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COURTS-MARTIAL JURISDICTION OVER CIVILIANS STATIONED OVERSEAS WITH UNITED STATES TROOPS

BY JOHN RITTENHOUSE‡

The emotionalism which surrounds the entire field of U. S. Military law makes the problem of the subjection of civilians to military justice during peacetime difficult to objectively assay. The major objective of this note is to briefly trace the origin of this problem. This paper will not consider the recent decisions affecting active-duty members of the Armed Services overseas and their amenability to trial by foreign nations' courts. This situation is epitomized by the case of *Wilson v. Girard.*[1] It will not be concerned with the question of an ex-serviceman and his triability by court-martial for capital offenses committed while on active duty as raised by *Toth v. Quarles,*[2] nor will it consider the question of courts-martial jurisdiction over civilian categories in time of war or other national emergency.[3]

The problem of civilian citizens traveling throughout the world in close company with our Armed Service personnel is peculiarly a product of our times. Unique, too, is the size of the dependent-employee "army" now quartered overseas.[4]

The end of World War II found the United States confronted with an unparalleled international scene. The "cold war" had evolved. The dormant antipathy between two conflicting systems of government became active once more. Basic defense concepts placed our military forces in globe-girdling locations. The problems of maintaining a large peacetime military force in positions throughout the world forced a revision of policy respecting civilians. For purposes of necessity and morale, two high-level policy changes were made in the role of civilians with the armed forces. First, civilian technical specialists were employed to aid and support our field forces. Secondly, civilian dependents were allowed to accompany armed forces personnel during prolonged tours of duty in foreign lands. These changes were made as it became increasingly clear that the opposing attitudes of East and West were to be with us for an indeterminate period.

Concurrent with the evolution of this policy on the part of the Armed Forces, came the move for codification of the military rules of criminal procedure. World War II had brought to light real and imagined inequities in the field of military justice. The comparison between the justice meted out by military law in time of war and the gentler methods of our civilian courts was striking. A strong

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1 354 U.S. 525 (1957).

2 350 U.S. 511 (1955).

3 See, Winthrop, *Military Law and Precedents,* (2d ed. Reprint 1920, orig. pub. 1896), Vol. I, p. 137, "it need hardly be remarked that the mere fact that a civilian is serving, in time of peace, in connection with the military administration of the government . . . will not be sufficient to subject him to military trial for offenses committed during such service." The current Supreme Court opinions seem content to preserve the distinction between wartime and peacetime control of such civilians, holding the former (by way of dictum) a constitutional exercise of powers. See, for example, McElroy v. United States, 359 U.S. 904 (1960).

4 U.S. Bureau of the Census, *Statistical Abstract of the United States: 1959* (80th Edition), Washington, D.C. 1959. p. 394, Table No. 497 indicates that the Department of Defense had 91,376 civilians working overseas. More recent Department of Defense figures supplied to the Supreme Court in 1956, indicate that the number of dependents overseas with the Armed Services is about 250,000 in number.

movement for military law reforms culminated in the adoption of the Uniform Code of Military Justice in 1950.[5]

HISTORICAL BACKGROUND OF FEAR OF MILITARY LAW

The United States and its citizens have had an inbred fear of military excesses far antedating the military misconduct of the redcoats in Massachussetts Bay Colony prior to the American Revolution.[6] As English citizens, many had inherited a distrust of military rule and justice. Military rule, as administered by the English monarchs, was not calculated to breed any love by the citizenry.

Some indication of the dominance and persistance of this feeling pervading American thinking can be gained from this statement of the United States Supreme Court in 1946:

> People of many ages and countries have feared and unflinchingly opposed the kind of subordination of executive, legislative and judicial authorities to complete military rule which according to the government congress has authorized here. In this country that fear has become part of our cultural and political institutions . . . .[7]

The Court stated further that: ". . . the military should always be kept in subjection to the laws of the country to which it belongs, and that (sic) he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law alone shall govern; and to it the military must always yield."[8]

Even with such reservations about military jurisdiction so prominently in mind, the new-born confederation of colonies found it necessary in 1776 to bind certain civilians to military law. Thus, the Continental Congress said that, ". . . all persons whatsoever, serving with the continental army in the field . . ."[9] should be bound by military regulations and trial by military courts-martial. This statement of policy, largely copied from the British military regulations,[10] has served as the basis for trial of civilians by military courts down to the present.

Of significance is a case considered by the Supreme Court of the United States in 1879.[11] This case concerned the plight of a paymaster's clerk in the Navy, serving aboard the USS Essex then stationed at Rio de Janeiro. Accused of malfeasance in his official duties, he was tried and convicted by a court-martial convened by the commanding officer. However, the admiral in charge declined to approve the sentence imposed and returned the proceedings. The court was instructed to revise the sentence *upward*. In discharging a later appeal for a writ of habeas corpus, the court said, "The constitutionality of the Acts of Congress touching army and navy courts-martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court."[12]

In placing the paymaster's clerk within the jurisdiction of a Navy court-martial, the Court supplied as essentially simple a yardstick for the measurement of his amenability to such trial as could

5 10 U.S.C. § 801-940 (1952 ed. Supp V). See text at note 33, *infra*.
6 Bowen, *John Adams and the American Revolution*, (1st ed. 1950) pp. 342-405.
7 Duncan v. Kahanamoku, 327 U.S. 304, 320 (1946).
8 Dow v. Johnson, 100 U.S. 158, 159 (1879).
9 Winthrop, op. cit. *supra* note 4, at 956.
10 *Id.* at 131.
11 Ex Parte Reed, 100 U.S. 13 (1879).
12 *Id.* at 21.

be wished. The determinant was simply the clerk's *written acceptance* of naval regulations.[13] Another case of similar fact structure a few years later served to confirm the stand of the Court in this regard.[14]

WORLD WAR I CASES

Though not directly in line with our basic restrictions, since the case occurred in wartime, *Ex Parte Gerlach*[15] should be touched upon. The defendant, a civilian employee of the United States Shipping Board, was discharged after serving as an officer in the merchant service on board the steamship McClellan on an eastward voyage to Europe. After discharge, he was sent back to the United States on an army transport as a passenger. Enroute to New York, he volunteered to stand watches. A few days later, he reneged on his agreement and refused thenceforth to stand duty. For this refusal he was tried by court-martial and sentenced to a prison term. Upon seeking a writ of habeas corpus, he was denied relief.

After quoting the second Article of War,[16] the court said that:

> The Articles were enacted in pursuance of the general war power, and ought to be given a broad scope in order to afford the fullest protection to the nation. The act is, in my

13 *Id.* at 22. The court says, "Their acceptance and agreement to submit to the laws and regulations for the government and discipline of the navy must be in writing, and filed in the department. They must take an oath and bind themselves to serve until discharged. . . .

"If these officers are not in the naval service, it may well be asked, who are.(?)"

14 Johnson v. Sayre, 158 U.S. 109 (1895). The Court says, "He was therefore, as has been directly adjudged by this court, a person in the naval service of the United States, and subject to be tried and convicted, and to be sentenced to imprisonment, by a general court-martial. . . ."

15 247 Fed. 616 (S.D. N.Y. 1917).

16 *Id.* at 617.

> opinion, constitutional. That an officer should be able to call upon a person accompanying the military forces to protect a transport and its occupants in time of danger, particularly where he had volunteered and indeed asked to stand watch as Gerlach had, is certainly within the fair object of the Articles of War, and is a *reasonable exercise of authority.*[17]

Here we encounter for the first time, a tacit admission on the part of a federal court, that Article Two of the Articles of War then in effect was constitutionally valid. Since this Article has served as the basis for the much contended section of the Uniform Code of Military Justice,[18] the wartime efficacy of this provision in 1917 has some significance.

In another case of World War I vintage,[19] the defendant Mikell was in the employ of the quartermaster at Camp Jackson near Columbia, South Carolina, as a civilian stenographer. It is hard to imagine a more prosaic job than this, far removed from the strife of battle and within the territorial limits of the United States. Even so, Mikell was tried and convicted by military court-martial for rendering false claims against the government. In reversing the grant of a writ of habeas corpus, the circuit court made a practical point when it said,

> To hold that a cantonment like this is not within military jurisdiction would handicap military authorities, and greatly hinder and delay military operations, and would, in some instances, *enable one employed in such capacity to successfully defraud the government without incurring any criminal liability whatsoever.* . . . This provision is highly proper, and manifestly intended to secure honest and fair dealing on the part of those employed by the government and should be rigidly enforced.[20]

Other cases of record stemming from the first world conflict lend little amplification to those already considered.[21] It is readily seen that these cases in the area of civilian trial by military courts bear little or no resemblance to our problem of the present day. They do, however, provide some judicial grist for the mill.

WORLD WAR II CASES—AN EXTENSION OF THE PATTERN

World War II cases regarding civilians add little depth to the picture already painted by the considered cases of the 1917-1919 era. The military courts were laboring under the same essential regulations.[22] *In re DiBartolo,*[23] however, offered an interesting statement

17 Ex Parte Gerlach, 247 Fed. 616, 618 (S.D. N.Y. 1917) (Emphasis added).
18 10 U.S.C. § 802 (11) (Supp. v, 1952).
19 Hines v. Mikell, 259 Fed. 28 (4th Cir. 1919), *cert. denied,* 250 U.S. 645 (1920).
20 *Id.* at 35 (Emphasis added).
21 See Ex parte Falls, 251 Fed. 415, (N.J. 1918); Ex parte Weitz, 256 Fed. (Mass. 1919); and Ex parte Jochen, 257 Fed. 200, 204 (S.D. Tex. 1919), wherein it was said: "That it is *not necessary that a person be in uniform in order to be a part of the land forces,* I think clear, not only upon considerations of common sense and common judgment, but upon well-considered and adjudicated authority." (Emphasis added).
22 Articles of War 1916, ch. 418, § 1, 39 Stat. 651; Articles of War 1920, ch. 227, sub ch. II § 1, 41 Stat. 787.
23 50 F. Supp. 929 (S.D. N.Y. 1943).

of the basic philosophy of the American people in reference to military jurisdiction and its limitations.[24] Included too, was an intrepid attempt to divine congressional intent.[25] The denial of a writ of habeas corpus to a civilian employee of the Army in North Africa conforms to the pattern set during World War I. Other cases involving a ship's cook,[26] a merchant seaman,[27] and a superintendent on a contract salvage job for the Army,[28] all reached the same conclusion and denied the writ.

From the trends evidenced by the cases occurring during the two world conflicts, we can see the scope of effectiveness granted to the Articles of War, Article Two,[29] by the judiciary. On the whole, the courts during both wars took a practical approach to the problems raised by the accompaniment of the armed forces by civilians. Cooperation in the principal task of winning the war seemed to be uppermost in the minds of the courts. Lip service was given to technical protections granted by the Constitution, but the war effort came first.

POST-WORLD WAR II CASES—A NEW PROBLEM EVOLVES

With the cessation of open hostilities in 1946, the world soon found itself divided into opposing camps. As has been mentioned heretofore, this problem engendered the use of civilian employees of the Armed Forces and the permitting of civilian dependents to join their husbands and fathers. The situation raised thereby was novel indeed.

The first major case encountered is *Grewe v. France*.[30] The defendant, a civilian engineer employed by the Army in Germany, was charged and tried on a variety of offenses stemming from his firing of a pistol into a crowded street. At the time of his military trial, he pleaded to no avail that the court did not have jurisdiction over him. Upon being returned to the United States to serve his prison sentence, he sued for a writ of habeas corpus.

In denying his application for a writ, the district court examined many of the cases considered above, and came to the same basic conclusion as before. In so doing, the court dealt with the fact that the actual warfare was over in Europe by saying,

> Plaintiff here argues that in June, 1946, the shooting war in Germany was over and that the American Forces

24 *Id.* at 932. "It is in keeping with the traditions of this peace-loving nation that its civil courts should not readily surrender a civilian to the jurisdiction of the military. Expediency and even necessity should not dispense with a painstaking examination to determine whether one whose liberties the civil courts have been charged to guard inviolate has been properly brought to justice in a military tribunal."

25 *Id.* at 932-33, where it was stated, "The 64th Congress made the change when it enacted the Articles of War of 1916. At the legislative hearings held upon the bill, Major General Crowder, Judge Advocate General, made statements which are incorporated in the transcript of the hearing annexed to the Senate Report No. 130, 64th Congress, First Session. . . ." (The opinion goes on to quote verbatim much of the General's testimony. He indicated that with respect to Article 2 of the Articles of War, that the Army wished to include a greater class of heretofore excluded civilians 'accompanying the army in the field'.) At the conclusion of this testimony, the court goes on to say, "These statements which supplied Congress with the reasons for the executive's desire for the change and the objects to be attained thereby are very cogent evidence of the congressional intent in adopting these recommendations. It is manifest, therefore, that Congress deliberately intended to subject to military authority, in the circumstances specified, not only camp retainers and not only those who serve with the army *but others who accompany it. Such persons must include those who are not employees of the army.*" (Emphasis added).

26 McCune v. Kilpatrick, 53 F. Supp. 80 (E. D. Va. 1943).

27 In re Berue, 54 F. Supp. 252 (S.D. Ohio 1944).

28 Perlestein v. United States, 151 F.2d 167 (3rd Cir. 1945); *cert. petition dismissed*, 328 U.S. 822 (1946).

29 Articles of War 1920 ch. 227, sub.-ch. 11 § 1, 41 Stat. 787.

30 75 F. Supp. 433 (E.D. Wis. 1948).

were no longer engaged in military operations, and concludes that he, therefore, could not be considered as accompanying the army in the field.

Petitioner's argument ignores the other provision of Article 2(d), to wit: ". . . all persons accompanying or serving with the Armies of the United States without the territorial jurisdiction of the United States . . ."[31]

Another case with a different fact situation reached a similar result the following year.[32] It would seem then, that the pattern of cases decided immediately after the end of hostilities of World War II placed their dependence upon the provisions of Article 2 (d) without any question as to its constitutionality. It must be realized that the only points of reference were cases which, although they had been outside the territorial limits of the United States, *had occurred in time of war.* As the shooting war became more remote, the question of infringment of constitutional guarantees was raised with more telling effect.

THE UNIFORM CODE OF MILITARY JUSTICE—1950

Our gigantic war effort of World War II embodied at its peak, some twelve and one-half million men and women in uniform. It seems only natural that these citizen-soldiers, reared in the ways of the full protection of civilian court procedures, would react unfavorably to the harsher concepts of traditional military law. React they did. With the fighting over in Europe and Asia, the nation once more demobilized, and a horde of interested veterans groups descended upon Congress demanding reform of military law.

Many a sympathetic ear was tuned in the post-war Congress, indeed many members themselves were veterans with definite ideas concerning reforms. For those members of the Congress without any personal experience, the siren song of ten percent of the population, all of voting age, sufficed. Hearings were held; groups were heard.

From the voluminous records of Senate[33] and House[34] hearings, the proceedings of the hard-working sub-committee of the Armed Services Committee,[35] emerged the Uniform Code of Military Justice. The Code was enacted into law on May 5, 1950, and became effective on May 31, 1951.[36]

The purpose of the Code was to provide a single system of criminal law and judicial procedure for all of the Armed Forces of the United States.[37] We are primarily concerned with the features and

31 *Id.* at 435.

32 United States ex. rel. Mobley v. Handy, 176 F.2d 491 (5th Cir. 1949); *cert. denied*, 338 U.S. 904; *reh. denied*, 338 U.S. 945. This case involved a petition for a writ of habeas corpus by a former post exchange employee who, while working in Germany, was arrested and confined to a military compound. Defendant fled to the United States where he was arrested. He was being prepared for return to Germany for trial by courts-martial when he applied for the writ. Relief was denied on the basis that the Army had jurisdiction over him prior to his escape from Germany and therefore retained it upon his apprehension.

33 Senate Hearings Before Committee on Armed Services on S. 857 and H.R. 4080, 81st Cong., 1st Sess. 1, 256 (1949).

34 Full Committee Hearings on H.R. 3341 and H.R. 4080, House of Representatives, Committee on Armed Services 81st Cong., 1st Sess. (1949).

35 H.R. Rep. No. 491, 81st Cong., 1st Sess. 11 (1949); S. Rep. No. 486, 81st Cong., 1st Sess. 7-8 (1949).

36 Effective that date along with the Manual for Courts-Martial by Executive Order 10214 of 8 Feb 1951.

37 Enacting clause of Public Law No. 506, 81st Cong., 2d Sess. (May 5, 1950), 64 Stat. 108 (1950), 50 U.S.C.A. (Chap. 22) § § 551-736 (1950 Supp).

provisions of Article 2 (11) of the Uniform Code[38] and its ramifications. A comparison of the texts of Article 2(11) and former Article of War, Article 2(d), illustrates clearly the parentage of the Uniform Code provision. To be sure, a certain amount of expansion of applications to civilians is evident in Article 2(11). This might have been expected in light of the changed status of civilians in relation to the armed forces after World War II.

The underlying intent of Congress in passing Article 2(11) of the Code is well-documented.[39] Typical of these expressions of legislative intent is a comment by Congressman Kilday, member of the House Committee who said:

> I agree that persons serving with the armed forces of the United States *must be subject to military law, as they always have been.* We have a different situation now than we have had heretofore, with armed service (sic) all over the world.[40]

The congressional intent was again clearly expressed on the subject during the legislative consideration of the Uniform Code of Military Justice. In explaining the bill on the floor of the Senate, Senator Estes Kefauver indicated,

> If the wife accompanies her husband outside the continental limits of the United States and outside the territories listed in subsection (11) . . . *she will be subject to the uniform code as presented in this bill, just as she is subject to the military code today.*[41]

The major concern evidenced in the testimonies of the various interested groups (ie.—American Legion, Veterans of Foreign Wars, the Army Reserve Association, and similiar organizations) seemed to be centered upon other matters.[42] Indeed, the committees themselves seemed more concerned with bringing military practices more

38 Article 2. Persons subject to the Code. "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 170° West, the Canal Zone, the main group of Hawiian Islands, Puerto Rico, and the Virgin Islands."

Art. 1, Sec. 8, Cl. 14, U.S. Const. provides: "The Congress shall have Power to make Rules for the Government and Regulation of the land and naval forces."

Art. I, Sec. 8, Cl. 18, U.S. Const. provides: "The Congress shall have Power to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

39 *Supra* at notes 33, 34, and 35. Also 96 Cong. Rec. 1357 (1950).

40 *Supra* at note 34, page 1336 (Emphasis added).

41 96 Cong. Rec. 1357 (1950) (Emphasis added).

42 *Supra* at notes 33 and 34.

in line with civilian court procedures, eliminating "command influence" over military courts and generally democratizing the military justice approach. A careful scrutiny of all published testimony before the House committee[43] indicates little, if any, awareness in 1949 of the problems soon to be created by Article 2(11) of the Code.

Apparently, the only person testifying that voiced any real concern over the Uniform Code provisions concerning civilians was the one person most likely to be officially involved with the Code's administration—the Judge Advocate General of the Army.[44] Even he did not voice his criticism of Article 2(11) but rather against Articles 2(3) and 3(a) of the proposed Code. These articles gave the services jurisdiction over former active-duty personnel for crimes committed against the Code while on active duty. His fears in this regard were apparently warranted. The subsequent case of *Toth v. Quarles*[45] so indicates.

From this scant indication of legislative intent, we are forced to conclude that the law makers believed that they were merely codifying and incorporating the substantial provisions of Articles of War, 1916, Article 2(d). Certainly there is no indication that the original intent of Article 2(11) of the Uniform Code was otherwise.

POST UNIFORM CODE CASES—ARTICLE 2(11) DECIMATED

The first of a recent series of cases in which the Supreme Court of the United States considered the constitutional questions raised by the provisions of Article 2(11) of the Code are the much-discussed *Kinsella v. Krueger*[46] and *Reid v. Covert cases.*[47] These cases were considered together since the questions raised, as well as the basic fact situations involved, were nearly identical.

In *Kinsella,* Mrs. Dorothy Krueger Smith was convicted by a general court-martial in Japan for the premeditated murder of her officer-huband. Sentenced to life imprisonment, her father sued out a writ of habeas corpus on her behalf upon her return to the United States. The contention of the defense was that Mrs. Smith, as a civilian dependent, was not triable under the provisions of the Uniform Code. The writ was discharged in the lower court.[48] Certiorari having been granted directly from the Supreme Court, that Court in affirming the denial of writ said:

> In all matters of substance, the lives of military and civilian personnel alike are geared to the local military organization which provides them living accommodations, medical facilities, and transportation from and to the United States. We could not find it unreasonable for Congress to conclude that all should be governed by the same legal standard to the end that they receive equal treatment under

43 *Supra* at note 34.

44 Sen. Hearings before Committee on Armed Services on S. 857 and H.R. 4080, 81st Cong., 1st Sess. 1, 256 (1949). The then Judge Advocate General of the Army, General Green, said: "Articles 2(3) and 3(a) of the code extend military jurisdiction over persons not now subject to it. I believe that this is unnecessary and the inevitable result will be public revulsion against its exercise. It has been my experience that no matter how fair and just the system of military justice may be, if it reaches out to the civilian community, every conceivable emotional attack is concentrated on the system. This is as it should be . . . . I do not advocate that such persons should go unpunished. I merely suggest that you confer jurisdiction upon Federal Courts to try any person for an offense denounced by the code if he is no longer subject thereto."

45 350 U.S. 511, (1955).

46 351 U.S. 470 (1956).

47 *Id.* at 487.

48 137 F. Supp. 806 (S.D. W.Va. 1956).

law. The effect of a double standard might well create sufficient unrest and confusion to result in the destruction of effective law enforcement.[49]

Considering the congressional background of the legislation the majority went on to express the carefully limited opinion,[50] "On the question before us, *we find no constitutional bar to the power of Congress to enact Article 2(11) of the Uniform Code of Military Justice.*"[51]

Mr. Chief Justice Warren with Justices Black and Douglas dissented but did not file their opinions due to pressure of time at the close of the 1956 term. Mr. Justice Frankfurter filed a reservation citing also the pressure of court business at the end of the term.[52] The second 1956 case, *Reid,*[53] had a basic fact situation close to that of *Kinsella.* The same base line of demarcation was here drawn by the court, with the same inconclusive results. In addition to the contention that the court-marial lacked jurisdicion in the first instance to hear her case, defendant raised another question regarding jurisdiction. She maintained that even if the military court had originally been capable of exercising its control, the Army had lost this power when she was returned to the continental United States. This fallacy was quickly dismissed as invalid.

Considered by themselves, these 1956 cases decided by the Supreme Court might cause speculation that the pattern set by the pre-Uniform Code cases of the lower federal courts was to be adhered to. Not so.

Between the 1956 session of the court which arrived at the tenuous decisions of *Reid* and *Covert,* and the 1957 first term, there was a change in the personnel sitting upon the High Court.[54] It will also be recalled that the dissenting opinions of the Court were not filed at the end of the 1956 term. They never were. A petition for rehearing was granted in both of these cases. The Court thereupon reversed its former position just 364 days after it had been pronounced.[55]

To what circumstances may be attributed such a complete shift in viewpoint? A perusal of the comparison of the respective votes of the Justices indicates a partial answer to this inquiry.[56] The four 1956 dissentors remained steadfast in their views and formed the foundation for the six-to-two reversal. Add to this steadfast four the vote of newly-seated Mr. Justice Brennan and the changed mind of Mr. Justice Harlan and the result becomes obvious.

Why such a marked change in the short span of less than one year? The majority opinion of the Court, written by Mr. Justice Black and concurred in by Mr. Chief Justice Warren and Associate Justices Douglas and Brennan, indicated that the court-martial

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49 Kinsella v. Krueger, 351 U.S. 470, 476 (1956).

50 *Id.* at 474. "Essentially, we are to determine only whether the civilian dependent of an American serviceman authorized to accompany him on foreign duty may constitutionally be tried by an American court-martial in a foreign country for an offense committed in that country."

51 *Id.* at 480 (Emphasis added).

52 *Id.* at 481, 483.

53 Reid v. Covent, 351 U.S. 487 (1956).

54 Mr. Justice Sherman Minton retired 15 October 1956 and was replaced by Mr. Justice William J. Brennan, Jr. Shortly thereafter, Mr. Justice Stanley Forman Reed retired on 25 February 1957 and was replaced by Mr. Justice Charles Evans Whittaker.

55 Reid v. Covert and Kinsella v. Krueger, 354 U.S. 1 (1957).

56 See chart 1(a) accompanying.

trials of civilians do not meet the minimal constitutional requirements of a peacetime United States.[57] The Court dismissed lightly the pattern carefully set up over the years by the lower federal courts.[58] The rather extended attention paid to the "tradition of keeping the military subordinate to civilian authority. . . ."[59] and like pronouncements lead one to believe that the Court is here resting its case purely upon the foundation of enlightened civil rights considerations.

The Court, quoting the long-recognized authority of Colonel Winthrop, said,

> We agree with Colonel Winthrop . . . who declared: ". . . *a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*"[60]

The Court based its decision upon the narrow confines of the specific issue raised by these two cases. It held that civilian dependents of military personnel who committed capital offenses during peacetime were not within the jurisdiction of the military courts-martial. In so doing, the Court adhered to the traditional ground rules requiring narrow scrutiny of specifics when construing an act of Congress to be unconstitutional.

57 Reid v. Covert and Kinsella v. Krueger, 354 U.S. 1, 19 (1957), "Since their court-martial did not meet the requirements of Art. III, Sec. 2, or the Fifth or Sixth Amendments we are compelled to determine if there is anything *within* the Constitution which authorizes the military trial of dependents accompanying the armed forces overseas."

58 *Id.* at A-21.

59 *Id.* at 23.

60 Winthrop, Military Law and Precedents (2d, Reprint 1920), 107.

In writing his dissent in these cases, Mr. Justice Clark, with Mr. Justice Burton concurring, said:

> My brothers who are concurring in the result seem to find some comfort in that for the present they void an Act of Congress only as to capital cases. I find no distinction in the Constitution between capital and other cases. *In fact, at argument all parties admitted there could be no valid difference.* My brothers are careful not to say that they would uphold the Act as to offenses less than capital. . . . *All that remains is for the dependents of our soldiers to be prosecuted in foreign courts, an unhappy prospect not only for them but for all of us.*[61]

It is submitted that the minority view is the sounder, more practical one; and from a standpoint of protection of constituional rights of citizens it is the preferable approach. The last sentence above-quoted certainly sets the scene for our current dilemma. Further statements from the minority opinion are also worthy of note.[62]

The 1957 reversals by the Court seem to have set the pattern of reasoning for the immediate future.[63] It is not, after all, a radical step in logic from the 1957 decisions affecting the trial of civilian dependents for capital crimes to the set of 1960 decisions about to be considered.

1960 CASES—COMPLETING THE SQUARE ALMOST

Four cases were argued late in 1959, with decisions delayed until January 18, 1960, which serve the purpose of clarifying and expanding the decision reached in the *Reid v. Covert* rehearing.[64] The four cases concerned a civilian dependent convicted of a non-capital crime (involuntary manslaughter),[65] a civilian employee for a capital crime (murder),[66] and two civilian employees convicted for non-capital crimes (larceny in the first case, sodomy in the second).[67]

The multiplicity of fact situations presented by the lumping together of these cases, the lack of a united majority and minority decision, and the extreme importance of the cases, requires us once more to refer to a judicial "score card."[68]

The first case to be considered[69] concerned a civilian dependent wife of a serviceman who, along with her husband, was tried by a general court-martial in Germany for involuntary manslaughter in the death of one of the couple's children. Both husband and wife submitted guilty pleas and were sentenced to prison terms. At the time of trial and thereafter, Mrs. Dial urged that she was not amenable to trial by military court. After her return to the United States for imprisonment, her mother sued out a writ of habeas corpus which was granted by the federal district court.[70] The government appealed her release.

61 Reid v. Covert and Kinsella v. Krueger, 354 U.S. 1, 89-90 (1957) (Emphasis added).
62 *Id.* at 83.
63 See charts 1 (a) and 1 (b) accompanying for comparison.
64 Reid v. Covert and Kinsella v. Krueger, 354 U.S. 1 (1957).
65 Kinsella v. United States ex rel. Singleton, 361 U.S....., (1960).
66 Grisham v. Hagan 361 U.S. ... (1960).
67 McElroy v. United States ex rel. Guagliardo and Wilson v. Bohlender, 361 U.S..... (1960).
68 Chart 1 (b) accompanying.
69 Kinsella v. United States ex rel. Singleton, 361 U.S.... (1960).
70 United States ex rel. Singleton v. Kinsella, 164 F. Supp. 707 (SD W. Va. 1958).

COMPARISON CHART OF SUPREME COURT VOTE:

(A) REID V. COVERT AND KINSELLA V. KRUEGER

1956	*Clark*	*Reed*	*Burton*	*Minton*	*Harlan*	**Frankfurter**	**Warren**	**Black**	**Douglas**	*Reid v. Covert and Kinsella v. Krueger*
1957	*Clark*	*Whittaker* (not participating)*	*Burton*	**Brennan***	**Harlan (limited concurrence)**	**Frankfurter (limited concurrence)**	**Warren**	**Black**	**Douglas**	

Legend: Italics—For Court-Martial Jurisdiction
Bold—Against Court-Martial Jurisdiction
*—Newly Appointed Justice

(B) 1960 DECISIONS

	Clark	*Whittaker*	*Stewart**	**Brennan**	**Harlan**	**Frankfurter**	**Warren**	**Black**	**Douglas**	*Grisham* **(employee capital off.)**
1960	**Clark**	**Whittaker**	**Stewart***	**Brennan**	*Harlan*	*Frankfurter*	**Warren**	**Black**	**Douglas**	*Singleton* **(dependant non-cap.)**
	Clark	*Whittaker*	*Stewart**	**Brennan**	*Harlan*	*Frankfurter*	**Warren**	**Black**	**Douglas**	*Guagliardo* **(employee non-cap.)**
	Clark	*Whittaker*	*Stewart**	**Brennan**	*Harlan*	*Frankfurter*	**Warren**	**Black**	**Douglas**	*Bohlender* **(employee non-cap.)**

Cases

The majority opinion, written by Mr. Justice Clark, places great reliance upon the authority of the 1957 cases.[71] The opinion states:

> In the second Covert case, each opinion supporting the judgment struck down the article (Article 2(11), UCMJ) as it was applied to civilian dependents charged with capital crimes . . . . *The briefs and argument in Covert reveal that it was argued and submitted by the parties on the theory that no constitutional distinction could be drawn between capital and noncapital offenses for the purposes of* Clause 14.[72]

It can thus be seen that all concerned, the court and government counsel, had begun in 1957 to spin a fine web of theory which could ultimately result in but one logical result: the complete banishment of court-martial jurisdiction *under Article 2 (11) of the Uniform Code of Military Justice* for civilians accompanying the armed forces overseas either as dependents or as employees of the armed forces during peacetime.

The majority opinion here drew a distinction between jurisdiction of courts-martial for capital crimes but not for noncapital crimes. The Court pointed out that in so doing, there would be placed in the hands of the military an ability, under guise of mercy, to reduce the crime charged from capital to noncapital and thereby retain jurisdiction which would otherwise be lacking.[73]

The Court quoted *Toth v Quarles*[74] as to the effect to be given to the interpretation of Article One, Section Eight, Clause 14 of the United States Constitution. The Court indicated its continuing approval of such a criteria, namely, that of "status". In further defending the majority view concerning the determinant "status", the court said:

> But the power to 'make Rules for the government and Regulation of the land and naval Forces' bears no limitation as to offenses. The power there granted includes not only the creation of offenses but the fixing of punishment therefor. If civilian dependents are included in the term 'land and naval forces' at all, they are subject to the full power granted the Congress therein to create capital as well as noncapital offenses. *This Court cannot diminish and expand that power, either on a case-by-case basis or on a balancing of the power there granted Congress against the safeguards of Article III and the Fifth and Sixth Amendments. Due process cannot create or enlarge power.*[75]

This "status" test was not concurred in by two of the justices. Mr. Justice Harlan, Mr. Justice Frankfurter concurring, said in dissent, that the proper distinction was a test of capital crime versus noncapital crime as committed by a civilian with the armed forces overseas.[76] In the former instance, any civilian regardless of his "status" should be exempt from trial under Article 2 (11). In the latter case, according to the dissent, any civilian with the armed

71 Reid v. Covert and Kinsella v. Krueger, 354 U.S. 1 (1957).
72 Kinsella v. United States ex rel. Singleton, 361 U.S..... (1960).
73 *Id.* at .... (Emphasis added).
74 350 U.S. 11 (1955).
75 Kinsella v. Unitde States ex rel. Singleton, 361 U.S.... (1960). (Emphasis added).
76 Concurring and dissenting opinions, McKlroy v. United States ex rel. Guagliardo; Wilson v. Bohlender; Kinsella v. United States ex rel. Singleton; and Grisham v. Hagan, 361 U.S..... (1960).

forces overseas should be amenable to trial by courts-martial. One specific criticism of the "status" test was leveled by Justice Harlan as follows:

> I revert to the Court's "status" approach to the power of Congress to make rules for governing the armed forces. How little of substance that view holds appears when it is pointed out that had those involved in these cases been inducted into the army, *though otherwise maintaining their same capacities,* it would presumably have been held that they were all fully subject to Article 2 (11). Yet except for this formality their real "status" would have remained the same.[77]

In this seven-to-two decision, we are confronted with a highly anomalous situation. The majority pays lip service to due process.[78] Yet the end result of this decision is to allow Mrs. Dial, one of the defendants, her freedom, while her soldier husband serves out a maximum sentence for the very same crime. The difference is "status". I submit that such a double standard is more repugnant to the American sense of due process than any trial of a civilian under Article 2 (11).

The second opinion of the 1960 series concerning Article 2 (11) is a consolidation of two cases.[79] These cases analyze the problem of noncapital offenses committed by civilian employees of the armed services overseas.

The *Guagliardo* case involved an electrical lineman at a North African air base who was court-martialed and convicted on charges of larceny and conspiracy to commit larceny. Upon commencement of his sentence in the United States, he filed for a writ of habeas corpus. The district court dismissed his application,[80] the court of appeals reversed and ordered the respondent dismissed.[81] The government appealed the ruling to the Supreme Court.

The *Wilson* case concerned a civilian auditor working for the Army in Berlin. He was convicted by a general courts-martial on a guilty plea on three counts of sodomy. Upon arrival in the United States, he also applied for a habeas corpus writ, which was granted,[82] and appealed by the government.

77 *Id.* at ____. (Emphasis added).
78 *Ir.* at 304-05, wherein the Court says, "Neither our history nor our decisions furnish a foothold for the application of such due process concepts as the Government projects."
79 McElroy v. United States ex rel Guagliardo and Wilson v. Bohlender 361 U.S.____ (1960).
80 158 F. Supp. 171 (DC Wash DC 1958).
81 259 F.2d 927, 104 U.S. App. D.C. 112 (Ct. App D.C. 1959).
82 167 F. Supp. 791 (DC-Colo. 1958).

Two new dissenters, Mr. Justice Whittaker and Mr. Justice Stewart, in application to civilian employees only, expresses the opinion that such employees are of such "status" as to be amenable to trial by courts-martial overseas in time of peace. Mr. Justice Whittaker, in writing the dissent indicated:

> There is a marked and clear difference between civilian dependents 'accompanying the armed forces' and 'civilian persons' serving with (or) employed by the armed forces at military posts in foreign lands. The latter are engaged in purely military work. . . . These civilian employees thus perform essential services for the military and, in doing so, are subject to the orders, direction and control of the same military command as the "members" of those forces; and, not infrequently, members of those forces who are assigned to work with and assist those employees are subject to their direction and control. . . . They are so intertwined with those forces and military communities as to be in every practical sense an integral part of them. On the other hand, civilian dependents 'accompanying the armed forces' perform no services for those forces, present dissimilar security and disciplinary problems, have only a few of the military privileges and generally stand in a very different relationship to those forces than do the civilian employees. . . .[83]

The two dissentors felt that the powers granted by Article One, Section Eight, Clause 14, of the United States Consitution, enabled the Congress to regulate such civilian personnel. The conclusion reached by the majority was erroneous, said the dissent, since:

> (I)t would seem clear enough that Congress could rationally find that those persons are "in" those forces and, though there be no shooting war, that those forces, in turn, are "in the field"; and hence Congress could and did constitutionally make those employees subject to the military power. *Both the practical necessities and the lack of alternatives,* shown so clearly by Mr. Justice Clark in the Covert case (citations omitted), strongly buttress this conclusion, if, indeed, it could otherwise be doubted.[84]

Therefore we see injected into the problem of the jurisdictional validity of Article 2 (11) of the Code still another philosophy. The current tests of validity and the supreme court advocates of each have set forth their views. One more case remains to be considered.

The final case for consideration in this current judicial "ring cycle" is that of *Grisham v. Hagen.*[85] Concerned here is the plight of a civilian employee of the Army stationed in France accused of the unpremeditated murder of his wife. He was tried and convicted by a general courts-martial acting under the authority of Article 2 (11). Brought back to the continental United States to serve his thirty-five year sentence, he applied for a writ of habeas corpus. The district court dismissed his application[86] and the court of appeals affirmed the denial.[87] He thereupon appealed to the Supreme Court.

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83 McElroy v. United States ex rel Guagliardo, and Wilson v. Bohlender 361 U.S..... (1960).
84 *Id.* at. (Emphasis added).
85 361 U.S.... (1960).
86 161 F. Supp. 112 (DC MD Penna 1958).
87 261 F.2d 204 (U.S. C App-3d Cir. 1958).

The Court, in overthrowing the decisions of the lower federal courts, utilized the standards outlined for the other 1960 cases here considered. Since this case involved a civilian employee accused of a capital crime, an application of the standards set forth by the various justices resulted in a seven-to-two reversal with Mr. Justice Stewart and Mr. Justice Whittaker dissenting. The dissent, in applying the obverse side of the "status'" coin, would hold a civilian employee overseas amenable to trial by courts-martial for any offense.

The majority of the court, speaking through Mr. Justice Clark, indicate that they felt the 1957 *Reid v. Covert*[88] decision to be controlling. Applying the principal determinant of the distinction formed between capital and noncapital crimes, the court said:

> (T)he considerations pointed out in Covert have equal applicability here. . . . (we) there held that the death penalty is so irreversable that a dependent charged with a capital crime must have the benefit of a jury. The awesomeness of the death penalty has no less impact when applied to civilian employees. Continued adherence to Covert requires civilian employees to be afforded the same right of trial by jury.[89]

Having thus anchored their reasoning to 1957, the majority went on to grant Mr. Grisham his freedom.

POSSIBLE ALTERNATIVES

The recent series of cases considered here[90] indicate that the provisions of Article 2 (11) of the Uniform Code have been virtually eliminated for peacetime application to civilians. One question that then immediately confronts the military is how to fill the vacuum of policy thus created concerning criminal jurisdiction over civilians stationed with the armed forces overseas? Or has there been a vacuum created at all?

Whether the North Atlantic Treaty Organization Status of Forces Agreements[91] will still cover civilian personnel stationed within the various host nations is to be doubted in the light of these 1960 decisions. The NATO Agreement defines 'civilian component' as: ". . . the civilian personnel accompanying a force of a contracting Party who are in the employ of an armed service of that contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the States in which the force is located."[92]

It would seem then, that the NATO Agreements envisaged only such categories of civilians traveling with the forces of a sending

88 354 U.S. 1 (1957).

89 Grisham v. Hagan, 361 U.S..... (1960). The Court continues its pronouncement with a puzzling statement that: ". . . . Furthermore, the number of civilian employees is much smaller than the number of dependents, and the alternative procedures available For controlling discipline as to the former more effective." (Emphasis added). Query: How much substance and validity do either of these contentions have? Just how effective are these "alternative procedures" available for controlling discipline, and, for that matter, what are they? Has the Court attempted here to equate constitutional protection with the number of persons involved?

90 McElroy v. United States ex rel Guagliardo and Wilson v. Bohlender, 361 U.S..... (1960); Grisham v. Hagan, 361 U.S..... (1960); Kinsella v. United States ex rel Singleton, 361 U.S..... (1960).

91 Agreement Between the Parties to the North Atlantic Treaty Regarding The Status of Their Forces, June 19, 1951; 4 U.S. Treaties & Other International Agreements 1792, T.I.A.S. No. 2846 (effective August 23, 1953).

92 *Id.* Art. 1, para. 1 (a).

nation as would already be amenable to the military jurisdiction of that sending nation. So also with the provisions of our administrative agreement with Japan[93] covering virtually the same provisions of criminal jurisdiction as does the NATO Agreement. Scrutiny of the provisions of the agreements between the United States and the nations basing a major portion of these civilians and comparison with the tendency of the recent cases as regards such civilians, indicates a possible pattern. It seems likely that the other nations involved could logically reason that such civilians, be they dependents or employees, will have the same status as any tourist traveling within that nation and committing a crime against the local regulations.

These agreements set forth minimal standards or guarantees to safeguard the procedural rights of any person tried under them. A comparison of the rights guaranteed to Americans under the provisions of the Uniform Code of Military Justice and the NATO Agreements reveals that:

> The Uniform Code of Military Justice and the Manual for Courts-Martial contain all of the safeguards guaranteed by paragraph 9 of Article VII of the agreement. The code, however, contains the following additional safeguards not guaranteed by the agreement:
>
> 1. A prohibition against compulsory self-incrimination (art. 31, UCMJ) which is comparable to the provision in the Fifth Amendment to the Constitution that no person "shall be compelled in any criminal case to be a witness against himself";
>
> 2. A prohibition against cruel and unusual punishment (art. 55, UCMJ) which is comparable to the provision in the Eighth Amendment to the Constitution that there shall not be inflicted "cruel and unusual punishment"; and
>
> 3. A prohibition against introduction of illegally obtained evidence (MCM, para. 152) which is comparable to the provision in the Fourth Amendment to the Constitution that the right of the people "against" unreasonable searches and seizures * * * shall not be violated. . . . .[94]

93 Protocol to Amend Article XVII of the Administrative Agreement Under Article III of the Security Treaty Between the United States of America and Japan, Spt. 29, 1953; 4 U.S. Treaties & Other International Agreements 1846, T.I.A.S. No. 2848.

94 Hearings to Review Operation of Article VII of the Agreement Between The Parties to the North Atlantic Treaty Regarding the Status of Their Forces Before a Subcommittee of the Senate Committee on Armed Services, 84th Cong., 1st Sess. 13, 272 (1955).

The results of this comparison are such as to make it obvious to even the casual observer that the Uniform Code hews closer to the line of Constitutional safeguards than does the NATO Agreement. If such be the case, can it be doubted that it is preferable to be subjected to the requirements of the Uniform Code? Such doubt is apparently evidenced by the Supreme Court.

Since legal writers[95] and hearings before the Congress[96] indicate that there is a direct relationship between the agreements with foreign nations regarding the scope of their jurisdiction over American military regulated personnel and the guarantees set forth under the Uniform Code, it seems logical to assume that the two would be difficult to divorce from each other. Yet this is the virtual effect of the decisions rendered by the court in the field of civilians accompanying the armed forces. Without the foundation of the Uniform Code provisions upon which to lay our reasoning, we have no alternative but to look to other possibilities of a workable solution.

As was pointed out by Mr. Justice Clark in the 1956 cases,[97] the provisions of the Code compare favorably with the most advanced criminal codes of procedure in existence. Certainly the workings of the Uniform Code are subjected to more substantive and procedural reviews, both military and civilian, than any other criminal proceedings in the world including our own domestic courts. A cursory reference to the cases herein cited should offer ample proof of this.

In considering the plight of the many civilian dependents and possible methods of now dealing with their criminal infractions, several possibilities present themselves. They may be enumerated as follows:

1. The military has the power to forbid the billeting overseas of this category of civilian.

2. The Congress may make provision for a trial court set up which would travel the overseas 'circuit'.

3. The military may continue to permit civilian dependents to accompany their armed services relatives without the protection of any United States-administered criminal procedure.

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95 E.D. Re, *The NATO Status of Forces Agreement*, printed in Hearings on H.J. Res. 309 and Similar Measures Before the House Committee on Foreign Affairs, 84th Cong., 1st Sess., pt. 1, at 509-t10, as follows:

"Sound legal analysis, therefore, would require the conclusion that although a certain immunity exists for foreign visiting forces, the *extent of the immunity is strictly a matter of agreement* (Emphasis added.) It is for the territorial sovereign to determine the extent to which he wishes to waive the exercise of his jurisdiction. The agreements actually entered into by the nations of the world, and the decided cases clearly demonstrate that the problem has always involved reconciling "the practical necessities of the situation with a proper respect for national sovereignty." Predicated upon the foregoing legal analysis, it is apparent that the contention that, in absence of the agreement, the NATO countries would have no jurisdiction over American forces stationed there is completely untenable. . . ."

96 *Id.* at 1043, "the most important of these jurisdictional arrangements are contained in article VII of the North Atlantic Treaty Organization Status of Forces Agreement, now in force in most NATO nations, and article XVII of the Japanese Administrative Agreement. . . ." *Id.* at 1050 "International law, as reflected in the cases and in the working arrangements, does not appear to support the view that, in absence of an agreement, the United States would be able to exercise exclusive criminal jurisdiction over its overseas forces. . . ." "Although the NATO and Japanese agreements require foreign courts to grant certain safeguards to American defendants, they do not guarantee all the constitutional safeguards afforded to defendant in federal or state criminal trials. Most of the countries in which members of American armed forces are being tried do not provide by their internal law for such safeguards. *The agreements would seem open to criticism, HOWEVER, ONLY IF THEY FAIL TO REQUIRE SAFEGUARDS GUARANTEED TO DEFENDANTS IN COURTS-MARTIAL.* (Emphasis added). Therefore the extent to which constitutional guarantees apply to courts-martial must be determined before it can be decided whether a failure to assure traditional safeguards affects the constitutionality of the agreements."

97 Kinsella v. Krueger, 351 U.S. 470, 478 (1956).

4. The military may require, as a condition precedent to their transportation overseas, the signing of a waiver making such dependents once more amenable to the Code.

5. The government may make provision for the return of any civilian offender to the continental limits of the United States for trial by a federal court.

It is quite evident at this juncture, that all of the possibilities contain the seeds of their own destruction. In the first instance, although it is quite evident that the military has the power to prevent civilian dependents from going overseas as a family unit, such policy change would place the armed services at precisely the same disadvantage morale-wise, as they were at the end of World War II. Since this decision came from the highest level, presumably there was ample and substantial reason for its institution and substantial reason for its continuance.

The second proposal presents multitudinous problems of policy factors. Individual treaties would have to be negotiated with each nation involved, providing for a United States court to exercise jurisdiction on foreign soil. Certainly it would not be unrealistic to envision a request for reciprocity. And should such treaties be successfully negotiated, in what manner would we derive a jury? The expenses involved would be secondary to the procedural confusion.

The third possibility seems to be, at present, the most likely. It requires no action at all on the part of any branch of the government. The losers can take comfort in the fact that they are serving prison terms in foreign lands to engender a greater understanding of the protections of the United States Constitution.

The fourth possibility, if required, would be certain for a speedy test before the Supreme Court. Also arising herein would be the same morale factor cited above.

The fifth possibility would involve such problems as the ability to obtain foreign witnesses and transport them hither, to keep them within the jurisdiction of the court for the requisite period of trial, to allow the jury to see the scene of the crime if that were deemed necessary by the defense and court, and many more factors which would pique the imagination of a good defense counsel.

None of these counter proposals put forth as replacements for the now banished provisions of the Code would seem workable. How do we now provide for the orderly workings of any criminal regulations with regard to such civilian dependents? The Court seems to believe that the way will be found. The pertinent question seems to be, at present, how do we provide for the punishment of a premeditated murder at an overseas base perpetrated by a civilian American and involving only American personnel? To believe that a foreign court would entertain jurisdiction in such a matter, certain to become an international *cause celebre,* is to fly in the face of reality.

What of the category of civilian employees of the armed forces? Can we say with any more assurance that these persons, with the

court-accorded "status" of civilians will be treated in any lesser manner? It seems unlikely that such would be the case under the rationale of the majority decisions in the 1960 cases.[98]

Semantically, the "status" argument put forth by the majority of the Court may have validity. Theoretically, the constitutional safeguards concept invoked by the majority may have validity. When viewed in the glaring light of possible alternative measures to insure the administration of justice for all, the better reasoned view appears to lie with the slim majority of the 1956 cases.[99]

98 Cases cited in Note 90, *Supra*.
99 Kinsella v. Krueger, 351 U.S. 470, (1956); Reid v. Covert, 351 U.S. 1 (1957).