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Comments and Casenotes

Civilian Dependents And Employees At Overseas Bases Not Subject To Court Martial Jurisdiction

*Kinsella v. United States*¹

*McElroy v. United States*²

*Grisham v. Hagan*³

The instant cases involve an expansion of the principle enunciated earlier in the companion cases of *Reid v. Covert*⁴ and *Kinsella v. Krueger*.⁵ In those cases, the Supreme Court held that civilian dependents of servicemen stationed at overseas bases could not constitutionally be tried by courts-martial for *capital* offenses committed while overseas during peacetime. The majority of the Court in the *Covert* case intimated, however, that this should apply to *any* offense, regardless of its gravity. Mr. Justice Frankfurter and Mr. Justice Harlan, in separate concurring opinions, restricted their concurrences to the facts of the *Covert* case, namely *capital* offenses. Mr. Justice Clark and Mr. Justice Burton dissented. Because of those divergent viewpoints, and the factor of a possible shift in the balance of the Court due to the non-participation of Mr. Justice Whittaker in the *Covert* case, and the anticipated retirement of Mr. Justice Burton, there was some doubt as to how the court would treat extensions of court-martial jurisdiction to civilian dependents accompanying the armed forces overseas in cases involving *noncapital* offenses, or to civilian employees serving with the armed forces overseas.

The instant three cases, decided by opinions handed down on the same day, resolve these open questions. In the *Kinsella* case,⁶ the defendant, wife of a member of the United States Army stationed in Germany, was convicted in Germany by a court-martial of the *noncapital* offense of involuntary manslaughter of her one year old son. The jurisdiction of the court-martial was based on Article 2 (11) of the Uniform Code of Military Justice,⁷

¹ 361 U.S. 234 (1960).

² 361 U.S. 281 (1960).

³ 361 U.S. 278 (1960).

⁴ 354 U.S. 1 (1957), noted 17 Md. L. Rev. 335 (1957).

⁵ *Ibid.*

⁶ *Supra*, n. 1.

⁷ 10 U.S.C.A. § 802 (11), which reads: "The following persons are subject to this chapter:

* * * * *

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law,

in conjunction with the NATO Status of Forces Agreement.⁸ The United States Court of Military Appeals upheld the conviction, and the defendant was returned to the United States to serve her sentence in the Federal Reformatory for Women. Petitioner, the mother of the defendant, contending that her daughter was deprived of the safeguards of Article III and the Fifth and Sixth Amendments to the Constitution, secured her discharge from custody by a petition for *habeas corpus* filed with the United States District Court for the Southern District of West Virginia.⁹ The Government appealed to the Supreme Court, which, in affirming the action of the District Court, held that the defendant as the wife of a soldier stationed overseas was not amenable to prosecution by a court-martial for a *noncapital* offense committed while overseas during peacetime.

In the *McElroy* case,¹⁰ the Court held that two civilian employees of overseas military forces were not amenable to prosecution by courts-martial for *noncapital* offenses. In the *Grisham* case,¹¹ the Court held, *a fortiori*, that a civilian employee of an overseas military force was not amenable to prosecution by a court-martial for a *capital* offense.

Mr. Justice Clark, speaking for the majority in the instant cases analyzed them in two aspects: (1) in terms of Article I, section 8, clause 14 of the Constitution which gives Congress the power "to make Rules for the Government and Regulation of the land and naval Forces;" and (2) in terms of the "Necessary and Proper" Clause.¹²

As to Article I, section 8, clause 14, the Court said the question is one of *status*, rather than one of *offense*, and consequently, civilian dependents and employees cannot be considered as falling within the term "land and naval

persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands."

⁸ 63 STAT. 2241 (1949); 4 UNITED STATES TREATIES AND OTHER INTERNATIONAL AGREEMENTS (hereinafter cited T.I.A.S.) (1953), pt. 2, 1794.

⁹ 164 F. Supp. 707 (S.D. W. Va. 1958).

¹⁰ *Supra*, n. 2. The decision involved two separate cases. In one, a civilian electrical lineman, employed by the Air Force, was convicted by a court-martial near Casablanca, Morocco, of larceny and conspiracy to commit larceny of government property. In the other, a civilian auditor, employed by the Army and stationed in Berlin, was convicted by a court-martial of sodomy.

¹¹ *Supra*, n. 3. Petitioner, a civilian employee of the United States Army in France, was tried by a court-martial for the capital offense of unpremeditated murder.

¹² Art. I, § 8, cl. 18.

Forces."¹³ The Court alluded to the recognized textual authority on court-martial jurisdiction,¹⁴ which was later quoted from in the *McElroy* case:

"That a civilian, entitled as he is, by Art. VI of the Amendments to the Constitution, to trial by jury, cannot be made liable to the military law and jurisdiction, in time of peace, is a fundamental principle of our public law. . . ."¹⁵

In fortification of the *status* approach, the Court discussed the landmark case of *United States ex. rel. Toth v. Quarles*,¹⁶ in which it was held that a soldier who had committed an offense while in the service could not be tried by a court-martial for this offense after his discharge from such service. In the instant case, the language of the *Toth* case was applied, namely, ". . . the power granted Congress 'to make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces."¹⁷ In the *McElroy* case, the Court said, ". . . as to all civilians serving with the armed forces today, we believe the *Toth* doctrine, . . . that we must limit the coverage of Clause 14 to 'the least possible power adequate to the end proposed,' . . . to be controlling."¹⁸

As to the effect of the "Necessary and Proper" Clause,¹⁹ the Court stressed the propriety of limiting Article I, section 8, clause 14 by use of the "Necessary and Proper" Clause, rather than expanding clause 14, as the Government strongly urged. The Court, in echoing James Madison, said:

"That clause [Necessary and Proper Clause] is not itself a grant of power, but a *caveat* that the Congress possesses all of the means necessary to carry out the specifically granted 'foregoing' powers of sec. 8 'and all other Powers vested by this Constitution'."²⁰

Then the Court rationalized by saying that as the "Necessary and Proper" Clause did not expand clause 14 in the *Covert* case, it cannot expand it to include prosecution of

¹³ Art. I, § 8, cl. 14.

¹⁴ WINTHROP, *MILITARY LAW AND PRECEDENTS* (2d ed. 1896).

¹⁵ *Ibid.*, 143, cited in *McElroy v. United States*, *supra*, n. 2, 284.

¹⁶ 350 U.S. 11 (1955), noted, 16 Md. L. Rev. 143 (1956).

¹⁷ *Ibid.*, 15.

¹⁸ *Supra*, n. 2, 286.

¹⁹ Art. I, § 8, cl. 18.

²⁰ 361 U.S. 234, 247 (1960).

civilian dependents for *noncapital* offenses. This idea was followed in the *McElroy* and *Grisham* cases.

Mr. Justice Harlan, joined by Mr. Justice Frankfurter, dissented in the *Kinsella* case and in the *McElroy* case, but concurred in the *Grisham* case. He attacked the *status* rationale of the majority, and emphasized that the distinction between *capital* and *noncapital* offenses should be maintained, in view of the awesomeness of the death penalty. In addition, he urged that the "Necessary and Proper" Clause should be applicable to allow the military to subject these *noncapital* offenders to court-martial jurisdiction.

Mr. Justice Whittaker, joined by Mr. Justice Stewart, concurred in the *Kinsella* case, but dissented in the *McElroy* and *Grisham* cases. He would draw no distinction between *capital* and *noncapital* offenses committed by civilian dependents, but he felt that the distinction between civilian dependents and civilian employees should be the criterion. This reasoning would subject all civilian employees to court-martial jurisdiction, regardless of the gravity of the offense.

This series of cases completes the orbit of adjudication in this area of court-martial jurisdiction over civilians accompanying or serving with the armed forces overseas in peacetime. Any previous doubts have been resolved in clear cut fashion. Now, no civilian, whether dependent or employee, accompanying or serving with the armed forces overseas in peacetime, may be deprived of his constitutional right to trial by jury by being subjected to trial by court-martial.

The conclusiveness of the instant cases is far less awesome than the problems which they create. The immediate reaction to these decisions is that unless Congress can operate quickly, perpetrators of these offenses will continue to go unpunished. Senator Hennings, Chairman of the Senate Constitutional Rights Subcommittee, has indicated several solutions:

"The United States has several alternatives: (1) Let foreign countries try these American civilians the way they would try any other American civilians under their local laws in their own courts; (2) bring the civilians back for trial in courts in the United States; (3) enact legislation placing such civilians in a military status so they could be covered by courts-martial under the Uniform Code of Military Justice."²¹

²¹ Congressional Record, vol. 106, no. 8, 646, January 19, 1960.

The Court in the instant cases suggested various alternatives in dealing with these civilians. Of those alternatives, the following appear to be the most feasible:²²

First. Congress might provide for the replacement of civilian employees by servicemen currently in the specialist program of the Department of the Army.²³ This has some merit, but has the obvious obstacle of shortage of manpower. It is conceivable, however, that these specialists could be used to fill at least a portion of the overseas jobs. Of course, such an alternative could not include civilian dependents.

Second. Congress might grant greater concessions to foreign governments to try these American civilians than those provided for in the existing Status of Forces Agreement.²⁴ This is an undesirable approach from the standpoint of morale and international relations, and the great diversity among foreign judicial systems would undoubtedly produce conflicting standards of fairness. However, due to the vast difficulties in bringing civilians back to the United States for trial, greater resort to prosecution by foreign countries might be feasible.²⁵

Third. Congress might provide for the prosecution of these civilians in Federal District Courts in the United States. This appears to be a sound approach, although admittedly not devoid of complications. For one thing, foreign witnesses cannot be subpoenaed by the federal courts. There would also be much interference with service duties if military witnesses were shuttled back and forth. There is a possible conflict with the Sixth Amendment which commands that a trial shall take place in "the State and district" where the crime was committed.²⁶ In addition, the apparent expense in transporting the neces-

²² The other alternatives suggested by the Court were: the institution of a procedure similar to that used by the Navy in regard to paymasters' clerks, who served aboard ship and whose trials were sanctioned in *Ex parte Reed*, 100 U.S. 13 (1879) and *Johnson v. Sayre*, 158 U.S. 109 (1895); the compulsory induction or voluntary enlistment into the armed forces of those civilian employees slated for overseas positions; the voluntary enlistment of specialists similar to the procedure used with the Seabees during World War II.

²³ See Army Regulation 600-201, 20 June 1956, as changed 15 March 1957, and Army Regulation 624-200, 19 May 1958, as changed 1 July 1959.

²⁴ 63 STAT. 2241 (1949); 4 T.I.A.S. (1953), pt. 2, 1794.

²⁵ The Court did not list this explicitly, but it may be inferred from the opinion.

²⁶ However, *Cook v. United States*, 138 U.S. 157, 181-183 (1891) indicates that the sixth amendment has reference only to crimes committed within a state; see also *United States v. Dawson*, 15 How. 467, 487 (U.S. 1853).

sary persons back and forth might be imposing. These are only a few of the many obstacles.²⁷

It is beyond the scope of this note to discuss detailed proposals for such legislation, but this writer believes that suitable legislation should incorporate three broad ideas:

First. Congress should provide for the prosecution of these civilian dependents and employees in Federal District Courts sitting in the United States, accepting the Court's earlier construction that Article III, Section 2 of the Constitution empowers Congress to provide for the place of trial for federal crimes occurring outside the boundaries of the States, and restricting the Sixth Amendment's application to federal crimes committed within a State.²⁸ A special federal court could be created with concurrent subject matter jurisdiction with courts-martial of violations of the Uniform Code of Military Justice, or the existing federal courts could be used, provided they were granted this concurrent jurisdiction. If the latter is adopted, the individual should be brought back to the United States and tried in the federal district in which the home port of his overseas unit is located. This would produce uniformity, leave little doubt as to venue, and facilitate the knotty problem of arranging for overseas witnesses. As to the establishment of roving Article III courts in foreign lands, it is extremely doubtful that any foreign country would acquiesce in such a proposal.²⁹

Second. Congress should implement the above suggested legislation with a provision for a *waiver of jury trial*, whereby a civilian accused of a crime could waive his constitutional right to be tried in an Article III court and thus voluntarily submit himself to court-martial jurisdiction.³⁰ In criminal cases a defendant may waive a jury trial, so by analogy it would seem that he could waive his federal prosecution in the United States, assuming Congress authorized such prosecution: "As a practical matter, then, it seems that anyone overseas could, with the

²⁷ EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* (1st ed. 1956), Ch. III; for an exhaustive discussion, see Comment, *Criminal Jurisdiction Over Civilians Accompanying American Armed Forces Overseas*, 71 Harv. L. Rev. 712 (1958).

²⁸ *Supra.* n. 26; and see 71 Harv. L. Rev., *ibid.*, 723.

²⁹ See Comment, *Criminal Jurisdiction Over Civilians Accompanying American Armed Forces Overseas*, *supra.* n. 27.

³⁰ This waiver would also extend to the constitutional guarantee of indictment by grand jury. See *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942); *Patton v. United States*, 281 U.S. 276 (1930); *Barkman v. Sanford*, 162 F. 2d 592 (5th Cir. 1947), *cert. den.* 332 U.S. 816 (1947); see also 71 Harv. L. Rev. 712 (1958); 107 U. of Pa. L. Rev. 270 (1958); 27 Geo. Wash. L. Rev. 245 (1958).

cooperation of military authorities, subject himself to their jurisdiction."³¹ This might appeal to the individual in many cases because of a desire to maintain anonymity, the impracticability of retaining suitable counsel in the United States, or the firm belief that the military court will be more lenient than the federal court. There appears to be nothing in the instant cases which would prohibit the use of such a waiver provision.

Third. Congress should amend the jurisdictional provisions of the Status of Forces Agreement to allow the foreign countries greater primary concurrent jurisdiction than they have at present under the treaty.³² At the same time, there should be instituted a policy which would limit the number of demands made by the United States upon foreign countries to turn over American civilians held by foreign courts for violations of foreign law. Such a policy would allow cases with very serious charges to be sent to the United States, but for expediency would allow the less serious cases to be tried in foreign courts, as they would be if no Status of Forces Agreement existed.

Mr. Justice Clark, who criticized the majority in the *Covert*³³ case for failing to provide any authoritative guidance as to what Congress might do by way of legislation, has supplied much of this needed guidance in the

³¹ EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* (1st ed. 1956), Ch. III, 24.

³² *Ibid.*, 41. Everett has summed up Article VII of the Status of Forces Agreement, which deals with jurisdiction, in this manner:

"Under the Status of Forces Treaty, the United States reserves exclusive jurisdiction over persons subject to its military law with respect to offenses punishable under that law, but not under the law of the host country where the offense is committed. Conversely, as to crimes punishable under the law of the host country, but not under American law, that country reserves exclusive jurisdiction. This jurisdiction embraces American military personnel, their dependents, and civilians 'accompanying' an American armed force 'who are in the employ of an Armed Service of' the United States. . . . It is clear, however, that the most typical case will be one where the offense committed would be punishable under both American law and the foreign law concerned. Here there is concurrent jurisdiction. One nation, nevertheless, is considered to have primary jurisdiction; the other, only secondary jurisdiction. The United States would have primary jurisdiction of an offense solely against the security or property of the United States, or against the person or property of American personnel, as well as of offenses arising out of actions 'in the performance of official duty.' In other instances of concurrent jurisdiction, the host country has the primary right to exercise jurisdiction. It is agreed, however, that that country will give 'sympathetic consideration' to any request by the United States for waiver of jurisdiction if the United States thinks such waiver 'to be of particular importance.'"

³³ 354 U.S. 1 (1957), noted 17 Md. L. Rev. 335 (1957).

instant cases. The burden is now upon Congress.⁸⁴ By effecting the three ideas of federal prosecutions in the United States, waiver of jury trial, and revampment of the jurisdictional provisions of the Status of Forces Agreement, the constitutional rights of the individual will be adequately safeguarded, and our relations with foreign countries should not be any more strained than they are at present.

FRANK J. VECILLA

⁸⁴Senator Keating, on January 19, 1960, introduced Senate Resolution 235, which proposed a select committee to investigate and recommend new legislation in this area relating to the jurisdiction of federal courts over civilians employed by or accompanying our armed forces overseas. At this writing, the resolution is in the hands of the Committee on the Judiciary.
