1-1-1970

Another Jurisdictional Limitation Placed on Courts-Martial

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v. McCormack was the authority cited by the court of appeals for the proposition that the speech or debate clause is not a bar to the action.[67]

The opinion of the court of appeals concluded with these words of Judge Cummings:

> If these plaintiffs should ultimately prevail in this consolidated action, members of Congress will not be imperiled in their Congressional functions but will merely have to conduct their future investigations under a narrower, constitutional mandate. A decision for plaintiffs here would signify no less respect for a coordinate branch of the Government. . . . Thus permitting this action to proceed will have no chilling effect on the legislators' performance of their duties.[68]

The case of *Powell v. McCormack* settled the academic question of the power of a house of Congress to judge the qualifications of its members. This case will have long term effects transcending the decision on the merits.[69] The analysis and reasoning utilized to reach the result will affect any future attempt at congressional discipline,[70] broaden the scope of judicial review of acts of the legislature, yield a different definition of mootness, and, at least until *Stamler v. Willis* reaches the Supreme Court, provide the major restricted interpretation of the immunities conferred by the speech or debate clause of the Constitution.

F. LAWRENCE MATTHEWS

ANOTHER JURISDICTIONAL LIMITATION PLACED ON COURTS-MARTIAL

Petitioner, a member of the United States Army stationed in Hawaii, was convicted by court martial of attempted rape, housebreaking, and assault with attempt to rape. The nature of the crime was purely "civil," and was committed while the petitioner was off duty, not on a military post, and not in uniform. After his arrest by civilian police, however, he was turned over to the military authorities for questioning and subsequently charged with violations of Articles 80, 130, and 134 of the

67. 415 F.2d at 1370.

68. *Id.*

69. "I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved." H. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

70. Since all congressional discipline cases will involve a fine, or other continuing punishment, it is likely that any future congressional discipline case will certainly be litigated in the federal courts to see if the action was constitutional.

Uniform Code of Military Justice.[1] He was convicted and sentenced to ten years imprisonment at hard labor and forfeiture of all pay and allowances, and was given a dishonorable discharge. His conviction was affirmed by the Army Board of Review and by the United States Court of Military Appeals.[2] The petitioner, at this time a prisoner in a federal penitentiary, filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania. The court denied relief.[3] The United States Court of Appeals for the Third Circuit affirmed, holding that courts-martial have jurisdiction over cases in which the defendant is presently in the military service, even when the crime is cognizable in the civilian court and the offense occurred while the accused soldier was on leave away from a military reservation.[4] The United States Supreme Court granted certiorari and *held*, reversed: A court-martial lacks jurisdiction over a member of the armed forces who allegedly commits a crime within the territorial limits of the United States which is neither service-connected nor on a military post, nor against a person performing any duties related to the military. *O'Callahan v. Parker*, 395 U.S. 258 (1969).

The history of the American military judicial system begins in England. By the seventeenth century, the kings were responsible for promulgating laws to govern the army in time of war. When Charles I attempted to expand court-martial jurisdiction over soldiers and sailors for certain nonmilitary offenses in time of peace, Parliament intervened and adopted the Petition of Right of 1627.[5] This law called for the King to halt such courts-martial which were contrary to the common law.[6]

Under the reign of William and Mary, Parliament adopted the Bill of Rights,[7] which vested in the sovereign, as commander-in-chief, the right

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1. The articles provide respectively:

(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing to effect the commission, is an attempt to commit that offense.

(b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

10 U.S.C. § 880 (1964).

Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct.

10 U.S.C. § 930 (1964).

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, specific, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

10 U.S.C. § 934 (1964).

2. United States v. O'Callahan, 16 U.S.C.M.A. 568 (1967).

3. 256 F. Supp. 679 (M.D. Pa. 1966).

4. 390 F.2d 360 (3d Cir. 1967).

5. 3 Car. 1, c. 1.

6. *Id.*

7. 1 W. & M., c. 2 (1688); *see* F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 304-05 (1908).

to command and the power to enforce and maintain discipline. The sovereign's use of these powers, however, was regulated by the Mutiny Act.[8] This act provided for trial by court-martial during peacetime only for the crimes of mutiny, sedition, and desertion, all of which are military-connected crimes. All other offenses had to be by "the judgement of his Peeres and according to the Known and Established Laws of this Realme . . . ."[9] There were later enactments which allowed the sovereign to adopt articles of war in time of peace for troops stationed in the dominions or elsewhere outside of England. These acts enabled him to convene courts-martial as if in wartime.[10] The Mutiny Act of 1720[11] provided for trial by court-martial for nonmilitary crimes if no request for civil trial was received by the military from the injured party within eight days.[12] This "within eight days" provision was dropped the following year.[13]

During the American Revolution, Congress found itself with an army and no articles of war to govern it. The British Military Code was already known to the colonists, and with minor modifications the Congress adopted both the Mutiny Act and the Articles of War which were then in force.[14] Among those British articles adopted by Congress in 1776[15] was one which obligated the commanding officer to deliver an offending soldier to the proper civil authorities when requested.[16] This article withstood even the complete revision of 1806.[17] Even though on its face this article appeared to have given concurrent jurisdiction to the military and civilian courts, the actual practice in England was that civil courts had exclusive jurisdiction of civil offenses committed by soldiers during peacetime.[18] The court-martial had no jurisdiction over a crime for which the common law or statute provided a punishment.[19] Neither

8. 1 W. & M., c. 5 (1688).

9. *Id.*

10. Mutiny Act of 1712, 12 Anne, c. 13.

11. 7 Geo. I, c. 6.

12. *Id. See also* F. WEINER, CIVILIANS UNDER MILITARY JUSTICE 13-14, 245-46 (1967).

13. 8 Geo. I, c. 3 (1721). *See also* F. WEINER, *supra* note 12, at 14.

14. G. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 44, 342 (2d ed. 1909) [hereinafter cited as G. DAVIS]. There is a conflict as to which set of articles was enforced at the beginning of the American Revolution, the Articles of 1765 or 1774. These articles are substantially the same. *See* Duke & Vogel, *The Constitution and the Standing Army*, 13 VAND. L. REV. 435, 445 n.47 (1960).

15. G. DAVIS at 608 (Rules and Articles for the Better Government of the Troops, 1776, § 10, art. 1).

16. Whenever any Officer or Soldier shall be accused of a capital Crime, or of having used Violence against the Persons or Property of Our Subjects, such as is punishable by the known Laws of the Land, the Commanding Officer and Officers of every Regiment, Troop, or Party, to which the Person or Persons so accused shall belong, are hereby required, upon Application duly made by or in behalf of the Party or Parties injured, to use his utmost Endeavours to deliver over such accused Person or Persons to the Civil Magistrate; and likewise to be aiding and assisting to the Officers of Justice, in apprehending and securing the Person or Persons so accused, in order to bring them to a Trial.

G. DAVIS at 589 (British Articles of War of 1774, § 11, art. 1). The Article also provides that any commanding officer not complying therewith shall be dismissed from the service.

17. Act of April 10, 1806, ch. 20, § 1, art. 33, 2 Stat. 366.

18. 2 J. CAMPBELL, LIVES OF THE CHIEF JUSTICES 91 (1849).

19. A. TYTLER, MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 154 (3d ed. 1814).

the British nor American Articles of War had provisions relating to common-law crimes, such as murder and larceny.[20]

A general article provided for trial by court-martial for all noncapital crimes and all disorders and neglects against "good order and *military* discipline,"[21] which were not specifically provided for in the articles. The most likely construction seems to be that the clause "to the prejudice of good order and military discipline" applies to "crimes not capital," as well as to "disorders and neglects."[22] In order for an offense to be cognizable under the general article, it must have a direct impact upon good order and military discipline.[23] Yet, in the United States, there were many instances when the general article was used by commanding officers to include any "offense . . . affecting, in any material though inferior degree, the discipline of the command."[24] Even if some commanding officers did not recognize the implicit limitations of the general article, the Supreme Court limited it to areas directly affecting military discipline.[25]

The Articles of War of 1806 remained essentially unchanged until 1863, when Congress passed the Enrollment Act.[26] Section 30 of the Act provided for court-martial jurisdiction in cases of murder, assault, and rape in time of war, insurrection, and rebellion. This was the first explicit extension of military jurisdiction in the United States over nonmilitary offenses. *Coleman v. Tennessee*[27] was the only Supreme Court case in which section 30 was in issue. The Court held that such an act was necessary since it would have been absurd to let the invaded state courts try Union soldiers,[28] and such an article was needed when a marching army had to dissuade the commission of acts of violence and pillage by its troops.[29]

The Enrollment Act was incorporated in the 1874 Articles of War.[30]

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20. G. DAVIS at 581 (British Articles of War of 1774); G. DAVIS at 618 (American Articles of War of 1776).

21. G. DAVIS at 601 (British Articles of War, 1774, § XX, art. III) (emphasis added); G. DAVIS at 618 (American Articles of War of 1776, § XVIII, art. V);

> All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the above articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion. *Id.*

See also note 1, *supra.*

22. G. DAVIS at 475.

23. W. WINTHROP, MILITARY LAW AND PRECEDENTS 1123 (1920).

24. *Id.* at 1125.

25. *Ex parte* Mason, 105 U.S. 696, 698 (1881) stated:

> The gravamen of the military offense is, that, while standing guard as a soldier over a jail in which a prisoner was confined, the accused willfully and maliciously attempted to kill the prisoner. Shooting with intent to kill, is a civil crime, but shooting [of] a soldier of the army standing guard over a prison, with intent to kill a prisoner . . . is not only a crime against society, but an atrocious breach of military discipline.

26. 12 Stat. 736 (1863).

27. 97 U.S. 509 (1878).

28. *Id.* at 516.

29. 97 U.S. at 513.

30. Rev. Stat. § 1342, art. 58 (1875).

Consequently, the 1806 articles, requiring delivery of military offenders to the proper civilian authorities, were made inoperative during times of war or rebellion.[31]

The Articles of War of 1916[32] expanded the court-martial jurisdiction to peacetime as well as to time of war for selected noncapital crimes.[33] The general article also included capital crimes for the first time,[34] and the military then had jurisdiction over the capital crimes of murder and rape committed outside of the United States in time of peace.[35]

The 1916 articles concerning jurisdiction remained the same until the enactment of the Uniform Code of Military Justice in 1950.[36] The Code, although being a great reformation in military law, extended even further the court-martial jurisdiction over capital crimes by giving courts-martial power to try cases of rape and murder *within* the United States during peacetime.[37]

The Articles of War and the Uniform Code of Military Justice were created by Congress through the power granted to it by article I of the Constitution.[38] Section 8, clause 14 seems to limit the power of Congress to govern and regulate the land and naval forces in their *military* roles. Therefore, the offenses over which courts-martial should have jurisdiction must have some special relationship to the military. All the Articles of War enacted from the time the Constitution went into effect until the time of the Civil War supported this limitation in the types of offenses over which those articles had jurisdiction.

The Supreme Court recognized the limited jurisdiction of courts-martial, and seems to have kept in mind the objective of article III, section 2, to "preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future."[39] On many occasions, the Court seems to have looked to both article I and article III, section 2, in determining jurisdiction. If the case was one which impaired trial by jury and at the same time did not concern itself with the governing and regulating of the armed forces, the Court limited the military court's jurisdiction.[40]

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31. Rev. Stat. § 1342, art. 59 (1875).

32. 39 Stat. 650 (1916).

33. Articles of War of 1916, art. 93, 39 Stat. 650, 664 provided:

> Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with the intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

34. Articles of War of 1916, art. 96, 39 Stat. 666.

35. Articles of War of 1916, art. 92, 39 Stat. 664.

36. 64 Stat. 108 (1950).

37. Uniform Code of Military Justice, arts. 118, 120, 10 U.S.C. 712, 714 (1958).

38. *Ex parte* Mason, 105 U.S. 696 (1881).

39. *See Ex parte* Quirin, 317 U.S. 1, 39 (1943).

40. "Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections." Reid v. Covert, 354 U.S. 1, 21 (1957) (civilian

In the instant case, after giving a brief historical sketch of the jurisdictional limits of courts-martial, Justice Douglas pointed out such distinctions between article I and article III courts as the constitutional protection of salaries and life tenure granted to article III judges. He also distinguished courts-martial from other article I courts by viewing the former as instruments of discipline rather than of justice.

Justice Douglas' underlying premise seemed to be that military courts were courts of very limited jurisdiction and that because of their position as instruments of discipline, any expansion of their jurisdiction would be a direct threat to those constitutional freedoms which the civil courts are more likely to protect. He stated that the status of a person as a member of the armed forces "is necessary for jurisdiction; but it does not follow that ascertainment of 'status' completes the inquiry, regardless of the nature, time, and place of the offense."[41]

In most of the cases concerning the jurisdiction of courts-martial, the test of jurisdiction was one of status, that is, whether the accused subjected to the court-martial proceeding was a person who could be regarded as falling within the term "land and naval Forces."[42]

O'Callahan v. Parker[43] has added another test. After the accused has been determined to be a member of the armed forces, the next question is whether the offense which the accused had allegedly committed is one which is service-connected, or whether it is a civil offense. Courts-martial have jurisdiction over the former but, since *O'Callahan*, not the latter.

The instant decision has left an important question unanswered, *i.e.*, what constitutes a service-connected offense. Justice Douglas has given some indication as to the definition of the term,[44] but has left the question open. The tact which the Court has taken may very well lead to future cases in which "service-connected" offenses will be defined and in which courts-martial jurisdiction would be limited even further. Even if Congress has expanded the jurisdiction of courts-martial well beyond the intent of the framers of the Constitution, the premise that military law is primarily an instrument of discipline rather than one of justice is no

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dependents of military personnel accompanying them overseas cannot be subjected to courts-martial jurisdiction). *See also* Grisham v. Hagan, 361 U.S. 278 (1960) (civilian employees of the armed forces cannot be subjected to courts-martial jurisdiction overseas); Toth v. Quarles, 350 U.S. 11 (1955) (courts-martial had no jurisdiction over serviceman after discharge from the armed services); Dunran v. Kahanamoku, 327 U.S. 304 (1946) (civilians could not be subjected to martial law after threat of invasion was over).

41. O'Callahan v. Parker, 395 U.S. 258, 267 (1969).

42. Kinsella v. United States, 361 U.S. 234, 240 (1960); United States v. Schafer, 13 U.S.C.M.A. 83 (1962).

43. 395 U.S. 258 (1969).

44. There was no connection—not even the remotest one—between his military duties and the crimes in question. The crimes were not committed on a military post or enclave nor was the person whom he attacked performing any duties related to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.

395 U.S. at 273.

longer true. Members of the armed forces had the right to counsel[45] long before such right was given to the civilian,[46] whether he is indigent or not.[47]

The criticism that the courts-martial are under direct command influence because the convening authority appoints both the defense and the prosecution is also unfair. Actually, such criticism can be leveled at the civil courts as well; the public defenders, state attorneys, judges, and even the jury are all paid and "convened" by the same party, the state.

Although it is historically true that courts-martial jurisdiction should be limited solely to "service-connected offenses," this is not because they are instruments of discipline rather than justice; a more rational explanation is that courts-martial, by their very nature, are limited as to their jurisdiction, as are all courts.

GEORGE A. KOKUS

IMPLIED CONTRACTUAL DUTY OF BANKS NOT TO DISCLOSE INFORMATION TO THIRD PARTIES CONCERNING ITS DEPOSITORS' ACCOUNTS

Plaintiffs (depositors) alleged that the defendant bank negligently, willfully or maliciously, or intentionally divulged information concerning their accounts to third parties. The third parties then sued the plaintiffs and enjoined the bank from distributing any of plaintiffs' monies on deposit, whereby plaintiffs suffered damages equal to the cost of settlement of that suit and attorneys' fees expended in defense thereof. The trial court granted defendant's motion to dismiss on the ground that plaintiffs' complaint failed to state a cause of action and denied plaintiffs' motion for a rehearing. On appeal to the District Court of Appeal, Third District, *held,* reversed and remanded: A complaint which alleges that a bank negligently, willfully or maliciously, or intentionally divulged information concerning plaintiffs' accounts to third parties states a cause of action upon which relief can be granted, upon the theory that the bank breached its implied contractual promise of nondisclosure. *Milohnich v. First National Bank,* 224 So.2d 759 (Fla. 3d Dist. 1969).

The relationship existing between a bank and its depositors is generally considered to be that of debtor and creditor,[1] and it arises only out

45. Uniform Code of Military Justice of 1950, art. 32, 64 Stat. 118.

46. Gideon v. Wainwright, 372 U.S. 335 (1963).

47. United States v. Tempia, 16 U.S.C.M.A. 629 (1967). For further reforms within the military law see Bellin, *The Revolution in Military Law,* 54 A.B.A.J. 1194 (1968).

1. See cases collected at 10 AM. JUR. 2d *Banks & Banking* § 339 n.11 (1963).