

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 8: The New Deal/Great Society Era—Foundations/Scope/Extraterritoriality

Reid v. Covert, 354 U.S. 1 (1957) (expanded)

Clarice Covert murdered her husband, a sergeant in the Air Force, when he was stationed in the United Kingdom. Congressional law at the time authorized military trials for all persons who committed crimes on army bases overseas. Covert was tried by a military court, found guilty of murder, sentenced to life in prison, and shipped to the District of Columbia to serve her sentence. Upon entering the United States, she petitioned the local federal district court for a writ of habeas corpus, claiming that her military trial violated her Fifth and Sixth Amendment rights. The District Court granted the writ, and the government of the United States immediately appealed that decision to the Supreme Court of the United States.

The Supreme Court in June 11, 1956 rejected Covert's claims. Relying on Ross v. McIntyre (1891),¹ Justice Clark's majority opinion ruled 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." Justice Clark's opinion was published before Chief Justice Warren, Justice Douglas, and Justice Frankfurter finished writing their dissents. During the writing process, Justice Harlan was convinced to rehear the case. Upon reargument, he joined the majority, along with Justice Brennan, who had replaced Justice Minton.

With the retirement of Justice Reed, a 5–4 majority to reject the habeas petition became a 6–2 majority in favor of Covert's claims. Justice Black's opinion concluded that American citizens tried by Americans in foreign countries were entitled to the full panoply of constitutional rights. Justice Harlan and Justice Frankfurter insisted only that a jury trial was warranted under the particular circumstances of Covert's case. Think about the status of In re Ross after Reid. Did Justice Black overrule the case or distinguish the case? Compare the majority opinion in Reid to the majority opinion in Johnson v. Eisentrager (1950). As of 1957, under what conditions would a judicial majority insist that a person accused of a crime overseas had constitutional rights? Under what conditions would a jury trial clearly be denied? Where were the gray areas? Notice also how the differences between Justice Black and Justice Harlan on the rights of Americans overseas mirror their differences over incorporation. Black insists that government officials cannot "pick and choose" among constitutional rights when conducting trials overseas. Harlan insists only that trials be fundamentally fair. Do incorporation and questions about the extraterritorial scope of the Constitution present similar issues? Might different rules apply for each?

JUSTICE BLACK announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE DOUGLAS, and JUSTICE BRENNAN join.

...

... [W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights

¹ See *American Constitutionalism, Volume II: Rights and Liberties*, Chapter 7.

and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. . . .

...
The language of Art. III, 2 manifests that constitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as here at home. After declaring that all criminal trials must be by jury, the section states that when a crime is "not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." If this language is permitted to have its obvious meaning, 2 is applicable to criminal trials outside of the States as a group without regard to where the offense is committed or the trial held. . . .

... While it has been suggested that only those constitutional rights which are "fundamental" protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shalt nots" which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments. Moreover, in view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right. . . .

...
The *Ross v. McIntyre* (1891) approach that the Constitution has no applicability abroad has long since been directly repudiated by numerous cases. That approach is obviously erroneous if the United States Government, which has no power except that granted by the Constitution, can and does try citizens for crimes committed abroad. Thus the Ross case rested, at least in substantial part, on a fundamental misconception and the most that can be said in support of the result reached there is that the consular court jurisdiction had a long history antedating the adoption of the Constitution. The Congress has recently buried the consular system of trying Americans. We are not willing to jeopardize the lives and liberties of Americans by disinterring it. At best, the Ross case should be left as a relic from a different era.

...
The "Insular Cases" (1901-1922) can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship. None of these cases had anything to do with military trials and they cannot properly be used as vehicles to support an extension of military jurisdiction to civilians. Moreover, it is our judgment that neither the cases nor their reasoning should be given any further expansion. 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. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there.

...
[T]he Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were "necessary and proper" for the regulation of the "land and naval Forces." Such a latitudinarian interpretation of these clauses 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. The Constitution does not say that Congress can regulate "the land and naval Forces and all other persons whose regulation might have some relationship to maintenance of the land and naval Forces." There is no indication that the Founders contemplated setting up a rival system of military courts to compete with civilian courts for jurisdiction over civilians who might have some contact or relationship with the armed forces. Courts-martial were not to have concurrent jurisdiction with courts of law over non-military America.

We should not break faith with this Nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution. The country has remained true to that faith for almost one hundred seventy years. Perhaps no group in the Nation has been truer than military men themselves. Unlike the soldiers of many other nations, they have been content to perform their military duties in defense of the Nation in every period of need and to perform those duties well without attempting to usurp power which is not theirs under our system of constitutional government.

JUSTICE FRANKFURTER, concurring in the result.

... The cases cannot be decided simply by saying that, since these women were not in uniform, they were not "in the land and naval Forces." The Court's function in constitutional adjudications is not exhausted by a literal reading of words. It may be tiresome, but it is nonetheless vital, to keep our judicial minds fixed on the injunction that "it is a constitution we are expounding." *M'Culloch v. Maryland* (1819).

The prosecution by court-martial for capital crimes committed by civilian dependents of members of the armed forces abroad is hardly to be deemed, under modern conditions, obviously appropriate to the effective exercise of the power to "make Rules for the Government and Regulation of the land and naval Forces" when it is a question of deciding what power is granted under Article I, and therefore what restriction is made on Article III and the Fifth and Sixth Amendments. I do not think that the proximity, physical and social, of these women to the "land and naval Forces" is, with due regard to all that has been put before us, so clearly demanded by the effective "Government and Regulation" of those forces as reasonably to demonstrate a justification for court-martial jurisdiction over capital offenses.

The Government speaks of the "great potential impact on military discipline" of these accompanying civilian dependents. This cannot be denied, nor should its implications be minimized. But the notion that discipline over military personnel is to be furthered by subjecting their civilian dependents to the threat of capital punishment imposed by court-martial is too hostile to the reasons that underlie the procedural safeguards of the Bill of Rights for those safeguards to be displaced. It is true that military discipline might be affected seriously if civilian dependents could commit murders and other capital crimes with impunity. No one, however, challenges the availability to Congress of a power to provide for trial and punishment of these dependents for such crimes. The method of trial alone is in issue.

... I therefore conclude that, in capital cases, the exercise of court-martial jurisdiction over civilian dependents in time of peace cannot be justified by Article I, considered in connection with the specific protections of Article III and the Fifth and Sixth Amendments.

... The Court's opinions in the territorial cases did not lay down a broad principle that the protective provisions of the Constitution do not apply outside the continental limits of the United States. This Court considered the particular situation in each newly acquired territory to determine whether the grant to Congress of power to govern "Territory" was restricted by a specific provision of the Constitution. The territorial cases, in the emphasis put by them on the necessity for considering the specific circumstances of each particular case, are thus relevant in that they provide an illustrative method for harmonizing constitutional provisions which appear, separately considered, to be conflicting.

... One observation should be made at the outset about the grounds for decision in *Ross*. Insofar as the opinion expressed a view that the Constitution is not operative outside the United States . . . it expressed a notion that has long since evaporated. Governmental action abroad is performed under both the authority and the restrictions of the Constitution—for example, proceedings before American military tribunals, whether in Great Britain or in the United States, are subject to the applicable restrictions of the Constitution.

...

The consular court jurisdiction . . . was exercised in countries whose legal systems at the time were considered so inferior that justice could not be obtained in them by our citizens. The existence of these courts was based on long-established custom, and they were justified as the best possible means for securing justice for the few Americans present in those countries. The *Ross* case, therefore, arose out of, and rests on, very special, confined circumstances, and cannot be applied automatically to the present situation, involving hundreds of thousands of American citizens in countries with civilized systems of justice. If Congress had established consular courts or some other non-military procedure for trial that did not contain all the protections afforded by Article III and the Fifth and Sixth Amendments for the trial of civilian dependents of military personnel abroad, we would be forced to a detailed analysis of the situation of the civilian dependent population abroad in deciding whether the *Ross* case should be extended to cover such a case. It is not necessary to do this in the present cases in view of our decision that the form of trial here provided cannot constitutionally be justified.

JUSTICE HARLAN, concurring in the result.

I concur in the result, on the narrow ground that, where the offense is capital, Article 2(11) cannot constitutionally be applied to the trial of civilian dependents of members of the armed forces overseas in times of peace.

...
I do not think the courts-martial of these army wives can be said to be an arbitrary extension of congressional power. . . . First of all, the historical evidence presented by the Government convinces me that, at the time of the adoption of the Constitution, military jurisdiction was not thought to be rigidly limited to uniformed personnel. . . .

... I cannot say that the court-martial jurisdiction here involved has no rational connection with the stated power. The Government, it seems to me, has made a strong showing that the court-martial of civilian dependents abroad has a close connection to the proper and effective functioning of our overseas military contingents. . . .

Jurisdiction by courts-martial over all civilians accompanying the Army overseas is essential because of the manner in which U.S. Armed Forces personnel live in their overseas military communities. In this command, almost all personnel serving in or accompanying the U.S. Armed Forces live in or near separate, closely knit U.S. military communities which are basically under the control, administration and supervision of the local U.S. Commander, who is, in turn, responsive to the normal military chain of command. . . .

...
I do not think that it can be said that these safeguards of the Constitution are never operative without the United States, regardless of the particular circumstances. On the other hand, I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world. For *Ross* and the *Insular Cases* do stand for an important proposition, one which seems to me a wise and necessary gloss on our Constitution. The proposition is, of course, not that the Constitution "does not apply" overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place. . . .

...
On this basis, I cannot agree with the sweeping proposition that a full Article III trial, with indictment and trial by jury, is required in every case for the trial of a civilian dependent of a serviceman overseas. The Government, it seems to me, has made an impressive showing that, at least for the run-of-the-mill offenses committed by dependents overseas, such a requirement would be . . . impractical. . . .

So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases, the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority. I do not concede that whatever process is "due" an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. . . . In fact, the Government itself has conceded that one grave offense, treason, presents a special case:

The gravity of this offense is such that we can well assume that, whatever difficulties may be involved in trial far from the scene of the offense . . . , the trial should be in our courts.

I see no reason for not applying the same principle to any case where a civilian dependent stands trial on pain of life itself. The number of such cases would appear to be so negligible that the practical problems of affording the defendant a civilian trial would not present insuperable problems.

JUSTICE CLARK, with whom JUSTICE BURTON joins, dissenting.

JUSTICE BURTON and I remain convinced that the former opinions of the Court are correct, and that they set forth valid constitutional doctrine under the long-recognized cases of this Court. . . .

...
Historically, the military has always exercised jurisdiction by court-martial over civilians accompanying armies in time of war.

...
[I]t is reasonable to provide that the military commander who bears full responsibility for the care and safety of those civilians attached to his command should also have authority to regulate their conduct. Moreover, all members of an overseas contingent should receive equal treatment before the law. In their actual day-to-day living, they are a part of the same unique communities, and the same legal considerations should apply to all. There is no reason for according to one class a different treatment than is accorded to another. . . .

...
Another alternative the Congress might have adopted was the establishment of federal courts pursuant to Article III of the Constitution. These constitutional courts would have to sit in each of the 63 foreign countries where American troops are stationed at the present time. Aside from the fact that the Constitution has never been interpreted to compel such an undertaking, it would seem obvious that it would be manifestly impossible. The problem of the use of juries in common law countries alone suffices to illustrate this. . . .

Likewise, trial of offenders by an Article III court in this country, perhaps workable in some cases, is equally impracticable as a general solution to the problem. The hundreds of petty cases involving black-market operations, narcotics, immorality, and the like, could hardly be brought here for prosecution even if the Congress and the foreign nation involved authorized such a procedure.

The only alternative remaining—probably the alternative that the Congress will now be forced to choose—is that Americans committing offenses on foreign soil be tried by the courts of the country in which the offense is committed. . . . It is clear that trial before an American court-martial in which the fundamentals of due process are observed is preferable to leaving American servicemen and their dependents to the widely varying standards of justice in foreign courts throughout the world. Under these circumstances, it is untenable to say that Congress could have exercised a lesser power adequate to the end proposed.

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. . . .