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Case Notes

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Case Notes / Constitutional Law—Korean War Expatriates' Suit for Back Pay—Judicial Construction of Statutory Provision—Military Compensation

DURING THE KOREAN WAR, Otho G. Bell, an American soldier, was captured by the North Koreans and imprisoned. At the termination of hostilities in 1953, he refused repatriation and went to China. By an administrative order of the Secretary of the Army, he was dishonorably discharged January 23, 1954.

Subsequently, in mid-1955, Bell returned to the United States and later that year, with petitioners Cowart and Griggs, filed claims with the Department of the Army for back pay and allowances to the date of discharge.

On May 22 of this year the Supreme Court held, in *Bell v. United States*, 366 U.S. 393, 81 Sup. Ct. 1230, 6 L. Ed. 2d 365 (1961), that these petitioners were entitled to the claimed back pay and allowances, thus reversing the decision of the Court of Claims reported at 181 F. Supp. 668.

The facts stipulated in both decisions do not paint the petitioners in a very favorable light. In the POW camps each of the three claimants openly consorted with his Chinese captors, became monitors of forced study groups, distributed propaganda, made broadcasts, and wore Chinese uniforms. Bell, in particular, wrote articles, stated he would fight against the United States, sold food intended for the sick, and caused a fellow American prisoner to be bayoneted.

In view of the above, the Court of Claims opinion (per Jones, C.J.) included the following: "Neither the light of reason nor the logic of analysis can possibly justify the granting of a judgment favorable to these plaintiffs." *Bell v. United States* (Ct. Cl.), *supra*, at 674.

Petitioners demurred to the incriminating facts as irrelevant. They relied instead on the provisions of the Missing Persons Act, first enacted in 1942 as 56 Stat. 143, and now codified at 50 U.S.C.A. Appen. §1001 et. seq. Title 1002 of that act reads: "Any person who is in active service . . . and who is . . . captured by a hostile force . . . shall . . . be entitled to receive or to have credited to his account the same . . . pay . . . to which he was entitled at the beginning of such period of absence or may become entitled thereafter." [On the right of a POW to recover such pay see: *Straughn v. United States*, 1 Ct. Cl. 324 (1866); *Jones v. United States*, 4 Ct. Cl. 197 (1868).]

The Army's contention in the Supreme Court was that Bell, Cowart, and Griggs were no longer in active service when they refused to return to this country; but Justice Potter Stewart, writing for a unanimous Supreme Court, dismissed the Army's refusal to pay as based on an invalid interpretation of the statute. Citing *Walsh v. United States*, 43 Ct. Cl. 225, 231 (1908), he said that the mere fact that an officer or soldier is under charges does not deprive him of his pay and allowances; such forfeiture can only be imposed by the sentence of a lawful court martial.

The court leaves open the validity of an administrative determination that such expatriates were absent from active service. In fact the administrative order not to pay the petitioners (contained in a letter to petitioner's lawyer dated October 2, 1956, and signed by Major General H. W. Crandall, Chief of Finance, U.S.A.) *did not* include a determination that they were absent from duty so as to forfeit their pay according to the statute. In general, the power to make such determinations in the administration of the Missing Persons Act is stated at 50 U.S.C.A. Appen. §1009.

In summation, Justice Stewart said, "[T]he Congress may some day provide that members of the Army who fail to live up to a specified code of conduct as prisoners of war shall forfeit their pay and allowances. Today we hold only that the Army did not lawfully impose that sanction in this case." *Bell v. United States*, 81 Sup. Ct. 1230, 1243 (1961).

Thus the Supreme Court has decided the particular case without, apparently, settling the issue for the future. What would have been the outcome had the Army *first* determined that, by their refusal to return, the petitioners *were* absent from active service? Absent such finding, the Court was bound by the statute. "The right to compensation . . . rests upon, and is governed by, certain statutory provisions and regulations. . . . These fix the pay to which officers and men are entitled." 15 Op. Atty. Gen. 175 (1876). [On the right to refuse pay to deserters and persons AWOL, see: *United States v. Landers*, 92 U.S. 77, 23 Wall. 603 (1876); *Dodge v. United States*, 33 Ct. Cl. 28 (1897).]

Madden, J., dissenting in the Court of Claims, decried the "judicial re-writing of statutes," and his opinion and that of Stewart, J., for the Supreme Court both contain not-so-subtle directions to the legislature to do something about preventing such situations as that faced by the court here. A similar wish is expressed in *Misconduct in the Prison Camps: A Survey of the Law, and an Analysis of the Korean Cases*, 56 Col. L.R. 709, at 794: "Since ideological warfare has changed the concept of what the detaining power can force or encourage the prisoner of war to do, the military and the legislature must make appropriate adjustments."

The adequate reformation of existing law can be achieved only by legislation. *Wilson v. District of Columbia*, 179 F. 2d 44 (D.C. 1949). A court cannot write into an act of Congress a provision which Congress affirmatively omitted. *Howard Industries v. United States*, 83 F. Supp. 337 (Ct. Cl. 1949). The legal necessity of abiding by the applicable statute will not be debated, but the implications of the instant holding, together with trends in military and judicial thinking, could provide controversies for the future.

Example: In *Wilson v. Bohlender*, 361 U.S. 281, 80 Sup. Ct. 305, 4 L. Ed. 2d 282 (1960), the Supreme Court reversed the court martial conviction of a civilian employee of the Army in Berlin. Yet at p. 25 of Appellant's Brief for the similar case of

Reid v. Covert, 351 U.S. 487, 76 Sup. Ct. 880, 100 L. Ed. 1352 (1956), petition for rehearing granted, 352 U.S. 901, 77 Sup. Ct. 123, 1 L. Ed. 2d 92 (1957), was the contention that all civilians who accompany the Armed Forces overseas are so closely identified with these forces as to be indistinguishable from them for all practical purposes. In fact, in the *Wilson* case, Justice Clark in the majority opinion went so far as to suggest incorporating those civilian employees who are stationed outside the United States directly into the armed services, either by compulsory induction or by voluntary enlistment.

The intimation is there that such civilians should be subject to military justice. Should they not then be eligible for military benefits? Should they not be able to rely on the same statutory protection? At this writing, Bruce Wilson, plaintiff in *Wilson v. Bohlender*, *supra*, has petitioned the Court of Claims, claiming back pay and benefits during the period of his illegal detention in Army prisons. While there are differences between his case and that of Otho Bell, the question remains whether judicial indignation should in either case foreclose their claims.

Bell v. United States points out the need for legislative or administrative action in the field of military and quasi-military compensation. The determination of the pending *Wilson* case could well shed light on what form the statutory revisions will take.

RALPH J. ROHNER

Constitutional Law—The Federal Exclusionary Rule— Fourth and Fifth Amendment Rights—Application to the States.

APPELLANT, DOLLREE MAPP, was convicted of possession of obscene literature in violation of the Ohio Penal Code (Ohio Rev. Code §2905.34 1953). The damning evidence was obtained by forcible entrance into appellant's home by police officers without a search warrant. When appellant attempted to resist this invasion she was handcuffed and imprisoned in her bedroom. On the pretext of searching for a fugitive, the officers pried into suitcases, a chest of drawers and through personal papers. Though the fugitive was not found, the obscene material forming the basis of the indictment was seized. Rejecting appellant's contention that the obscenity statute is unconstitutional under the first and fourteenth amendments and that the evidence is inadmissible, the Ohio Supreme Court upheld her conviction. (*State v. Mapp*, 170 Ohio St. 427, 166 N.E. 2d 387 (1960)). On certiorari the Supreme Court, in a 5-4 decision, *held*, the federal exclusionary rule is applicable to the states through the fourteenth amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961).

The federal exclusionary rule had its origin in the case of *Weeks v. U.S.*, 232 U.S. 383, 34 S.Ct. 341, 58 L. Ed. 652 (1914). In that case, the Court barred the use of illegally obtained evidence in federal prosecutions. In so doing, the Court attempted to

inhibit violations of the individual's fourth amendment rights of freedom from unreasonable searches and seizures. The holding in *Weeks* set the standard in federal law enforcement. In a later case (*Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L. Ed. 1782 (1949)) involving the use of illegally obtained evidence in a state court the Supreme Court held that although the fourth amendment creates a "right to privacy" which would compel the exclusion of evidence obtained in violation of that right, the use of such evidence in a state criminal proceeding did not violate due process. Thus, the Court had created a double standard dependent upon the jurisdiction. The Court in the *Wolf* case blandly enumerated other forms of redress available to the individual. Unfortunately, subsequent considerations of these remedies indicates that they are illusory at best.

In the instant case Justice Clark, writing for the Court, specifically overruled the *Wolf* case. He recognized that the fourth amendment applied to the states through the fourteenth amendment. Thus, the sanctions of the *Weeks* doctrine in federal criminal proceedings were imposed on state criminal proceedings. Justice Clark emphasized that to do otherwise would be a granting of a right but a withholding of its privileges and enjoyment. He severely criticized the "other means" of protection alluded to by the Court in the *Wolf* case. Justice Clark points out that, in reality, they have been worthless and futile.

The main argument of the dissent centers on the right of the states to cope with their own internal problems (*i.e.*, honored autonomy of state judiciaries). Though this argument is telling and it again underlies the difficulties of imposing objective standards on an overlapping relationship, it is logical to assume that when the states refuse to carry out their duties towards the citizenry, the federal government should intercede to protect this aspect of our dual citizenship. The right to be secure against unreasonable searches and seizures has been held to be a fundamental right (*Wolf v. Colorado, supra*). The holding in the instant case is not a radical departure from precedent as the dissent argues. Rather, it is the logical culmination of a series of decisions modifying the *Wolf* holding. In *Rea v. United States*, 350 U.S. 214, 76 S.Ct. 292, 100 L.Ed. 233 (1956) the Court precluded state use of evidence illegally obtained by federal agents. In *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697, 78 A.L.R. 2d 233 (1960) the Court barred the use, in a federal case, of illegally seized evidence by someone legitimately on the premises. Subsequently, the use of the "silver platter" doctrine, allowing admittance in a federal court of evidence illegally obtained by state agents was barred by the Court's holding in *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed. 2d 1669 (1960).

These decisions, coupled with the holding in the instant case indicate that the standard of justice hitherto applied by a sometimes callous, sometimes tender judicial conscience has been replaced by a definite rule. Whether the Court will further abandon the 'conscience test' in related areas of individual rights remains to be seen. In any event, the law of admissibility of evidence in state criminal proceedings is settled.

In deciding the Constitutional question in the instant case, the Court may be accused of overstepping the bounds of judicial restraint. Nevertheless, the decision brings a sense of order and reason to a chaotic state created by the *Wolf* decision.