THE CASE OF THE MURDERING WIVES: *REID V. COVERT* AND THE COMPLICATED QUESTION OF CIVILIANS AND COURTS-MARTIAL

CAPTAIN BRITTANY WARREN*

I. Introduction

In 1957, in a case known colloquially around chambers as "The Case of the Murdering Wives," the Supreme Court reversed itself. In *Reid v. Covert* (*Reid II*), it withdrew its barely one-year-old decision upholding the courts-martial of two military spouses, and instead held that for capital offenses in times of peace, the provisions of the Uniform Code of Military Justice (UCMJ) granting court-martial jurisdiction over persons accompanying the force could not be constitutionally applied to civilian dependents of overseas armed forces servicemembers.[1] For the first and only time, after already publishing its opinion, the Supreme Court reached a different result in identical litigation, following published opinions, and without a controlling change in the composition of the Court.[2]

Reid II is traditionally known for two things. To military lawyers, the case stands for the proposition that dependents may not be subject to trial by court-martial, because the Fifth Amendment's loophole for military jurisdiction ("except in cases arising in the land and naval forces") cannot override the rights to a jury trial embodied in the Fifth and Sixth Amendments.[3] To international law aficionados, *Reid II* is the

* Captain, U.S. Army. J.D., 2012, The George Washington University Law School; B.S., 2004, Duke University. The opinions and conclusions represented in this article are solely those of the author and do not necessarily represent the views of the Department of Defense, the Department of the Army, the Judge Advocate General's Corps, or any governmental agency. I am profoundly grateful to Professor Gregory Maggs, Dean Lisa Schenck, and Colonel Denise Lind for helpful guidance in writing this article, as well as the staff of the *Military Law Review* for outstanding editing. No one is an island, least of all a lawyer, so my deepest appreciation goes to my husband, Lloyd, and to my children, Sophia and Sam, for their unwavering love and support. Material from the papers of Justice John Marshall Harlan II is quoted with the permission of the Seeley G. Mudd Manuscript Library, 20th Century Public Policy Papers. Material from the papers of Justice Hugo Black is quoted with the permission of Hugo L. Black, Jr.

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

[2] Frederick Bernays Wiener, *Persuading the Court to Reverse Itself*, 14 LITIG. 6, 10 (1989). Wiener's excellent account of the case and its rehearing is referenced liberally in this article.

[3] *See infra* notes 308–309 and accompanying text.

landmark case wherein the Supreme Court ruled that the Constitution supersedes international treaties ratified by the United States.[4] From a vantage point nearly sixty years later, neither of those propositions strikes a modern reader as extreme. At the time, however, *Reid II* was incredibly controversial—before the Court,[5] among the Justices themselves,[6] and in the public's reaction to the Court's seemingly abrupt about-face.[7]

The story of *Reid II* is the story of the "murdering wives" at the center of the controversy, Clarice B. Covert and Dorothy Krueger Smith. They are in many ways unsympathetic figures. There is no doubt that these women, in exceptionally violent ways, murdered their husbands, but what is missing from that narrative is the fact that they were also two mothers who were let down by the very military health system from which they sought help.[8] The story of *Reid II* is also the story of Frederick Bernays Weiner, the retired Army lawyer who argued the case at all levels of the appeal, and his legal strategy that illustrated his vociferous belief that the civilian and military justice system must remain separate from one another.[9] Finally, the story of *Reid II* is the story of the Court itself: Justice Hugo Black, who distrusted what he saw as the encroachment of military power into civilian justice; Justice John Marshall Harlan II, who cast his vote one way, and then another; and Justice Felix Frankfurter, who initially refused to decide, and then finally did.[10]

This case, and its two decisions, sits at the intersection between Constitutional law, military law, and international law, and impacts fundamental questions about the scope of the Constitution, executive and legislative powers, and U.S. sovereignty. Can civilians be tried in military courts? After *Reid II*, many people would say that the answer is no, but like the women themselves, that answer is ultimately far more complicated.

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[4] *See infra* notes 304–307 and accompanying text.
[5] *See infra* Parts IV.–VI.
[6] *See infra* Part VII.A.
[7] *See infra* Part VIII.A.
[8] *See infra* Part III.
[9] *See infra* Part IV.A.
[10] *See infra* Parts IV.–VI.

II. Civilians Under Military Justice

For all its complexities, the issue of civilians in military courts was not a novel one at the time of *Reid II*. Neither was it new to the Founders when they were confronted with this issue back in 1787. Whether civilians are ever amenable to court-martial jurisdiction is a question almost as old as the concept of the court-martial itself—thus, understanding the contours of the problem requires a brief detour into legal and constitutional history.

A. The British Practice Before the Revolution

Tracing the origins of military jurisdiction over civilians begins with an analysis of British practice following the passing of the first Mutiny Act of 1689, which both legalized a standing army and brought it under the control of Parliament.[11] As tempting as it might be to think of the rise of the civilian contractor as a uniquely twenty-first century phenomenon, civilians were a common feature on the battlefield even then. At that time, three classes of civilians typically accompanied a British army during times of war: retainers, which included servants, volunteers, and women and children; sutlers, who sold provisions like tobacco and coffee to armies in the field;[12] and civil officers and civilian employees of the military.[13] Each of these groups was subjected to court-martial at various times,[14] though the power of the British Crown to court-martial these various groups tended to be construed narrowly, both under the provisions of the Mutiny Act and the later Articles of War.[15]

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[11] Courts-martial had existed before 1689, but they had traditionally been conducted by clergymen and members of the Doctors' Commons. It was not until the passage of the first Mutiny Act in 1689 that the peacetime courts-martial of soldiers was allowed. FREDERICK WIENER, CIVILIANS UNDER MILITARY JUSTICE 6, 165–66 (1967).

[12] DAVID MICHAEL DELO, PEDDLERS AND POST TRADERS: THE ARMY SUTLER ON THE FRONTIER 75 (1998).

[13] WIENER, *supra* note 11, at 7.

[14] Records from the 1691 Irish campaign, for example, indicate that a sutler was condemned for buying stolen goods, and a woman was condemned for inciting soldiers to desert. *Id.* at 12 n.37.

[15] The first Articles of War, for example, only granted court-martial jurisdiction for a narrow class of offenses; Articles of War 16 required that military personnel accused of crimes punishable "by the known laws of the land" be tried before a civilian magistrate. *Id.* at 13–14.

In the 1740s, a new "camp follower" provision was added to the Articles of War that read as follows:

> All Suttlers and Retainers to a Camp, and all Persons whatsoever Serving with Our Armys *in the Field*, tho' no inlisted Soldiers, are to be Subject to Orders, according to the Rules & Discipline of War.[16]

The term of art "in the Field" referred to a time of hostilities when military operations were underway.[17] As nineteenth century scholars pointed out, this language was intended to encompass those persons "of a private condition" who supported the troops in the field, and who would not otherwise be subject to civilian law:

> Being so blended together in their local situation, in their concerns, and their interests with the soldiery; it would seem almost impracticable to govern them by any other than a law common to them both . . . the temporary sojourners, and voluntary members of the camp, are thrown, from absolute need, under the influence of the prevailing law (for it can hardly be insisted that they could be safely left to themselves); whence alone results an uniform and consistent rule, and reciprocal protection.[18]

Wives of British soldiers, accompanying their husbands in the American Colonies during periods of hostility, were regularly tried and punished under the camp-follower provision.[19] Records indicate that these women were viewed as part of the Army and their conduct regulated accordingly.[20]

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[16] *Id.* at 22.
[17] Supplemental Brief on Rehearing on Behalf of Appellee and Respondent at 33, Reid v. Covert, 354 U.S. 1 (1957) (No. 701).
[18] E. SAMUEL, HISTORICAL ACCOUNT OF THE BRITISH ARMY, AND OF THE LAW MILITARY 691–92 (1816), *quoted in* Reply Brief for Appellant and Petitioner on Rehearing at 44–45, Reid v. Covert, 354 U.S. 1 (1957) (No. 701).
[19] *Id.* at 29–31.
[20] *Id.* The government devotes a significant portion of the brief discussing cases listed in the pamphlet, *Women Camp Followers of the American Revolution* by Walter Hart Blumenthal. *Id.* One case described was that of Elizabeth Clarke, who was tried in 1778 for plundering a farmer's house in violation of the articles of war, given 100 lashes and "drummed out of the Army." *Id.* at 31.

B. Civilians Under the U.S. Military

At the start of the Revolution, the Continental Congress enacted the Articles of War, copied from the British articles, to govern the newly formed Revolutionary Army.[21] Among the enacted articles was a camp-follower provision identical to the British version.[22] The court-martial of civilians was, at least in some form, a power given to the U.S. military from its inception. As scholars have noted, the records show that there were a number of military trials of civilians during the Revolutionary War, including at least two wives.[23]

The power to court-martial civilians was exercised only sporadically in the eighteenth and nineteenth centuries, tending to occur in "functional areas of war and in locales where there were no operating civilian courts." [24] The practice appeared to be relatively rare prior to the Civil War; only seven such trials were identified between 1800 and 1860.[25] More commonly, misbehaving camp followers were simply expelled from the camp.[26] Though the trial of civilians—primarily employees—spiked during the Civil War, the practice fell off again after that war's conclusion.[27] The reason for this relative rarity appears to have been the

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[21] For two excellent accounts of this period, see Frederick Bernays Wiener, *American Military Law in Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 4–10 (1989), and JUDGE ADVOCATE GENERAL'S OFFICE, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 7–25 (1975), http://www.loc.gov/rr/frd/Military_Law/pdf/lawyer.pdf.

[22] Robert A. Girard, *The Constitution and Court-Martial of Civilians Accompanying the Force: A Preliminary Analysis*, 13 STAN. L. REV. 461, 482 (1961).

[23] *Id.*

[24] John F. O'Connor, *Contractors and Courts-Martial*, 77 TENN. L. REV. 751, 764–65 (2010).

[25] *Id.*; *see also* Girard, *supra* note 22, at 489–90. As Professor Girard points out, however, this may have been a function of the record-keeping; most of the trials took place in remote locales and there may be additional records which did not survive. *Id.*

[26] O'Connor, *supra* note 24, at 765. A survey taken by the Judge Advocate General's office noted:

> Individuals, however, of the class termed "retainers to the camp," or officers' servants and the like, as well as camp followers generally, have rarely been subjected to trial in our service. For breaches of discipline committed by them, the punishment has generally been expulsion from the limits of the camp and dismissal from employment.

Id. at 765 n.7.

[27] *Id.*

narrow construction given to the phrase "in the field"—the leading commentators on military law agreed that this limited the application of court-martial jurisdiction to acts taking place both in times of war and in active theaters of battle.[28]

In 1916, Congress revised the Articles of War to extend court-martial jurisdiction to civilians accompanying the armed forces in times of peace.[29] The revised Article 2(d) provided for the courts-martial of the following classes of civilians:

> All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles.[30]

Despite the broad assertion of jurisdiction in the 1916 Articles, adopted unchanged in the 1920 revisions,[31] there were no courts-martial of civilians except during declared wars,[32] though a number of lower court decisions began construing the "in the field" requirement broadly.

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[28] *Id.* As Attorney General Williams wrote in 1872:

> To determine when an army is "in the field" is to decide the question raised. These words imply military operations with a view to an enemy. Hostilities with Indians seem to be as much within their meaning as any other kind of warfare. . . . When an army is engaged in offensive or defensive operations, I think it safe to say that it is an army "in the field."

Id.

[29] *Id.* at 767.

[30] *Id.* at 767 n.80.

[31] The need to revise the Articles became apparent almost immediately after their enactment. In 1917, a riot in Houston involving the all-African-American 24th Infantry killed eighteen people. Sixty-three members of the unit were tried and thirteen were hung one day after the convening authority approved the sentence, all without appellate review of any kind. Wiener, *supra* note 21, at 17–23.

[32] O'Connor, *supra* note 24, at 767–68; *see also* OVERSEAS JURISDICTION ADVISORY COMM., REPORT TO THE SECRETARY OF DEFENSE, THE ATTORNEY GENERAL, AND THE CONGRESS OF THE UNITED STATES 13 (1997), *available at* www.fas.org/irp/doddir/dod/ojac.pdf.

For example, one district court decision from 1919 determined that "in the field" necessarily included mobilization and training camps in the United States.[33] Similar cases arising during World War II were likewise upheld.[34]

The court-martial as it then existed was a "rude tribunal composed of men of the sword,"[35] focused primarily on the "swift and severe suppression of license and insubordination."[36] Its procedures reflected this. None of the court members—the trial counsel, judge, or defense counsel—had to be lawyers or have much familiarity with legal procedure;[37] the convening authority had an enormous amount of control over the proceedings; and there were no procedures in place for judicial review of sentences.[38] The system had drawn a great deal of criticism and calls from legal scholars for reform throughout the early years of the twentieth century,[39] but those criticisms gained little real traction until World War II. World War II was the largest military mobilization in history; more than 16 million men and women volunteered or were drafted into active military service.[40] There were 1.5 *million* courts-martial during World War II.[41] This assertion of military justice over individuals who were still, as Wiener called them, "civilians at heart,"

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[33] O'Connor, *supra* note 24, at 767–68.
[34] Girard, *supra* note 22, at 497 n.177.
[35] 3 MACAULAY, HISTORY OF ENGLAND 35 (1874 ed.), *quoted in* Joseph W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 320 n.7 (1964).
[36] Bishop, *supra* note 35, at 319–20.
[37] And it showed. Professor Morgan, in his 1919 article on the court-martial system, described the following case:

> In C. M. No. 119330 accused, on trial for desertion, was evidently of very low mental calibre. Counsel, a chaplain, instead of relying upon the defence of mental incapacity, complacently informed the court that he did not believe in sending men before "nut boards," i.e., boards of psychiatry, for such mentally irresponsible soldiers "should either be emasculated or sent to Leavenworth."

Edmund M. Morgan, *The Existing Court-Martial System and the Ansel Army Articles*, 29 YALE L.J. 52, 60 n.25 (1919).
[38] *Id.* at 59–67.
[39] *See, e.g.*, *id.*
[40] Keith M. Harrison, *Be All You Can Be (Without the Protection of the Constitution)*, 8 HARV. BLACKLETTER J. 221, 227 (1991).
[41] *Id.*

resulted in a predictable push for reform of the system following the war.[42]

> Substantial numbers of servicemen who had never been in trouble with the law in civilian life served time in military jails, and came home from the war with military records showing court-martial convictions or less than honorable discharges. Senators and Congressmen were flooded with complaints.[43]

In response to this criticism, Congress initiated a series of reforms of the Articles of War. The result, 1948's Elston Act, substantially reformed the Articles as they applied to the Army, but Congress then decided that all of the Armed Forces—recently consolidated into a single Department of Defense—should be governed by a single code.[44] This code, the UCMJ, was enacted in 1950, and made sweeping reforms to the military justice system as a whole.[45] In addition to modernizing the practice of military law,[46] the UCMJ also expanded the reach of military

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[42] Wiener's article on the subject posits that the push for reform could also be traced to the resentment felt on account of the Army's officer selection system. Commanders have a great deal of power in the military justice system, and unlike the Navy, which commissioned officers primarily on the basis of education, the Army required all officers to attend basic training and then Officer Candidate School. As a result of this system of selection, there was an inversion of societal roles—"the butler rather than the country club member frequently wound up as the commander who issued the orders." Wiener, *supra* note 21, at 25–27.

[43] THE ARMY LAWYER, *supra* note 21, at 194.

[44] Wiener, *supra* note 21, at 29–33.

[45] For an excellent overview of the enactment of the UCMJ written by the head of the committee tasked with its drafting, see Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 173 (1952–1953). For decided criticism of the enactment, and of Professor Morgan's draftsmanship in particular, see Wiener, *supra* note 21, at 32–36. Wiener, as discussed later in this article, was an outspoken critic of what he saw as the "civilianization" of the military justice system. *See supra* notes 199–202 and accompanying text. It is interesting to note that Professor Morgan favored a broad military jurisdiction over civilians accompanying the force overseas, reflected in Article 2(11), and a correspondingly broad reform of the military justice system, while Wiener favored an incredibly narrow application of military jurisdiction to civilians, and was highly critical of the reforms embodied in the UCMJ. *Cf.* THE ARMY LAWYER, *supra* note 21, at 199.

[46] These reforms included, among other things, a right to counsel and privilege against self incrimination; requiring a thorough and impartial investigation before referral to a general court-martial; the addition of prohibitions on unlawful command influence; and the right of an accused to be represented by a lawyer defense counsel. THE ARMY LAWYER, *supra* note 21, at 204–08.

law over civilians with three separate jurisdictional grants.[47] Article 2(10) of the UCMJ applied to all civilians accompanying the force in the field in times of war; Article 2(11) applied to all government employees serving with the force overseas and all civilian dependents accompanying their sponsors overseas in peace or war; and Article 3(a) applied to former servicemembers for crimes committed while on active service.[48]

As scholars have noted, this expansion of military jurisdiction gave rise to little debate either in committee or on the floor, as its "constitutionality was apparently assumed or not considered."[49]

C. The Problem of Dependents

After World War II, the United States began maintaining large military bases throughout the world.[50] Civilian employees accompanied the servicemembers to provide "needed skills"—common enough in light of historical practice—and lower federal courts regularly upheld the military's jurisdiction over them.[51] For the first time, however, servicemembers brought with them thousands of dependents—wives, husbands, and children.[52] These dependents—numbering almost half a million by the 1950s—were under the jurisdiction of the U.S. military per UCMJ Article 2(11),[53] as well as pursuant to agreements with host countries which exempted them from trial in foreign courts.[54] This jurisdiction does not appear to have been seriously questioned, and was certainly liberally exercised by the military. Between 1950 and 1956, the Army tried 2,454 civilians by court-martial.[55] In 1952, the Supreme Court upheld the conviction of a dependent, on facts which will become familiar, by military "occupation court" in post-WWII Germany.[56] Yvette Madsen murdered her Air Force officer husband and was tried by

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[47] O'Connor, *supra* note 24, at 772.
[48] *Id.*
[49] Girard, *supra* note 22, at 494–95.
[50] *Id.* at 464.
[51] *Id.* at 497 n.177.
[52] *Id.* at 497.
[53] *Id.*
[54] WIENER, *supra* note 11, at 238.
[55] Of these, 181 were general courts-martial, the process reserved for felony-level offenses. Girard, *supra* note 22, at 504 n.204; Supplemental Brief for Appellant and Petitioner on Rehearing at 30–31, Reid v. Covert, 354 U.S. 1 (1957) (No. 701).
[56] Madsen v. Kinsella, 343 U.S. 341 (1952).

an occupation court under the German Criminal Code.[57] She argued that the trial was improper because the jurisdiction of courts-martial over civilian dependents accompanying the force was exclusive.[58] The Court rejected this argument, finding that the jurisdiction of courts-martial and occupation courts was concurrent, but the Court did not question the legitimacy of applying military law to a servicemember's wife.[59]

This was the state of the law when military servicemember spouses Clarice Covert and Dorothy Krueger Smith joined their husbands in England and Japan.

III. Factual Background

A. The Cast of Characters

1. "I killed Eddie last night."

On March 11, 1953, at 2 p.m., Clarice Barksdale Covert arrived for her appointment with Captain Ivan Heisler, a psychiatrist assigned to the 5th Hospital Group in Upper Heyford, England.[60] The thirty-two year old mother of two appeared disheveled and obviously distressed.[61] Captain Heisler asked her how she was doing.[62] "I killed Eddie last night," she said.[63] She hit him with an ax while he was asleep in bed, about 11 p.m. the night before, and was sure he was dead.[64] Captain Heisler questioned her briefly, then left the room and found the base surgeon, Major Holloway.[65] The two of them went with a military policeman to the Covert home, where they found the mutilated body of Clarice's husband in their bedroom underneath some blankets.[66] The

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[57] *Id.* at 344–46.
[58] *Id.*
[59] At least one scholar argued in reviewing the case that this was because both parties had conceded court-martial jurisdiction, and any approval of such jurisdiction did "not bear the earmarks of a considered judgment." Girard, *supra* note 22, at 449.
[60] This and all background information is taken primarily from the Transcript of Record at 13, Reid v. Covert, 351 U.S. 487 (1956) (No. 701). The author has supplemented with newspaper articles and archival information.
[61] *Id.* at 22.
[62] *Id.* at 13.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*

Office of Special Investigations later found the hand ax that was allegedly used to bludgeon him to death, and a pair of bloody pajamas, unwashed and stuffed into the dirty-clothes hamper.[67] Clarice was convicted of murder under Article 118 of the UCMJ and sentenced to life in prison at Federal Reformatory for Women at Alderson, West Virginia.[68]

2. "It is too bad I did not get him in the heart."

Sometime during the early morning of October 4, 1952, Shigeko Tani, a housekeeper employed by Colonel and Mrs. Aubrey Dewitt Smith at their home in the Washington Heights housing project in Tokyo, Japan, heard Colonel Smith calling for her from the bedroom he shared with his wife Dorothy.[69] She found him between their two beds with a bloody wound in his side and an eight-inch Okinawa knife on his bed.[70] Colonel Smith said that Dorothy had stabbed him.[71] Tani went to call a neighbor, Colonel Joseph Hardin, for help; when she returned, she found Dorothy and Colonel Smith grappling over a six-inch kitchen knife.[72] Tani took the knife and returned it to the kitchen.[73] Colonel Hardin arrived and found Colonel Smith lying in a pool of blood.[74] Dorothy lay on her bed, trying and failing to light a cigarette.[75] She seemed highly intoxicated, her speech incoherent and irrational.[76] She eventually passed out, but before he left to accompanying Colonel Smith to the hospital, Colonel Hardin overheard her say, "It is too bad I did not get him in the heart."[77] Colonel Smith remained conscious all the way to the hospital, but the knife had severed veins in his kidney and punctured his inferior vena cava—he died on the operating table at 6 a.m. on October 4.[78] Dorothy was convicted of his murder under Article 118 of the

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[67] *Id.* at 14.
[68] *Id.* at 2.
[69] As above, this and all background information is taken primarily from the Kinsella v. Krueger. Transcript of Record at 24–27, 351 U.S. 470 (1956) (No. 713). The author has supplemented with newspaper articles and other archival information.
[70] *Id.* at 24.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 25.
[78] *Id.* at 27.

UCMJ, and like Clarice, was sentenced to life in prison at the Federal Reformatory for Women at Alderson, West Virginia.[79]

3. Clarice and Eddie

Clarice B. Covert was born December 21, 1920, in Augusta, Georgia, to May Cossi and Robert Laurent Barksdale.[80] The facts reveal a deeply unhappy woman who suffered through a lonely and isolated childhood. Her father, who went by Laurent, came from Augusta society—his own father, Robert Toombs, was a lawyer and former state legislator.[81] Laurent appears to have been something of a black sheep. Following the death of Robert Toombs in 1905, Laurent spent years at a time working various jobs throughout Central and South America, including as an accountant and movie theater operator.[82] He married May in 1919; her 1919 passport application indicates that she intended to travel abroad in order to join him in Tampico, Mexico, where he worked as an accountant for Island Oil and Transport Company.[83] Their time abroad was short. Shortly before Clarice's birth in 1920,[84] a pregnant May returned to Augusta to stay with Laurent's mother, Annie, and sister, also a Clarice. Whether it was due to the travel or some other complication of pregnancy, Clarice was born prematurely; she said later that her parents thought she was going to die and had even bought a

[79] *Id.*
[80] *Id.* at 18.
[81] Robert Toombs Barksdale was an extremely well-respected member of the Augusta community. He was a member of the Kappa Alpha fraternity at the University of Georgia, graduating in 1869. He studied law under Judge E.H. Pottle in Warrenton and was admitted to the bar in 1880, served two terms in the Georgia State legislature, and then left the practice of law to work as a civil engineer in Augusta. HISTORY OF WARREN COUNTY, GEORGIA 1793–1974, at 245–46 (1976).
[82] Robert Lawrence Barksdale, U.S. Passport Application, 1919, *U.S. Passport Applications, 1795–1925* (National Archives Microform Publication M1372). One intriguing bit of information—Laurent registered for the draft in 1917 while working as a stenographer for Shannon Copper Company in Greenlee, Arizona—the registrar wrote "lost one eye" in the report accompanying the draft registration. Robert Laurent Barksdale, Draft Registration, June 5, 1917, World War I Draft Registration Cards, 1917–1918 (Roll: 1522447).
[83] May Cossi Barksdale, U.S. Passport Application, Aug. 28, 1919, *U.S. Passport Applications, 1795–1925* (National Archives Microform Publication, Roll: 0883).
[84] Records indicate May and Laurent crossed the border from Mexico into Laredo, Texas, on September 10, 1920. National Archives and Records Administration (NARA), Washington, D.C.; Nonstatistical Manifests and Statistical Index Cards of Aliens Arriving at Laredo, Texas, May 1903–November 1929; Record Group: *85*, Records of the Immigration and Naturalization Service; Microfilm Serial: A3379; Microfilm Roll: 6.

coffin in preparation for her death.[85] After that inauspicious beginning, Clarice's childhood continued to be unhappy, marked by loneliness and fear. She never felt wanted or loved by either of her parents.[86] May and Laurent fought regularly over money; Laurent was a gambler who had difficulty holding down a steady job.[87] A coldly indifferent man who never showed his daughter any affection, and who once attempted to throw her out of a window because she was not a boy,[88] Laurent finally abandoned the family in 1932. Clarice moved with her mother to Key West, Florida, to live with her grandmother, Lottie Lee Simmons.[89] Tall and awkward, Clarice spoke later of the shame she felt of her home: it was a "dirty, broken down three-bedroom house, next to a chicken yard and an alley."[90] Her shame led to isolation; she rarely brought friends home from school, feeling acutely "different" from her peers.[91] She traveled regularly to visit her aunt and namesake in Augusta.[92] This close relationship would later prove significant at her trial for her husband's murder.

Clarice left home after high school in order to train to become a nurse.[93] She abandoned this plan for reasons unclear—when she met Edward Covert on a blind date in January 1943, she was working as a secretary.[94] At twenty-two, she was ripe for romance—"Eddie" was a lieutenant in the Army stationed out of Camp Blanding. They married two months later, and in May of that year he was shipped to fight in World War II while Clarice settled down to work in the War Department at Camp Blanding.[95] The marriage ran into problems almost from the beginning—like her father, Eddie was a gambler. At one point, Clarice was forced to send him over six hundred dollars in order to "keep him

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[85] Transcript of Record, *supra* note 69.
[86] *Id.* at 18.
[87] *Id.*
[88] May Barksdale testified by stipulation at her daughter's court-martial that Laurent "delighted in tormenting" Clarice with his "cruel" behavior. *Id.* at 21.
[89] Lottie Lee Simmons, Sheet No. 45 (handwritten), *Tenth Census of the State of Florida, 1935*; (Microfilm ser. S 5, 30 reels); Record Group 001021; State Library and Archives of Florida, Tallahassee, Florida.
[90] Transcript of Record, *supra* note 69, at 18.
[91] *Id.*
[92] *Niece of Augustan Weds Army Officer at Camp Blanding*, AUGUSTA CHRON., Apr. 6, 1943, at A5.
[93] Transcript of Record, *supra* note 69, at 18.
[94] *See Niece of Augustan Weds Army Officer at Camp Blanding*, AUGUSTA CHRON., Apr. 6, 1943, at A5; *see also* Transcript of Record at 63, Reid v. Covert, 351 U.S. 487 (1956) (No. 701).
[95] Transcript of Record, *supra* note 69, at 18.

out of the stockade."[96] Their financial difficulties continued upon his return in November, 1945, when he quickly blew through the $5,000 that she'd been able to save while he was off fighting in Italy and Africa.[97] Unable to find suitable employment, Eddie reentered service as a master sergeant in the Air Force in 1946.[98] He moved with Clarice to Williams Air Force Base in Arizona where he established a pattern of behavior that would quickly become familiar—gambling debts, bad checks, and poor decisions that would leave his growing family (two sons were born, one each in 1947 and 1949) in desperate financial straits.[99] Significantly, Clarice attempted to leave him in 1948; she took her young son Bruce and her mother to Phoenix, where she filed for divorce.[100] The separation did not last. "I couldn't stay away from him. I was a nervous wreck . . . I couldn't eat; I couldn't sleep; I couldn't even hardly hold my job down."[101]

In 1951, Eddie was assigned to the Seventh Air Division in Upper Heyford, England.[102] Clarice had hoped for a fresh start, but Eddie quickly fell back into his old habits—he got into trouble over gambling debts, he drank too much, and he ignored the children.[103] His irresponsibility also caused him problems at work. Though he initially appeared efficient, his superiors quickly realized that his judgment was poor and childish, leading to his frequent reassignment.[104] Given her husband's behavior, Clarice assumed the bulk of the responsibility for her family because she was devoted to her children.[105] She began having difficulty sleeping and sought help from the military base psychologists for a variety of stressors in her life: Eddie's irresponsibility and their financial problems, the health of her children,[106] and "morbid thoughts" about her own childhood. The most significant stressor, based on the prosecution's case against her, came in December 1952, when Clarice

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[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.* at 19.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at 21.
[105] At the time of the murder, she had two—Bruce and Barry. The day after she killed her husband, she was informed that she was again pregnant. Her son Craig was born on December 7, 1953, and was taken from her on March 8, 1954. *Id.*
[106] Specifically, she was worried that her younger son, Barry, three at the time of the murder, had not yet begun to speak. *Id.* at 19.

received word that her Aunt Clarice had died and left her $40,000.[107] She wanted to use the money to pay off their debts and take care of their sons' education, but Eddie intended to spend the money on a new car and a trip around Europe.[108] On top of this disagreement with her husband, she also began fixating on the idea that Laurent Barksdale was going to reappear and attempt to claim a share of the inheritance.[109]

In hindsight, her failed attempts to obtain help from the military base are a tragic illustration of her increasingly desperate mental state. She felt like she was dying and unable to go on, but was turned away from the infirmary because she did not have a fever and thus there was no emergency.[110] She got an appointment with a doctor on base who decided she needed sedation and prescribed her Phenobarbital; she was later given sleeping pills from the hospital when an examination revealed no "organic difficulties."[111] On the night of March 7, 1953, she took four of the sleeping pills in what may have been a suicide attempt. The next night she went back to the dispensary in desperation and was given another appointment with the base doctor.[112] She told him at her appointment on March 9 that she wanted to be hospitalized, that there was something wrong with her and if he did not take her, she was going to explode.[113] Instead of hospitalization, the doctor gave her more pills.[114] On March 10, Clarice took a hand ax and bludgeoned her sleeping husband to death with it, then took all of the pills that she had left and climbed into bed with his corpse.[115] The next afternoon, she dropped her two boys off at the base nursery and went to her appointment with Captain Heisler, where she confessed to the murder.[116]

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[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.* at 20.
[114] *Id.*
[115] *Id.*
[116] *Id.*

4. Dorothy and Smittie

Dorothy Jane Krueger was born on January 24, 1913, while her parents were vacationing near Sacketts Harbor, New York.[117] Unlike Clarice, whose connection to the military came entirely through her husband, Dorothy was raised an Army brat. Her father was General Walter Krueger, a Prussian immigrant who would go on to become the first man to rise from the rank of Private to General in the U.S. Army.[118] She, along with her older brothers James and Walter, Jr., would accompany her father during his meteoric rise;[119] at the time of her birth, Captain Krueger was assigned to the Department of Languages at Fort Leavenworth as an instructor in Spanish and German.[120] Dorothy's mother was Grace Aileen Norvell; her parents had met in the Philippines

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[117] KEVIN C. HOLZIMMER, GENERAL WALTER KRUEGER: UNSUNG HERO OF THE PACIFIC 20 (2007).

[118] *Id.* at 10.

[119] He would be featured on the cover of Time Magazine in 1945 as the commander of the Sixth Army in the Pacific Theater during World War II. *See World Battlefronts: Old Soldier*, TIME, Jan. 29, 1945. General Krueger's life story is incredibly inspiring—he immigrated to the United States at the age of eight after his father's death and quit high school in order to enlist in the Army during the Spanish-American War. *Id.* He received a battlefield commission to second lieutenant in 1901 during the Philippine-American War, where he befriended fellow second lieutenant and future general Douglas MacArthur; received the Distinguished Service Medal for his service in France during World War I; taught at both the Army War College and the Naval War College during the inter-war years; and was one of the unsung heroes of the Pacific Theater, particularly the battle for Luzon, during World War II. He retired as a four-star general in 1946. *Walter Krueger, Led Sixth Army: General in Pacific, Noted as Strategist, Is Dead at 86*, L.A. TIMES, Aug. 21, 1967, at 31.

An incredibly successful officer at all levels of command, a feat all the more impressive for his lack of formal schooling, General Krueger had a reputation as one of the strictest disciplinarians in the Army, but his primary concern was for the men under his command. *See World Battlefronts: Old Soldier*, TIME, Jan. 29, 1945. In one instance, a soldier overheard General MacArthur tell General Krueger that he wanted to send the Rangers in a frontal assault on the heavily defended island of Corregidor, near Luzon. General Krueger refused: "If I want to kill those guys, I'll just line them up and shoot them." The soldiers were instead dropped in behind enemy lines. http://blog.oregonlive.com/oregonatwar/2011/10/two_wwii_vets_frank_smith_84_a.html.

General Krueger was considered by many to have had a greater impact on the training of the Army in the run up to World War II than anyone else, as he either commanded or trained against every division that went into action in either theater. General Krueger apparently only failed at one thing during his military career—in 1927 he attempted to transfer into the Army Air Corp, but his flight instructor, Lieutenant Claire Lee Chennault, flunked him. HOLZIMMER, *supra* note 117.

[120] General Krueger spoke four languages fluently—English, German, Spanish, and French. HOLZIMMER, *supra* note 117, at 18.

while Walter was assigned to the 30th Infantry on Marinduque.[121] Again contrasting with Clarice's unhappy upbringing, Dorothy's parents were by all accounts madly in love, very active socially,[122] and close to their children. Both of Dorothy's brothers followed their father into the service; James graduated from West Point in 1926 and Walter, Jr. in 1931.[123] It is probably no surprise at all that she herself chose to marry one of their classmates, Aubrey Dewitt Smith, class of 1930.

Handsome, blue-eyed Aubrey Dewitt Smith, known as "Smittie," grew up in Boonesville, Missouri, the son of a pipe fitter.[124] Charming and light-hearted, Smittie had a nonchalant attitude that made him popular with his fellow officers, but did not endear him to the administration at West Point—he graduated as a "clean sleeve," with no academic designation or cadet rank.[125] This apparent lack of military deportment may have been a source of friction with his future father-in-law, known in military circles as a strict disciplinarian. Both Dorothy's father and brother both tried to convince her not to marry Smittie,[126] but Dorothy, a difficult child and a headstrong woman, did not listen. They were married in 1934 at Jefferson Barracks, in Missouri, where her father was the base commander. The ceremony was lavish; more than 1,000 people attended, including the entire post command.[127] For a time, the marriage went smoothly—they welcomed a son, Aubrey Jr. (Tooey), in 1936, and a daughter, Sharon, in 1938.[128] Smittie was, despite his somewhat unpromising entry into service, considered an officer "with brilliant prospects for advancement."[129] A veteran of World War II and Korea, he was decorated twice for valor.[130] He was assigned to Far East Command in 1950 and became the chief of plans, operations, and

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[121] Grace was in the Phillipines visiting her sister, the wife of an Army chaplain. *Id.* at 15–16.
[122] Their social activities were frequently mentioned in local papers' "Notes of Society." While stationed at Fort Meade, Maryland, then-Colonel and Mrs. Krueger were noted to have dined with Representative John D. Dingell. *Notes of Society: Official and Resident*, WASH. POST, July 4, 1935, at 8.
[123] *See World Battlefronts: Old Soldier*, TIME, Jan. 29, 1945.
[124] Aubrey D. Smith, U.S. Military Academy Yearbook 1930.
[125] *Id.*
[126] Walter Jr.'s daughter, Carol Holben, told the author over the phone that her father thought Smittie was a "real sonofabitch." Telephonic Interview with Carol Holben, in Woodbridge, Va. (Oct. 2, 2011) [hereinafter Holben Interview].
[127] *Army Mum on Death of S.A. Colonel*, S.A. SUN. LT., Oct. 5, 1952, at 1.
[128] Holben Interview, *supra* note 126.
[129] *Hold Wife of Colonel Slain in Tokyo Home*, CHI. TRIB., Oct. 5, 1952.
[130] *Id.*

training under General Mark W. Clark in 1952.[131] He seemed primed for unlimited advancement, but under the surface, trouble was brewing.

According to Walter, Jr., Smittie was a gambler[132] and womanizer with a hard-partying lifestyle that rubbed off on his wife.[133] Dorothy drank heavily and abused prescription drugs—her medical records revealed that she began seeking treatment in 1946 for alcoholism, addiction to sedatives, suicidal tendencies, and a "violent and uncontrollable temper."[134] She was admitted to a mental hospital for three months in 1951, and attempted suicide while traveling to Japan by boat later that year.[135] The situation did not improve in Tokyo. At the end of April 1952, she was admitted to the base hospital after getting drunk and smashing her fist through a window.[136] She stayed in the hospital under treatment for just over two weeks; there was some discussion that she should be evacuated back to the United States as her "emotional instability" might prove "embarrassing," but these discussions were scuttled when Smittie pled for one more chance to help her get her problems under control.[137] She was released from the hospital on May 15, and until September of that year, Smittie appeared true to his word. Tani, the housekeeper, described the Smiths' home-life as "normal" and "happy."[138] Tragically, that sense of normalcy did not last.[139]

In September, Dorothy began drinking again, and kept pills around the house that her husband and children began hiding from her.[140] Smittie was overheard making sarcastic remarks about his wife's pill habit.[141] Friends noticed that she was nervous and prone to bouts of crying; she eventually sought medical help for "menopause," which

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[131] *Id.*
[132] A letter from General Krueger to Dorothy references Smittie's gambling obliquely. "I'm not going to bail him out anymore." Ms. Holben told the author about this letter but has not been able to obtain a copy. Holben Interview, *supra* note 126.
[133] *Id.*
[134] Transcript of Record at 28–29, Kinsella v. Kruege, 351 U.S. 470 (1956) No. 713).
[135] *Kin of Krueger Breaks Down at Murder Hearing*, CHI. TRIB., Jan. 5, 1953, at 8.
[136] Transcript of Record, *supra* note 69, at 28.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] In mid-September, a seventeen-year-old friend of their son's overheard Smittie make a sarcastic remark about her pills. She responded, "Some day I'm going to kill you." This exchange formed part of the prosecution's evidence of premeditation. *Id.* at 24.

resulted in her being prescribed a cocktail of medications—seconal, sodium amytal, Phenobarbital, hormones, and Dexedrine.[142] On September 29, 1952, when her condition had not improved and her doctor suggested hospitalization, she begged him not to hospitalize her because she could not leave her family.[143] Instead, he prescribed her paraldehyde, a liquid sedative.[144] There are differing accounts as to what happened next. According to the prosecution, Dorothy was told that she was being sent back to the United States alone, that she had been a detriment to her husband's career and cost him a promotion.[145] According to the defense, the entire family was being transferred back to the United States in order for Smittie to be promoted to Brigadier General.[146] In any event, the news of her impending move appeared to unbalance Dorothy further—on the morning of October 3, while so intoxicated she had trouble walking unassisted, she told a friend she wanted to kill herself but lacked the means of doing so.[147] That evening, she waited until Smittie had fallen asleep and then stabbed him in the side with an eight-inch Okinawa knife she had instructed Tani to get for her several days earlier.[148] The following morning, she was arrested for her husband's murder and kept under guard at the hospital.[149]

B. The Trials

Clarice was tried by general court-martial as a person "accompanying the force" under Article 2(11). The court-martial, convened by the commander of 7th Air Command, took place at Royal Air Force Station Brize Norton and lasted May 25–29, 1953.[150] Notably, her lawyers attempted at the outset to attack the jurisdiction of the court-martial through a motion to dismiss, arguing that the trial of a private citizen for a capital crime in a military court violated the Fifth and Sixth Amendments to the Constitution.[151] Her lawyers focused the entirety of

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[142] *Id.* at 30.
[143] *Id.*
[144] *Id.*
[145] *Defense to Open with Refutation of Motive Claim*, THE NEWS (Mt. Pleasant, Iowa), Jan. 7, 1953, at 4.
[146] *Id.*
[147] *Neighbor Takes Stand to Help Colonel's Wife*, CHI. TRIB., Jan. 8, 1953, at A5.
[148] Transcript of Record, *supra* note 69, at 25.
[149] *Id.*
[150] *Id.* at 1–2.
[151] *Id.* at 29. Her lawyers, in a creative but ultimately futile motion, attempted to have other dependent wives of servicemembers appointed as members of the panel. *Id.* at 30.

their case at trial on the question of her mental responsibility.[152] They argued that she had been legally insane at the time of the murder, pointing to her behavior both before and after the murder: her increasing anxiety, her repeated requests for hospitalization, and climbing into bed with her husband's corpse.[153] A sanity board, composed of three psychiatrists, had judged her to be sane under the standards laid out in the applicable Air Force regulation;[154] these three psychiatrists also testified during the prosecution's rebuttal of her insanity defense. She was found guilty of premeditated murder and sentenced to life in prison at Alderson Federal Reformatory for Women in West Virginia.[155] Following the trial, two of the three prosecution psychiatrists submitted affidavits to the reviewing authority stating that they vehemently disagreed with the findings of the general court-martial. Both believed that she was temporarily insane at the time of the murder, but had found her to be sane based on the overly strict requirements of the Air Force manual.[156]

Clarice appealed her case to the Air Force Board of Military Review, which affirmed in a two-to-one decision. In a lengthy opinion, Colonels Gordon O. Berg and H.L. Allensworth noted that the jurisdiction of the court-martial was not challenged on appeal, but they raised and dealt with the issue *sua sponte*; in their view, the Visiting Forces Agreement between the United Kingdom and the United States gave the U.S. jurisdiction over dependent wives accompanying their husbands.[157] The issue of whether Clarice could properly be tried by court-martial was thus disposed of easily—the bulk of the opinion was spent examining the validity of the court's findings "as to the sanity of the accused."[158] Colonel Pisciotta wrote a blistering dissent, arguing forcefully that

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The judge's decision to deny that motion prompted the attack on jurisdiction on Sixth Amendment grounds. *Id.*

[152] *Id.*

[153] *Id.*

[154] The applicable standard came from Air Force Manual 160-42, *Psychiatry in Military Law*, which advanced a "policeman at the side" test for whether a defendant was acting under an irresistible impulse. The prosecution psychiatrists testified that if a policeman had been present in the room at the time of the murder, Clarice would not have killed her husband. *Id.* at 24–28. The defense psychiatrists, of course, disagreed. *Id.* at 28.

[155] *Id.* at 12.

[156] *Id.* at 42–43.

[157] *Id.* at 32.

[158] *Id.* at 33.

Clarice was not legally sane at the time of the murder;[159] his opinion did not touch on the constitutionality—or lack thereof—of Article 2(11).

Clarice then petitioned the Court of Military Appeals (CMA) for review.[160] This time, she won—CMA reversed and remanded for a new trial. As in the lower court, the issue of Article 2(11)'s constitutionality was not raised. Judge Brosman spent the entirety of his opinion for the court determining that Clarice was "distinctly prejudiced" by a "palpable misconstruction" of the Air Force manual's policeman-at-the-elbow test.[161] She was released from Alderson Prison on July 14, 1955, and taken in the custody of the Air Force to the District of Columbia (D.C.) jail, where Curtis Reid, the named defendant in her federal habeas case, was superintendent.[162] The Secretary of the Air Force, Harold E. Talbott, determined that Clarice should be tried again.[163] Clarice underwent a psychiatric evaluation at St. Elizabeth's Hospital beginning July 25, and was returned to the D.C. jail having been found sane on September 23, 1955.[164] Her retrial, this time not treated as capital, was tentatively scheduled for November 28, 1955.[165]

Like Clarice, Dorothy was also tried by court-martial under Article 2(11) as a person accompanying the force. Before her trial, her lawyers, retired Brigadier General Adam Richmond and Lieutenant Colonel Howard S. Levie, attacked the jurisdiction of the court-martial, arguing that Dorothy should be tried in Japan.[166] Their argument was certainly creative, but it did not involve attacking the constitutionality of the tribunal itself—they argued that the Army had lost jurisdiction under Article 2(11) as soon as Colonel Smith had died.[167] At that point, she was no longer "accompanying" her husband and, in effect, merged with

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[159] *Id.* at 91. Colonel Pisciotta wrote: "It is a sad commentary on military justice for us to hold that Mrs. Covert, a civilian, is to be adjudged legally sane and responsible for her acts because of an erroneous, unsound, abandoned rule of military psychiatry, while if tried by a civilian court (except for her status as accompanying her husband overseas") would have been adjudged by civilian standards as insane and legally not responsible." *Id.*

[160] United States v. Covert, 19 C.M.R. 174 (C.M.A. 1955).

[161] *Id.* at 183–84.

[162] Transcript of Record, *supra* note 69, at 2.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Woman Loses Plea for Trial by Japan*, N.Y. TIMES, Jan. 5, 1953, at 4.

[167] United States v. Smith, 17 C.M.R. 314 (1954); *Woman Loses Plea for Trial by Japan*, *supra* note 166, at 4.

the Japanese population.[168] The court's legal officer,[169] Colonel John Pitzer, rejected this and the case went to trial.[170] The only real issue was whether Dorothy was mentally responsible at the time she stabbed her husband; Richmond focused his strategy on the argument that drug use had transformed Dorothy into a "wrecked personality" unable to distinguish right from wrong.[171] The prosecution, led by Lieutenant Colonel Willie H. H. Jones, put on a series of witnesses, including the housekeeper, Tani,[172] that painted a far colder picture.[173] The trial, owing in part to novelty of trying the daughter of a WWII hero, was something of a circus. At several points, it had to be recessed briefly as Dorothy broke down in hysterics.[174] The nine-member panel, including one officer of the Women's Army Corps,[175] returned a verdict of guilty in just over an hour—the president of the board, Major General Joseph

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[168] *Smith*, 17 C.M.R. at 319.

[169] At the time, courts-martial were not presided over by judges; the Army's field judiciary program would not be established until 1958. THE ARMY LAWYER, *supra* note 21, at 230–31.

[170] *Woman Loses Plea for Trial By Japan*, *supra* note 166, at 4.

[171] *Sentence General's Daughter to Life for Slaying Husband*, MILWAUKIE SENTINEL, Jan. 10, 1953, at 1.

[172] Family lore claimed Colonel Smith had gotten Tani pregnant while Dorothy was in the hospital for psychiatric treatment in early May, 1952. Holben Interview, *supra* note 126; *see also Triangle Rumor in Slaying of Colonel Denied*, WASH. POST, Oct. 6, 1952, at 3. If true, this might explain Dorothy's cryptic remarks the night of the murder—"What were you doing while I was at the hospital?" and "No one will ever know the reason why." Transcript of Record, *supra* note 134, at 25–26.

[173] During his one hour and forty-five minute summation, Lieutenant Colonel Jones said:

> Please examine these facts in sequence—these things Mrs. Smith was quoted as saying about her husband: "He told me I was a detriment to his career. He told me he was being shanghaied (transferred) from his job as a result of my behavior. He told me he was sending me back to the United States. Before that happens, I'll kill him."

Tokyo Trial of Colonel's Wife Near End, WASH. POST, Jan. 10, 1953, at 4.

[174] Dorothy began screaming when the prosecution introduced the morgue photo. *Kin of Krueger Breaks Down at Murder Hearing: General's Daughter on Trial for Knifing*, CHI. TRIB., Jan. 5, 1953, at 8. She also lost her composure during the prosecution's summation, when Lieutenant Colonel Jones said, "I defy you to produce one expression of regret from this woman for the crime she has committed." *Woman Guilty of Murder in Tokyo Slaying*, LEWISTON DAILY SUN, Jan. 10, 1953, at 7.

[175] The panel had originally included two women. One, Major Olive E. Mills, was excused when she told the court that she was opposed to the death penalty for a woman. The other, Lieutenant Colonel Lillian Harris, remained on the panel to render the verdict. *Krueger Daughter Tried*, N.Y. TIMES, Jan. 5, 1953, at 4.

Sullivan, wept as he read it to the court.[176] Dorothy, however, remained calm and took the verdict "like a soldier's daughter and a soldier's widow."[177]

Dorothy's case was appealed to the Army Board of Review, where a unanimous panel affirmed her sentence. The panel undertook a lengthy discussion of the jurisdictional argument raised below, that court-martial jurisdiction terminated upon the death of Colonel Smith, and held that while her status as a dependent may have terminated, "there is nothing . . . which remotely suggests . . . that her dual status as a person 'accompanying the U.S. armed forces in Japan' likewise ceases to exist."[178] Dorothy appealed her case to CMA,[179] where Judge Brosman, writing for a divided court,[180] affirmed the judgment of the court below—jurisdiction was discussed and upheld in a brief part of the forty-six page opinion.[181]

IV. Before the Court—*Reid I*

A. A Crack in the Wall

In 1954, when both women were still at Alderson Prison, noted Washington, D.C., attorney Frederick Bernays Wiener became involved with their appeals. He represented Clarice at all levels of her appeal in both military and federal court, and together with Brigadier General Richmond, was hired by General Krueger to represent Dorothy following

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[176] *Slain Colonel's Wife Gets Life*, CHI. TRIB., Jan. 10, 1953, at 1. Dorothy was saved from capital punishment by the fact that the verdict was not unanimous. Instead, she received life. The article does not mention why the president of the board wept. *Mrs. Smith Guilty, Sentenced to Life*, N.Y. TIMES, Jan. 10, 1953, at 2.

[177] *Colonel's Wife Takes Sentence Calmly*, CHI. TRIB., Jan. 11, 1953, at 11.

[178] Transcript of Record, *supra* note 69, at 38.

[179] Before appealing to Court of Military Appeals, Dorothy petitioned the Board of Review for a new trial on the basis of newly discovered evidence—one of the members of the sanity board had made a statement to the effect that he felt constrained by the narrow standards in Technical Manual 8-240, *Psychiatry in Military Law*, and that if he'd been asked to give his opinion in civilian practice he would have found Dorothy to be insane at the time of the murder. *Id.* at 48. The Board of Review denied the petition for failure to exercise due diligence in bringing the information to the court. *Id.* at 46.

[180] Chief Judge Quinn filed a dissent arguing that the lower courts had applied the legal definition of insanity too strictly; he did not address the jurisdictional issue. United States v. Smith, 17 C.M.R. 314, 345 (1954).

[181] *Id.* at 319–20.

the success of Clarice's federal habeas petition.[182] The run up to the Supreme Court will be thoroughly discussed below; first, however, it is important to get the measure of the men whose advocacy would prove so instrumental to the decision.

Brigadier General Adam Richmond was, like General Krueger, a career soldier. A native of Council Bluffs, Iowa,[183] he received both his undergraduate and law degrees from the University of Wisconsin.[184] He entered the Army as a second lieutenant infantryman in World War I; in the interwar years he was stationed in Washington, D.C., the Panama Canal Zone, and finally, San Antonio, where he served as the Judge Advocate General of the Third Army[185] under General Krueger.[186] He spent World War II in North Africa and the Mediterranean before a car accident in Naples in 1945 ended his Army career.[187] A devoted husband and father to three girls, Brigadier General Richmond moved to Bethesda, Maryland, and became very active in the community.[188] This loyalty and civic-mindedness would serve him well when General Krueger, his former boss at Third Army, requested that he go to Japan to defend Dorothy in her murder trial.[189] General Krueger could not go himself—Grace, his wife, was seriously ill.[190] As Dorothy had a contingent of defense lawyers headed up by Lieutenant Colonel Levie,[191] referred to in some reports as Chief Defense Counsel,[192] it is likely that Richmond served in large part as General Krueger's eyes and ears on the

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[182] Wiener, *supra* note 2, at 10.

[183] *Two Former D.C. Area Men Raised to Brigadier General*, WASH. POST, Mar. 26, 1943, at 4.

[184] Richmond received a B.A. in 1912 and an LL.B. in 1914. THE UNIVERSITY OF WISCONSIN ALUMNI DIRECTORY, 1849–1919, at 278 (1921).

[185] *Gen. Richmond—Community Leader*, WASH. POST, Dec. 3, 1959, at B2.

[186] Lieutenant Colonel Richmond even administered the oath of office to newly-pinned Brigadier General Dwight D. Eisenhower in General Krueger's office in San Antonio. *Eisenhower Moves Higher*, SAN ANTONIO LIGHT, Oct. 3, 1941, at 2.

[187] *Gen. Richmond—Community Leader*, WASH. POST, Dec. 3, 1959, at B2.

[188] *Id.*; *Two Former D.C. Area Men Raised to Brigadier General*, WASH. POST, Mar. 26, 1943, at 4.

[189] Wiener, *supra* note 2, at 10.

[190] *Eve of Trial: Widow of Colonel Calm*, SAN ANTONIO SUNDAY LIGHT, Jan. 4, 1953, at 1.

[191] Transcript of Record, *supra* note 69, at 49. Dorothy was defended by appointed counsel, Lieutenant Colonel Levie and Major Dudley Rae, *id.*, in addition to Brigadier General Richmond. Lieutenant Colonel Levie was a former New York City attorney who had served on the United Nations Armistice Staff in Korea. *Gen. Krueger's Daughter to Go on Trial Monday*, LIMA NEWS, Jan. 4, 1953, Page 4-A.

[192] *Defense to Open with Refutation of Motive Claim*, THE NEWS (Mt. Pleasant, La.), Jan, 7, 1953, at 4.

ground. After Dorothy's conviction, Brigadier General Richmond vowed to take the case "all the way to the President" if necessary.[193]

If Richmond was General Krueger's eyes and ears, Frederick Bernays Wiener was his muscle. Wiener, known as Fritz to his friends, was a towering figure in military law. Following his graduation magna cum laude from Harvard Law School in 1930,[194] he took a commission in the Army as a Judge Advocate General officer and served on active duty until 1945.[195] At the time he became involved with Clarice and Dorothy, he was a Colonel in the Army Reserves whose private practice specialized in military justice and constitutional law.[196] He was perhaps the best person to represent the women on their road to the Court; not only was he a respected scholar in military law[197] and a former student of Justice Frankfurter's,[198] but he also believed deeply that military justice "must remain a separate system because of a vast gulf between the objectives of a military and a civilian society."[199] During the Congressional hearings on the proposed enactment of a UCMJ, Wiener railed against the civilianization of military justice:

> It will be a grave error if by negligence we permit the military law to become [sic] emasculated by allowing lawyers to inject into it the principles derived from their

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[193] *Mrs. Smith Balks Life Term*, N.Y. TIMES, Jan. 11, 1953, at 4.

[194] He graduated from Brown in 1927—while there, he was successful academically, but his fellow students found something in his conduct objectionable. During his junior year, several students were suspended for "tying [him] in his nightshirt to a Rehobeth cemetery tombstone." The students explained that they objected to "his conduct and bearing on campus." *Suspend 3 Brown Students*, OLEAN EVENING TIMES, Dec. 16, 1925, at 1.

[195] *Tribute to Colonel Frederick Bernays Wiener, 1906–1996*, 46 M.J. 204 (1996).

[196] *Id.*

[197] He taught at The George Washington University Law School from 1951 to 1956. *Id.*

[198] Justice Frankfurter thought so much of his former student, in fact, that he asked Wiener to write an opinion analyzing the Court's holding in *Ex parte Quirin*. 317 U.S. 1 (1942). *Quirin* upheld the trial by military tribunal and subsequent execution of eight German saboteurs captured in the United States in 1942. *Id.* Wiener, with characteristic bluntness, found serious deficiencies with the Court's work. Louis Fisher, *Military Tribunals: A Sorry History*, 33 PRESIDENTIAL STUD. Q. 484, 492–94 (Sept. 2003). The two men had a great deal in common; Justice Frankfurter, as a major in the Judge Advocate General Reserve Corps during World War I, helped revise the Articles of War. THE ARMY LAWYER, *supra* note 21, at 117–18.

[199] *Tribute to Colonel Frederick Bernays Wiener, 1906–1996*, 46 M.J. 204 (1996).

> practice in the civil courts, which belong to a totally different system of jurisprudence.[200]

In his brief on behalf of Clarice before the Court, Wiener would quote Colonel William Winthrop, a man often described as "The Blackstone of Military Law."[201] Winthrop had famously stated that "a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in a time of peace."[202] The use of this quote was not mere rhetorical flourish, as it is quite likely that Wiener subscribed to a similar view. In Wiener, Clarice and Dorothy had a true believer.

He was a fiercely intelligent man, physically imposing,[203] whose customary argument style was "cogent and persuasive," and "liberally sprinkled with supporting data and historical documentation."[204] An experienced advocate who had by this point written a treatise on appellate practice,[205] Wiener was also incredibly familiar with the Court and how best to conduct the business of advocacy in front of it. That included closely following the decision for a case whose subject matter bore more than a passing familiarity to his own—1955's *Toth v. Quarles*.

Robert W. Toth, along with an accomplice, Thomas L. Kinder, brutally murdered a Korean man while serving as a security guard in Korea.[206] Kinder was tried and convicted by court-martial, but by the time the crime was discovered, Toth had taken an honorable discharge and was back in the United States.[207] Toth was apprehended and returned to Korea, where he was tried by court-martial under Article 3(a), which granted military jurisdiction over former servicemembers

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[200] WILLIAM T. GENEROUS, JR., SWORDS AND SCALES 48 (1973). This would not be the last time that Wiener testified before Congress on matters of military justice—he appeared at every major congressional committee considering military justice between 1948 and 1966. *Tribute to Colonel Frederick Bernays Wiener, 1906–1996*, 46 M.J. 204 (1996).

[201] Most recently, indeed, that appellation became the title of a biography by Joshua Kastenburg. JOSHUA E. KASTENBURG, THE BLACKSTONE OF MILITARY LAW: COLONEL WILLIAM WINTHROP (2009).

[202] Brief for the Appellee at 40, Reid v. Covert, 351 U.S. 487 (1956) (No. 701).

[203] GENEROUS, *supra* note 200, at 49.

[204] *Id.*

[205] FREDERICK BERNAYS WIENER, EFFECTIVE APPELLATE ADVOCACY (1950).

[206] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 11 (1955).

[207] *Id.*

who had committed crimes before their discharge.[208] After his conviction, Toth's sister filed a habeas petition on his behalf.[209] The D.C. Circuit upheld the constitutionality of Article 3(a) on the grounds that a person is generally subject to trial in the jurisdiction where the offense was committed, but when Toth's sister appealed to the Supreme Court, it reversed 6-3.[210] Justice Black wrote the opinion for the Court, holding that Congress's Article I, section 8 power to "Make Rules for the Government and Regulation of the land and naval Forces" only allowed for court-martial jurisdiction over individuals who were actually *in* the land and naval forces at the time of trial.[211] Civilians were not in the land and naval forces, thus, Article 3(a)'s grant of jurisdiction over former servicemembers was invalid. Importantly for Clarice and Dorothy, the Court signaled a somewhat jaundiced view of military justice. Black wrote:

> [C]onceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.[212]

As indicated by the short amount written in the military courts of appeals' opinions on the issue of whether it was constitutional to subject a civilian wife to court-martial, the jurisdictional question pre-*Toth* was "more or less taken for granted."[213] After the Court's decision in *Toth*, and its erosion of some of the statutory bases for exercising military jurisdiction over civilians, Wiener shifted his emphasis to an attack on the constitutionality of Article 2(11).

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[208] GENEROUS, *supra* note 200, at 175.
[209] *Id.*
[210] *Id.*
[211] United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).
[212] *Id.* at 17. This view would be echoed in Justice Black's opinion for the Court in *Reid II*.
[213] GENEROUS, *supra* note 200, at 177.

B. The First (Unsuccessful) Try

Just ten days after the *Toth* decision, Clarice filed a habeas petition in the federal district court for the District of Columbia.[214] Judge Edward Tamm granted her petition. For Judge Tamm, the central teaching of *Toth* was that "a civilian is entitled to a civilian trial."[215] He recognized that his ruling would create "great difficulties," but thought that Congress could easily remedy those difficulties by drafting a long-arm statute to give federal district courts jurisdiction over such cases.[216]

Feeling encouraged by this ruling, General Krueger filed an identical petition in the federal district court for the Southern District of West Virginia.[217] Chief Judge Ben Moore, however, distinguished both *Toth* and Tamm's decision—while he rejected the idea that Dorothy was "part" of the armed forces, he worried that invalidating court-martial jurisdiction over dependents would lead to a "serious situation" where such civilians would either be triable only in local courts abroad or left "free from all restraints whatever."[218] Thus, he upheld Article 2(11), but on notably tepid terms—he could not say "with certainty" that court-martial jurisdiction over civilians accompanying the armed forces abroad is *not* "necessarily and properly incident" to Congress's rule-making power for the armed forces, so the statute should be upheld.[219]

Both cases were appealed to the Supreme Court—the Government filed a direct appeal of Judge Tamm's ruling, while General Krueger appealed Judge Moore's denial of habeas relief to the Fourth Circuit.[220] Nina Kinsella, Alderson's warden, brought the case to the Supreme Court before the Fourth Circuit could weigh in.[221] Because Wiener was by this point representing both women, he cooperated with the

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[214] United States *ex rel.* Covert v. Reid, H.C. No. 87-55, D.D.C., unreported, *per* Tamm, D.J. Nov. 22, 1955, Transcript of Record, *supra* note 69, at 131–32.
[215] *Id.* at 132.
[216] *Id.* Judge Tamm was somewhat ahead of his time in suggesting this course of action—forty-five years later, Congress would indeed pass a long-arm statute, known as the Military Extraterritorial Jurisdiction Act. *See infra*.
[217] United States *ex rel.* Krueger v. Kinsella, 137 F. Supp. 806 (S.D. W.Va. 1956); WIENER, *supra* note 11, at 238.
[218] *Id.* at 811.
[219] *Id.*
[220] Wiener, *supra* note 2, at 7.
[221] *Id.*

Government in expediting the cases so that they could be heard together at the Court's upcoming October term.[222]

The Government's argument, advanced by Solicitor General Simon E. Sobeloff and argued by assistant Solicitor General Marvin E. Frankel, concentrated on the constitutionality of Article 2(11) and its importance in international affairs.[223] Article 2(11), they argued, was a valid exercise of Congress's power to make rules for the regulation of the land and naval forces, the war power, and the power to make all laws necessary and proper for exercising the United States' sovereign authority in relation to other sovereigns.[224] Emphasizing the large number of civilians accompanying the armed forces abroad as both employees and dependents, the Government noted that:

> [C]ivilians . . . are part of the American military contingent abroad. Their actions directly affect the reputation, the status, and the discipline of our armed forces overseas, as well as their continued acceptability to host governments.[225]

Using historical examples from the British and American Articles of War which demonstrated the exercise of military court jurisdiction over certain classes of civilians, the Government argued that the constitutional provision for the Government and regulation of the armed forces "must be read as necessarily sanctioning" the trial by court-martial of civilians "intimately related to the armed forces."[226] That a committee of eminent scholars drafted the language in Article 2(11), which was then given "full consideration" by Congress and enacted as part of the UCMJ, should be given due weight.[227] Finally, the Government argued that the Court's

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[222] *Id.*

[223] One of the arguments was whether the Supreme Court had jurisdiction to hear the case at all—Wiener had argued that Reid, as superintendant of the District of Columbia jail, was an officer of the District of Columbia and not of the United States, and so was not entitled under the applicable statute, 28 U.S.C. § 1252, to take a direct appeal from a district court to the Supreme Court. FREDERICK BERNAYS WIENER, BRIEFING AND ARGUING FEDERAL APPEALS 138 n.6 (Bryan A. Garner ed., 2009). The Court postponed the jurisdictional question until a hearing on the merits; both briefs dealt with the issue of jurisdiction in Point I and jurisdiction was ultimately sustained. *Id.*

[224] Brief for Appellant, Reid v. Covert, 351 U.S. 487 (1956) (No. 701).

[225] *Id.* at 31–32.

[226] *Id.* at 34.

[227] *Id.* at 37–40. The Government pointed to an exchange between Mr. Felix Larkin, general counsel to the Department of Defense, and Congressman Elston and Mr. Smart,

previous holding in *In re Ross*, upholding the jurisdiction of a consular court over a sailor who committed a shipboard murder near Japan, should control—consular courts could be analogized to military courts, and *Ross* stood for the proposition that in creating this kind of extraterritorial jurisdiction Congress was not required to follow the provisions of Article III.[228] Additionally, as the Court noted in *Ross*:

> [W]hen "the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other."[229]

Court-martial jurisdiction was exercised pursuant to agreements with Japan and England and, like the consular courts at issue in *Ross*, allowed the United States to try its own citizens under its own laws.[230]

Wiener, on the other hand, argued first on a non-constitutional ground—that jurisdiction had terminated over Clarice once she had been returned to the United States and placed in civilian custody following CMA's reversal of her conviction, before turning to the argument that Article 2(11) was unconstitutional "to the extent that it purports to

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during the hearings before the House Armed Services Committee on the adoption of the Uniform Code of Military Justice (UCMJ), as evidence that Congress knew and understood that Article 2(11) would subject military dependents to court-martial jurisdiction.

> Mr. Elston: It would not cover the family of soldiers, would it?
> Mr. Larkin: I think it would, if they were dependents. *Id.* at 39.

Mr. Smart later expanded on his point in response to a question of whether Article 2(11) would grant jurisdiction over family members who were only visiting their soldier abroad.

> Mr. Smart: [They] would not, in any case, in my opinion, be subject to this code. *Whereas the family of a soldier, be it officer or private, does accompany him and he is certainly part of the forces.* I do not think it could be considered that this provision would be broad enough to cover a relative who goes for a mere visit. *Id.* at 40 (emphasis in government's brief).

[228] *Id.* at 61–62.
[229] *Id.*
[230] *Id.* at 56.

authorize a trial of civilians by court-martial in time of peace."[231] To support his argument, Wiener went fishing in previously filed Government briefs. First, Wiener noted ironically that in the Solicitor General's brief for *Toth*, Sobeloff had argued:

> Indeed, we think that the constitutional case is, if anything, clearer for the court-martial of Toth, who was a soldier at the time of his offense, than it is for a civilian accompanying the armed forces.[232]

In Wiener's view, the Court's invalidation of Toth's court-martial as an ex-airman should lead *a fortiori* to the conclusion that a court-martial of a woman who had been a civilian all of her life was equally invalid.[233] The brief went on to argue that the treaty power was "completely irrelevant" to the case, using the Government's position in its brief for the recently decided case of *United States v. Capps*.

> The basic axiom is that, as a sovereign state, the United States possesses . . . all the normal powers of a fully independent nation . . . subject to constitutional limitations like the Bill of Rights which govern all exercise of governmental authority in this country.[234]

The Government filed a reply brief outlining the grave consequences for discipline and morale if the Court should invalidate Article 2(11), and reasserted the constitutionality of the statute under Congress's war power and rule-making authority for the armed forces.[235]

With their arguments marshaled, Wiener and Frankel went before the Court for oral argument.[236] At this point, Wiener's decision to expedite

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[231] Brief for Appellee, *supra* note 224, at 36.
[232] *Id.*
[233] *Id.*
[234] WIENER, *supra* note 223, at 164; Brief for Appellee, *supra* note 224, at 101. Wiener somewhat gleefully posits that this quoted passage, with which "Appellant heartily agrees," demolished the government's argument. *Id.* at 101.
[235] Reply Brief for Appellant and Petitioner, Reid v. Covert and Kinsella v. Krueger, 351 U.S. 487 (1956) (Nos. 701 and 713).
[236] Marvin E. Frankel, the young assistant to the Solicitor General, was himself a future legal titan—after graduating Columbia Law School, where he'd been the Editor-in-Chief of the Law Review, Frankel spent several years as Assistant Solicitor General before entering private practice. He later taught at Columbia Law School, sat on the federal bench as a district court judge for thirteen years, and was an influential writer in

the two cases revealed itself to be a mistake. The cases were heard on the last day of the term, May 3, 1956, in an oral argument that extended almost an hour beyond the normal time for the Court to adjourn.[237] Wiener was asked only three questions, one of which was not even on the merits of his argument.[238] In addition, he admitted later, his argument was "marred by sarcasm and bitterness."[239] He could not understand why the Government was so unwilling to admit that *Toth* "knocked the props out from under" what had been the purported basis for the assertion of military jurisdiction over civilians, and so allowed his emotions to get the better of him.[240] One particularly cutting example:

> So I say, I suggest, that it would be much better for the Air Force to devote its very considerable talents to the material and terrific problem of maintaining our air supremacy, in a word, sticking to the wild blue yonder, instead of trying civilian women by court martial.[241]

The Court's conference notes from May 4, 1956, indicate that the justices tentatively intended to come out for the wives, regardless of Wiener's own evaluation of his argument's deficiencies. Chief Justice Warren, Black, Reid, Frankfurter, and Douglas all registered tentative votes for the wives; Burton, Minton, and Harlan intended to vote for the Government; Clark passed.[242] However, in the days following the conference, opinion on the Court began to shift. On May 14, 1956, Justice Reed circulated a memorandum explaining that he had become

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constitutional law. In later life he was a tireless advocate for human rights and the separation of church and state; he argued his last case in front of the Supreme Court while in a wheelchair due to prostate cancer, succumbing to his illness two weeks after oral argument. Jack Greenberg, *Frankel—What a Life!*, 102 COLUM. L. REV. 1743, 1743–47 (2002).

[237] Wiener, *supra* note 2, at 7.

[238] *Id.* All three questions came from Justice Frankfurter. Transcript of Oral Argument at 28, 30, Reid v. Covert and Kinsella v. Krueger, 351 U.S. 487 (1956) (Nos. 701 and 713).

[239] *Id.*

[240] *Id.*

[241] WEINER, *supra* note 223, at 343 n.49. Later, in the "cold, clear, and infinitely painful light of the morning after," Wiener became aware of the harm his resentment had probably done to his case. *Id.*

[242] DEL DICKSON, ED., THE SUPREME COURT IN CONFERENCE 550–51 (2001). Interestingly for modern discussions on the rights of the military to try civilians, Warren and Black explicitly stated that employees of the armed forces could be subjected to military trials—Black stated that "there is no doubt about the right of the government to subject soldiers and those *working for the military* to military jurisdiction." *Id.* (emphasis added).

convinced that his tentative votes in favor of the wives had been in error.[243] He had concluded that the "long history of the jurisdiction of consular courts" over U.S. citizens abroad demonstrated that, while citizens were entitled due process, what process was due—what manner of trial, in other words—was not controlled by the Constitution.[244]

With Justice Reed's switch, the outcome of the case was then settled—the Court voted against the wives 5 to 4, upholding the military's exercise of jurisdiction over Clarice and Dorothy. Justice Tom C. Clark, writing for the majority, noted that the Court's precedent had "well established" the principle that Congress could establish extraterritorial legislative courts that did not need to comply with the standards required under the Constitution for Article III courts; *Ross*, thus, was controlling.[245] The majority held 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.[246] The majority then punted on the issue of where the power to try civilians by court-martial arose:

> Having determined that one in the circumstances of Mrs. Smith may be tried before a legislative court established by Congress, we have no need to examine the power of Congress "To make Rules for the Government and Regulation of the land and naval Forces" under Article I of the Constitution. If it is reasonable and consonant with due process for Congress to employ the existing system of courts-martial for this purpose, the enactment must be sustained.[247]

Chief Justice Warren, joined by Black and Douglas, worried that "[t]he military is given new powers not hitherto thought consistent with our scheme of government," but stated that they needed more time to

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[243] Memorandum from Justice Stanley Reed to the Justices (May 14, 1956) (on file with the Princeton University Stanley G. Mudd Manuscript Library).
[244] *Id.*
[245] Kinsella v. Krueger, 351 U.S. 470, 475 (1956).
[246] *Id.* Clark went on to praise the UCMJ as including the fundamentals of due process, including some which the states were not under an obligation to provide to citizens domestically—the inference here, as William Generous, Jr., noted in his historical study of military justice, is that "if Americans companying the troops overseas had to be tried for alleged crimes committed on foreign soil, they would enjoy greater protections under the UCMJ than in the foreign courts." GENEROUS, *supra* note 200, at 178.
[247] *Kinsella*, 351 U.S. at 476.

prepare their dissents and would submit them at the next term.[248] Instead of joining in the dissent, Justice Frankfurter published a sharply worded reservation, noting the majority's refusal to examine the scope of Congress's power under Article I to make rules regulating the armed forces: "The plain inference from this is that the Court is not prepared to support the constitutional basis upon which the Covert and Smith courts-martial were instituted and the convictions were secured."[249] Explaining that "[w]isdom, like good wine, needs maturing," he reserved his vote.[250] Frankfurter seemed to think that the majority was relying on obsolete, irrelevant precedent,[251] but why he chose the relatively uncommon route of writing a reservation instead of a dissent is somewhat unclear. One clue is supplied by Wiener years later, as he described the scene at the Court on the date the decisions were read:

> Sitting next to me in the courtroom when the three opinions were orally announced was an experienced Supreme Court advocate who had long been a close friend, Charles A. Horsky of the District of Columbia bar. As Justice Frankfurter was holding forth, Horsky whispered to me, "That's a command to file a petition for rehearing."[252]

In typically laconic fashion, Wiener wrote, "[w]hich, needless to say, I proceeded to do."[253]

V. The Grant of Petition for Rehearing

Wiener had previously been the reporter for the Supreme Court's 1952 to 1954 Committee on the Revision of its Rules, so he was "fully aware that most requests for rehearing enjoy the viability of snowballs beyond the River Styx."[254] Rule 58 of the Court requires that rehearing petitions only be granted if a justice who voted with the majority changes his mind or begins to doubt his original vote, accepts the petition, and

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[248] *Id.* at 485–86.
[249] *Id.* at 481.
[250] *Id.*
[251] GENEROUS, *supra* note 200, at 178.
[252] Wiener, *supra* note 2, at 8.
[253] *Id.*
[254] *Id.*

convinces a majority of the Court to rehear the case.[255] As "it is scarcely necessary to remind lawyer readers that appellate judges rarely suffer such qualms once they have publicly concurred in a decision,"[256] Wiener had to think strategically—which of the justices in the majority might be amenable to a suggestion that the original decision was wrong?

On the merits, he focused his argument for rehearing on four issues: (1) military considerations clearly underlay all of the decisions to uphold the court-martial proceedings, so the scope of Congress's rule-making authority for the armed forces was by necessity at issue; (2) the legislative history indicates that Congress never considered the constitutionality of Article 2(11) at the time it was adopted and never considered *Ross* during any of the legislative hearings; (3) that there had been no mention of any source of constitutional power by which Congress could strip two citizens of their protections under the Bill of Rights; and finally, (4) Article 2(11) asserted a jurisdiction limited to instances "without the continental limits of the United States," whereas Clarice was now back within those limits, so Article 2(11) was inapplicable.[257]

The last part of the petition, however, might have carried the most weight with the Justices—he raised the issue of the Court's adjudicatory procedure in the two cases: the oral argument took place on an accelerated schedule which "cut nearly in half" the time for briefs under the rules; the argument was the last of the day on the last day of the term and stretched well past the time for adjournment;[258] and the opinions

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[255] *Id.*

[256] WIENER, *supra* note 11, at 239.

[257] WIENER, *supra* note 223, at 433–40.

[258] *Id.* at 439. Here, Wiener noted that he'd been asked only three questions during oral argument, and suggested that:

> To the extent, therefore, that there is a "tradition of the Supreme Court as a tribunal not designed as a dozing audience for the reading of soliloquies, but as a questioning body, utilizing oral arguments as a means for exposing the difficulties of a case with a view to meeting them," the lateness of the hour perceptively impaired the probing process. *Id.*

Here, Wiener was quoting Justice Frankfurter. *Clue to Rehearing*, N.Y. TIMES, June 17, 1957, at 12.

were announced before the three dissenters had time to articulate their views, or Justice Frankfurter to make a decision at all.[259]

He decided to aim his argument at Justice John Marshall Harlan II. He knew that he was going to get the three dissenters and Justice Frankfurter to vote in favor of his petition, so he only needed to convince one other justice—someone who had been in the majority.[260] He knew that he could count out Justice Clark, who was highly unlikely to repudiate the very opinion he'd authored. Around the working bar in D.C., further, Justices Burton, Reed, and Minton were colloquially known as "The Battalion of Death" because they rarely voted against a conviction.[261] This meant that "Justice Harlan was, very plainly, the swing man."[262] In targeting Justice Harlan, Wiener focused on the fact that the accelerated argument schedule hurt the consideration of his case. After a friend informed him that Justice Harlan was an admirer of the late Justice Robert Jackson, Wiener added a quotation from Jackson's *The Supreme Court in the American System of Government*.

> Not infrequently the detailed study required to write an opinion, or the persuasiveness of an opinion or dissent, will lead to a change of a vote or even to a change of result.[263]

Wiener's decision to target Justice Harlan was a productive one. Justice Frankfurter appeared to also believe that Justice Harlan was the key to a rehearing—just after the petition came in, he determined that the justices had never considered Wiener's fourth issue, and solicited the views of one of Justice Harlan's clerks.[264] The clerk, Wayne G. Barnett, wrote in a memorandum to Justice Harlan that he had a "distinctly dissatisfied" feeling about the action taken, and believed that the issues were "deserving of a more deliberate consideration than could be given them at the close of the term."[265] Another clerk, Paul M. Bator, wrote a

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[259] WIENER, *supra* note 223, at 439.
[260] Wiener, *supra* note 2, at 8.
[261] *Id.*
[262] *Id.*
[263] WIENER, *supra* note 223, at 439.
[264] Memorandum from Felix Frankfurter to John Marshall Harlan II (Jul. 18, 1956) (on file with the Princeton University Stanley G. Mudd Manuscript Library). The clerk told Justice Frankfurter that, in his opinion, there was no answer to Wiener's argument. *Id.*
[265] Preliminary Memo on Rehearing, Oct. Term, 1955, Nos. 701 & 713 (n.d.) (on file with the Princeton University Stanley G. Mudd Manuscript Library).

lengthy memo analyzing the petition for rehearing, concluding that, contrary to Justice Clark's majority opinion, the case had to rest on some specific power given to Congress, not on a "mere combination" of "no prohibition" plus "reasonableness."[266] He also thought that there should be a rehearing, that in difficult cases "account ought to be taken" of the view of every member of the Court, "especially one so prominent in Constitutional law as Justice Frankfurter."[267] On September 5, 1956, Justice Harlan circulated a memorandum to Justices Reed, Burton, Clark, and Minton, where he explained that he intended, "as presently advised" to vote for rehearing. He was troubled by their failure to "hitch" the court-martial to some specific constitutional power.

> These cases are very close and troublesome, and I am sure that I have not exhausted all of their difficulties. . . . No doubt I should at least have recognized my own difficulties with the present opinions before they came down. All I can say to that is that it perhaps illustrates the unwisdom of deciding difficult and far-reaching issues under the hammer of getting through with the Term's business.[268]

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[266] Memorandum on *Covert* and *Krueger* (n.d.) (on file with the Princeton University Stanley G. Mudd Manuscript Library). Bator, a future law professor at Harvard and Chicago, raised a compelling case for de novo review of the grounds on which *Ross* rested—"isn't the question of whether the Constitution follows the flag a very different one today than it was 100 years ago? Doesn't the fact that American interests are today world-wide . . . call for a re-examination of the needs of extending certain Constitutional protections abroad?" *Id.*

[267] *Id.*

[268] Memorandum from John Marshall Harlan II (Sept. 5, 1956) (on file with the Princeton University Stanley G. Mudd Manuscript Library). Shortly thereafter, Justice Frankfurter wrote to Justice Harlan:

> Dear John,
> I must put a brake on my pen to appear sober-minded in the expression of my appreciation for the views you have expressed in your memo to your four brethren. No—not for your views but for the fact that you have so disinterestedly re-examined them. Of course the issues in Nos. 701 and 713 are important, very important. But as Holmes Jr. said of *Haddock v. Haddock*, "the world will not come to an end whichever way this case is decided." What is vastly more important than the ultimate outcome of these cases—the doctrines that are finally announced—is the intellectual procedure, the quality and nature of the adjudicatory process by which decision is reached. On that depends the justification and the enduring foundation of the Court and its function in our governmental scheme. And so I'm

The justices of the majority responded with a series of discussions and memoranda—Justice Reed, for example, expressed sympathy for Harlan's position but went on to appear to counsel against voting for rehearing:

> While congressional determination of a desirable way to handle the international aspects of crimes by our troops and their dependents on foreign soil does not determine constitutionality, I hope you will reconsider before raising again the danger of putting a constitutional block in reasonable dealing with such a far-flung situation as this.[269]

Justice Harlan may have reconsidered, but he did not change his mind—his second memorandum came on September 26, following the conference on rehearing, circulations by Justices Black and Frankfurter,[270] and further discussions.[271] He explained that he thought

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> profoundly grateful to you, as a passionate American citizen I'm grateful, for your conscientious re-examination and candid report on what your deeper reflections have found. I have not the least doubt that your forthright performance will have a far-reaching wholesome influence on the world of the Court.

Note from Felix Frankfurter to John Marshall Harlan II (n.d.) (on file with the Princeton University Stanley G. Mudd Manuscript Library).

[269] Memorandum from Stanley Reed to John Marshall Harlan II (Sept. 7, 1956) (on file with the Princeton University Stanley G. Mudd Manuscript Library).

[270] Interestingly, Justice Frankfurter originally circulated what he was calling a dissent on September 19th to only Chief Justice Warren, Justice Black, and Justice Douglas. He stated that he thought there was very good reason to keep the fact that a dissent had been prepared among the four of them, and had not even informed the law clerks that it had been written. Memorandum from Felix Frankfurter (Sept. 19, 1956) (on file with the Library of Congress). He determined on September 20th that the reason to keep the dissent private were no longer applicable, and circulated it to the rest of the Court. Memorandum from Felix Frankfurter (Sept. 20, 1956) (on file with the Library of Congress).

[271] The justices of the majority exchanged a series of memoranda explaining and elaborating on their views from the previous summer's majority opinion. Justice Burton would rest the constitutionality of Article 2(11) in Article I, section 8, noting that the rule-making power granted in Clause 14 does not say, "to make *some* of the rules," and noting that he saw no adequate reason to put limitations upon executive and legislative powers that "wisely have been left broad in the fields controlling our foreign relations and national defense." Memorandum from Harold Burton to John Marshall Harlan II (Sept. 7, 1956) (on file with the Princeton University Stanley G. Mudd Manuscript Library) (emphasis in original). Justice Minton wrote that this nation "in the exercise of its power over its foreign affairs may very properly negotiate and contract for the right to

their reliance on *Ross* the previous term was mistaken, that the Court needed to hear more argument on whether Congress had the power under Article I to try civilians in military courts, and that he intended to vote for rehearing.[272]

VI. Before the Court—*Reid II*

In October, the Court granted the petition—in its grant, the Court focused the parties on four issues: (1) the specific practical necessities justifying court-martial of civilians, and any practical alternatives; (2) historical evidence bearing on the scope of the Article I, Section 8, Clause 14 rule-making power and whether that power was understood to be narrow or broad; (3) any relevant differences between court-martial of dependents and that of employees; and (4) the relevance of distinctions between petty crimes and major offenses.[273]

This time, both sides had plenty of time to submit briefs and prepare for argument, which was set for February 1957.[274] The Government submitted a supplemental brief that focused on four arguments in turn—that court-martial jurisdiction over civilians accompanying the armed forces abroad was of practical necessity as a matter of international relations and to accomplish the military mission; that there were no practical alternatives; that the scope of the rule-making power, when read in conjunction with the Necessary and Proper Clause, was broad and susceptible to expansion under changing circumstances; and that the constitutional distinction between major crimes and petty offenses was

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try its own citizens in a foreign country," and would "stand flatly and securely upon *In re Ross*." Memorandum from Sherman Minton to John Marshall Harlan II (Sept. 10, 1956), (on file with the Princeton University Stanley G. Mudd Manuscript Library). Justice Reed expressed sympathy for Justice Harlan's concerns—"[a]s one who had preliminary difficulties himself, it is quite easy for me to understand your desire to rehear the Covert and Krueger cases"—but ultimately, would find the constitutional basis for the enactment of Article 2(11) in the power of Congress to punish crimes of U.S. nationals beyond the limits of its territorial sovereignty, under Article III, section 2. Memorandum from Stanley Reed to John Marshall Harlan II (Sept. 7, 1956) (on file with the Princeton University Stanley G. Mudd Manuscript Library).

[272] Memorandum from John Marshall Harlan II (Sept. 5, 1956)) (on file with the Princeton University Stanley G. Mudd Manuscript Library).

[273] Grant of Petition for Rehearing, 77 S. Ct. 123 (Nov. 5, 1956).

[274] The case continued to prove contentious—Wiener later described the Government's factual assertions as the triumph of advocacy over accuracy. Many of the assertions made in the Government's supplemental brief were "bitterly contested" in the Appellant's reply brief. WIENER, *supra* note 223, at 180 & n.189.

not a relevant distinction for purposes of court-martial jurisdiction over civilians abroad.[275]

The Government brief focused heavily on the facts—i.e., the "practical necessities" supporting court-martial jurisdiction over civilians, so Wiener decided to focus on the law. The brief for the wives argued first that consent of England and Japan to American military jurisdiction over civilians within their territories could not invest the courts-martial with jurisdiction; that nothing in the Constitution authorized the trial of civilians by court-martial in time of peace and not in occupied territory; that the result reached the previous June was completely irreconcilable with *Toth*; and that practical alternatives to courts-martial were available.[276]

The oral argument took place on February 27, 1957. At this point, several personnel changes had occurred—Justices Reed and Minton had retired, replaced by Justices Brennan and Whittaker. As Justice Whittaker had not yet taken his seat, the argument occurred before eight Justices.[277] Solicitor General J. Lee Rankin argued the case for the Government. During his argument, he produced a "little black book" entitled *Women Camp Followers of the American Revolution*, which contained an account of camp followers subject at the time to military law, as persuasive authority for the continuing vitality of the practice.[278] When asked by Chief Justice Warren if women living on military bases in this country could be tried by court-martial, Rankin answered that Congress had the power to subject them to military law but had never chosen to do so.[279]

Then it was Wiener's turn. Though he could not help but poke at Rankin's historical references,[280] he had practiced with his wife to remove any trace of bitterness and sarcasm from his argument. As he

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[275] Government's Supplemental Brief on Rehearing, Reid v. Covert, 354 U.S. 1 (1957) (Nos. 701 and 713).
[276] Supplemental Brief for Appellee, Reid v. Covert, 354 U.S. 1 (1957) (Nos. 701 and 713).
[277] Wiener, *supra* note 2, at 9–10.
[278] *Gov't Claims '76 Precedent in Forces Trying Civilians*, STARS & STRIPES, Mar. 1, 1957, at 5.
[279] *Id.*
[280] On Rankin's book, Wiener quipped that it only proved that "the most enduring and durable alliance of all is between Mars and Venus." *Id.*

had lived with the case for three years, however, he wanted to end his argument on an emotional note.[281]

> If Your Honors please, I have tried to argue this case with some degree of objectivity . . . . But I cannot conceal my concern over the seriousness of what is involved, because this is about as fundamental an issue as has ever come before this Court . . . . Because we have here . . . a question involving the impact on the one hand of the supposed needs of the garrison state upon, on the other, the immutable principles of a free nation.[282]

He then quoted the late Justice Benjamin Cardozo:

> The great ideals of liberty and equality are preserved . . . by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power . . . . tends to . . . hold the standard aloft . . . for those who must run the race and keep the faith.[283]

"If your Honors please," Wiener concluded, "I have been enrolled among the body of defenders. I hope this Court will keep the faith."[284]

Solicitor General Rankin then stood up to give a rebuttal, at which point Justice Black "undertook the role of the banderillero who plants barbed sticks in the harried bull that is about to face the matador," and launched into a difficult series of questions, taking up the remainder of Rankin's time.[285] Justice Black's law clerks were clearly conspirators in the pace of the questioning—they handed Justice Black a note exhorting him to "hit [Rankin] with Winthrop, with Toth, with the constitutional provisions, English practice before 1789, the fact that Congress never authorized even the trial of soldiers for civilian offenses during time of war until 1862."[286] They expressed surprise that Rankin was not being subjected to more "penetrating questioning," and highlighted some areas

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[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *Id.*
[286] Notes from Clerks (n.d.) (on file with the Library of Congress).

in Justice Black's memorandum which "he undoubtedly cannot satisfactorily explain."[287]

It was apparently obvious to all in the room that the case was going to come down differently than it had the previous term.[288] How different remained to be seen.

VII. The Decision

A. Conferences and Bargaining

The Justices' conference notes showed a solid majority in favor of the wives—Chief Justice Warren, Black, Brennan,[289] Frankfurter, and Douglas all voted to reverse both convictions, while Justices Burton, Clark, and Harlan voted to affirm—and in time, Justice Harlan was prevailed upon to change his vote.[290] What was up in the air, however, was the scope of the majority opinion, which Chief Justice Warren assigned to Justice Black.

Justice Black had circulated a memorandum opinion in November which broadly concluded that courts-martial of civilians accompanying the armed forces overseas during times of peace violated the Constitution—this memorandum formed the basis of his opinion in *Reid*

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[287] *Id.*

[288] Wiener, *supra* note 2, at 10.

[289] Justice Brennan's vote might have been at least a little up in the air. On March 4, Justice Clark wrote him a note expressing concern for the practical necessities of court-martial jurisdiction over civilians and worried that the Court would only be adding to the confusion by reversing its prior decision.

> [W]e should hesitate to repudiate our opinion of last June—and more so the power of the Congress that has been exercised *unquestioned* for over 40 years. It will have a disastrous effect on our foreign relations with 63 countries—cause the NATO agreement to be scrapped to the extent of the force treaties and undermine the morale of any armed forces in these foreign installations.

Note from Tom C. Clark to William J. Brennan (Mar. 4, 1957) (on file with the Library of Congress) (emphasis in original).

[290] DEL DICKSON, THE SUPREME COURT IN CONFERENCE 554–55 (2001).

II.[291] On March 6, Justice Frankfurter began agitating with Chief Justice Warren for a more "restricted" opinion than Justice Black was writing—he was confident that the views expressed in the circulated memorandum "could not possibly command a Court vote."[292] He wanted the decision to be on the narrowest ground possible—namely, invalidating the grant of jurisdiction *only* in capital cases, while reserving a decision for all other offenses.[293] On March 13, he sent a note to Justice Black, explaining that he intended to write separately concurring in the result; he explained that Justice Black might draw more votes if he would restrict his opinion to capital cases.[294] Justice Frankfurter urged him to adopt that view, arguing the importance of having as large a majority as possible when invalidating an Act of Congress.[295] Justice Black did not end up taking Justice Frankfurter's advice, and the ultimate opinion in *Reid II* is a "contrariety of opinions by a narrow majority," and one vigorously expressed dissent.[296]

B. Black's Broad Holding

Justice Black's plurality opinion, joined by Chief Justice Warren, and Justices Douglas and Brennan, opened by acknowledging that "[t]hese cases raise basic constitutional issues of the utmost concern,"[297] and rejected from the outset the idea that the U.S. Government could act against its own citizens abroad in a manner "free of the Bill of Rights."[298] This point was made in the most definitive terms possible—"The United

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[291] The published opinion in *Reid* is ultimately an expanded version of the memorandum Justice Black circulated in the fall of 1956. *See* Memorandum by Mr. Justice Black, Nos. 701 and 713—Oct. Term, 1955 (Nov. 20, 1956) (on file with the Library of Congress)..

[292] Memorandum from Felix Frankfurter (Mar. 6, 1957) (on file with the Library of Congress).

[293] *Id.* This is completely consistent with Justice Frankfurter's views on the role of the Court in Constitutional interpretation. *See generally* NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES (2010).

[294] He references that at least one of the dissenters is open-minded about a more restricted opinion; it seems likely here that he is referring to Justice Harlan, who does end up concurring with the majority on the more narrow grounds Justice Frankfurter proposed. Memorandum from Felix Frankfurter (Mar. 13, 1957) (on file with the Library of Congress)..

[295] *Id.*

[296] Memorandum from Felix Frankfurter (Mar. 6, 1957) (on file with the Library of Congress).

[297] Reid v. Covert (*Reid II*), 354 U.S. 1, 2 (1957).

[298] *Id.* at 5.

States," Black wrote, "is entirely a creature of the Constitution."[299] The rights and liberties of U.S. citizens were "jealously preserved from encroachments" by the express terms of the Constitution itself[300]—because the right to a jury trial was a fundamental right,[301] it could not be rendered "inoperative" when it became inconvenient.[302] This, Black wrote, would destroy the benefit of a written Constitution and undermine the basis of our government.[303]

Black then swept aside the two key pillars of the Government's argument—that *Ross* should control, and that Article 2(11) could be upheld as legislation necessary and proper to carry out the United States' international obligations. First, Black rejected the rationale underpinning *Ross*, calling it a "relic from a different era,"[304] and then turned to whether an international agreement could give the U.S. Government power which was not constrained by the Constitution.[305] In emphatic language, Black held that it could not—quoting from the Article VI Supremacy Clause, Black wrote that nothing in the text of the Constitution or in its legislative history suggested that treaties and other international agreements did not have to comply with the Constitution.[306]

> There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.[307]

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[299] *Id.* at 5–6.
[300] *Id.* at 6–7.
[301] The trial by jury is, according to Black, "one of our most vital barriers to governmental arbitrariness." *Id.* at 10.
[302] *Id.* at 14.
[303] Black wrote that "[t]he Ross case is one of those cases that cannot be understood except in its particular setting; even then, it seems highly unlikely that a similar result would be reached today." *Id.* at 10.
[304] *Id.* at 14.
[305] *Id.* at 16.
[306] *Id.*
[307] *Id.* at 17. Justice Frankfurter argued strenuously that this language should not go into the final opinion. At the time, one of the most contentious issues in Congress was the proposed Bricker Amendment, named for its sponsor Senator John Bricker, which would have among other things refused to give force or effect to any treaty which violated the Constitution. *See generally* Arthur H. Dean, *The Bricker Amendment and Authority Over Foreign Affairs*, FOREIGN AFF., Oct. 1953. Frankfurter thought that because the decision was merely a plurality, the Court would be needlessly projecting itself into the controversy by mentioning treaties or the treaty power at all. Memorandum from Felix Frankfurter (May 20, 1957) (on file with the Princeton University Stanley G. Mudd Manuscript Library).

All of this was prologue to the meat of the opinion—having concluded that the Constitution "in its entirety" applied to the wives' trials, Black then turned to the question of whether anything within the Constitution gave the government the power to authorize courts-martial of dependents overseas. The answer, unsurprisingly, was no—the rule-making power granted to Congress under Article 1, Section 8, Clause 14 only gave Congress power over members of the "land and naval forces." The wives were not such members, so Clause 14 was inapplicable. As to the Government's argument that the Necessary and Proper Clause combined with Clause 14 to constitute "a broad grant of power," Black scathingly dismissed it.

> [T]he jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, s 8, and, at most, 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, and, more important, acts a deprivation of the right to jury trial and of other treasured constitutional protections. Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14.[308]

Black went on to condemn the entire business as against the tradition of keeping the military subordinate to civilian authority; it was a legislative scheme that the Framers would have feared—with a fear "rooted in history"—recognizing as they did that the army was "dangerous to liberty if not confined within its essential bounds."[309]

> The idea that the relatives of soldiers could be denied a jury trial in a court of law and instead be tried by court-martial under the guise of regulating the armed forces would have seemed incredible to those men, in whose lifetime the right of the military to try soldiers for any offenses in times of peace had only been grudgingly conceded.[310]

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[308] *Reid II*, 354 U.S. at 21.
[309] *Id.* at 23–24.
[310] *Id.* at 23.

The Court's previous precedents—*Toth*,[311] *Ex parte Milligan*,[312] *Duncan v. Kahanamoku*[313]—were manifestations of a "deeply rooted and ancient" opposition to the expansion of military control over civilians.[314] The only way such control could be justified, if at all, would be under Congress's "war powers," granting broad power to military commanders over individuals on the battlefield.[315] Because Japan and England were not areas of active hostilities, Congress's war powers were inapplicable.[316]

Finally—in an indication that Wiener's overtly emotional ending to oral reargument was effective—Black echoed Wiener's phrasing:

> 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. . . . And under our Constitution courts of law alone are given power to try civilians for their offenses against the United States.[317]

As a whole, Black's opinion was critical of military law—he noted that, despite the improvements embodied in the 1950 enactment of the UCMJ, there was no trial by jury, no independent judiciary, no grand jury indictment, and, most damning of all, no indication that the Bill of Rights applied to courts-martial.[318] Applying such a system to the wives of military members was constitutionally impermissible; Clarice and Dorothy must be set free.

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[311] United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).
[312] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (holding that the trial by military tribunal of civilians, where civilian courts were still operating, was unconstitutional)
[313] Duncan v. Kahanamoku, 327 U.S. 304 (1946). *Duncan*, also written by Justice Black, held that military tribunals did not have legal authority to try civilians imprisoned in Hawaii, which had been placed under martial law after the attack on Pearl Harbor, as there was no reason why the civilian courts could not operate. *Id.*
[314] *Reid II*, 354 U.S. at 33.
[315] *Id.*
[316] *Id.* at 33–34.
[317] *Id.* at 40–41.
[318] *Id.* at 35–39; GENEROUS, *supra* note 200, at 179.

C. The Narrowing of the Plurality

Justice Black's opinion swept broadly, but as Justice Frankfurter predicted, it did not command a majority vote. It was narrowed to capital cases by the concurring opinions of Justice Frankfurter and Justice Harlan.

Justice Frankfurter's concurring opinion agreed with Justice Black on the narrow ground that military jurisdiction did not extend to civilian dependents accused of capital offenses in times of peace.[319] He agreed with Justice Black that Congress could only subject to trial by court-martial those persons who were part of the land or naval forces; where he differed from the plurality opinion was on the question of whether civilian dependents could *ever* be viewed in such a light.[320] In Frankfurter's view, this was a question that had to be answered in light of the entire Constitution.[321] In the unique situation before the Court, where two wives had been tried by court-martial for a capital crime, the women were not sufficiently closely related to what Congress "may allowably deem essential" for the regulation of the armed forces to justify the loss of their protections under Article III and the Fifth and Sixth Amendments.[322] He explicitly left open the question of whether the analysis would come out the same had different questions been before the Court. Frankfurter's opinion foreshadowed the consequences and open questions after *Reid II*: whether consular courts would also be constitutionally defective; whether civilian employees could be tried by court-martial, capital or otherwise; and whether the prohibition on courts-martial for civilian dependents extended to non-capital crimes.[323]

Justice Harlan concurred with Justice Frankfurter's view that this holding only embraced capital offenses. As the sole member of the previous majority to vote against the prior holding, Justice Harlan also took time to explain why he had changed his mind.[324] Justice Harlan thought that the plurality opinion had too rigid a view of Congress's rule-making power, and agreed with the Government that the Necessary and Proper Clause supplemented the scope of Clause 14.[325] However, he

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[319] *Id.* at 42–43 (Frankfurter, J., concurring).
[320] *Id.* at 44.
[321] *Id.*
[322] *Id.* at 44–45.
[323] *Id.* at 45.
[324] *Id.* at 65–67 (Harlan, J., concurring).
[325] *Id.* at 71–72.

agreed with the plurality that the Constitution guaranteed the protections of indictment by grand jury and jury trial to citizens charged with capital crimes,[326] but disagreed with the plurality's conclusion that the Constitution in its entirety applied extraterritorially.[327] In Justice Harlan's view, *Ross* and associated precedents put a "wise and necessary gloss" on the Constitution—that the provisions of the Constitution apply overseas only to the extent that "the particular local setting" and "the practical necessities" do not render their application "impractical and anomalous."[328] Unwilling to reach the question of whether Article III and the Fifth and Sixth Amendments apply to all trials by court-martial of civilian dependents overseas,[329] Justice Harlan instead confined his opinion to the holding that the requirements of due process in capital cases required a civilian trial.[330]

D. The Angry Dissent

Justice Clark's vigorous dissent, joined by Justice Burton, castigated the Court for turning loose two women who "brutally killed their husbands" in an opinion which impaired the "long-recognized vitality of an old and respected precedent in our law," and, in a pointed and very prescient critique, for failing to give any guidance to Congress as to how to remedy the problem.[331]

Clark noted that the three separate opinions left it doubtful that Congress could return to a system of consular courts, as the plurality explicitly attacked the rationale underlying *In re Ross*. Other alternatives were similarly unavailing: enacting Article III courts overseas would have such administrative obstacles as to be "manifestly impossible;" enacting a long-arm statute would be "equally impracticable" because trials in this country for misconduct committed abroad would require prohibitive expenditures of money and time. Foreign courts, the only option left, would leave American servicemen and their dependents subject to the "widely varying standards of justice in foreign courts

[326] *Id.* at 74.
[327] *Id.* at 75–76.
[328] *Id.* at 74–75.
[329] *Id.* at 76–77.
[330] *Id.* at 77–78.
[331] *Id.* at 78 (Clark, J., dissenting).

throughout the world."[332] He also argued that there was no principled basis in the Constitution for a distinction between capital and non-capital cases, and the concurring Justices' reliance on such a distinction to "abstain" from ruling with finality on the overall constitutionality of Article 2(11) injected uncertainty into the entire system of military justice.[333]

Clark's dissent, like Frankfurter's concurrence, foreshadowed the "sequels" to *Reid II* which would come before the Court in 1960, and in many ways also foreshadowed the current and continuing controversy over whether civilians may be subjected to military justice not in times of peace, but in times of not-quite-war.

VIII. The Aftermath—"Watch Your Wives, Boys"

A. Release

Public reaction to the decision was decidedly mixed. A Washington Post editorial noted that while the "soundness" of the principle handed down was "scarcely open to question," its application was troubling—the editorial pointed out many of the same problems raised by Justice Clark in his dissent, and wondered if the sound principle had been stretched to the point of producing "unsound consequences."[334]

The soundness of the principle articulated by the Court, however, was open to debate, at least in some circles. One widely syndicated New York columnist lit into the decision with almost comical ferocity—Justice Black was a "former Ku Kluxer" whose opinion came out in favor of condoned murder, and now might be an excellent time to accompany one's husband abroad in order to murder him.

> Madame Kreuger-Smith ran a knife into Col. Aubrey Smith who is just as dead as if he were killed in

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[332] *Id.* at 89. Justice Clark had raised this issue in his note to Justice Brennan, where he described the French system of presumption of guilt and dismissed the courts of Spain as "certainly no protection whatever." Note from Tom C. Clark (Mar. 4, 1957) (on file with the Library of Congress).

[333] *Reid II*, 354 U.S. at 89–90 (Clark, J., dissenting).

[334] Merlo J. Pusey, *Not Since 1930s Has Court Made Such Impact: Court Had Embarrassing Choice*, WASH. POST, June 30, 1957, at E1.

> Kentucky. Madame Covert took an ax, like Lizzie Borden, to her ever-loving and he is just as dead as if he got his head knocked off in New England.[335]

Time Magazine agreed, publishing an editorial which reflected with distaste that this decision proved that Court decisions depended heavily on the personalities and philosophical underpinnings of the various justices, and questioned whether the decision meant that the murdering wives were answerable to no forum at all.

> Discussing the decision with other officers last week, a top Pentagon lawyer joked grimly: "Watch your wives, boys, that's all I can say."[336]

Not every opinion was unfavorable, however—Justice Black received several letters roundly praising *Reid II* as one of the great constitutional decisions.[337] Professor Edmund Cahn of New York University School of Law, in language representative of the type, wrote that "[a] man who has written an opinion like this can feel confident that he has justified his life."[338]

B. What Happened to Clarice and Dorothy?

The women went on to live quiet lives with their families. Clarice was already out of prison on bail when the Supreme Court's decision was handed down. She left for Arizona, where she got a job working on a weekly paper in Coolidge, a small town southwest of Flagstaff. In 1958, she brought a custody suit in Pinal County and was re-awarded custody of her three children.[339] After that, she disappeared—perhaps gratefully—from the public eye.[340] She worked in the advertising section

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[335] Robert C. Ruark, *He Dissents Loudly on Murderesses*, EL PASO HERALD-POST, June 28, 1957, at 1.

[336] *The Supreme Court: No Man's Land*, TIME, Jun. 24, 1957, *available at* http://www.time.com/time/magazine/article/0,9171,825012,00.html.

[337] *See, e.g.*, Letter from Abe Krash to Hugo Black (June 12, 1957) (on file with the Library of Congress).

[338] Letter from Edmund Cahn to Hugo Black (June 12, 1957) (on file with the Library of Congress).

[339] *Woman Slayer Regains Custody of Children*, TUCSON DAILY CITIZEN, Mar. 22, 1958, at 4.

[340] Intriguing glimpses of Clarice and her family crop up in the margins of Arizona papers—she won a cash prize from Safeway Grocery in 1962. *PLUS Hundreds of Cash*

of the Arizona Sun in Flagstaff—quite successfully[341]—started going by the name "Kit," played bridge, sent her boys to summer camp, and took family vacations.[342] A woman with her name and birth date appears in the Social Security Death Index in 1992.[343]

Dorothy was released from prison on June 20, 1957;[344] sadly, her mother, Grace, died before she could see her daughter regain her freedom.[345] Dorothy was released into the custody of Brigadier General Richmond and his wife;[346] they accompanied her to San Antonio, where her father had been living with Tooey and Sharon.[347] Tooey entered the Air Force; Sharon married a sheriff and settled in Bee County, Texas.[348] Dorothy spent some time in a mental hospital getting treatment for her alcohol addiction, but eventually took some secretarial courses and began, very tentatively, to support herself.[349] She lived with her father until his death in 1962,[350] and lived quietly in San Antonio until her death in 1991.[351]

Adam Richmond died of cancer in 1959, remaining to the last an active member of the community, having supported the Echo Lake Park association for disadvantaged children until his death.[352] Frederick Wiener continued to work to constrain the government's ability to court-

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Winners!, ARIZ. DAILY SUN, Nov. 27, 1962, at 16. Her son Barry took part in a third and fourth-grade Christmas Pageant in 1958. *Marshall Third and Fourth Grades Present Program*, ARIZ. DAILY SUN, Dec. 19, 1958, at 3.

[341] An advertisement she prepared for Cheshire Motors won national recognition. *News and Views: Ad Wins Recognition*, ARIZ. DAILY SUN, July 13, 1961, at 1.

[342] Clarice, working in the *Sun*'s advertising department and going by "Kit," took her three children on vacation in 1960. *Purely Personal*, ARIZ. DAILY SUN, Aug. 3, 1960, at 5. Her son, Bruce, was a boy scout and went to summer camp. *Purely Personal*, ARIZ. DAILY SUN, Aug. 16, 1961, at 5. She also enjoyed bridge. *Flagstaff Pair Wins Duplicate Bridge Game*, CASA GRANDE DISPATCH, Dec. 4, 1963, at 7.

[343] Social Security Administration, Clarice B. Covert, Social Security Death Index, Master File.

[344] *Prison Frees Daughter of Krueger*, WASH. POST, June 20, 1957, at A3.

[345] *Mrs. Krueger Succumbs*, SAN ANTONIO EXPRESS, May 14, 1956, at 1.

[346] *Prison Frees Daughter of Krueger*, *supra* note 344, at A3.

[347] *Cf. Eve of Trial: Widow of Colonel Calm*, SAN ANTONIO SUNDAY LIGHT, Jan 4. 1953, at 1.

[348] Holben Interview, *supra* note 126.

[349] *Id.*

[350] *Id.*

[351] Dorothy Jane Kruger, 22 May 1991, Bexar County, Texas Death Index, 1964–1998. The record misspells her name, but it is likely this is the same woman as Bexar County contains San Antonio.

[352] Victoria Stone, *Gen. Richmond, County Leader*, WASH. POST, Dec. 3, 1959, at B2.

martial civilians—in 1960, he argued *United States ex rel. Kinsella v. Singleton* pro bono. He was active in military justice and constitutional law until his death in 1996.[353] Of all of the parties involved, he probably had the greatest grasp of what was at stake during the litigation, and could uniquely appreciate the enormous impact the case and all of its complexities had on military and international law.

C. Later Cases and Later Laws

As Justice Clark anticipated, the questions left open by the concurring opinions of Justice Frankfurter and Justice Harlan resurfaced a few years later. A series of cases raised and answered the question of whether the prohibition against military trials of civilians in time of peace extended to employees, and whether it applied to non-capital offenses.[354] After 1960, the authority of the government to order the courts-martial of civilians was clear—whether for capital or non-capital offenses, against employees or dependents, the Constitution absolutely barred the application of military justice against civilians *in times of peace*.[355] The Court never considered the scope of the power to court-martial civilians in times of war.

Then came the CMA case of *United States v. Averette*, in which a civilian contractor stationed at Long Binh, Vietnam, challenged his conviction for larceny before a court-martial under Article 2(10), which granted jurisdiction over all persons accompanying the force in the field

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[353] *Tribute to Colonel Frederick Bernays Wiener, 1906–1996*, 46 M.J. 204 (1996).

[354] In a display of stunning irony, the majority opinion in each of these cases was authored by Justice Clark, who wrote that the Court's decision to deny jurisdiction was controlled by the holding of *Reid II*. United States *ex rel.* Kinsella v. Singleton, 361 U.S. 234, 243–44 (1960) (civilian dependent, non-capital offense); Grisham v. Hagan, 361 U.S. 278, 280 (1960) (civilian employee, capital offense); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 283–84 (civilian employees, non-capital offenses).

[355] Interestingly, Justice Harlan strongly dissented in *Singleton* and *Guagliardo* (the non-capital cases), but concurred in *Hagan* (a capital case), arguing that the Court was misconstruing the rule laid down in *Reid II*—in his mind, the Court was reading Congress's power to make rules for land and naval forces too narrowly. When combined with the Necessary and Proper Clause, the rule-making power was broadened to reach those with a close enough relationship to the military that Congress deems it necessary to give the military jurisdiction over their offenses. McElroy v. United States *ex rel.* Guagliardo, 80 S. Ct. 311, 315–16 (1960) (Harlan, J., dissenting). The key distinguishing factor for Justice Harlan was whether the crime was noncapital, in which a closely related civilian would be amenable to courts-martial, or capital, in which a closely related civilian would *not* be so amenable. *Id.*

in time of war.[356] The CMA strictly construed the definition of "in time of war" and invalidated the court-martial because Congress never formally declared war in Vietnam.[357] This was the last word on the subject for thirty-six years.

The world has become more complicated since *Averette*. Civilian contractors are employed in ever-increasing numbers to fill the gaps left after a series of reductions in troop strength in the U.S. military.[358] Since the early 1990s, the role of civilian contractors has expanded to all areas of military operation—logistical support, training, and security,[359] and the numbers are enormous—the military recently estimated 104,100 such contractors in Afghanistan alone.[360] The question of how best to address contractor misconduct has embroiled legal scholars for years.[361] There have been two major attempts by Congress to address the problem—as might be expected, both have been somewhat controversial.

1. The Military Extraterritorial Jurisdiction Act[362]

The Military Extraterritorial Jurisdiction Act of 2000, or MEJA, was signed into law on November 22, 2000. Motivated in part by a complaint to Senator Jeff Sessions that a crime committed by a military

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[356] United States v. Averette, 41 C.M.R. 363, 365 (1970).
[357] *Id.*
[358] P.W. Singer, *Outsourcing War*, FOREIGN AFF., Mar./Apr. 2005, at 120, *available at* http://www.foreignaffairs.com/articles/60627/p-w-singer/outsourcing-war. After the first Gulf War, the Department of Defense reduced the size of the Armed Forces by thirty percent. *See* Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 374 (2004).
[359] *See* DEBORAH D. AVANT, THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY 1 (2005).
[360] Justin Elliot, *How Many Private Security Contractors Are There in Afghanistan? The Military Gives Us a Number*, TPMMUCKRAKER (Dec. 2, 2009), http://tpmmuckraker.talkingpointsmemo.com/2009/12/so_how_many_private_contractors_are_there_in_afgha.php.
[361] *See, e.g.*, P.W. Singer, *War, Profits, and the Vacuum of Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004); J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155 (2005); Jonathan Finer, *Holstering the Hired Gun: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT'L L. 259 (2008); Laura A. Dickinson, *Military Lawyers, Private Contractors, and the Problem of International Law Compliance*, 42 N.Y.U. J. INT'L L. & POL. 355 (2010).
[362] Military Extraterritorial Jurisdiction Act (MEJA) of 2000, Pub. L. No. 106-523, 114 Stat. 2488.

dependent on a base in Germany had gone unpunished,[363] MEJA provides a statutory basis for asserting federal jurisdiction over felony-level offenses committed by individuals "employed by or accompanying the Armed Forces" anywhere abroad.[364] The MEJA's drafters intended it to fill the gap between the reach of U.S. law—which often lacks an extraterritorial component—and the willingness, or lack thereof, of host nations to prosecute in their own justice systems.[365] As a gap-filling measure it has been used successfully in approximately thirty-five prosecutions: both military dependents and civilian employees have been convicted under MEJA for crimes as varied as possession of child pornography, fraud, and murder.[366]

While useful, MEJA is not without its detractions. Commentators point to a troubling lack of clarity on its jurisdictional reach, as well as the practical problems of investigating and prosecuting crimes which occurred thousands of miles from the federal courthouse.[367] These concerns primarily focus on MEJA's applicability to civilian contractors employed in contingency operations such as Iraq or Afghanistan.[368] By its terms, the ability of MEJA to reach certain classes of contractors is somewhat limited—MEJA encompasses only individuals employed by or supporting the mission of the Department of Defense, which has the practical effect of insulating government contractors working in support

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[363] For an account of MEJA's passage, see Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55, 80 (2001).

[364] *See* 18 U.S.C. §§ 3261(a)(1), 3267(1)(A) (2006). The "accompanying the force" language applies to all military dependents, while the "employed by" language has been limited to those persons employed by the Department of Defense.

[365] An oft-cited example is the 1990s Dyncorp scandal, where employees of the company providing logistical services to the Army in Bosnia were accused of sex trafficking in the purchase of women and young girls from local brothels. A Criminal Investigation Division investigation terminated when it became clear that the United States lacked a long-arm statute under which to prosecute, and the Bosnian government likewise insisted that it too lacked the legal authority to act. *See* Robert Capps, *Crime Without Punishment*, SALON (June 27, 2002, 5:03 PM), http://www.salon.com/2002/06/27/military_10/singleton.

[366] *MEJA Statistics as of June 30, 2010*, U.S. DEP'T OF DEF., http://www.dod.gov/dodgc/images/meja_statistics.pdf (last visited July 27, 2012).

[367] Johnathan Finer, Recent Developments, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE INT'L L. J. 259, 263 (2008).

[368] *Id.*

of other federal agencies, such as the State Department, from its reach.[369] Additionally, MEJA does not apply to individuals who are citizens of or "ordinarily resident" in the host nation.[370] However, while commentators have questioned MEJA's ability to adequately address contractor misconduct,[371] its utility as a tool for prosecuting military dependents has yet to be seriously challenged. Indeed, the first recorded prosecution under MEJA was a woman who might be seen as the spiritual heir of Clarice and Dorothy—Latasha Arnt stabbed her Air Force non-commissioned officer husband on Incirlik Air Base in Turkey in 2003.[372] Convicted of voluntary manslaughter in the Los Angeles District Court, Arnt was sentenced to eight years in prison.[373] Although the Ninth Circuit later overturned her conviction because the trial judge failed to give the jury an involuntary manslaughter instruction, MEJA itself was not questioned by the court.[374] Latasha Arnt pled guilty rather than face a third trial and was sentenced to time served in September 2007.[375]

The recognition that the intended gap-filler itself left a sizable enforcement gap has led to several attempts to either amend MEJA or enact a new law which would extend jurisdiction over all federal

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[369] Margaret Prystowsky, *The Constitutionality of Court-Martialing Civilian Contractors in Iraq*, 7 CARDOZO PUB. POL'Y & ETHICS J. 45, 56–57 (2008). This problem came to a head in 2007, when DOJ failed to prosecute under MEJA any of the contractors involved in the deaths of seventeen Iraqis in what came to be known as the Nissour Square shooting. Finer, *supra* note 367, at 259.

[370] 18 U.S.C. §§ 3267(1)(C), 3267(2)(C).

[371] *See, e.g.*, Brittany Warren, Note, *"If You Have a Zero-Tolerance Policy, Why Aren't You Doing Anything?": Using the Uniform Code of Military Justice to Combat Human Trafficking Abroad*, 80 G.W.U. L. REV. 1255, 1267–70 (2012); Margaret Maffai, Comment, *Accountability for Private Military and Security Company Employees That Engage in Sex Trafficking and Related Abuses While Under Contract with the United States Overseas*, 26 WIS. INT'L L.J. 1095, 1116 (2009).

[372] United States v. Arnt, 474 F.3d 1159 (9th Cir. 2007).

[373] *Id.*

[374] *Id.* This is not to say that MEJA has not been subjected to constitutional challenges. Several defendants have argued that MEJA is unconstitutional because Congress lacked the power to enact it, or that it was unconstitutional as applied to them, but as of yet these arguments have been unpersuasive to the federal courts. *See, e.g.*, United States v. Brehm, No. 1:11-CR-11 (E.D.Va Mar. 30, 2011) (rejecting a challenge to MEJA by a South African national contractor employed by DOD in Afghanistan); United States v. Green, 654 F.3d 637 (6th Cir. 2011) (rejecting a challenge to MEJA by a former servicemember convicted of rape and murder in Mahmoudiyah, Iraq).

[375] Richard K. De Atley, *Moreno Valley Woman's Sentence for Killing Husband Is Time Served*, PRESS ENTERPRISE, Sept. 12, 2007.

contractors abroad.[376] Congress soon enacted another, much more problematic, method for trying civilians accompanying the force.

2. Article 2(a)(10) and United States v. Ali

In 2006, Congress "clarified" what is now Article 2(a)(10) by amending its language—Article 2(a)(10) confers court-martial jurisdiction over civilians accompanying the force in times of declared war *or contingency operation*.[377] The Court has never questioned the power of Congress to court-martial civilians in times of war—indeed, even Justice Black's plurality opinion in *Reid II* acknowledged that "the extraordinary circumstances present in an area of actual fighting" have been considered sufficient to confer military justice jurisdiction over certain civilians present in those areas.[378] The question now becomes whether any of Congress's enumerated powers allow for the extension of jurisdiction embodied in the amended Article 2(a)(10). The term "contingency operation" is defined broadly in the U.S. Code, encompassing not only wars-by-any-other-name such as Iraq and Afghanistan but also, *inter alia*, deployments during national emergencies.[379] Commentators such as law professor Steve Vladeck have criticized this clarification as creating a slippery slope for application of military justice against civilians in violation of both the Constitution and the Court's *Reid* precedents.[380]

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[376] In response to public perceptions that MEJA was insufficient to effectively combat contractor misconduct, the House of Representatives passed the MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. (2007), which would have extended MEJA's reach to all civilian contractors operating in support of contingency operations as well as created Theater Investigative Units under the FBI to investigate allegations of criminal misconduct by such contractors. *H.R. 2740: MEJA Expansion and Enforcement Act of 2007*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=h110-2740 (last visited July 27, 2012). The bill died in the Senate. *Id.* Another bill, known as the Civilian Extraterritorial Jurisdiction Act, S. 1145, 112th Cong. (2011), is currently awaiting vote in the Senate. *See S.1145:CEJA*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=s112-1145 (last visited Mar. 14, 2012). The CEJA would grant U.S. courts jurisdiction over crimes committed by all federal contractors abroad, not merely ones employed by or supporting the DOD. *Id.*

[377] John Warner National Defense Authorizations Act for 2007, Pub. L. No. 109-364; 120 Stat. 2083, 2217; H.R. 5122, 109th Cong. (2007) (enacted) (emphasis added).

[378] Reid v. Covert, 354 U.S. 1, 33–34 (1957).

[379] 10 U.S.C. § 101(a)(13) (2006).

[380] Steve Vladeck, *Can The Military Court-Martial Civilian Contractors?: Reflections on the Oral Argument in* United States v. Ali, LAWFAREBLOG (Apr. 12, 2012, 12:05 AM).

The only case thus far to successfully subject Article 2(a)(10) to civilian court review is currently working its way through the appellate process.[381] On February 23, 2008, Alaa Mohammed Ali, a dual Iraqi-Canadian citizen[382] working as an interpreter for a military police unit in Iraq, stabbed another interpreter during a verbal altercation and was brought before a general court-martial under Article 2(a)(10)'s grant of jurisdiction.[383] At the time of the incident, Ali had been employed by L3 Communications as a linguist in support of L3's contract with Intelligence and Security Command, but L3 terminated his employment following the preferral of charges against him.[384] In a pre-trial motion, Ali challenged both the exercise of jurisdiction over him particularly, arguing that jurisdiction was lacking because his employment with L3 was terminated before trial, as well as Congress's power to expand Article 2(a)(10) generally.[385] After the military judge rejected both arguments and denied his motion to dismiss,[386] Ali pled guilty and was sentenced to six months confinement.[387] Thereafter, the Judge Advocate General certified the case for review to the Army Court of Criminal Appeals (ACCA).[388]

A three-judge ACCA panel unanimously upheld the constitutionality of the amended Article, distinguishing Supreme Court precedent by pointing out that prior exercises of court-martial jurisdiction occurred during times of peace or without an authorizing

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[381] Other courts-martial were attempted against civilian contractors following Ali's conviction. In at least two of those cases, the pending actions were challenged via habeas proceedings in federal court, but the military "agreed not to pursue the UCMJ charges against the employee before the court could rule on the habeas petitions." *Government Contracts Advisory—Court to Consider Constitutionality of Military Jurisdiction Over Civilian Contractor Employee Misconduct*, STEPTOE & JOHNSON, Nov. 23, 2011, *available at* http://www.steptoe.com/publications-newsletter-346.html.

[382] As an Iraqi citizen, Ali could not have been tried under MEJA because of the exception for host-country nationals. *See supra* note 370.

[383] United States v. Ali, slip op., No. 12-0008/AR, at *2 (C.A.A.F. July 18, 2012).

[384] *Id.* at *4–5.

[385] *Id.* at *7–8.

[386] The military judge relied on a World War II era case to hold that Ali's "relationship with his civilian employer is not determinative" of his status as a person accompanying the force. *Id.* at *7 (citing United States v. Perlstein, 151 F.2d 167, 169–70 (3d Cir. 1945)). In rejecting Ali's argument that Congress lacked the power to expand the jurisdictional reach of the UCMJ, the military judge found that Congress properly enacted Article 2(a)(10) pursuant to its power to make rules governing the land and naval forces under Article I, Section 8, Clause 14 of the U.S. Constitution. *Id.*

[387] *Id.* at *2.

[388] *Id.* at *9.

statute.[389] Finding that the exercise of jurisdiction under Article 2(a)(10) was appropriately limited by the dual requirements of a declared war or contingency operation, and a person accompanying the force in the field, ACCA affirmed Ali's conviction.[390]

The Court of Appeals for the Armed Forces (CAAF) granted review, and on July 18, 2012, also affirmed Ali's conviction.[391] Before the court, Ali renewed his arguments that exercise of UCMJ jurisdiction was improper both as to him in particular, and in general as an invalid action by Congress.[392] In writing for the majority, Judge Erdmann first found that Article 2(a)(10) applied to Ali because he was, in a contingency operation, serving with the Army[393] "in the field," defined as requiring an area of actual fighting.[394] Because Ali met the statutory requirements of Article 2(a)(10), court-martial jurisdiction could be properly exercised over him.[395] Judge Erdmann then turned to the more difficult question, which was whether Article 2(a)(10) itself violated the Constitution. This required a two-prong inquiry—first, whether Article 2(a)(10) was unconstitutional as-applied because it violated Ali's Fifth and Sixth Amendment rights, and second, whether Article 2(a)(10) was unconstitutional as exceeding Congress's enumerated powers. In

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[389] United States v. Ali, 70 M.J. 514, ARMY 20080559, slip op. at 2 (A. Ct. Crim. App. 2011).
[390] *Id.*
[391] United States v. Ali, slip op., No. 12-0008/AR, at *2 (C.A.A.F. July 18, 2012).
[392] This later point led to a memorable exchange during oral argument. Ali's appellate counsel argued that Congress's war powers were inapplicable to the Iraq conflict, and thus unavailable as a basis for enacting the amended article, because Congress had not formally declared war against Iraq. Judge Stucky responded: "Well, what were we doing over there [in Iraq] then? And in Korea? Dancing down the primrose path?" Mike Hanzel, *CAAF Outreach Argument in Seattle:* United States v. Ali, No 12-0008/AR, CAAFLOG (Apr. 6, 2012).
[393] In finding that Ali was serving with the Army, Judge Erdmann pointed to the military judge's findings of fact, including that Ali wore a uniform with a U.S. Army nametape on it, wore body armor and a helmet like the soldiers in the squad to which he was assigned, and was under the operational control of the squad leader. *Ali*, No 12-0008/AR, slip op. at *17.
[394] Ali had argued that "in the field" must be construed narrowly to require both a contingency operation and the practical unavailability of a civilian court. *Id.* at *18. The Court of Appeals for the Armed Forces found that unpersuasive, instead adopting the definition advanced by the Government, taken from the Cold War-era case United States v. Burney. 6 C.M.A. 776, 787–88 (1956). The majority also found his "practical unavailability" argument unavailing because there was no available Article III alternative—as a national of the host-nation, Ali could not have been tried under MEJA. *Ali*, No 12-0008/AR, slip op. at *34.
[395] *Ali*, No 12-0008/AR, slip op. at *19–20.

rejecting Ali's as-applied challenge, the majority distinguished *Reid II* by finding the concerns raised in that case and its progeny inapplicable to Ali—the protections of the Fifth and Sixth Amendment categorically did not apply to him because he was not an American citizen and was neither present in the United States nor had he developed "substantial connections" to the United States prior to the trial.[396] In a brief portion of the opinion, the majority then agreed with Ali's argument that Congress lacked the power to grant court-martial jurisdiction over civilians under Article I, Section 8, Clause 14 because that clause only gave Congress rule-making authority over actual members of the military, but found this argument to be "unpersuasive" because Congress could properly grant such jurisdiction pursuant to its war powers.[397]

These later two points were a source of contention in the concurrences. Chief Judge Baker wrote separately to criticize the majority's broad assertion that the Fifth and Sixth Amendments did not apply to Ali given the "more nuanced" approach to the extraterritoriality of the Constitution used by the Supreme Court in *Boumediene v. Bush*.[398] His concurrence also orbited a different center of gravity than did Judge Erdmann's majority opinion; Chief Judge Baker focused on the "structural question" of whether Congress has the power *as a threshold matter* to grant jurisdiction over civilian contractors accompanying the force.[399] In a careful and considered analysis, Chief Judge Baker concluded that in the narrow context of the case before the court, a combination of Article I powers—"the Rules and Regulations Clause, the war powers, and the Necessary and Proper Clause"—authorized the court-martial of this particular noncitizen contractor.[400] Judge Effron's

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[396] Here the majority was quoting *United States v. Verdugo-Urquidez*, a Supreme Court case where the Court found that the Fourth Amendment's protections did not apply to a noncitizen whose residence was searched without a warrant in Mexico. 494 U.S. 259, 263 (1990). Judge Erdmann's opinion also reviewed a series of Supreme Court cases which concluded that the protections of the Fifth and Sixth Amendments do not apply to aliens outside of the United States. *Ali*, No 12-0008/AR, slip op. at *29 (citing Balzac v. Porto Rico, 258 U.S. 298 (1922) (holding right to jury trial inapplicable in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914) (Fifth Amendment grand jury provision inapplicable in the Philippines); Dorr v. United States, 195 U.S. 138 (1904) (jury trial provision inapplicable in the Philippines)). Ali was not a resident of the United States, nor were his connections with the United States—predeployment training at Fort Benning and employment by a U.S. company—sufficient in light of *Verdugo-Urquidez*. *Id.* at 30.

[397] *Ali*, No 12-0008/AR, slip op. at *32–33.

[398] *Id.* at *2, *21–22 (Baker, C.J., concurring in part and in the result) (citing Boumediene v. Bush, 553 U.S. 723 (2008)).

[399] *Id.* at *3.

[400] *Id.* at *16.

concurrence was similarly narrowly drawn; court-martial jurisdiction over Ali was proper solely because there was no available Article III forum, as MEJA did not apply to Ali as a host-country national.[401] Noting that the differences between courts-martial and Article III criminal trials are issues of constitutional structure rather than due process, Judge Effron pointed out that while courts-martial comport with "general notions of fairness," the Constitution mandates a particular method of trial with which courts-martial do not comply.[402] For that reason, the case was not, in his view, the appropriate vehicle for assessing the constitutionality of Article 2(a)(10) in other contexts.

IX. Conclusion

Now that the military appellate courts have weighed in on the subject, the case will almost certainly end up before the Supreme Court. Even then, *Ali* is unlikely to provide a definitive answer to the question of civilians and courts-martial given the unique facts of the case highlighted in the CAAF concurrences. It is an open question whether a civilian otherwise subject to MEJA could ever be permissibly subjected to court-martial. While some commentators have argued that Congress lacks the power to subject civilians accompanying the forces in hostilities abroad to courts-martial,[403] it is not entirely clear that history and precedent would agree.[404] Given the complexities of the modern battlefield and the cautious skepticism courts have traditionally employed when considering questions of military jurisdiction over civilians, this is an issue which deserves—and will certainly receive—careful scrutiny going forward.

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[401] *Id.* at *5 (Effron, J., concurring in part and in the result).
[402] *Id.* at *10.
[403] O'Connor, *supra* note 24.
[404] It is important to keep in mind that the cases which would appear to articulate a blanket prohibition on the court-martial of civilians—*Toth*, *Reid II*, and *Singleton*—all dealt with attempts to court-martial individuals during a time of peace, and did not address individuals serving, as modern civilian contractors arguably do, as proxies of their military counterparts in areas of active hostilities. A civilian dependent, however intimately connected to the service, is not part of the armed forces because he or she does not serve a historically military function in a hostile area. It is far more difficult to argue that the civilian contractor providing direct logistical or operational support to combat operations in Afghanistan is not "part of" the armed forces as that phrase was traditionally understood.

As it stands, despite the broad language of the plurality opinion, *Reid II* created almost as many questions as it answered. The question of court-martial jurisdiction over civilians is as troubling today as it was sixty years ago. The problems of *Reid II* and its progeny are unlikely to resolve themselves any time soon.