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# Civilians Before Courts Marital

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The treason clause has not served as the principle legal weapon in combatting disloyalty. But the validity of the legal weapons which have been used has never been adequately examined in light of its restrictive nature and policy. The treason clause is passing from the obsolescent to the obsolete.

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## CIVILIANS BEFORE COURTS MARTIAL

On or about September 27, 1952 a Korean named Bang Swoon Kill was apprehended by certain military authorities near a United States Air Base in Korea. Later under order of a security officer, he was marched forward and shot by two airmen. The officer and one airman were subsequently tried and convicted for this crime.[1] But to the dismay of the Air Force, it was discovered that the third perpetrator, Toth, had been discharged on December 8, 1952. On April 8, 1953 he was formally charged with conspiracy to murder[2] and murder.[3] Under authority of Article 7 (b) of the Uniform Code Of Military Justice,[4] he was apprehended at his place of employment in Pittsburgh, Pa. After certain preliminaries, he was flown to Korea to be tried by a court martial, jurisdiction being predicated upon Article 3 (a) of the Uniform Code of Military Justice.[5]

Thereafter Toth's sister applied for a writ of *habeas corpus* in the United States District Court for the District of Columbia. Toth was returned from Korea; the District Court granted the writ and ordered his release.[7] It reasoned that since the Uniform Code of Military Justice was silent as to the procedure to be followed in arresting and apprehending a civilian, Congress intended that the procedure should be identical to that exercised by any civilian arresting officer. Thus, before being removed to a distant point to stand trial, Toth should have been arraigned before a United States Commissioner or any nearby officer empowered to commit persons charged with offenses against the laws of the United States.[8]

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[1] N.Y. Times, Nov. 8, 1955, p. 26, col. 5.
[2] 50 U.S.C.A. § 675, Art. 81, U.C.M.J.
[3] 50 U.S.C.A. § 712, Art. 118, U.C.M.J.
[4] 50 U.S.C.A. § 561(b).
[5] U.S.C.A. § 553(a). Subject to the provisions of section 618 of this title, (statute of limitations) any person charged with having committed while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts martial by reason of the termination of such status.
[6] *Toth v. Talbott,* 113 F. Supp. 330 (D.C. 1953). As to the appropriate place of hearing, see 67 Harv. L. Rev. 479 (1954).
[7] 114 F. Supp. 468 (D.C. 1953).

On appeal, the Court of Appeals, reversing, stated that Article 3 (a) of the Uniform Code of Military Justice was a valid exercise of Congressional power under Article 1, §8 of the United States Constitution and that there are no constitutional, statutory, or judicial dictates requiring a hearing before a person is transferred to a distant place to be tried by a military court martial. It held further that the case against Toth arose when the crime was committed. Hence there was no need for an indictment by a grand jury since the case was explicitly excepted from the scope of the Fifth Amendment as one arising in the land and naval forces.[9]

The Supreme Court of the United States granted certiorari to consider the important constitutional questions involved. It held that Congress could not validly enact a statute which would extend the jurisdiction of courts martial to include servicemen who had committed offenses against the Uniform Code of Military Justice while in service but were discharged before being charged. Military tribunals should be restricted within those narrow limits necessary to the well-being of the military in the pursuit of its primary goals to fight or be ready to fight wars should the occasion arise. To attain this goal prosecution of civilian ex-servicemen is not essential. Therefore such personnel are entitled to the protection of an Article III court as well as all the other guarantees secured to an accused by the Constitution.[11]

The Toth case was one of several cases recently considered by the Supreme Court on the subject of jurisdiction of military courts over civilians. Congress inserted Article 3 (a) in the Uniform Code of Military Justice because of certain World War II crimes. Cases such as that of Hirshberg,[12] Lo Dolce,[13] and Durant[14] were brought to its attention, and the need for a remedy was clearly seen. Hirshberg escaped trial simply because he was discharged, even though he immediately re-enlisted. Lo Dolce evaded prosecution because he was discharged and the treaty of extradition with Italy where the crime was committed was held to be in a state of suspension while Italy was controlled by the Nazi. Only Durant was seasonably apprehended since she was on terminal leave and subject to military orders.

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[8] This hearing is required in order that a competent tribunal may determine whether reasonable grounds exist supporting the belief that the accused committed the crime for which he will be tried at a distant point in a trial where there may be no constitutional guarantees. *U.S. ex rel. Kassin v. Mulligan,* 295 U.S. 396 (1935). *Neely v. Henkel,* 180 U.S. 109 (1901). Certainly the hearing was not meant to be a shield for the guilty. *Biddinger v. Commissioner,* 245 U.S. 128 (1917).

[9] *Talbott v. Toth,* 215 F. 2d. 22 (1954).

[10] 348 U.S. 809 (1954).

[11] *Toth v. Quarles,* 350 U.S. 11 (1955).

[12] *Hirshberg v. Cooke,* 336 U.S. 210 (1949).

[13] *In re LoDolce,* 106 F. Supp. 455 (W.D.N.Y. 1952).

[14] *Durant v. Hiatt,* 81 F. Supp. 948 (N.D. Ga. 1948).

Congress lacked the foresight of the Judge Advocate General.[15] It saw the need, but not the remedy for it failed to realize that a court martial has only special and limited jurisdiction.[16] The constitutional limitation on this jurisdiction is that an action must be necessary and proper to the services. For an activity to be valid it must comport with and be directed to the execution of military functions which, traditionally, have been to wage war, defend the principles of the nation, and act in emergencies. Since there is no rational connection between the trial of civilians and the purposes of the military, the jurisdiction over civilians must fall.

Surely, when a person casts aside the garb of a serviceman and regains the permanent status of a civilian, he should be tried by a civilian, constitutional court.[17] The court's power is based upon the tenet that an individual's military status is determined by and co-terminous with his contract of enlistment,[18] which commences with the oath, and from which point the individual assumes the status of one in the armed forces.[19] The contract of enlistment is terminated by discharge and is protected by the Article III judiciary to the extent that it and not the military has the sole power to test the validity of a discharge. This discharge, while terminating the status, returns the suspended civil rights and carries with it valuable property rights which due process requires the courts to protect.[20]

It should be noted, however, that some courts failing to recognize this basic contract theory have left to the military the determination of the validity of the contract of enlistment. Thus courts have refused to issue writs of habeas corpus when there have been enlistments by minors even when these minors are being held for trial by courts martial.[21] A further example of a convenient mis-application of the contract theory is the case of *Ex parte Drainer*.[22] Drainer enlisted in the Marine Corps; shortly thereafter he deserted and later enlisted in the United States Navy, from which he obtained an honorable discharge. He was apprehended by the authorities, charged with desertion and put to his defense before a court martial. The civilian court in ordering him released stated that his discharge terminated his status as a serviceman depriving the military of jurisdiction. It is submitted however that his discharge merely terminated his second contract with the Navy. His status created by the first contract of enlishment was still subsisting,

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[15] *Hearings before the Subcommittee of the Senate Committee on Armed Services* on S. 857 and H.R. 4080, 81st Cong., 1st Sess., pp. 256-257. The unmerited grief to be visited upon military as foretold by the Judge Advocate General became a reality in the *Toth* case.

[16] *Dynes v. Hoover,* 20 How. 65 (1857).

[17] *Supra,* note 11.

[18] *U.S. ex rel. Flannery v. Commanding General, Second Service Command,* 59 F. Supp. 661 (S.D.N.Y. 1946).

[19] *U.S. v. Grimley,* 137 U.S. 147 (1890). The Supreme Court drew an analogy between the contract of marriage and the contract of enlistment.

[20] *U.S. ex rel. Roberson v. Keating,* 121 F. Supp. 477 (N.D. Ill. 1949).

[21] *Allen v. Wilkinson,* 129 F. Supp. 73 (M.D. Pa. 1955), *Ex parte Foley,* 243 F. 470 (W.D. Ky. 1917), *Dillingham v. Booker,* 163 F. 696 (4th Cir. 1908), *Ex parte Lewkowitz,* 163 F. 646 (S.D.N.Y. 1908).

[22] 65 F. Supp. 410 (N.D. Cal. 1946).

giving the court martial jurisdiction, for an individual cannot cast aside the rights and duties of his contract of enlistment by his own act and volition.[23]

The doctrine of status determined by the contract of enlistment within oath and discharge should be logically applied to bring about uniform justice in all cases. If a given case does not come within the purview of the enlistment, jurisdiction must be given to an Article III court. In this connection, Senator Hennings is sponsoring a noteworthy bill presently being considered by the Senate Judiciary Committee.[24] This bill would subject an ex-serviceman who had transgressed certain sections of the Uniform Code of Military Justice to the jurisdiction of the District Court where the crime was committed or, if committed without the limits of the United States, to the jurisdiction of the District Court where the accused is found or brought. The constitutionality of thus extending the jurisdiction of the District Courts has been repeatedly upheld.[25]

In considering civilians appearing before courts martial, the side of the military should not be overlooked, particularly in those cases where a serviceman is discharged and immediately re-enlists.[26] The Hennings' Bill does not give jurisdiction to the District Courts to try cases under Articles 85-103 and 109-117[27] of the Uniform Code of Military Justice. These articles include such offenses as desertion, absence without leave, missing movement of ship, disobedience of lawful orders and regulation, mutiny, and so forth—offenses which go to the very heart of discipline in the service. While it may be inconceivable that such discharged offenders will be immediately re-enlisted through some oversight in the military, the loophole should be filled. This loophole is circumscribed by the crimes omitted in the Hennings Bill and the decision of the Toth case.[28] In these discharge-immediate-re-enlistment cases, jurisdiction of courts martial should be allowed to transcend the formality of a discharge, especially when there is no actual change in the status of the individual from soldier to civilian to soldier. Justice demands that these offenders be tried, and a military trial is essential to good discipline and morale.

The Supreme Court of the United States at its 1955 term has granted certiorari in two cases which clash on the question of the jurisdiction of the military over civilian dependents residing with their army husbands overseas. The Federal District Court of West Virginia held that the *Toth* case did not prohibit court martial of a wife who killed her husband while he was stationed with the U. S.

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[23] *Supra,* note 19.
[24] S. 2791, 84th Cong., 2d Sess.
[25] *U.S. v. Flores,* 289 U.S. 137 (1933), *Blackmer v. U.S.,* 284 U.S. 421 (1932), *U.S. v. Bowman,* 260 U.S. 94 (1922).
[26] *Hirshberg v. Cooke,* 336 U.S. 210 (1949), U.S. ex rel. Roberson, 121 F. Supp. 477 (N.D. Ill. 1949). Roberson although discharged through an administrative error and then re-enlisted was not amendable to court martial jurisdiction for an offense committed during the prior enlistment
[27] 50 U.S.C.A. §§ 679-697, 703-711.
[28] *Supra,* note 11.

Army in Japan and she was residing with him.[29] The District Court for the District of Columbia, on the other hand, held that the *Toth* case prohibited court martial of a wife who killed her husband in England, where he was stationed with the U. S. Army and she was residing with him.[30]

A similar situation was before the Supreme Court in *Madsen v. Kinsella*[31] in which an army wife was convicted by the United States Court of Allied High Commission for Germany for violating §211 of the German Criminal Code, to wit, killing her husband, a United States Army lieutenant, who was stationed with the occupation forces in Germany. At the time of her conviction there was no non-military courts of the United States in Germany and she enjoyed an immunity from the jurisdiction of German Courts. The Supreme Court held that the military commission set up to control Germany and the military court martial had concurrent jurisdiction. The only jurisdictional question actually answered by the Court was that the military commission had jurisdiction, the parties having stipulated that the court martial had jurisdiction. The decision also held that the Chief Executive may constitutionally set up such a commission as Commander-in-Chief of the Armed Forces since he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions in territories occupied by the Forces of the United States. His authority, in this instance, survives the cessation of hostilities. Jurisdiction, in this light, continues after a treaty of peace has been entered into and until such time as the final objective of the occupation has been realized.[32]

The distinguishing feature between the *Madsen* case and the cases of *Covert* and *Smith*[33] is that Madsen was convicted by a military court which was sitting in an occupied territory and was applying the criminal laws in effect in the occupied land. Further, the court was duly organized under the power of the Commander-in-Chief of the Armed Forces, not under the regulatory power of Congress over the land and naval forces.

The *Madsen* case upheld the principle that a citizen of the United States may be tried by a military court when that court is merely exercising powers of a suspended foreign court. Again in *Ex Parte Quirin*[34] and *In Re Yamishita*[35] the military had jurisdiction to try cases, even within the continental limits of the United States, which amount to offenses against the law of war or the law of nations. However, court martial jurisdiction within the United States can never be exercised over a civilian not connected with the military when the regular courts of the United States are operating.[36]

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[29] *Krueger v. Kinsella,* 137 F. Supp. 806 (S.D.W.Va. 1956); affirmed 76 Sup. Ct. 886 (1956), 5 to 4 decision.

[30] *Covert v. Reid,* 24 L.W. 2238 (D.C. 1955); reversed 76 Sup. Ct. 880 (1956), 5 to 4 decision.

[31] 343 U.S. 341 (1952).

[32] *Neely v. Henkel,* 180 U.S. 109 (1901).

[33] *Supra,* notes 29 and 30.

[34] 317 U.S. 1 (1942).

[35] 327 U.S. 1 (1945).

[36] *Ex parte Milligan,* 4 Wall. 2 (1866).

But it is submitted that none of the principles expounded in the foregoing cases can be extended to include an offense against the laws of the United States committed by a civilian citizen of the United States temporarily residing with the armed forces overseas. Jurisdiction in this type of case is not necessary for the proper prosecution of war for the final object of self-sufficiency of a conquered or freed people. It is not necessary for the proper government of the land and naval forces since there is no military Contact involved. The only connection with the military is the fact that the military controls the area in which the accused resides.

Control and dominion by the military as the sole basis for jurisdiction should be limited to those cases in which a civilian is serving with or accompanying the armed forces in such a capacity that he loses his civilian status. This merging of the individual with the military is realized when the individual becomes directly and intimately involved in the military operations of the armed forces furthering its objective, defense and war. Thus we see cases rightly decided in which civilian technicians operating with the army overseas[37] and merchant seamen while on board naval vessels in time of war[38] are subject to trial by court martial. Especially in time of war, it may be seen that a speedy trial is necessary in this type of case if the armed forces are to attain their goals. Again it may be seen that this jurisdiction might be necessary for the morale of the armed forces, especially when the technicians and the servicemen are working side by side. But to say that the contract of marriage with a serviceman implies the condition that the status of the military is assumed and one thereby is subject to a trial by court martial is going too far.

The opponents of the principle limiting court martial jurisdiction argue that to try a civilian offender in District Courts would be impractical, ineffective, uneconomical, and not serve the ends of justice since all parties would have to be transported to the United States and foreign witnesses could not be compelled to attend.[39] To this it must be answered that Article III courts could be set up in the various military theaters of operations with juries made up of American citizens residing overseas. By this method, democratic principles would be witnessed first-hand by citizens of foreign countries. There could be no better exposition of democracy than seeing democratic justice in action.

It has been held that the Constitution does not follow the flag and, therefore, United States citizens residing overseas do not possess the rights secured by the Constitution.[40] While this theory seems outmoded under present standards of foreign engagements, the Constitution has been extended only by explicit enactments of Congress.[41] However, it must be noted that the Constitutional rights

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[37] *Grewe v. France,* 75 F. Supp. 433 (E.D. Wis. 1948), *Perlstein v. U.S.,* 151 F. 2d. 167 (3rd Cir. 1945).

[38] *In re Berue,* 54 F. Supp. 252 (S.D. Ohio 1944), *McCune v. Kilpatrick,* 53 F. Supp. 80 (E.D. Va. 1943).

[39] *U.S. v. Burney,* 6 U.S.C.M.A. 776, 21 C.M.R. 98 (1956).

[40] *Ross v. McIntyre,* 140 U.S. 453 (1891).

[41] *Cf.,* note 29.

are good and being good they should be extended to every possible sphere. If the laws of the United States are being extended to these given spheres, there is no valid reason why the rights secured by the Constitution should not also be extended.

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## RECENT CASES

PERJURY—CONGRESSIONAL SUBCOMMITTEE INVESTIGATIVE POWERS—SPEEDY TRIAL—Major William V. Holohan was commanding officer of the Mangostine mission of the Office of Strategic Service which parachuted behind German lines in Italy on September 26, 1944. The purpose of the mission was to unify and assist various partisan groups behind the German lines. Members included Major Holohan, Lieutenant Icardi, Sergeant LoDolce and Captain Landy Tozzini and Manini were two Italian partisans who later joined and worked with the group. In December, 1944, Major Holohan disappeared. In June, 1950 Tozzini and Manini were trapped in a series contradictions and confessed, implicating themselves with Icardi and LoDolce in the murder of Major Holohan.

The body of Major Holohan was recovered June 16, 1950, from Lake Orta, Italy, exactly where Tozzini and Manini admitted in their confessions that they had deposited it. In August, 1950, in Rochester, New York, LoDolce admitted participation in the killing with Tozzini, Manini and Icardi. See inserted statement in *Hearings Before the Special Subcommittee of the Committee on Armed Services House of Representatives under authority of H. Res. 125,* 83rd Cong., 1st Sess. at 103 (1953).

Pursuant to the Italian law the Novara Court of Assizes, in August, 1950, indicted *in absentia* both Icardi and LoDolce. The Italian Government's request for extradition of LoDolce was refused. *In re LoDolce,* 106 F. Supp. 455 (W.D. N.Y. 1952).

In March, 1953, Icardi, who had been honorably discharged in 1946, testified *voluntarily* before the Special Subcommittee of the House Armed Services Committee regarding the disappearance of Major Holohan. On the testimony given before this committee, Icardi was indicted in eight counts for the crime of perjury. *United States v. Icardi,* Criminal No. 821-55, D. C., August 1955.

This case leads to an inquiry as to the legitimate function of the Special Subcommittee. H. Res. 125, 83rd Cong., 1st Sess. Until now only one objective of a House or Senate investigation has been recognized by the Federal Courts as being within their constitutional powers. The purpose of the investigation must be to gather information for the enactment of legislation. *McGrain v. Daugherty,* 173 U. S. 135 (1927).

Neither House possesses the general power of inquiring into the private affairs of citizens, *Kilbourn v. Thompson,* 103 U. S. 168, 190 (1880), nor can they "compel divulgence of information for the purpose of *ascertaining whether a crime has been committed* as a basis for a criminal prosecution." *United States v. Bryan,* 72 F. Supp. 58, 61 (1941). Yet the sub-committee in its own report, *Special Subcommittee of the Committee on Armed Services United States House of Representatives* H. Res. 125, 83rd Cong., 1st Sess. 1 (1953), admitted that it