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Recent Limitations in Court-Martial Jurisdiction over Civilians Overseas

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COMMENTS

RECENT LIMITATIONS IN COURT-MARTIAL JURISDICTION OVER CIVILIANS OVERSEAS

INTRODUCTION

The advent of increased world tensions has produced peculiar circumstances unanticipated by even the most accurate clairvoyant. A predicament has confronted the Supreme Court in regard to civilian dependents and employees accompanying the armed forces to their overseas bases. In most areas of military operation, treaties with foreign nations have allowed the United States jurisdiction of those Americans based there. Legislation has provided that: "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 . . ."[1] are subject to military jurisdiction. Beginning in 1956, the Court has been faced with a series of five cases, two involving dependents and three involving employees of the armed forces stationed in foreign lands.[2]

In all five cases the defendants were tried, convicted, and sentenced by military tribunals. Defendants asserted lack of jurisdiction by the court and applied for writs of habeas corpus, basing the application on the premise that they could not be subjected to the foreign jurisdiction under the existing treaties and that as civilian citizens of the United States were guaranteed their rights under the Constitution to indictment by grand jury[3] and trial by jury.[4] All five opinions affirmed the defendants' allegations.

However, the opinions lacked unanimity. The issue, on the surface, would appear to be whether citizens accompanying the armed forces as

[1] 50 U.S.C.A. § 552 (11) (Supp., 1959).

[2] Kinsella v. United States, 361 U.S. 234 (1960); McElroy v. United States, 361 U.S. 281 (1960); Wilson v. Bohlender, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Reid v. Covert, 354 U.S. 1 (1957).

[3] U.S. Const., Amendment V which provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . ."

[4] U.S. Const., Amendment VI which provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

dependents and employees are considered part of the military. In four cases,[5] a thin majority of five held them not to be in the military; the initial case required a concurring opinion to enable a majority.[6] Numerous concurring and minority opinions were written. Why should such a relatively simple issue cause so many varied opinions? The answer is two-fold: First, since the facts presented were new and original, the Court treated the situation as one of "first impression;" and second, the Court was forced to review the established doctrine of separation of powers.

By "first impression" it is meant that the factual situation which confronted the Court involved cases whose events had no precedent opinions upon which to base a decision. By this "first impression" the Court was to determine from a purely factual point of view whether dependents were to be given civilian or military status. The separation of powers concept has been brought into play by implication, for if defendants were considered as civilians, only jurisdiction by Article III courts would be tolerated in deciding their constitutional rights.[7] If, however, they were to be classified as part of the military, Article I, Section 8, clauses 14 and 18 authorized congressional jurisdiction over them.[8]

In *Reid v. Covert*,[9] the Supreme Court ruled that dependents have civilian status and therefore are under the exclusive jurisdiction of Article III courts. The Court in the four later cases adopted the *Reid* opinion as to result and rationale. Basing its opinion on the separation of powers doctrine, subservience of the military courts to civil law courts and the protection of one's constitutional rights, the Court granted petitioners' habeas corpus writs. Although the factual situation is of first impression the problem is neither novel nor original. In *Ex parte Milligan*,[10] the Supreme Court maintained these same basic doctrines, but ap-

[5] Kinsella v. United States, 361 U.S. 234 (1960); McElroy v. United States, 361 U.S. 281 (1960); Wilson v. Bohlender, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960).

[6] Reid v. Covert, 354 U.S. 1 (1957).

[7] U.S. Const., Art. III, § 2, cl. 3 provides: "The Trial of all Crimes, except in Cases of Impeachment shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

[8] U.S. Const. Art. I, § 8, cl. 14 provides: Congress is empowered "to make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, cl. 18 provides: Congress is "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."

[9] 354 U.S. 1 (1957).

[10] 71 U.S. 2 (1866).

plied them in an area distinct, but yet similar to the modern day cases. The present Court, therefore, while not expressly so stating, has by implication broadened and extended the ruling of *Milligan* to where it now applies in an area foreign from its original concept.

EX PARTE MILLIGAN—THE LANDMARK

A brief history of court-martial proceedings prior to the *Milligan* decision will be helpful. In 1806, the Court held that a military tribunal had no jurisdiction over a civilian never in the militia.[11] In *Dynes v. Hoover,*[12] Dynes, a Navy seaman, was tried before a military tribunal for desertion. He was found not guilty, but guilty of attempted desertion. Not being specifically charged with that crime, Dynes, on habeas corpus, petitioned the Supreme Court. The Court upheld the conviction, stating that Congress under the Constitution had the power to regulate the Navy and Army, part of which included disciplinary measures, but warned that a court-martial was to be "called into existence for a special and limited purpose and to perform a particular duty."[13] This upheld the doctrine originally expressed in *Anderson v. Dunn,*[14] wherein the Court stated that military tribunals should be given "the least possible powers adequate to the end proposed."[15]

Three years prior to *Milligan,* the Court ruled it could inquire into the record of a court-martial only as regards jurisdiction over the person, subject matter and punishment involved in the controversy.[16] Thus prior to *Milligan,* it was determined: That no civilian could be subjected to military rule in the United States; that Congress had the power through legislative courts to act against military violators; and that the Supreme Court could only interfere wherein the jurisdiction of the person or subject matter was at issue.

In *Ex parte Milligan,*[17] a civilian citizen of Indiana was arrested by the military during the Civil War. Such power was authorized by congressional act. It was claimed by the Union that because of the rebellion and the threat of imminent invasion that it was imperative for the protection of the country that the army act in arresting Milligan. At the time of the

[11] Wise v. Withers, 3 Cr. (U.S.) 331 (1806).

[12] 61 U.S. 65 (1857). Accord: In re Spencer, 40 Fed. 149 (D. Kan., 1889); In re Zimmerman, 30 Fed. 176 (N.D. Cal., 1887).

[13] Hoover v. Dynes, 61 U.S. 65, 67 (1857).

[14] 6 Wheat. (U.S.) 204 (1821).

[15] Ibid., at 231.

[16] Ex parte Vallandigham, 68 U.S. 243 (1863). See In re Yamashita, 327 U.S. 1 (1946); Dynes v. Hoover, 61 U.S. 65 (1857).

[17] 71 U.S. 2 (1866).

arrest, all civil courts in the vicinity were open and functioning. Because of this fact, the Court granted a writ of habeas corpus and held that as long as civil courts were open and operating, military tribunals had no jurisdiction over civilians.[18] The Constitution provides that the judiciary powers under Article III are to secure the protection of federal laws. It was quite evident to the Court that military tribunals were not granted any power under Article III and, as a result, were subservient to Article III courts in the determination of one's basic rights. No congressional act could dictate otherwise.

> The power of punishment is, alone through the means which the law have [sic] provided for that purpose and if they are ineffectual, there is an immunity from punishment no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law, human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers or the clamor of an excited people.[19]

Acts of Congress under their Article I powers are for legislative purposes only. Any overextension of their powers into those reserved for the judiciary under Article III threatens the separation of powers doctrine which is an integral part of our government system and, as a result, such acts are unconstitutional.

Article III courts are the roots from which the tree of justice flourished. The protection of citizens under the Constitution is exclusively a matter for civil determination and any exercise by any branch of the government other than the judiciary will not be tolerated. Military tribunals are a creature of Congress. Under Article I, these legislative courts are allowed to function, but are restricted in their application. Only those parties connected with the military are subject to its jurisdiction. At all times civilians are entitled to the use of civil courts in the determination of their rights and obligations. Being a civilian, Milligan was due his day in a civilian court. In short, civilians are not to be subjected to court-martial jurisdiction.

The Court made an exception to this rule, but restricted it to a narrow area. The government argued that because of the threatened invasion of Confederate troops, martial law should be extended. The Court ruled that martial law could apply only when civil courts were closed as a result of *actual attack or invasion.* If civil administration was inoperative, then military tribunals could have jurisdiction over civilians in order to maintain law and order, which would, in effect, prevent vandalism and

[18] The facts of Milligan and Vallandigham are almost identical, but were decided differently, the reason being that during Vallandigham the Civil War had not been decided.

[19] Ex parte Milligan, 71 U.S. 2, 119 (1866).

damage to civilian property. Only absolute necessity would allow martial law to exist and then only "on the theatre of active military operations, where war really prevails. . . . Martial rule can never exist where the courts are open, in the proper and unobstructed exercise of their jurisdiction."[20] Such an exercise of power could not be a sham. "Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the civil courts and deposes the civil administration."[21]

The two courts cannot exist simultaneously where constitutional rights are involved. One must give way to the other. By reason of the Constitution itself, Article III courts are the protectors of constitutional rights and therefore superior to the military tribunals. The logic behind such a result is quite evident, for ". . . surely an ordained and established court was better able to judge of this [evidence] than a military tribunal composed of gentlemen not trained to the profession of law."[22] The military was to remain subservient to civil administration to avoid the possibility of despotic government. The Supreme Court said in a later case that affirmed the military's secondary role in judicial rulings:

> [T]he military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend of the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield.[23]

EXTENSION OF THE MILLIGAN DOCTRINE IN RECENT CASES

During World War II and up to the present day, numerous disputes of this nature have arisen. In each instance the Court has not expressly extended *Milligan's* doctrine, but the effects of its decisions has been an application of *Milligan* principles. Mr. Justice Murphy, in *Duncan v. Kahanamoku*,[24] recognized this effect and stated that *Milligan* should be applied to United States territories as well. This concurring opinion has been the only opinion of the Court, of all its post-war decisions, expressly adhering to the *Milligan* decision. In the *Duncan* case, petitioners applied for and were granted writs of habeas corpus. One petitioner was employed in the Naval Yards and the other was a resident civilian of Hawaii when arrested and convicted by the military. At the time of the court-martial, the civil courts had been open eight months and two years respectively, having originally been closed because of Pearl Harbor.

[20] Ibid., at 127.

[21] Ibid.

[22] Ibid.

[23] Dow v. Johnson, 100 U.S. 158, 169 (1879). See McCune v. Kilpatrick, 53 F. Supp. 80 (E.D., Va., 1943); Hines v. Mikill, 259 Fed. 28 (C.C.A. 4th, 1919).

[24] 327 U.S. 304 (1946).

Mr. Justice Black stated that military law was looked upon with abhorrence and that, as a result, military trials of civilians charged with crimes, especially when not made subject to judicial review, were contrary to our political traditions and our institution of jury trials in courts of law.

Justice Murphy, as previously stated, found that *Milligan* should apply.

> Only when a foreign invasion or civil war actually closes the courts and renders it impossible for them to administer criminal justice can martial law validly be invoked to suspend their functions.[25]

Obviously the courts were functioning and, therefore, no jurisdiction over civilians was allowed to the military under the separation of powers doctrine.

Madsen v. Kinsella[26] was the first case where a dependent overseas was convicted of a crime by a military tribunal. The petitioner was found guilty of murdering her husband, a serviceman stationed in Germany. The Court refused to issue the habeas corpus writ. Since the crime occurred during the occupation of Germany, the Court's decision was based on the "war action" rather than on petitioner's citizenship status.

The Court reasoned that without the occupation of allied forces in Germany, no semblance of law and order could exist. As in *Milligan*, military rule was allowed over civilians until a stable civil administration could be created to displace the military. Unlike *Milligan*, however, this involved jurisdiction in a foreign country. By dicta, the Court created a paradox which left unsettled questions for further determination. The dicta was: "The policy of Congress to refrain from legislating in this unchartered area does not imply its lack of power to legislate"[27] over dependents in foreign countries in peacetime. By recognizing Congress's power to legislate in this field, if it so desired, the Court contradicted *Milligan*, for *Milligan* outlawed any congressional attempts to transfer the jurisdiction over civilian rights to any court other than those established by Article III.

Mr. Justice Black wrote a separate opinion refusing to recognize Congress' military power to create such courts to rule on American citizens overseas. During wartime such court-martial jurisdiction could exist under *Milligan*, but Justice Black was reluctant to extend such jurisdiction to post-war trials.

[25] Ibid, at 326.

[26] 343 U.S. 341 (1952). See Santiago v. Nogueras, 214 U.S. 260 (1909). Cf. Hirabayashi v. United States, 320 U.S. 81 (1943).

[27] Madsen v Kinsella, 343 U.S. 341, 348, 349 (1952).

In *Toth v. Quarles*,[28] Toth, having been honorably discharged, was arrested by the military in Pittsburgh and flown to Korea. Court-martial proceedings were brought for acts allegedly committed by Toth while in the service. This power to try Toth was derived from the Uniform Code of Military Justice.[29] Justice Black declared such power unconstitutional. Abhorring the extension of jurisdiction to military tribunals, he asserted that only Article III courts had jurisdiction over Toth. That once " 'a person [is] separated from the service, [he] ceases to be amenable' to military and naval jurisdiction."[30]

As in *Milligan*, the Court could find nothing in the history of constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people. Therefore, Toth, like any other United States civilian, was to be entitled to the safeguards guaranteed him through the processes of Article III courts.

The majority again defined the basis upon which the military courts function. The role of the armed forces was to protect our nation, and to do so, it required tight disciplinary controls. Such disciplinary controls are the primary reason for military tribunals and the Court could not comprehend how the "discipline of the Army [was] going to be disrupted, its morale impaired . . . by giving ex-servicemen the benefits of a civilian court trial when they are actually civilians. . . ."[31]

Reid v. Covert[32] involved two decisions. Petitioners living in Japan and England were convicted by military courts of murdering their soldier husbands. Treaties existing with Japan and England precluded their civil administration of jurisdiction over American citizens stationed at military bases. Such jurisdiction was bestowed upon the military by congressional act,[33] *i.e.*, all American citizens stationed at United States overseas bases were under the complete judicial control of the base commander. Petitioners asserted denial of their constitutional rights under Article III Section 2, the Fifth and the Sixth Amendments.

[28] 350 U.S. 11 (1955). For further discussion of Toth v. Quarles, consult 5 *De Paul L. Rev.* 121 (1955). Cf. Hirshberg v. Cooke, 336 U.S. 210 (1949); Kahn v. Anderson, 255 U.S. 1 (1921); Ex parte Mason, 105 U.S. 696 (1881). Contra: Ex parte Joly, 290 Fed. 858 (S.D.N.Y., 1922); Terry v. United States, 2. F. Supp. 962 (W.D. Wash, 1933).

[29] 50 U.S.C.A. § 553 (a) (1950). This clause provides: "[A]ny 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 . . . shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status."

[30] Hirshberg v. Cooke, 336 U.S. 210, 216 (1949).

[31] Toth v. Quarles, 350 U.S. 11, 22 (1955).

[32] 354 U.S. 1 (1957).

[33] 50 U.S.C.A. § 552 (11) (Supp., 1957).

As noted before, the Court was faced with a factual situation calling for a "first impression" decision. A basis for such a ruling was to be had, therefore, from other categories of constitutional law.

Four cases provided the Court with a foundation for the first *Reid* opinion. *In re Ross*[34] tested the validity of Consular Courts created by Congress to try American citizens in foreign lands. Ross was convicted of murder by this court, and petitioned the Supreme Court for a writ of habeas corpus. The Court denied the writ.

> By the Constitution a government is ordained and established "for the United States of America," and not for countries outside their limits against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States. . . . The Constitution can have no operation in another country.[35]

Therefore petitioners in *Reid* would not be guaranteed their constitutional rights since they were entitled to none.

The *Insular* cases[36] were another bases which the Court used to furnish a foundation for their decision. In these cases the Supreme Court found that the Constitution was not, in and of itself, applicable to United States territories even though an American possession. Only federal legislation could apply the guarantees of the Constitution in territories outside the Union of States. It would naturally follow, stated the Court, that since the Congress could institute laws in such territories, it could also create legislative courts to adjudicate those laws.

Thus, after deciding that petitioners were part of the armed forces, the Court in *Reid* ruled:

> These cases [*Insular* and *Ross*] establish . . . that the Constitution does not require trial before an Article III court in a foreign country for offenses committed there by an American citizen and that Congress may establish legislative courts for this purpose.[37]

The effect of this decision gave Congress through its legislative courts, jurisdiction over citizens' constitutional rights.

Upon rehearing of *Reid*, the prior majority was overruled. Mr. Justice

[34] 140 U.S. 453 (1891).

[35] Ibid., at 464.

[36] Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Downes v. Bidwell, 182 U.S. 244 (1901).

[37] Kinsella v. Kruegar, 351 U.S. 470, 476 (1956). Cf. Ex parte Bakelite, 279 U.S. 438, 449 (1929), where the Court held: "[I]t long has been settled that Article III does not express the full authority of Congress to create courts, and that other Articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying these powers into execution."

Black returned to *Duncan* and *Toth* as the basis for petitioners not being classified as part of the armed forces. Black reaffirmed the subjection of martial justice to the civil law and the separation of powers doctrine.

> [T]he jurisdiction of military tribunals is a very limited and extraordinary jurisdiction [and] was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. *Every extension of military jurisdiction is an encroachment on the Jurisdiction of the Civil Courts. . . .*[38]

If military jurisdictional powers are to be limited, then Article I, Section 8, Clause 14 is to be narrowly construed and is to apply only to "the land and Naval forces." The necessary and proper powers of Congress could not, therefore, apply "to any group of persons beyond that class described in Clause 14."[39] Only those actually in the armed forces could be subjected to the powers given to Congress.

Since neither Toth nor any ex-serviceman could be tried by court martial, certainly dependents also would be exempt. Ex-servicemen should be considered more closely connected to the military than dependents. Justice Black, by adopting *Toth*, reiterated that the military court "emphasizes the iron hand of discipline more than it does the even scales of justice;"[40] notwithstanding the recent reforms, military trial does not give an accused the same protection which exists in civil courts.

The government, as in *Milligan*, alleged that this was a mere exception to the rule and that because of world tensions, the armies were "in the field" of threatened warfare and the court should allow military jurisdiction over citizens associated with the armed forces. The court rejected their contention, declaring that such action is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights. The Court would not allow such encroachment.

> The attitude appears to be that a slight encroachment on the Bill of Rights and other safeguards in the Constitution need cause little concern. . . . Slight encroachments create new boundaries from which legions of power can seek new territory to capture. . . .[41]

To the Court, such powers were extended to the military, which allowed the commanding officer at each base executive, legislative and judicial powers. Such powers in our society are the very acme of absolutism, which would lead to the destruction of the Bill of Rights.

The opinion of the Court was concurred in by four Justices. Two concurring opinions were needed to constitute a majority. These opinions, however, were founded on the prior *Reid* Case. The concurring Court stated that Congress's powers under Article I were applicable to

[38] Reid v. Covert, 354 U.S. 1, 21 (1957) (emphasis supplied).

[39] Ibid., at 21.

[40] Ibid., at 38.

[41] Ibid., at 39.

petitioners since they were to be included as members of the armed forces: "[U]nder the Constitution, the mere absence of a prohibition against an asserted power, plus the abstract reasonableness of its use, is enough to establish the existence of the [congressional] power."[42] But to the concurring Justices, capital offense crimes were so unusual that an exception to the Congress's power could be applied. Because of their serious nature and rare existence, constitutional guarantees under Article III courts were to be given the petitioners. As a result of this reasoning and because these opinions were needed to produce a majority, the question remained as to a dependent's fate for a non-capital crime.

Three cases involving employees convicted of capital and non-capital offenses by courts-martial were recently decided by the Court.[43] The claim of the government was two-fold: One, the *Reid* decision was applicable only to dependents involved in capital crimes; and two, the clause declared unconstitutional by the *Reid* Court applied only to that particular situation and, therefore, dependents convicted of non-capital crimes and employees convicted of all crimes were still subject to military jurisdiction.[44] The Court ruled that such was not the fact and both employees and dependents were to be considered as civilians with the same rights as petitioners in *Reid*. In all four cases, a majority of five or more followed the doctrines expressed by Mr. Justice Black in the second *Reid* opinion. The petitioners were to be considered civilians, for no encroachment by the military will be allowed on Article III courts.

In *Kinsella v. United States*,[45] a dependent was tried and convicted by the military for manslaughter, a non-capital offense. Because of the thinking in concurring opinions in *Reid*, the government argued that military jurisdiction over dependents was allowable. The Court, however, found no basis for this argument. The Court, therefore, ruled that: "[T]he materials furnished show that military jurisdiction has always been based on the 'status' of the accused, rather than the nature of the offense."[46] Thus the doctrines in *Reid* were applicable in this case also.

The Court also pointed out the effects of the government's assertion; that if it were allowed, the military could have jurisdiction over all by reducing a capital offense to a non-capital crime. In effect, such a situation would nullify *Reid*.

[42] Ibid., at 66.

[43] An interesting note is that Mr. Justice Clark delivered the first Reid majority, the second Reid minority and then reversed his view in writing the Kinsella, Wilson, McElroy and Grisham majorities.

[44] 50 U.S.C.A. § 552 (11) (Supp., 1957).

[45] 361 U.S. 234 (1960).

[46] Ibid., at 243.

McElroy v. United States[47] and *Wilson v. Bohlender*[48] involved non-capital crimes committed by military employees stationed in foreign bases. *Grisham v. Hagan*[49] involved a like employee convicted of a capital offense. Treaties barred jurisdiction by the foreign governments of those accused. The Court decided that the doctrines of *Reid* in regard to employees were to be of the same effect as they were regarding dependents. The cases presented by the government were found not in point since they involved assistant paymasters of the Navy.[50] This group had always been treated by the Court as being an inherent part of the Navy.[51] The civilians involved in the three cases were not paymasters and therefore could not be considered as an inherent part of the Navy. As a result, the *Reid* doctrine was applied in all three cases and petitioners were granted writs of habeas corpus.

SIMILARITIES BETWEEN REID AND MILLIGAN

The ramifications of the *Madsen* and the second *Reid* Decision with its four subsequent corollary cases create an expansion of the *Milligan* rule. Fear of military extension into the civil courts which influenced the Court's reasoning in *Milligan* prompted the *Reid* Court to the same conclusion. Separation of power and the reduction of military jurisdiction were the two main foundations for both decisions.

The *Reid* Court did not express *Milligan*'s Doctrine once it reached the conclusion that petitioners were civilians, but when coupled with the *Madsen* case, one can perceive the effects of *Milligan*. In *Reid* and the four recently decided cases, the Court pointed out that their rulings applied only during the time of peace. *Madsen* allowed military jurisdiction of civilians during a period of "war" when operation by civil courts was near impossible. One of the government's basic contentions in *Reid* was that because of such world tensions jurisdiction should rest in the military. It should also be noted here that one petitioner in *Reid* was living in Japan during the Korean War. As a result, therefore, the two cases have now created a situation in foreign jurisdictions whereby the military has jurisdiction of civilians in the actual locale of "war," but not in the immediate area of war (Korea), or at a time when war is threatened.

[47] 361 U.S. 281 (1960).

[48] Ibid.

[49] 361 U.S. 278 (1960).

[50] Johnson v. Sayre, 158 U.S. 109 (1895); Ex parte Reed, 100 U.S. 13 (1879). See In re Varney, 141 F. Supp., 190 (S.D. Cal., 1956).

[51] United States v. Hendee, 124 U.S. 309 (1888); In re Bogart, 3 Fed. Cas. No. 1, 596 (D. Cal., 1873).

The government in both *Milligan* and *Reid* argued the need for expediency of trial in this situation as ground for allowing military jurisdiction of a civilian. The reply from either case could be sufficient in both cases to answer this assertion. The *Reid* Court said:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.[52]

The *Milligan* Court in like language held that all citizens

> [A]re guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. When peace prevails . . . there is no difficulty of preserving the safeguards of liberty. . . . [T]hese safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty. . . .[53]

Other sections of the opinions are similar, especially in the areas involving the purpose of military law and the fear of the founding fathers of military dominance. The *Milligan* Court observed: "The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts. . . ."[54] Mr. Justice Black in *Reid* wrote: "Because of its very nature and purpose the military must place great emphasis on discipline and efficiency. Correspondingly, there has always been less emphasis in the military on protecting the rights of the individual than in civilian society and civilian courts."[55]

In regard to our founding fathers' intention, Justice Black stated that any wide interpretation of Article I, Section 8, Clauses 14 and 18 "would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority."[56] Justice Davis in *Milligan* held that the purpose of the Constitution and the men who framed it was to guard "the foundations of civil liberty against the abuses of unlimited power. . . ."[57]

In both cases, the Court maintained the supremacy of Article III courts and the protection of the individual's rights guaranteed by the

[52] Reid v. Covert, 354 U.S. 1, 14 (1957).

[53] Ex parte Milligan, 71 U.S. 2, 123, 124 (1866).

[54] Ibid., at 123.

[55] Reid v. Covert, 354 U.S. 1, 36 (1957).

[56] Ibid., at 30.

[57] Ex parte Milligan, 71 U.S. 2, 126, (1866).

Constitution. By constitutional interpretation, the protection needed to guarantee these rights is accomplished by Article III courts only and no others. The *Milligan* Court had no problem in deciding whether petitioner was a civilian or not. The argument used for deciding that petitioners in *Reid* were civilians is the same as *Milligan,* namely, as stated before, the subservience of military courts and the separation of powers doctrine—meaning that no Article I legislative court could decide judicial matters which solely belonged in Article III courts. *Milligan* stated that no civilian residing in a state of the Union could be subjected to military jurisdiction in time of peace. *Reid* provided the same for civilians overseas where existing treaties prevented foreign jurisdiction of civilians at military bases. In time of war, *Milligan* allowed military jurisdiction of civilians only when and where actual war existed. *Reid* with *Madsen* provided for the same jurisdiction over civilians where actual war existed in a foreign jurisdiction.

Both the minority of *Reid* and the concurring opinion of *Milligan* refused to adopt this theory. In *Milligan,* the concurring Justices believed that Congress by its Article I powers could allow military jurisdiction over civilians. The Court said:

> [I]t is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against public safety.[58]

As seen before, the *Reid* minority adopted the same position.

CONCLUSION

Treaties releasing American civilians from foreign litigation and the unconstitutionality of military jurisdiction over them have created a jurisdictional vacuum. Since no Article III courts are established in those foreign lands, how can the accused be extended his constitutional privileges? The Court emphasized that this was a political question, but offered alternatives which Congress might adopt. The Court suggested that in cases involving employees, legislation be enacted to induct them into the military, much the same as doctors and dentists. In regard to all civilians overseas under military auspices, three suggestions were offered. One was to bring the civilians back to the United States for trial, but this would create havoc because of the transportation of witnesses and the accused. The other two alternatives are more feasible. The Court suggested that regardless of the treaty, such civilians could be extradited into the foreign courts.[59] The objection to this proposal is

[58] Ibid., at 140.

[59] Cf. Wilson v. Girard, 354 U.S. 524 (1957).

that an American civilian would be subjected to a jurisdiction and procedure completely unknown to him. Ignorance of this could deprive the accused of a fair trial. Creation by Congress of foreign federal courts is the third alternative. If treaties exist which create these jurisdictional vaccums, they would be directed to these courts and the Supreme Court has upheld Congress' power to so provide.[60]

Regardless of the congressional decision, *Reid* has extended the *Milligan* application to include this narrow field. Once again the Courts have protected the individuals' rights and their jurisdictional province from congressional encroachment. All that need be said was said over one hundred and fifty years ago:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers or either of them: the judiciary shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not men.[61]

[60] Ex parte Bakelite, 279 U.S. 438 (1929); American Insurance v. 356 Bales of Cotton, 26 U.S. 511 (1828).

[61] Mass. Const. Art. XXX.

LACHES IN ADMIRALTY ACTIONS

The length of time during which an action may be brought by a seaman for personal injury is governed by the admiralty doctrine of laches, unlike ordinary common law actions which are generally strictly governed by statutes of limitations.[1] The seaman who is injured or becomes ill in the service of the ship has three basic remedies against the owner of the ship: (1) An action for maintenance and cure which will allow him to recover his wages until the end of the voyage, his expenses for lodging and medical expenses he has incurred for cure. (2) An action for unseaworthiness should he be injured through the unseaworthiness of the vessel. (3) An action under the Jones Act for negligence of the owner of the vessel or his servants.[2] Laches is applied somewhat differently

[1] Gardner v. Panama R.R. Co., 342 U.S. 29 (1951); Holmberg v. Armbrecht, 327 U.S. 392 (1946); Southern Pacific Co. v. Bogert, 250 U.S. 483 (1919); The Key City, 14 Wall. (U.S.) 653 (1871).

[2] E.g., The Osceola, 189 U.S. 158 (1903). Justice Brown stated that the law was settled in these four propositions:

"1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

"2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of