

## Sec. 8—Powers of Congress

## Cls. 11, 12, 13, and 14—War; Military Establishment

its clause 14 powers. Thus, it held that an honorably discharged former soldier, charged with having committed murder during military service in Korea, could not be tried by court-martial but must be charged in federal court, if at all.<sup>1573</sup> After first leaning the other way,<sup>1574</sup> the Court on rehearing found court-martial jurisdiction lacking, at least in peacetime, to try civilian dependents of service personnel for capital crimes committed outside the United States.<sup>1575</sup> Subsequently, the Court extended its ruling to civilian dependents overseas charged with noncapital crimes<sup>1576</sup> and to civilian employees of the military charged with either capital or noncapital crimes.<sup>1577</sup>

## WAR LEGISLATION

## War Powers in Peacetime

To some indeterminate extent, the power to wage war embraces the power to prepare for it and the power to deal with the problems of adjustment following its cessation. Justice Story emphasized that “[i]t is important also to consider, that the surest means of avoiding war is to be prepared for it in peace. . . . How could a readiness for war in time of peace be safely prohibited, unless we could in like manner prohibit the preparations and establishments of every hostile nation? . . . It will be in vain to oppose constitutional barriers to the impulse of self-preservation.”<sup>1578</sup> Authoritative judicial recognition of the power is found in *Ashwander v. TVA*,<sup>1579</sup> upholding the power of the Federal Government to construct and operate a dam and power plant, pursuant to the National Defense Act of June 3, 1916.<sup>1580</sup> The Court noted that the assurance of an abundant supply of electrical energy and of nitrates, which would

<sup>1573</sup> *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955). See also *Lee v. Madigan*, 358 U.S. 228 (1959).

<sup>1574</sup> *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956).

<sup>1575</sup> *Reid v. Covert*, 354 U.S. 1 (1957) (voiding court-martial convictions of two women for murdering their soldier husbands stationed in Japan). Chief Justice Warren and Justices Black, Douglas, and Brennan were of the opinion Congress’ power under clause 14 could not reach civilians. Justices Frankfurter and Harlan concurred, limited to capital cases. Justices Clark and Burton dissented.

<sup>1576</sup> *Kinsella v. United States*, 361 U.S. 234 (1960) (voiding court-martial conviction for noncapital crime committed overseas by civilian wife of soldier). The majority could see no reason for distinguishing between capital and noncapital crimes. Justices Harlan and Frankfurter dissented on the ground that in capital cases greater constitutional protection, available in civil courts, was required.

<sup>1577</sup> *Grisham v. Hagan*, 361 U.S. 278 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960).

<sup>1578</sup> 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1180 (1833).

<sup>1579</sup> 297 U.S. 288 (1936).

<sup>1580</sup> 39 Stat. 166 (1916).