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Constitutional Law–Military Jurisdiction over a Discharged Serviceman

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mized by the designated person or issue who are alive or who were conceived at the time of distribution.

The enactment of such a statute would put Ohio in line with the better definition of "issue" and with her important commercial and industrial sister states.

WILLARD J. HUNTER, JR.

Recent Decisions

CONSTITUTIONAL LAW — MILITARY JURISDICTION OVER A DISCHARGED SERVICEMAN

More than five months after receiving an honorable discharge from the U. S. Air Force, a former enlisted man was arrested by the military. He was charged under the Uniform Code of Military Justice (U.C.M.J.)[1] with the murder of a Korean civilian prior to his discharge. Jurisdiction was predicated on Article 3(a)[2] of the U.C.M.J.

Habeas corpus proceedings were instituted in the United States District Court,[3] and the prisoner was released[4] on non-constitutional grounds. The United States Court of Appeals reversed,[5] holding Article 3(a) constitutional.

The Supreme Court of the United States, on certiorari, reversed the Court of Appeals, and held[6] that Article 3(a) could not be sustained as constitutional.[7] The Court held that the military powers granted to Congress by Article I section 8 of the Constitution[8] restricted military juris-

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[1] Articles 118 and 81 of the U.C.M.J., 64 STAT. 140 and 134, 50 U.S.C. §§ 712 and 675.

[2] Article 3(a) U.C.M.J., 64 STAT. 109, 50 U.S.C. § 553, which provides: ". . . 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 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."

[3] United States *ex rel.* Toth v. Talbott, 113 F. Supp. 330 (D.C.D.C. 1953).

[4] United States *ex rel.* Toth v. Talbott, 114 F. Supp. 468 (D.C.D.C. 1953).

[5] Talbott v. United States *ex rel.* Toth, 215 F.2d 22 (D.C. Cir. 1954).

[6] United States *ex rel.* Toth v. Quarles, —— U.S. ——, 76 Sup. Ct. 1 (1955).

[7] U.S. CONST. art. I, § 8, cls. 10, 11, 12, 14 and 18 do not aid the government. *In re* Yamashita, 327 U.S. 1 (1946); *Ex parte* Quirin, 317 U.S. 1 (1942).

[8] U.S. CONST. art. II, § 8, cl. 14: "to make rules for the government" and "to regulate the land and naval forces." Cognizance of this power is taken in the exception to the fifth amendment: "except in cases arising in the land and naval forces." This exception, however, does not create a system of courts nor jurisdiction. See 9 NOTRE DAME LAW, 26 (1933).

diction to persons *actually* members of the Armed forces. Justice Black, in writing the majority opinion, reasoned that the expansion of courts-martial jurisdiction attempted under Article 3(a) "encroaches on the Federal Courts under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals."

Military tribunals, Justice Black continued, are not and cannot be constituted in such a way as to qualify under the Constitution as courts.[9]

The U.C.M.J. was enacted[10] by Congress under Article I section 8 of the Constitution.[11] Article 3(a) of that Code was inserted specifically to cure the defect resulting from the inability of the military to try a discharged serviceman for a crime committed prior to his discharge.[12]

Although the military establishment has possessed similar statutory authority for over ninety years,[13] the question of whether this continuing jurisdiction over a discharged serviceman violates the Constitution has never been satisfactorily resolved.[14]

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[9] The majority gives two instances in which this is true: juries (grand and petit) and judges. As to the former, the court said: "But whether right or wrong, the premise underlying the constitutional method for determining the guilt or innocence in federal courts is that laymen are better than specialists to perform this task. This idea is inherent in the institution of trial by jury." 75 Sup. Ct. at 5-6.

As to judges, the majority stated: "The provision of Article III was devised to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the government. . . . They [the military "judges"] are appointed by military commanders and may be removed at will." 75 Sup. Ct. at 5.

[10] May 31, 1951. Pub. L. No. 506, 81st Cong. § 5, c.169 (May 5, 1950).

[11] See note 8 *supra.*

[12] Hirshberg v. Cook, 336 U.S. 210 (1949); *In re* Lo Dolce, 106 F. Supp. 455 (W.D.N.Y. 1952); Hironimus v. Durant, 168 F.2d 288 (4th Cir. 1948); *Hearings before Subcommittee of House Committee on Armed Services on H.R.* 2498, 81st Cong., 1st sess. 5, 11 (1949); S. Rep. No. 486, 81st Cong., 1st sess. 8 (1949).

[13] 12 STAT. 696 (1863). This was substantially reenacted in Article of War 94, 41 STAT. 805 (1920), which was the predecessor to Article 3(a).

[14] There is some dispute as to whether the precedents cited by the court of appeals and the dissent in the Supreme Court decision are substantial authority. *In re* Bogert, 3 Fed. Cas. 796, no. 1596 (C.C.D. Cal. 1873) was one of the first cases decided. Using a dictum from *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866), the court affirmed the validity of Article 94 of the Articles of War after interpreting "cases" in the fifth amendment to mean "crime committed." *Ex parte* Joly, 290 Fed. 858 (S.D.N.Y. 1922), without considering the rationale, the court felt bound by the *Bogert case.* The court in Terry v. United States, 2 F. Supp. 962 (W.D. Wash. 1933) felt bound by the two preceding cases and upheld the validity of the act. Because of the long passage of time, the court in Kronberg v. Hale, 180 F.2d 128 (9th Cir. 1950) reached the same result. One case, prior in time to the *Kronberg* case, reached a contrary result: Flannery v. Commanding General, 69 F. Supp. 661 (S.D.N.Y. 1946). See 42 GEO. L. J. 545 (1954). Thus, quaere: Has this question ever been satisfactorily resolved before? See 67 HARV. L. REV. 479 (1954) and Snedeker, *Jurisdiction of Naval Courts-Martial Over Civilians,* 24 NOTRE DAME LAW, 490 (1945).

It has always been the policy of the Supreme Court in reviewing a court-martial judgment to concern itself only with the determination of jurisdiction.[15] The Court in the instant case did not deviate from this rule. By holding Article 3(a) unconstitutional, the Court found that the military had no jurisdiction over the person of a civilian.

Under "civilian law" the *locus* of the criminal offense is determinative of jurisdiction over the person. The *status* of the accused is immaterial. Under military law the opposite is true.[16] In *In re Grimley*,[17] it was held that the taking of the oath of induction, or any other ceremony prescribed, is the jurisdictional fact which changes civilian status to military status and subjects the individual to military jurisdiction.

The Supreme Court in the instant case complemented these "status-changing" cases by affirmatively holding that an unconditional discharge is a change of status from the military back to civilian.[18]

More important than the distinction between locus and status is the age-old philosophy of two distinct systems of adjudication—the civil courts and the military tribunals. This philosophy stems from the fact that the civil courts and the military tribunals are established by two separate powers of Congress: Article III of the Constitution establishes civil courts; Article I section 8 establishes military tribunals.

> Congress has the power to provide for the trial and punishment of military offenses . . . and the power to do so is given without any connection between it and Article III of the Constitution . . . ; indeed the two powers are entirely independent of each other.[19]

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[15] Burns v. Wilson, 346 U.S. 137 (1953); Gusik v. Schilder, 340 U.S. 128 (1950); Whelchel v. MacDonald, 340 U.S. 122 (1950); Hiatt v. Brown, 339 U.S. 103 (1950); Humphrey v. Smith, 336 U.S. 695 (1949); United States v. Tobita, 3 U.S.C.M.A. 267, 12 C.M.R. 23 (1953); U.S. v. Padilla & Jacobs, 1 U.S.C.M.A. 603, 5 C.M.R. 31 (1952). See 32 N.C.L. Rev. 1 (1953).

[16] Durant v. Hiatt, 81 F. Supp. 948 (N.D. Ga. 1948); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); U.S. v. Solinsky, 2 U.S.C.M.A. 153, 7 C.M.R. 29 (1953); Art. 2 U.C.M.J., 50 U.S.C. § 552 (Supp. 1952); Art. 3 U.C.M.J., 50 U.S.C. § 553 (Supp. 1952). See Snedeker, *Jurisdiction of Naval Courts-Martial Over Civilians*, 24 Notre Dame Law, 490 (1945): "The obligation . . . determines the status and the status . . . determines the power of Congress to provide . . . a means of criminal prosecution other than by jury."

[17] 137 U.S. 147 (1890); United States v. Perry, 1 C.M.R. 516 (1951). Thus a serviceman cannot be tried for a criminal offense committed by him before he acquired military status, even though the offense is one prohibited by military law. United States v. Logan, 31 C.M.R. 363 (1944); Billings v. Truesdell, 321 U.S. 542 (1944).

[18] *Manual for Courts-Martial*, United States, 1951, paragraph 11a, p. 19; Hirshberg v. Cook, 336 U.S. 210 (1949); *Ex parte* Wilson, 33 F.2d 214 (E.D. Va. 1929); U.S. v. Santiago, 1 C.M.R. 365 (1951); Article of War 81, 41 STAT. 809 (1920), 10 U.S.C. § 1580 (1946).

[19] Johnson v. Sayre, 158 U.S. 109 (1895); Dynes v. Hoover, 61 U.S. (20 How) 65 (1857).

A Congressional act as broad and sweeping in its application as Article 3(a) not only narrows the gap between the two systems, but it enters an area which is to be solely occupied under Article III by civil courts (not military tribunals). The entry is attempted by Congress through the power granted in Article I, although Article I was not intended to procure jurisdiction over civilians.[20] The Supreme Court in examining the validity of Article 3(a) weighed the right of a civilian to constitutional safeguards against the necessity of trial by military tribunal.

It is true, the test of Congressional power, as the dissent points out,[21] is that an act of Congress bear a reasonable relation and is plainly appropriate to the proposed end.[22] The majority is not questioning the merit of the proposed end which is that a criminal shall not go unpunished. The majority, however, is questioning the *reasonableness* of the Congressional act. By applying a stricter test than the one used by the dissent, the Court limited the Legislature to "the *least* possible power adequate to the end proposed (emphasis supplied)."[23] The result is consistent with other cases in which fundamental personal liberties have been involved.[24]

In effect, the Supreme Court has established another boundary of that evasive term due process.[25] They have drawn the line beyond which Congress can not go. They have saved the courts the burdensome task of deciding what is and what is not due process in each individual case involving ex-military personnel.

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[20] See note 7 *supra.*

[21] 76 Sup. Ct. 1, 13 (1955).

[22] McCulloch v. Maryland, 17 U.S. (6 Wheat.) 204 (1821). See note 23 of the majority opinion. Another factor which played an important part in this decision was the alternative solution offered Congress, *viz.* to give the federal courts jurisdiction over discharged servicemen. *Hearings before Committee on Armed Services on* S. 951 and H.R. 4080, 81st Cong., Ist sess. 256 (1949). At that time Brigadier General Green proposed this alternative to prevent adverse criticism of the military for usurping too much federal power. Also, "you preserve the constitutional separation of military and civil courts. . . ." There is no constitutional objection to this measure: see 76 Sup. Ct. 1 (1955) for cases cited.

[24] The right to freedom of speech outweighs interference with the administration of justice. Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941). The right to counsel outweighs the efficient prosecution of crime. DeMeerleer v. Michigan, 329 U.S. 663 (1947); Powell v. Alabama, 287 U.S. 45 (1932). The right to religious freedom outweighs the power to demand expressions of loyalty, W. Va. v. Barnette, 319 U.S. 624 (1943). The right to trial by jury outweighs the convenience of trial by military tribunal. Duncan v. Kahanamoku, 327 U.S. 304 (1946).

[25] *Ex parte* MacDonald, 76 Ala. 603 (1884); People v. Tilkin, 34 Cal. App.2d 89, 90 P.2d 148 (1939); Gilmer v. Bird, 15 Fla. 410 (1875); Bardwell v. Collins, 44 Minn. 97, 46 N.W. 315 (1890); Hallenbeck v. Hahn, 2 Neb. 377 (1872); Stuart v. Palmer, 74 N. Y. 183 (1878); Gaffney v. Jones, 44 Wash. 158, 87 Pac. 114 (1906).