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The Treaty Making Power and the Extraterritorial Effect of the Constitution: Reid v. Covert and the Girard Case

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Two major cases concerning the relationship of treaties to the United States Constitution were decided by the Supreme Court in 1957: Reid v. Covert¹ and Wilson v. Girard.² While these cases appear to answer some long debated questions in the field of treaty law, they create a host of new problems which still await resolution. In the preparation of this article it had been hoped that consideration of these two cases in the light of the precedents would permit some useful generalizations concerning the law in this field. However, it must be concluded that the law as to the relationship of treaties to the Constitution is still too much in the formative stages to allow any really definitive treatment. Thus, this article will do no more than attempt to analyze the relevant cases and make some suggestions as to the trend which future decisions ought to take.

I. The Recent Cases

Unquestionably, the more important of the two cases was Reid v. Covert. This case appears to have established the principle that treaties are subject to constitutional limitations, even though there was no opinion in which a majority of the Court concurred. The point was squarely made only in the opinion of Justice Black, which was concurred in by three other Justices.³ Although neither the two concurring Justices nor the two dissenters⁴ discuss this issue, they do not take exception to such a conclusion, and the proposition seems inherent in the concurring opinions of Justice Frankfurter⁵ and Justice Harlan.⁶

The question as to the relationship of treaties and the Constitution perhaps arose from the peculiar wording of Article VI, under which the laws of the United States are required to be made in pursuance of the Constitution in order to be the supreme law of the land, whereas treaties are not explicitly so limited.⁷ Concern over

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¹Member of the New York and District of Columbia Bars.
³354 U.S. at 524 (1957).
⁴Justice Frankfurter and Justice Harlan concurred; Justice Clark and Justice Burton dissented; and Justice Whittaker did not participate.
⁵354 U.S. at 41.
⁶Id. at 65.
this question was aggravated by the decisions in *Missouri v. Holland* and *United States v. Pink*. In *Missouri v. Holland*, the Court rejected a constitutional attack on a treaty with Canada for the protection of migratory birds. This attack was based on the theory that the treaty was contrary to the tenth amendment since the protection of migratory game was not one of the powers granted to the federal government. In the *Pink* case, an executive agreement was held to overrule a state determination of the ownership of assets, with a situs within the state, of a nationalized Russian corporation.

In *Reid v. Covert*, Justice Black explained that the peculiar wording of Article VI was intended only to validate "agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War..." and not to relieve all treaties of the constitutional limitations. He distinguished *Missouri v. Holland* on the ground that absent some specific constitutional prohibition, the treaty making power represents a delegation by the states and the people to the national government so that the tenth amendment is no barrier. The *Pink* case was not discussed.

Thus, *Reid v. Covert* has laid to rest the contention that treaties and executive agreements are not subject to any constitutional limitations whatever, and therefore endanger the American constitutional system. But with this problem solved, the case proceeds to raise two further difficulties, and these it copes with much less satisfactorily. These two problems are: (1) the extent to which the Constitution applies beyond the boundaries of the United States, a problem that obviously becomes acute as to treaties and executive agreements regarding American interests overseas; and (2) the extent to which the grant of treaty-making power may *proprio vigore* validate a treaty which conflicts with some other portion of the Constitution. It is with these two problems that the rest of this paper will be concerned.

8. 252 U.S. 416 (1920).
9. 315 U.S. 203 (1942). This concern was undoubtedly the source of much agitation for the Bricker Amendment.
10. Reserving to the states or the people all power not delegated to the national government.
12. In *Missouri v. Holland*, Justice Holmes also dwelt on the exceedingly transitory nature of a state's interest in migratory birds. 252 U.S. at 434. Today it could not seriously be denied that the commerce clause provides ample basis for federal action, even absent the treaty power.
13. The case is discussed at notes 93-100 infra, and related text.
15. U.S. Const. art. II, § 2, cl. 2.
As to the first of these, *Reid v. Covert* re-opened to dispute an area of constitutional interpretation whose broad outlines, at least, had been considered firmly established. For until the decision in *Reid v. Covert*, commentators had generally agreed, on the basis of more than ample precedent,\(^{16}\) that only those portions of the Constitution involving fundamental human liberties, perhaps those applied to the states under the due process clause of the fourteenth amendment,\(^ {17}\) were applicable beyond the "incorporated territories\(^ {18}\) of the United States.\(^ {19}\) However, four of the eight Justices sitting in *Reid v. Covert* rejected this approach:

> While it has been suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant in logic or otherwise for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.\(^ {20}\)

And, as will be developed subsequently, the question as to whether the grant of the treaty-making power could overcome other provisions of the Constitution was almost totally ignored.

The decision in *Reid v. Covert* naturally increased concern as to the validity of provisions in various agreements, relating to the stationing of American forces overseas, providing under certain circumstances for trial by the receiving country of American servicemen and others accompanying the American armed forces.\(^ {21}\) These doubts were quickly dispelled by *Wilson v. Girard*, in which the Court upheld against constitutional attack the waiver by the United States pursuant to Article XVII of the Japanese Administrative Agreement of its claim to jurisdiction over a member of

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16. See notes 30-57 *infra*, and related text.
the United States armed forces and his surrender to the Japanese for trial in a Japanese civilian court. The Court held that there was no "constitutional . . . barrier to the provision as applied here." Since Girard was an enlistee rather than a draftee, the argument could not be made that the government through the selective service process was compelling a citizen to subject himself to judicial procedures which did not conform to the safeguards established by the Constitution. The failure of the Court to rely on this point, and the unanimity of the opinion seem to make it highly unlikely that this distinction would produce a contrary result in a case involving a draftee.

While the Girard case and the congressional attacks on status of forces agreements have concentrated on the provisions dealing with criminal jurisdiction, the questions of the effect of the Constitution on treaties and executive agreements and its extraterritorial applicability bear on other aspects of the status of forces

22. Article XVII of the Japanese Administrative Agreement incorporates by reference the NATO Status of Forces Agreement provisions dealing with criminal jurisdiction.

23. 354 U.S. at 530.

24. See Appendix A to the Opinion of the Court, 354 U.S. 531 at 543.

25. While numerous safeguards are provided by the status of forces agreements (see NATO Status of Forces Treaty Article VII, Sections 8, 9), there is no guarantee of a grand or petit jury or of the privilege against self-incrimination or a public trial. The first three are specifically said in Palko v. Connecticut not to be "of the very essence of a scheme of ordered liberty" and are therefore not guaranteed by the fourteenth amendment in trials by states. Palko v. Connecticut, 302 U.S. 319, 323-26 (1937), and cases there cited. But perhaps to some extent Palko, as well as Adamson v. California, 332 U.S. 46 (1947) and Twining v. New Jersey, 211 U.S. 78 (1908), have impliedly been overruled by Slochower v. Board of Higher Education, 350 U.S. 551 (1956). However, the fact that a result like Slochower was reached in Konigsberg v. State Bar, 353 U.S. 252 (1957), where the privilege was not claimed indicates that Slochower depends on other factors. Palko does not discuss the right to public trial.

26. Any argument that Girard as an enlistee had waived his rights would seem equally applicable to the dependent who voluntarily accompanied her serviceman husband overseas in Reid v. Covert.


28. See NATO Status of Forces Treaty, Article VIII and Japanese Administrative Agreement, Article XVIII. The issue may also be relevant to international agreements entered into by the United States for settlements of claims of American nationals against foreign governments as a result of nationalization or expropriation; e.g., Agreement between the Governments of the United States of America and the Federal People's Republic of Yugoslavia Regarding Pecuniary Claims of the United States and Its Nationals, July 18, 1948, T.I.A.S. No. 1803. See Oliver, Executive Agreements and Emanations from the Fifth Amendment, 49 Am. J. Int'l L. 362 (1955). Until passage in 1957 of amendments to the Fair Labor Standards Act, 52 Stat. 1060 (1938), as amended, 29 U.S.C. §§ 201-219 (1952), provisions in status of forces agreements covering conditions of employment of receiving country nationals by the visiting forces might also have created constitutional questions. See Green, op. cit. supra note 19, at 806-07.
agreements, notably those dealing with settlement of claims. These constitutional problems are illustrated by a case in the Court of Claims, *Seery v. United States*. A castle owned by an American national was utilized during the occupation of Austria by the United States Army as an officers' club. On the termination of the American occupation, the United States made a lump sum payment to the government of Austria for all claims arising out of damage to or use of Austrian property during the occupation. It was agreed that all claimants could proceed only against the Austrian Government and not against the United States. The Court of Claims held that this agreement was contrary to the just compensation clause in the fifth amendment, and that therefore the agreement was ineffective to bar the plaintiff from maintaining her claim against the United States.

That this holding of the Court of Claims is not limited to claimants who are American nationals is shown by an earlier Court of Claims case, *Turney v. United States*. In this case the United States had mistakenly sold as surplus some classified radar equipment in the Philippines. When the vendee sought to re-sell the equipment to the Chinese Nationalist Government, the United States induced the Philippine Government to place an export embargo on the equipment so that the seller could only deliver it to the United States. At the time of this action and of the delivery of the property to the United States, title to the property was in a Philippine corporation. Nonetheless the Court of Claims held that the action of the United States Government, including its action in inducing the Philippine Government to impose the export embargo, constituted a taking requiring payment by the United States of just compensation under the fifth amendment.

II. The Historical Precedents

In view of the contemporary importance of the extraterritorial applicability of the Constitution and its evident relation to treaties and executive agreements entered into by the United States, it would be well to consider the long line of cases dealing with this subject which form the background of the equally divided Court in the *Covert* case. As will be seen, these cases also shed some light on the extent to which the treaty making power may provide an affirmative basis for upholding a treaty under constitutional attack.

The question of the geographical application of the Constitution first arose with respect to the territories in the American con-
tinent. On some occasions the Court held that the Constitution was squarely applicable; at other times it held that the Constitution did not apply directly to the territories, although its provisions for protection of fundamental personal rights were applied by inference. As was noted in American Publishing Co. v. Fisher, statutory provisions for government of the territories provided for extension to the territories of the laws of the United States or the Constitution and laws of the United States so that the statements in favor of automatic applicability of the Constitution, absent such statutes, were generally dicta.

At about the same time that the Court was approaching the last of the cases concerning the western territories it began to be faced with problems relating to the applicability of the Constitution beyond the continental United States. The first of these cases, and one that was to become a critical precedent in Reid v. Covert, was In re Ross. This case involved an attack on constitutional grounds on a criminal proceeding before an American consul in Japan pur-

31. The issue seems first to have appeared in American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828). In this case the Court held that Article IV, Section 3, authorizing the Congress to govern the "Territory or other Property" of the United States authorized the action of Congress in establishing in Florida after its cession by Spain courts not based on Article III of the Constitution. The subject of constitutional application to the territories became a major political issue prior to the Civil War. While two somewhat differing interpretations of the matter are presented in Downes v. Bidwell, 182 U.S. 244, 275-76, 295-97 (1901), in general it seems fair to state that, perhaps surprisingly, it was the civil libertarians who in general opposed automatic extension of all the provisions of the Constitution to the territories. The reason for this situation was that those who favored the extension of slavery to the territories contended that the Constitution recognized slavery and that, since the Constitution was, in their view, applicable to the territories, Congress could not by legislation forbid slavery in any of the territories, and thus deprive the inhabitants of their property interest in slaves. The Dred Scott case, Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), appeared to decide the issue in favor of the theory that the Constitution of its own force applied to all territory acquired by the United States since the time of the adoption of the Constitution. Insofar as the Missouri Compromise may be said to have been implementing the Louisiana Purchase, the Dred Scott decision has been said to be an early recognition of the fact that treaties are subject to constitutional limitation. See, Cowles, op. cit. supra note 14, at 176. However, this expression of opinion by the Court must be classed as dictum, and it was hardly very popular authority after the Civil War. As a result, the problem of applicability of the Constitution to the Western territories continued to be agitated in numerous cases coming before the Court.

32. E.g., Thompson v. Utah, 170 U.S. 343 (1898).
33. Mormon Church v. United States, 136 U.S. 1, 44 (1890). Perhaps this inference was drawn from the principle of international law which the Court had enunciated in other cases to the effect that, when jurisdiction over territory passes from one sovereign to another, the prior law remains in effect except to the extent contrary to fundamental personal rights. Chicago, R.I. & Pac. Ry. Co. v. McGlinn, 114 U.S. 542, 546 (1885); Ortega v. Lara, 202 U.S. 339, 342 (1906); Vilas v. Manila, 220 U.S. 345, 357 (1911).
34. 166 U.S. 464 (1897).
35. 140 U.S. 453 (1891).
suant to agreements with Japan providing for such extraterritorial jurisdiction. The Court held flatly that "the Constitution can have no operation in another country." But it should be noted that the Court had an additional basis for its decision. It found a positive constitutional basis for the creation of the consular court in the clauses relating to the treaty making power. The Court viewed these clauses as vesting in the federal government constitutional power to execute treaties on any subject which is a proper one concerning which to negotiate with foreign governments. In view of the prevalence of agreements providing for extra-territoriality, the treaty making power was therefore found to provide a suitable constitutional basis for the establishment of consular courts.

The issue again appeared with the vast expansion of America's overseas interest brought about by the Spanish-American War. In Downes v. Bidwell, an Act of Congress establishing duties on goods being transported from Puerto Rico to the United States in order to finance the local government of Puerto Rico was attacked as in contravention of clause 1 of Article I, Section 8 of the Constitution, which requires that "all Duties, Imposts and Excises shall be uniform throughout the United States" and also as repugnant to the export clause of the Constitution. The Court held that the duty was not unconstitutional, but the five-to-four majority was unable to join in any Opinion of the Court.

Justice Brown appears to take the position that while certain fundamental human rights are protected against United States Government action beyond those territories that have been incorporated into the United States, the rest of the Constitution is not so applicable. Justice Gray apparently largely joined in this opinion. The opinion of Justice White appears to differ from that of Justice Brown more in form than in substance. Justice White takes the position that the federal government cannot exercise any power other than through the Constitution. Thus, instead of emphasizing constitutional inapplicability, Justice White looks to the Constitution

36. Id. at 464.
37. U.S. Const. art. II, § 2; art. IV, § 2.
38. 140 U.S. at 463.
39. 182 U.S. 244 (1901).
40. The Foraker Act, 31 Stat. 77 (1900).
41. U.S. Const. art. I, § 9, cl. 5; see 182 U.S. at 248, 288.
42. While the official reports carry at the top of the pages containing the opinion of Justice Brown, who announced the judgment of the court, the caption "Opinion of the Court," Justice White, Shiras, and McKenna, three of the five member majority, make it clear that they do not join in the reasoning of Justice Brown. 182 U.S. at 287. A note by the reporter also makes it clear that there is no opinion of the court. 182 U.S. at 244 n.1.
43. See particularly 182 U.S. at 276-77, 279-84.
44. Id. at 344, 345.
for a specific mandate for action and finds it in Article IV, Section 3 which vests in Congress power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States. He also quotes with approval the reference in *Ross* to the treaty making power as a foundation for action abroad.\

The basic distinction between the two opinions is that Justice White appears to view Justice Brown as holding that there is some source of power in Congress or the president to regulate unincorporated possessions or otherwise act outside the boundaries of the United States which does not derive from the Constitution; but Justice White himself recognizes that certain provisions of the Constitution may not be applicable to such authority, even though it has a constitutional source.\

The insubstantiality of the practical distinction between the position of Justice White and that of Justice Brown is made clear by the concurrence of White, joined in by Justice McKenna, in *Hawaii v. Mankichi*, in which it was held that the provisions of the fifth and sixth amendments of the Constitution concerning grand and petit juries were not applicable to the Territory of Hawaii after its annexation, but prior to its incorporation by statute.\

Subsequent cases arising from insular possessions of the United States appeared to make it clear that large portions of the Constitution were inapplicable beyond the incorporated territories, but that fundamental liberties provided for in the Constitution were protected even in unincorporated possessions.\

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45. *Id.* at 294. It must be noted that in a further discussion of the treaty power, Justice White makes it clear that in his view the treaty making power is not dominant over the rest of the Constitution but must be harmonized with it, even though he would recognize that by the treaty making power an area may be kept unincorporated and therefore its inhabitants denied some of the benefits of the Constitution. See 182 U.S. at 312-14.\n
46. 182 U.S. at 289, 294. The lines of demarcation between the two opinions seem to be based on the pre-Civil War controversy discussed supra at n.31. It is submitted that in view of Justice White's willingness to find authority in the treaty making and management of territory clauses of the Constitution, and in view of the existence of other general powers such as the president's authority as Commander-in-Chief of the Armed Forces and the president's broad authority in the field of foreign affairs, Article II, § 2, cls. 1, 2, 3, Article II, § 1, cls. 1, the distinction between the position of Justice White and that of Justice Brown, rooted as it is primarily in long dead political controversy, is more apparent than real.\n
47. 190 U.S. 197, 218 (1903).\n
Similar problems relating to constitutional applicability have arisen in the administration of occupied territory which the United States did not intend to retain. In the first *Neely v. Henkel* case,\(^{50}\) Congress had by statute specifically provided for extradition to foreign countries or territories or parts thereof occupied by the United States. Neely objected to extradition on the ground that he was being turned over for trial without constitutional safeguards. Despite the fact that the demanding authority was in fact the United States Military Government, the Court dismissed Neely's objection with the observation that the constitutional safeguards "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."\(^{51}\) The Court went on to say that the person extradited could not complain if he were required to submit to a mode of trial "as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States." The opinion was unanimous.

A closer examination of the status of an American occupation court was contained in *Madsen v. Kinsella*.\(^{52}\) This was a capital case in which a wife had murdered her husband, who was a soldier in the American Occupation Forces in Germany. The Court upheld the conviction by the occupation court. The Court noted that the tribunal did not provide for a jury, but stated that this was irrelevant in the instant case because cases arising in the land and naval forces do not require a grand or petit jury.\(^{53}\) The Court indicated that both courts martial and military commissions or tribunals had jurisdiction to try the wife.\(^{54}\) Justice Black alone dissented, but on a ground that hardly presaged his opinion in *Reid v. Covert*. He argued that the occupation courts were established by the president rather than by Congress and therefore were in violation of Article I of the Constitution which conveyed all legislative power to Congress.\(^{55}\)

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51. 180 U.S. at 122.
52. 343 U.S. 341 (1952).
53. Id. at 360, n. 26.
54. However, it must be noted that the wife appeared to concede that a court martial would have had jurisdiction, (see 343 U.S. at 345), and was only protesting against the use of the occupation courts. Nonetheless, the Court's willingness to uphold application of the occupation tribunal to the wife, although there was no statute, (see Black's dissent, 343 U.S. at 371-72), providing for military tribunals any of the numerous safeguards provided by the Uniform Code of Military Justice, (70A Stat. 36, 10 U.S.C. §§ 801-940 (Supp. IV, 1956)), for the court martial in the *Covert* case. See e.g., Article 31 (b) (warning before official interrogation); Article 32 (representation and right to cross-examine at investigative phase comparable to grand jury) is in striking contrast to *Covert*.
55. 343 U.S. at 371.
Johnson v. Eisentrager also sheds some light on the status of occupied territory. The opinion of the Court went down on the theory that German nationals, tried by military commission for continuing to assist Japan against the United States after the German surrender, were not entitled to turn to United States courts to seek habeas corpus, since the right to constitutional guarantees of an alien depends on territorial presence, and even when there is such presence, an enemy alien has only the right to test his enemy alien status. However, Justice Jackson went on to reject the theory that the fifth amendment is applicable to all persons of whatever nationality and wherever located when officials of the United States act.

Justice Black, joined by Justices Douglas and Burton in dissent, did not disagree with this latter point: "Probably no one would suggest, and certainly I would not, that this nation either must or should attempt to apply every constitutional provision of the Bill of Rights in controlling temporarily occupied countries."

III. THE FATE OF THE PRECEDENTS IN THE RECENT CASES

How are these precedents dealt with in Reid v. Covert? Justice Black, who appeared to take the position that all parts of the Constitution are applicable abroad, must be said to overrule In re Ross. He seeks to distinguish the Insular Cases because "they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is

57. The doctrine of territorial presence creates an interesting problem as to foreign nationals present in the United States under a status of forces agreement permitting court martial by the foreign government for crimes committed within the United States. Are such persons, despite the agreement, entitled to constitutional (or state) court trials because of their territorial presence? Colonel Howard Levie, Chief, International Affairs Division, Office of The Judge Advocate General, Department of the Army, advised the author by letter of January 15, 1958, that his office knew of no case in which such a claim had been made.
58. 339 U.S. at 796-97. Nonetheless there has been some indication that some portions of the Constitution are applicable in occupied territories. In Best v. United States, 184 F.2d 131, 138 (1st Cir.), cert. denied, 340 U.S. 939 (1950) it was said that the fourth amendment to the Constitution was applicable to a search by Army officers in occupied territory, and, that the lack of a judicial officer authorized to issue a search warrant did not render the fourth amendment inapplicable, but merely caused there to be a different test as to what was reasonable. Best, however, involved an American citizen.
59. Perhaps he merely parallels his position, in opposition to Palko, on the scope of the fourteenth amendment. See, e.g., Black's dissent in Adamson v. California, 332 U.S. 46, 68 (1947), where he applies only the first eight amendments and other similar specific prohibitions.
American citizenship." Madsen v. Kinsella is summarily dismissed in a footnote:

[That case] is not controlling here. It concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces. In such areas the Army commander can establish military or civilian commissions as an arm of the occupied area, whether they are connected with the Army or not.

Justice Frankfurter and Justice Harlan face a different problem in dealing with the precedents in their separate concurrences. They both hold that, at least in a capital case involving a dependent civilian accompanying the armed forces, due process requirements are not sufficiently met by a trial by court martial. Starting with this conclusion, the treatment of Ross and the Insular Cases is not surprising. Ross is treated as a reasonable solution of the nineteenth century concern over the administration of justice with respect to westerners in "non-Christian" countries. The Insular Cases lend support for the proposition that due process is the issue; insofar as they find a jury and a grand jury unnecessary whereas Justices Frankfurter and Harlan find one necessary, the distinction is given that a jury was alien to the traditions of the inhabitants of the insular possessions to whom the laws primarily would apply, and that the Insular Cases were not capital cases.

None of these distinctions is very convincing. Ross was a capital case, and while it may have been based on the concern which Americans felt for establishing some extraterritorial system of justice in foreign countries to protect Americans abroad, that too would seem in part to be the reason for the status of forces agreements. Another reason for the status of forces agreements is to assist in maintaining effective discipline in military communities overseas, an additional reason for supporting the trial in Covert that was lacking in Ross. Moreover, the procedural safeguards established for the exercise of court martial jurisdiction by the Uni-

61. Id. at 14.
62. Id. at 35, n.63.
63. This limitation was relied on by one district judge who ruled that a federal employee accompanying the armed forces overseas was subject to court martial jurisdiction. See N.Y. Times, January 15, 1958, p. 14, col. 2. But see United States ex rel. Smith v. Kinsella, No. 1963, S.D.W.Va., Aug. 1957 (overseas court martial of dependant for non-capital offense overturned).
64. Justice Harlan spells out the due process criterion somewhat more explicitly than does Justice Frankfurter (see 354 U.S. at 75), but the same rationale seems implicit in Justice Frankfurter's opinion. Id. at 44-46. Indeed the only basic difference between the two opinions is their treatment of the extent of the pre-constitutional precedent for court martial jurisdiction over civilians. Compare 354 U.S. at 64, with id. at 70-71.
form Code of Military Justice far exceed those prescribed by statute for exercise of consular jurisdiction.\footnote{Compare 10 U.S.C. §§ 801-940 (Supp. IV, 1956), with 354 U.S. at 62.} As for the \textit{Insular Cases}, though the 1901 cases involved temporary government of territories with wholly dissimilar traditions and institutions, \textit{Balsac v. Porto Rico}\footnote{258 U.S. 298 (1922).} came some twenty-four years after the occupation of the territory concerned.\footnote{The decision was unanimous; Justice Holmes did not join in the opinion of the Court but concurred in the results.} As for \textit{Madsen}, Justice Black's footnote will scarcely pass as a distinction. For Justice Black states in \textit{Reid v. Covert}:

The United States is entirely a creature of the Constitution. Its power and authority have no other source.\footnote{354 U.S. at 5-6.} [footnote omitted]

If, then, the United States acts in enemy territory, it can on this theory do so only as a result of some delegated power in the Constitution. And whatever power was is that could support the action in \textit{Madsen v. Kinsella}, presumably the power of the president as Commander-in-Chief, is not merely equally available in \textit{Reid v. Covert}, but is reinforced by the treaty making power and the right of Congress to make regulations to govern the armed forces.

But whatever criticism one may have of Justice Black's handling of \textit{Madsen}, he at least tries. Justice Frankfurter and Justice Harlan instead simply ignore the case, though since it is a capital case involving a civilian dependent accompanying the armed forces, it seems squarely in point. In both \textit{Madsen} and \textit{Covert} the support for trial by a non-Article III court without grand or petit jury depends on the president's power as Commander-in-Chief, the fifth amendment exception for cases arising in the land or naval forces, or constitutional non-applicability overseas. If anything, \textit{Madsen} is a stronger case for finding a violation of due process because in \textit{Madsen} the trial was by a military government court which the Court treated as essentially equivalent to a military commission,\footnote{Madsen v. Kinsella, 343 U.S. 341, 346 (1952).} and there are therefore none of the statutory safeguards which Congress has provided for courts martial.\footnote{Moreover, since \textit{Madsen}, the Uniform Code of Military Justice has made substantial improvements in the safeguards afforded defendants facing court martial. \textit{Compare} 10 U.S.C. §§ 801-940 (Supp. IV, 1956), \textit{with} Articles of War, 10 U.S.C. §§ 1471-1521 (1946). (The former supersedes that latter.)} Finally, the congressional basis of the trial in \textit{Covert} as compared with \textit{Madsen} further makes \textit{Covert} an a fortiori case because it provides additional constitutional

[footnote omitted]
support via the right of Congress to make regulations for the land and naval forces.

As perplexing as the treatment of the relevant cases is the failure to deal with the treaty making power as a basis on which to sustain the trial in Covert, particularly since Justice Frankfurter quotes the portion of Ross sustaining the treaty making power as an affirmative constitutional grant of authority for the form of judicial system established,71 and Justice Black distinguishes Missouri v. Holland on the ground that the treaty making power was an affirmative grant of authority to the federal government vis a vis the states.72 Since in both Covert and Krueger the crime is one that otherwise would be tried by a court of the host country over which the United States Constitution clearly does not extend, it is difficult to see why the treaty making power does not constitute a relevant constitutional basis of support for the form of trial chosen.

But if the two sets of views which result in the action of the Court in Covert failed to cope with the precedents in terms of logic, their failure is even greater in terms of the practicalities of the situation. For the net result of Covert seems to be that in possessions or occupied territories, over which the United States has virtually absolute control, a comparatively easy test will be applied to United States action; but in foreign countries, where United States control is minimal and the United States is dependent upon the concurrence of the foreign government, a very stringent standard is involved.

In the Girard case, the Court's brief per curiam opinion, whose only citation is to a dictum in The Schooner Exchange v. McFadden,73 makes it exceedingly difficult to determine what the case holds and what learning it brings to the subject of the relationship between treaties and the Constitution.74 If one assumes, as seems clear, that the decision would have been the same had Girard been a draftee,75 then the Court is holding that an American citizen can be compelled to go to an area where the United States Government may force him to stand trial without constitutional safeguards. To present the proposition so starkly is to demonstrate that in extreme cases the

71. See 354 U.S. at 54-56, quoting In re Ross, 140 U.S. 453, 462-64 (1891).
72. See Note 12 supra and related text.
73. 11 U.S. (7 Cranch) 116, 136 (1812).
74. My criticism of this aspect of the case echoes an increasing number of objections to what seems to be the Court's growing tendency to dispose of cases on a dixit basis. See Sacks, Forward to The Supreme Court, 1953 Term, 68 Harv. L. Rev. 96, 103 (1954); Bickel and Wellington, Legislative Purpose and the Judicial Process; The Lincoln Mills Case, 71 Harv. L. Rev. 1, 3-6 (1957).
75. See text at note 25, supra.
action would be struck down;\textsuperscript{76} it is only because of the existence of a congeries of constitutional powers, presumably, in the case of the status of forces agreements, the power to raise and support armies, to make rules for their governance\textsuperscript{77} and the treaty making power, that this may be done. Nor would it seem to be stretching the Girard case to assert that if the accused were not a member of the army but the wife of a member of the army who was a civilian dependent overseas, the result would be the same. For it would follow from the Girard case that the foreign country would have had jurisdiction had it not been for the treaty, and since the treaty provides for a waiver by the United States of whatever jurisdiction is granted it, the dependent could be turned over by the United States to the receiving country for the trial.\textsuperscript{78} Thus we reach the conclusion that a dependent accompanying the armed forces can be tried by foreign courts subject to no constitutional control and no jurisdiction even to review on the part of the American constitutional courts once the American involved is beyond the control of American military authorities, but cannot be tried by an American tribunal established under an Act of Congress providing for detailed procedural safeguards,\textsuperscript{79} and subject to at least limited review by constitutional courts.\textsuperscript{80}

This distinction between American tribunals on the one hand, and foreign tribunals given jurisdiction by American action on the other hand, is not new to the Court. In connection with post-World War II war crimes trials a number of efforts were made to obtain review in American courts of the war crimes tribunals' decisions.\textsuperscript{81} The problem reached the Supreme Court in a particularly acute form in Hirota v. MacArthur,\textsuperscript{82} in which the tribunal was exclusively American in composition and set up by the American occupying authorities in Japan. However, the Court held that since the tribunal was set up on behalf of all the allied powers, it was not a United States tribunal and therefore was not subject to attack or review in American courts despite its largely American character.

\textsuperscript{76} Extradition represents another similar situation, \textit{e.g.}, Charlton v. Kelly, 229 U.S. 447 (1913). But the Court has indicated that extradition powers are not unlimited; see Valentine v. U.S. \textit{ex. rel} Neidecker 299 U.S. 5, 9 (1936).

\textsuperscript{77} U.S. Const. art. I, § 8, cls. 12-14.

\textsuperscript{78} In Covert, Justice Frankfurter did not appear to see any constitutional difficulty in a foreign trial under such circumstances. See 354 U.S. at 48-49.


\textsuperscript{80} Burns v. Wilson, 346 U.S. 137 (1953).

\textsuperscript{81} These cases are detailed in Fairman, \textit{Some New Problems of the Constitution Following the Flag}, 1 Stan. L. Rev. 587 (1949).

\textsuperscript{82} 338 U.S. 197 (1948).
This is a doctrine that probably cannot be pushed too far. Could Covert, for instance, be overcome by drawing the status of forces agreement so that in cases involving dependents the court martial, though continuing to be composed entirely of Americans, sits as a joint tribunal of both United States and the receiving country?

IV. INTERNATIONAL CLAIMS

A similar question currently arises as to the claims procedures established under both the NATO and Japanese status of forces agreements. Under both agreements, claims, other than contractual claims arising from the performance of official duty by members of visiting forces or their civilian components, causing damage to parties other than the governments involved may be settled by the receiving state or adjudicated in accordance with the laws and regulations of the receiving state with respect to claims arising from the activities of its own armed forces. Whether settled by adjudication or negotiation, payment is made by the receiving state in its own currency, and the sending state then reimburses the receiving state for a portion of this payment. This formula obviously is subject to attack on the basis of the Seery case. As in the agreement in Seery, the claimant is prevented from proceeding against the United States and must proceed against another country for payment in local currency. Since a treaty supersedes a prior statute, the NATO status of forces treaty will probably supply the necessary authority to the United States, which was found lacking in Seery, for the position that the sovereign's consent to sue the United States had been withdrawn by the agreement and thus though the claimant may have a valid constitutional objection to the treatment being afforded him, he would have no forum in which to pursue it. With respect to the Japanese agreement, this avenue of defense by the United States is probably not available, as the Court of Claims views the matter. In this situation, the Hirota type of defense may be significant. In view of the fact that the Japanese government is to pay twenty-five per cent of claims under the status of forces agreement

83. See Japanese Administrative Agreement, Article XVIII, Section 3; NATO Status of Forces Treaty, Article VIII, Section 5.
85. Hannevig v. United States, 114 Ct. Cl. 410, 84 F. Supp. 743 (1949); insofar as Etlimar Societe Anonyme of Casablanca v. United States, 123 Ct. Cl. 552, 106 F. Supp. 191 (1952) holds that an executive agreement can withdraw consent to sue, it was overruled by Seery.
86. Ibid.
87. Settlement of Costs for Claims Arising under Article XVIII of the Administrative Agreement, March 23, 1953, 4 U.S. Treaties & Other Int'l Agreements 355, T.I.A.S. No. 2783; the NATO Status of Forces Treaty, Article VIII, provides a similar division of liability.
it could well be argued that such claims do not arise exclusively against the United States but have the sort of multi-national flavor \textit{a la Hirota} that forestalled the jurisdiction of the American courts in that case.

Another limitation on the \textit{Seery} case has been suggested; it is asserted that \textit{Seery} actually involves two separate takings, the first being the actual use of the foreign property by the American government and the second being the agreement which relegates the claimant to the foreign government for satisfaction.\footnote{88. Oliver, \textit{Executive Agreements and Emanations from the Fifth Amendment}, 49 Am. J. of Int'l L. 362 (1955).} It is contended that the \textit{Seery} case should be limited to the first of these takings, and that the case should be inapplicable to an agreement between a foreign government and the United States settling an expropriation claim in which the United States may accept a payment somewhat less than the actual value of the property taken and foreclose American citizens from having any claim against the foreign government.\footnote{89. \textit{Ibid.} Cf. Gray v. United States, 21 Ct. Cl. 340 (1886). Perhaps the distinction is whether the United States ultimately makes a bona fide effort to recover on the claim (in which case, since such a claim is a normal matter for settlement by international agreement, the treaty making power affords adequate support for the agreement, even though a portion of the claimant's claim is abandoned against his will) or surrenders the claim for some other concession (in which case the right to just compensation predominates). The existence of a remedy for a claimant who contends that the United States in settling his claim against another government has, in effect, taken his property without just compensation, may well have been withdrawn by 28 U.S.C. § 1502. The \textit{Seery} decision does not appear to consider whether an executive agreement would be affected by this provision. Of course, it only becomes relevant if the taking is considered to be by the agreement, rather than by the original use of the property by the army in the \textit{Seery} case, and the failure to consider 28 U.S.C. § 1502 is strong evidence that the court of claims considered the use rather than the agreement to constitute the taking.} Another distinction of the \textit{Seery} case based on this concept of two takings may also be suggested, that presented by the NATO or the Japanese agreement where the claims procedure is established prior to the taking by use. In such a case it may well be argued that the claims agreement is a matter of internal law in the receiving country determining what the consequences of property ownership are, so that, when the United States subsequently takes the property by use, the consequence of property ownership is merely to have a claim to be settled in accordance with the claims procedure. In other words, in \textit{Seery}, the United States was trying by executive agreement to take away a right which had already vested against the United States\footnote{90. And which was really intangible personality whose situs was American, particularly since Mrs. Seery was an American national and resi-} whereas no such vested right would exist in the case proposed.
One cannot conclude this brief discussion of the constitutional status of international agreements relating to claims settlements without some consideration of the *Pink* case. Under the so-called Litvinov Assignment, the Russian Communist Government assigned to the United States all amounts admitted to be due or that might be found to be due to the Communist Government from American nationals, including corporations and other entities. This fund was to be applied against claims of American nationals against Russia. Although the assignment on its face hardly compels such a conclusion, the Court interpreted it and the recognition of the Soviet government as purporting to validate the nationalization decrees of the Soviet government. Prior to the Litvinov Assignment, the New York Court of Appeals had directed the State Banking Commissioner to pay from the remaining proceeds of a Russian insurance company claims of certain foreign, but non-Russian creditors, and to pay any surplus to the board of directors of the company. This order was based on the theory that the public policy of New York forbade recognition of foreign nationalization decrees with respect to property having a New York situs. Some payment was made to foreign creditors, but payment of the major portion of claims that had been allowed was stayed when the Federal government intervened and claimed the funds on the basis of the Litvinov Assignment.

The opinion of the Court took the position that the president's power to recognize foreign governments and to try to maintain friendly relations with them encompassed the right to ratify foreign nationalization decrees, at least as to non-Americans, and involved a matter of federal supremacy before which the state policy must bow.

It is obvious that this opinion raises serious questions as to the constitutional protection afforded property when the property becomes involved in international affairs. Most titles to property in the United States are a matter of state law, and property in the United States consists largely of rights and obligations fixed by the state government, subject to the fourteenth amendment and certain other constitutional protections. If, however, the *Pink* case were read as holding that the treaty making power or the power of the
dent, and the claim could only be enforced in the Court of Claims. It must be stated, however, that the opinion in *Seery* does not lend any support to such a view of the matter, and seems to view the taking as one of tangible property in Austria.

92. American creditors had already been paid.
president to conduct the foreign affairs of the United States permits
the president to override all state created titles and that such action
by the president does not constitute a violation of the fifth amend-
ment, then it could be argued that under the power of the president
to conduct foreign affairs he can bargain away or give away
property rights in the United States with impunity. 93

Justice Frankfurter, in a concurring opinion, apparently thought
that the nature of the property was such that to talk of situs was
unrealistic, 94 but with so much property today consisting of intan-
gible personality this distinction is hardly reassuring. Another pos-
sible meaning of the case is merely to consider it as establishing a
priority for American claimants over foreign claimants. 95 But it
must be noted that the Americans being protected were not creditors
of the same corporation but claimants of other property seized by the
Russians. Under these circumstances, it is something of an extension
of the cases dealing with state preference of local as opposed to
foreign creditors of a given corporation to argue that American
claimants may be preferred out of assets of a corpus with which
they never had any connection over foreign nationals who did have
claims against that corpus. 96 However, the Court seems to be willing
to make such an extension, although its explanation of why the ex-
tension does not raise fifth amendment problems is not very
satisfactory. The court merely states that:

It matters not that the procedure adopted by the Federal Gov-
ernment is globular and involves a regrouping of assets. There
is no constitutional reason why this government need act as the
collection agency for nationals of other countries when it takes
steps to protect itself or its own nationals on external debts.
There is no reason why it may not, through such devices as the
Litvinov Assignment, make itself and its nationals whole from
the assets here before it permits such assets to go abroad in
satisfaction of claims of aliens made elsewhere and not incurred
in connection with business conducted in this country. 97

The concept that assets in which an American national never
had a claim may be taken from foreigners who had a claim to them
in order to make whole the American loss suffered in some other
assets seized, seems to raise considerably more difficulties than

93. For such an interpretation, see, e.g., Note, 51 Yale L.J. 848, 853
(1942).
94. See 315 U.S. at 234, 239.
95. By analogy with the argument that a state may protect a resident
creditor against creditors who are nationals of foreign countries since the
latter do not have the protection of the equal protection clause. See 315 U.S.
at 228.
Justice Douglas found, both as to due process and the just compensation clause. Perhaps the most satisfactory reading of *Pink* is to ignore the reasoning of the case and simply classify it with those cases that permit the federal government to override by executive agreement or treaty state-given property rights only when the state determination of title turns on foreign policy matters. But even this resolution is an uneasy one, since in these earlier cases the treaty merely served to prevent escheat.

A comparison of *Pink* with *Seery* discloses some anomalies. In *Pink*, it is held that by executive agreement the United States may validate action of a foreign country as to the status of property having an American situs despite state law to the contrary. In *Seery*, however, it is held that an executive agreement with a foreign government is incapable of giving effect to a determination as to the status of property within the foreign country's own borders. Since applicability of the just compensation clause does not depend on whether the claimant is a national of the United States, Mrs. Seery's American citizenship is hardly a sufficient distinction.

V. Conclusion

The failure of the Court in the *Covert* case to achieve an opinion in which a majority of the Court could join indicates that the problem of seeking to determine the relationship between treaties and the Constitution is far from solved. It seems unlikely that the rigid position taken by Justice Black, that the Constitution is universally applicable abroad and, impliedly, that the treaty-making power does not of itself supply constitutional support for a treaty attacked on some other constitutional ground, will provide a solution. The problems of accommodating national sovereignty to a world in which international cooperation becomes more and more necessary cry out for a contrary solution. The *Girard* case is merely

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98. *Ibid.* And see Chase, J., and Wilson, J., in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 245, 283 (1796). In that case the treaty preceded the Constitution and the Bill of Rights and, though validated by Article VI, may not have had to face scrutiny under the fifth amendment.

99. Compare *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817), in which a treaty with France was held to overcome a state law providing for escheat of lands held by French nationals under specified circumstances. See also *Hauenstein v. Lynham*, 100 U.S. 483 (1879).

100. While it has been suggested that the *Seery* case can be analyzed on the theory that the taken property had an American situs, the opinion of the court of claims is not so sophisticated.

one example of the sort of accommodation that must be made. Recognition of the treaty-making power and of the power of the executive branch in foreign affairs as affirmative constitutional support for treaties and agreements with foreign countries subject to accommodation with, rather than automatic overruling by other portions of the Constitution, seems warranted, particularly when an agreement's primary effect is external to the continental United States. In this process of accommodation, emphasis should be on the fundamental structure of the government of the United States and on fundamental human liberties rather than peculiar matters of Anglo-Saxon procedure. Such ideas are not novel. They have ample support in the applicable precedents, and the increasing interdependence of nations would seem only to emphasize the wisdom of this earlier solution to the problem.

102. A number of other proposed accommodations to foreign feelings that raise constitutional problems have received publicity, notably the agreement with Saudi Arabia as to the religious composition of, and observance by, troops sent there by the United States; see N.Y. Times, Feb. 29, 1956, p. 4, col. 3, and a proposed agreement with Spain regulating marriage between Roman Catholics and Protestants; see N.Y. Times, Dec. 26, 1954, p. 1, col. 4. The latter agreement was apparently never executed. "Apparently" is used because agreements affecting various facets of the status of forces are often classified. See, e.g., O'Brien v. Morrison-Knudsen Co., 33 Lab. Cas. 71, 114 (No. 87-275, S.D.N.Y. Nov. 27, 1957).