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school children will be nullified as either "ingenious" or "ingenuous" attempts to evade the Constitution, a document which, as has been said, is "colorblind."⁴⁶

ROBERT G. WEBB

Constitutional Law—Military Jurisdiction Over Civilians

In the last two decades the United States has been confronted with a major world war and a police action in Korea. These have necessitated wholesale conscription of millions of American citizens to supply the armies needed, and the additional use of citizens in civilian capacities to complement these armies. In such situations the military requires prompt and efficient means of dealing with personnel who commit acts threatening the discipline and morale of the armed forces. Resort was made to the age-old military tribunal, the court-martial.¹ Thus during war time courts-martial have long exercised jurisdiction over uniformed military personnel and civilians accompanying the armed forces in the field.²

However, upon cessation of hostilities, there arises the question of continued military jurisdiction over persons who committed crimes while on active duty but were separated prior to being charged with such crimes. The general rule was that a discharge or separation divested the military of jurisdiction.³ In *United States ex rel. Hirshberg v. Cooke*,⁴ the Supreme Court held this rule applicable to one who was discharged and immediately re-enlisted, reasoning that courts-martial could not assume jurisdiction without a grant of congressional authority.

This case motivated Congress,⁵ in enacting the new Uniform Code of Military Justice⁶ (hereafter referred to as UCMJ), to include article 3(a),⁷ a provision retaining military jurisdiction over serious offenders

⁴⁶ Mr. Justice Harlan dissenting in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

¹ For a concise historical development of courts-martial, see WINTHROP, *MILITARY LAW AND PRECEDENTS* 45-51 (2d ed. reprint 1920).

² See, e.g., *Caldwell v. Parker*, 252 U.S. 376 (1920); *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858); *Perlstein v. United States*, 151 F.2d 167 (3d Cir. 1945); *Ex parte Campo*, 71 F. Supp. 543 (S.D.N.Y.), *aff'd sub. nom. United States ex rel. Campo v. Swenson*, 165 F.2d 213 (2d Cir. 1947); *In re Berue*, 54 F. Supp. 252 (S.D. Ohio 1944); *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va. 1943).

³ *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, 14 (1951); *MANUAL FOR COURTS-MARTIAL, U.S. ARMY*, 9 (1949).

⁴ 336 U.S. 210 (1949).

⁵ H.R. REP. NO. 491, 81st Cong., 1st Sess. 5, 11 (1949); S. REP. NO. 486, 81st Cong., 1st Sess. 8 (1949).

⁶ 10 U.S.C. §§ 801-940 (Supp. V, 1958).

⁷ "[N]o person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States . . . may be relieved from amenability to trial by court-martial by reason of the termination of that status." 10 U.S.C. § 803(a) (Supp. V, 1958).

who had been lost to courts-martial by reason of a termination of their code status. Of equal constitutional significance is article 2(11),⁸ which grants military jurisdiction over all "persons serving with, employed by, or accompanying the armed forces" without the continental limits of the United States. These two jurisdictional provisions and their application to persons not in uniform are the subject of this Note.

The constitutionality of article 3(a) was squarely presented in *United States ex rel. Toth v. Quarles*,⁹ where it was held that petitioner, a discharged ex-serviceman who had severed all connections with the military, could not constitutionally be tried by court-martial for offenses against UCMJ committed while on active duty overseas. The Court emphasized that the necessity for compelling obedience and order in the military authorized Congress, under its power to make rules for the regulation of the land and naval forces,¹⁰ to establish courts-martial. However, the Constitution did not authorize Congress to expand court-martial jurisdiction to include civilians whose relationship with the military had been severed by discharge. The amenability of such civilians to military tribunals had no proper relationship to continued maintenance of order and discipline of the services, hence they could not be deprived of the right to a trial by jury in a civil court.

When the constitutionality of article 2(11) was presented in 1956 the Supreme Court held,¹¹ relying on the principle that constitutional guarantees do not extend beyond the boundaries of the United States,¹² that Congress could constitutionally subject civilian wives, accompanying their servicemen-husbands overseas, to trial by court-martial for the murder of their husbands. On rehearing the following year the Court in *Reid v. Covert*¹³ reversed itself and held that the Constitution necessarily follows the flag since all authority for governmental action abroad is derived from the Constitution. Thus, American citizens accompanying the military overseas were entitled to the safeguards of the Bill of Rights.¹⁴ Four Justices thought that the power to make regulations for the land and naval forces did not encompass persons who could not fairly be said to be *in* the military service, although they recognized that there might be circumstances where a person could be *in* the armed services even though he had not formally been inducted into the military. They concluded that *dependents* of servicemen were not *in* the military for purposes of trial by court-martial, stating that "*a statute cannot be*

⁸ 10 U.S.C. § 802(11) (Supp. V, 1958).

⁹ 350 U.S. 11 (1955).

¹⁰ U.S. CONST. art. I, § 8, cl. 14.

¹¹ *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956), 35 N.C.L. REV. 157.

¹² *Dorr v. United States*, 195 U.S. 138 (1904); *In re Ross*, 140 U.S. 453 (1891).

¹³ 354 U.S. 1 (1957).

¹⁴ U.S. CONST. amend. I-IX.

framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."¹⁵ The two concurring Justices¹⁶ limited their holding to capital cases involving dependents in peace time.

In *United States ex rel. Guagliardo v. McElroy*,¹⁷ the *Covert* holding was held inapplicable to a civilian employee of the Air Force convicted and sentenced by court-martial under the authority of article 2(11) for conspiracy¹⁸ to commit larceny.¹⁹ Noting that federal courts prior to UCMJ had also sustained military jurisdiction in similar cases,²⁰ the court reasoned that civilian employees may be deemed part of the military since certain civilians are indispensable to its operations. Following this reasoning a later district court decision²¹ held a civilian employed by the military in France amenable to court-martial for premeditated murder.²²

In the recent case of *Wheeler v. Reynolds*,²³ involving article 3(a), a district court held an inactive reservist amenable to court-martial jurisdiction for a murder he allegedly committed while on active duty in Germany. Distinguishing the *Toth* case, the court found an assignment to the inactive reserve did not operate as a discharge so as to deprive the military of jurisdiction. However, prior to UCMJ it was held²⁴ that an assignment to the inactive reserve was the equivalent of a discharge, and the court refused to allow the reservists to be recalled to active duty for the sole purpose of trial by court-martial. That the discharge should no longer be the determinative factor since the passage of UCMJ is shown by a case,²⁵ involving a fact situation essentially the same as *Hirshberg*, where the Military Court of Appeals held that a discharge did not divest courts-martial of jurisdiction for offenses committed during a former enlistment when the accused immediately re-enlisted. Morale, discipline, and good order required punishment for offenders still serving in the armed forces.

From the foregoing it appears that a discharged ex-serviceman who has severed all relations with the military may not constitutionally be

¹⁵ 354 U.S. at 35, quoting from *WINTHROP, op. cit. supra* note 1, at 107.

¹⁶ 354 U.S. at 41, 65 (concurring opinions).

¹⁷ 158 F. Supp. 171 (D.D.C. 1958).

¹⁸ 10 U.S.C. § 881 (Supp. V, 1958).

¹⁹ 10 U.S.C. § 921 (Supp. V, 1958).

²⁰ The court cited: *Hines v. Mikell*, 259 Fed. 28 (4th Cir. 1919); *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va. 1943); *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex. 1919); *Ex parte Falls*, 251 Fed. 415 (D.N.J. 1918). It should be noted that these cases held only that the military could try civilians employed by the services in the field during time of war.

²¹ *Grisham v. Taylor*, 161 F. Supp. 112 (M.D. Pa. 1958).

²² 10 U.S.C. § 918 (Supp. V, 1958).

²³ 164 F. Supp. 951 (N.D. Fla. 1958).

²⁴ *United States ex rel. Viscardi 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). The courts stated that inactive reservists were civilians subject to recall into active service only "in time of war or national emergency." It is conceivable that the same reasoning would apply today. See 10 U.S.C. § 672(a) (Supp. V, 1958).

²⁵ *United States v. Gallagher*, 7 U.S.C.M.A. 506, 22 C.M.R. 296 (1957).

tried by court-martial for offenses committed while he was in uniform.²⁶ However, military jurisdiction is not lost when the serviceman immediately re-enlists²⁷ or retains an inactive reserve status.²⁸ Civilian dependents accompanying the armed forces abroad may not be subjected to a military trial in peace time when charged with a capital crime.²⁹ Whether this reasoning will be applied in civilian dependent non-capital cases remains to be seen. However, a civilian employed by the armed services abroad is deemed to have military status and consequently is amenable to military jurisdiction,³⁰ even in capital cases.³¹ It will be interesting to see if the Supreme Court agrees that civilian employees and inactive reservists are in the land and naval forces for purposes of military trial in peace time.

RICHARD VON BIBERSTEIN, JR.

Constitutional Law—Police Power—Changed Economic Condition of Railroads Judicially Applied in Determining Reasonableness of Ordinance

The generally accepted test as to the constitutionality of an exercise of the police power¹ is whether under all the existing conditions and surrounding circumstances it is reasonable;² *i.e.*, it must be reasonably adapted to accomplish a legitimate end,³ be reasonable toward persons whom it affects,⁴ must not be for the annoyance of a particular class,⁵ nor be unduly oppressive.⁶ Reasonableness is a question of law for the

²⁶ United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

²⁷ United States v. Gallagher, 7 U.S.C.M.A. 506, 22 C.M.R. 296 (1957).

²⁸ Wheeler v. Reynolds, 164 F. Supp. 951 (N.D. Fla. 1958).

²⁹ Reid v. Covert, 354 U.S. 1 (1957).

³⁰ United States *ex rel.* Guagliardo v. McElroy, 158 F. Supp. 171 (D.D.C. 1958); *In re* Varney's Petition, 141 F. Supp. 190 (S.D. Cal. 1956).

³¹ Grisham v. Taylor, 161 F. Supp. 112 (M.D. Pa. 1958).

¹ Police power, although elusive of definition, has been defined as "the power inherent in every sovereignty to govern men and things, under which power the legislature may, within constitutional limits, not only prohibit all things hurtful to the comfort, safety, and welfare of society, but may prescribe regulations to promote the public health, morals, and safety, and add to the general public convenience, prosperity, and welfare." 11 AM. JUR., *Constitutional Law* § 247 (1937).

² Austin v. Shaw, 235 N.C. 722, 71 S.E.2d 25 (1952); Berger v. Smith, 156 N.C. 323, 72 S.E. 376 (1911). It has been suggested, however, that an exercise of the police power may be reasonable and yet unconstitutional. Soref, *The Doctrine of Reasonableness in the Police Power*, 15 MARQ. L. REV. 3 (1930).

³ "It is necessary . . . that the proposed restriction have a reasonable and substantial relation to the evil it purports to remedy." State v. Harris, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940). See also East Side Levee and Sanitary Dist. v. East St. Louis & C. Ry., 279 Ill. 123, 116 N.E. 720 (1917); Victory Cab Co. v. Shaw, 232 N.C. 138, 59 S.E.2d 573 (1950).

⁴ East Side Levee & Sanitary Dist. v. East St. Louis & C. Ry., *supra* note 3; State v. Bass, 171 N.C. 780, 87 S.E. 972 (1916).

⁵ Plessy v. Ferguson, 163 U.S. 537 (1896); Town of Clinton v. Standard Oil Co., 193 N.C. 432, 137 S.E. 183 (1927).

⁶ Plessy v. Ferguson, *supra* note 5.