laws concerning firearms in North Carolina should be re-examined and clarified, with an underlying policy designed to resolve the conflict between the need for regulation and the prohibition of infringement of the right to keep and bear arms.

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Military Jurisdiction—Ex-Servicemen—Civilian Dependents

The United States Supreme Court in the greatly controverted *Quarles v. Toth* case[1] declared that ex-servicemen are not subject to military jurisdiction for crimes committed in the service where charges are not preferred prior to discharge.

In stating that Article 3(a)[2] of the Uniform Code of Military Justice,[3] which provided for such jurisdiction was unconstitutional, the Court held that Congress had no power to give military courts such jurisdiction either under its powers "To raise and support Armies,"[4] "To declare War,"[5] "To provide for organizing, arming, and disciplining, the militia,"[6] or "To punish . . . (offenses) . . . against the Law of Nations";[7] nor could such power be derived from the President's power as Commander-in-Chief or on any theory of martial law.

The Court further expressed its belief that "any expansion of court-martial jurisdiction like that in the 1950 Act *necessarily encroaches* on the jurisdiction of the federal courts set up under Article III of the Constitution. . . ."[8] (Emphasis added.)

Possibly the most dominant reason which led to the *Toth* decision was the effect of Article 3(a) on the constitutional safeguard of trial by jury. This appraisal is certainly apparent from Justice Black's statement, "We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people [i.e., civilians]

[1] United States *ex rel* Toth v. Quarles, 350 U. S. 11 (1955). This case has been the subject of many comments; see: 67 HARV. L. REV. 479 (1954); 21 U. CHI. L. REV. 426 (1954); 41 CORNELL L. Q. 498 (1956); 33 TEX. L. REV. 932 (1955).

[2] "Subject to the provisions of Article 43, any person charged with having committed, while in a status in which he was subject to this Code, an offense against this Code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status." 64 STAT. 109 (1950), 50 U. S. C. § 553(a) (1952).

[3] Hereinafter: U. C. M. J.

[4] U. S. CONST. art. I, § 8, cl. 12.

[5] U. S. CONST. art. I, § 8, cl. 11.

[6] U. S. CONST. art. I, § 8, cl. 16.

[7] U. S. CONST. art. I, § 8, cl. 10.

[8] 350 U. S. 11, 15.

charged with offenses for which they can be deprived of their life, liberty, or property."[9] The Court seemed extremely hesitant to deprive veterans of the protection afforded by jury trial and rejected the contention that power to circumvent such protection could be inferred through the "Necessary and Proper" clause.

Although the *Toth* Case apparently decided the question of military jurisdiction over ex-servicemen,[10] it left unanswered the question of whether the *Toth* decision would be extended to include other civilians who had theretofore been subject to various other sections[11] of the U. C. M. J., i.e., civilian dependents and civilians working for and with the armed forces overseas. The possibility of such an extention was apparent from the Court's comment, "For given its natural meaning the power granted Congress . . . would seem to restrict court-marital jurisdiction *to persons who are actually members or part of the armed forces.*" (Emphasis added.)[12]

At the end of the 1956 Spring Term, the Supreme Court in *Kinsella v. Krueger*[13] and *Reid v. Covert*[14] indicated that it was unwilling to extend the *Toth* philosophy any further than was necessary. Both cases involved dependent wives alleged to have murdered their husbands who were on active duty outside the continental limits of the United States. Trials by general court-martial were awarded each defendant, verdicts of guilty were found, and sentences imposed. Habeas corpus proceedings were instituted, and the two cases were reviewed before the Supreme Court which upheld the convictions,[15] declaring that Article 2(11)[16] of the U. C. M. J. was constitutional.

Justice Clark,[17] who wrote the majority opinions in these two subsequent cases, initially stated that Congress had the power to establish legislative courts[18] and that citizens of the United States are not

[9] *Id.* at 17.

[10] Prior to Quarles v. Toth there were conflicting views; see: United States *ex rel* Flannery v. Commanding General, 69 F. Supp. 661 (S. D. N. Y. 1946) and Kronberg v. Hale, 180 F. 2d 128 (9th Cir. 1950).

[11] U. C. M. J. art. 2, §§ 5, 7, 8, 10, 12. [12] 350 U. S. 11, 15.

[13] 351 U. S. 470 (1956). [14] 351 U. S. 487 (1956).

[15] Military courts are legislative courts; neither their finding or decisions are reviewable by any civil court, including the Supreme Court, except collaterally by means of habeas corpus proceedings. Burns v. Wilson, 346 U. S. 137 (1954); Collins v. McDonold, 258 U. S. 416 (1923); Torble's Case, 13 Wall. 397 (1871).

[16] Article 2 provides: "The following persons are subject to this code. . . . (11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories; That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands." 64 STAT. 108 (1950), 50 U. S. C. § 551 (1952).

[17] Justice Clark was one of two justices who joined in all three majority opinions of the principal cases.

[18] 351 U. S. 470, 475-476.

guaranteed the right of trial by jury outside the continental limits of the United States, District of Columbia, Alaska, and Hawaii.[19]

Upon these foregoing premises the Court concluded, "If it is reasonable and consonant with due process for Congress to employ the existing system of courts-martial for this purpose, the enactment [Article 2(11)] must be sustained."[20]

Attention should be focused on the fact that Articles 3(a) and 2(11) of the U. C. M. J. are necessarily based upon the same constitutional provisions, yet the Court labeled the former unconstitutional in the *Toth* Case and the latter constitutional in the two more recent cases. Possibly the sole explanation for the above can be found obscurely embedded within footnote six[21] of the *Kinsella v. Krueger* opinion, where the Court narrowly construed the *Toth* ruling to a concise minimum: that Article 3(a) was unconstitutional because it "necessarily encroached on the jurisdiction of the federal courts set up under Article III of the Constitution."

Having established this restriction, the Court went on to say that there could be no such encroachment in the *Krueger* Case. However, the Court did not specifically say exactly why there could be no encroachment. Nevertheless, it could be assumed that the distinction was based upon the fact that Congress had not acted in giving the federal courts jurisdiction over the person or the crime. By so distinguishing the *Toth* Case the Court stated that it would not be necessary to justify the power of Congress with its [Congress's] constitutional limitations.

This latter statement of the Court raises two more questions which have not as yet been answered by the Court. Was there actually an encroachment in the *Toth* Case where the federal courts had in fact been given no jurisdiction over such crimes by Congress?[22] And secondly, if not: Was this encroachment the only justification for declaring Article 3(a) unconstitutional?

There seems to be two plausible alternatives which arise from the above analysis. Either the foundations of the *Toth* Case have been removed by the Court, leaving a mere legal mirage to support the final conclusion that ex-servicemen are free from military jurisdiction, or the Supreme Court has indirectly decided that it is not necessary for Congress to actually give the federal courts jurisdiction over crimes committed by ex-servicemen while they were in the service before

[19] There is considerable authority to support this premise; see: *In re* Ross, 140 U. S. 453 (1891); Reynolds v. United States, 98 U. S, 145 (1879); *In re* Berue, 54 F. Supp. 252 (S. D. Ohio 1944); United States v. Archer, 51 F. Supp. 708 (1944).

[20] 351 U. S. 470, 476.

[21] *Ibid.*

[22] This query was raised in Justice Reed's dissent, U. S. *ex rel* Toth v. Quarles, 350 U. S. 11, 24-28 (1955) (dissent).

a grant of such authority to a military court, in lieu thereof, will be termed an encroachment on the federal court's jurisdiction.[23]

The present status of the law seems to be that ex-servicemen cannot be tried by the military or civil courts for crimes committed while on active duty overseas, unless charges are brought prior to discharge.[24] In respect to civilian dependents and civilians working for and with the armed forces, the military courts continue to exercise jurisdiction. It also seems reasonable that the Supreme Court will extend the *Toth* ruling to exempt civilians subject to the U. C. M. J., who return to the United States before charges are preferred by the military authorities for crimes committed overseas.[25]

J. N. GOLDING

Taxation—Federal Income—Nonrestricted Stock Options—Proprietary and Compensatory Options—Taxability of Options upon Receipt[1]

In a recent Supreme Court decision, a serious blow was dealt taxpayers seeking to avoid income taxation arising out of certain employer-employee stock option plans. In *Commissioner v. LoBue*[2] the Court decided against a distinction supported in the Tax Court[3] and Courts of Appeals[4] which, for income tax purposes, divided employee stock option plans into two types.

The basic problem involved may be illustrated simply. *TP*, a key employee of *X* Corporation, is given an option by the corporation to

[23] It is likely that Congress will now give the federal courts jurisdiction over ex-servicemen and ex-dependents; such would be constitutional. U. S. CONST. art. III, § 2; Skiriotes v. Florida, 313 U. S. 69 (1941); United States v. Bowman, 260 U. S. 94 (1923); Jones v. United States, 137 U. S. 202 (1890).

[24] Military jurisdiction is not retroactive in regard to crimes committed prior to induction, although servicemen are presently on active duty; United States v. Logan, C. M. 248867, 31 B. R. 363 (1944); nor can it be revived as to crimes committed during the first enlistment, even though a second enlistment immediately follows; United States *ex rel* Herschberg v. Cooke, 336 U. S. 210 (1949). However, military jurisdiction does *not* cease while a discharged serviceman is serving his sentence; Kohn v. Anderson, 255 U. S. 1 (1921); and if charges are brought before discharge, military jurisdiction continues after said discharge; Carter v. McCloughry, 183 U. S. 365 (1902).

[25] 351 U. S. 487, 490.

[1] In 1950 Congress enacted what is now INT. REV. CODE OF 1954, § 421, which provides for capital gains treatment of certain "restricted stock options." If an option complies with § 421 the employee has to report no income until he sells the stock; and, then, any excess over the option price is taxed as a capital gain. However, any stock option plan which does not come within the restrictions of § 421 will not receive the special capital gains treatment. The taxability of these so-called nonrestricted options is the subject of this note.

[2] 351 U. S. 243 (1956).

[3] Malcolm S. Clark, P-H 1950 T. C. Mem. Dec. ¶ 50210; Norman G. Nicholson, 13 T. C. 690 (1949); Delbert B. Geeseman, 38 B. T. A. 258 (1938).

[4] Commissioner v. LoBue, 223 F. 2d 367 (3d Cir. 1955), *rev'd*, 351 U. S. 243 (1956); Commissioner v. Smith, 142 F. 2d 818 (9th Cir. 1944), *rev'd*, 324 U. S. 177 (1945).