CONSTITUTIONAL LAW—RIGHT TO TRIAL BY JURY—ALIENS CHARGED WITH NON-MILITARY OFFENSES IN A UNITED STATES COURT IN BERLIN ENTITLED TO JURY TRIAL—*United States, as the United States Element, Allied Kommandatura, Berlin v. Tiede*, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979).

Hans Detlef Alexander Tiede and Ingrid Ruske were charged by American officials in West Berlin with hijacking a Polish jet airliner and related crimes.[1] The informations alleged that the defendants, both residents of East Berlin, German Democratic Republic (East Germany),[2] boarded the plane in Gdansk, Poland.[3] When the plane was within minutes of its scheduled landing at Schoenfeld Airport, East Germany, Tiede grabbed a stewardess, placed a gun to the back of her head,[4] and demanded that the pilot land at Tempelhof Central Airport located in the American sector of West Berlin.[5] The captain, apprehensive for the safety of his passengers and crew, complied with the ultimatum.[6]

United States authorities assumed jurisdiction over the defendants and convened the United States Court for Berlin.[7] The court is an outgrowth of the American occupation of Germany after World War II and it shares concurrent criminal jurisdiction with the Berlin courts within the American sector of West Berlin.[8] The proceedings were governed by American procedural law and German substantive law.[9]

During the pre-trial proceedings, defense counsel filed motions demanding a trial by jury.[10] In opposition to the motions, the pros-

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[1] Trial Transcript at 2673-75, United States, as the United States Element, Allied Kommandatura, Berlin v. Tiede, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979) [hereinafter Trial Transcript]. In addition to the hijacking charge, both defendants were charged with the joint commission of taking of a hostage and with depriving persons of their liberty in violation of the Strafgesetzbuch, the German Criminal Code. Tiede was also charged with assault and unlawful possession of a weapon. Informations, Criminal Case Nos. 78-001 & 78-001-A (U.S. Ct. for Berlin Jan. 15, 1979).

[2] Trial Transcript, *supra* note 1, at 2257, 2276.

[3] Trial Transcript, *supra* note 1, at 2675.

[4] Trial Transcript, *supra* note 1, at 2676. The gun, a teargas and blank pistol, had been smuggled on board by Ruske's twelve year-old daughter. *Id.* at 2675.

[5] Trial Transcript, *supra* note 1, at 1766-69, 2676.

[6] Trial Transcript, *supra* note 1, at 1768-70, 2684, 2774.

[7] United States, as the United States Element, Allied Kommandatura, Berlin v. Tiede, 86 F.R.D. 227, 228 (U.S. Ct. for Berlin 1979). *See* note 82 *infra*.

[8] United States, as the United States Element, Allied Kommandatura, Berlin v. Tiede, 86 F.R.D. 227, 238 (U.S. Ct. for Berlin 1979).

[9] *Id.* at 229.

[10] Pre-trial Proceedings Transcript at 1236, United States, as the United States Element, Allied Kommandatura, Berlin v. Tiede, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979) [hereinafter Pre-trial Proceedings Transcript].

ecution contended that the proceedings should not be governed by the United States Constitution but instead by foreign policy as interpreted by the United States Secretary of State.[11] The Secretary had previously determined that the defendants were not entitled to a jury trial.[12] In *United States, as the United States Element, Allied Kommandatura, Berlin v. Tiede*,[13] Judge Herbert J. Stern[14] determined that the accused were clothed with a constitutional right to trial by jury and the motions were granted.[15]

Throughout the last century American courts have often considered the applicability of the United States Constitution to those territories outside the United States governed by American officials. The issue was first addressed by the United States Supreme Court in *In re Ross*.[16] In 1880, Ross, an American seaman, was convicted by an American Consular tribunal for the murder of a fellow sailor on board a United States vessel in the harbor of Yokohama, Japan.[17] Ross petitioned for a writ of habeas corpus[18] asserting that the legislation, promulgated pursuant to a series of American-Japanese treaties,[19] which provided for trials by consular tribunals[20] was unconstitutional.[21] In particular, Ross claimed that he was unconsti-

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[11] United States, as the United States Element, Allied Kommandatura, Berlin v. Tiede, 86 F.R.D. 227, 228 (U.S. Ct. for Berlin 1979).

[12] *Id.*

[13] 86 F.R.D. 227 (U.S. Ct. for Berlin 1979).

[14] Judge Stern, an article III judge in the United States District Court for the District of New Jersey, was appointed by the United States Ambassador to the Federal Republic of Germany to preside over these proceedings in the capacity of an article II judge. *Id.* at 228. For a further discussion of the jurisdictional issue, see note 82 *infra*.

[15] 86 F.R.D. at 228. After the court suppressed certain statements made by Ruske, the prosecutor moved for dismissal of all charges against her. Pre-trial Proceedings Transcript, *supra* note 10, at 1236, 1239. The court found that Ruske had been "without bail, without an attorney, without counsel of any kind, with mail censored, from August 30th to November 3rd, [1978]," *id.* at 1222, in "violation of [her] Fourth, Fifth and Sixth Amendment rights." *Id.* at 1220. Judge Stern granted the requested relief. Trial Transcript, *supra* note 1, at 1405-06. For a discussion of the constitutional protections afforded by the United States Court for Berlin, see note 81 *infra*.

[16] 140 U.S. 453 (1891).

[17] *Id.* at 457.

[18] *Id.* at 454. The United States Circuit Court for the Northern District of New York denied the petition and an appeal was taken to the United States Supreme Court. *Id.* at 459.

[19] *Id.* at 465. The terms of the treaty provided that "Americans committing offenses in Japan shall be tried by the American consul general or consul, and shall be punished according to American laws." *Id.* at 465.

[20] *Id.* at 468-69. Enabling legislation was passed which provided that American ministers and consul would have judicial authority to arraign, try, and sentence American citizens charged with committing offenses against Japan "in conformity with the laws of the United States." *Id.*

[21] *Id.* at 463. Ross reasoned that the legislation involved did not afford one accused of a felony abroad the same protections enjoyed by American citizens at home. *Id.*

tutionally deprived of his rights to indictment by grand jury and trial by jury.[22] Justice Field, speaking for a unanimous Court, declared that the guarantees of the United States Constitution "apply only to citizens and others within the United States, or [to those] who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad."[23]

In the *Insular Cases*,[24] the Court was called upon to interpret the question whether constitutional protections extended beyond the territorial United States. The *Insular Cases* is a series of Supreme Court decisions which considered the issue of the permissibility of the levy of import duties on goods entering the United States from Puerto Rico, Cuba, and the Phillippines.[25] In *Downes v. Bidwell*[26] the issue raised was whether "Puerto Rico" was a territory of the United States for the purposes of article I, section 8, clause I of the United States Constitution which requires that "duties . . . be uniform 'throughout the United States.' "[27] It was determined that "Porto Rico" was merely "appurtenant . . . [to] but not a part of the United States within the revenue clauses of the Constitution."[28] As a result, the legislation which imposed non-uniform duties upon imports from the island was not unconstitutional.[29] The Court concluded that Congress should approach the status of each territory on a case-by-case basis.[30]

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[22] *Id.* at 458.

[23] *Id.* at 464.

[24] Those opinions which constitute the *Insular Cases* are Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901); Dooley v. United States, 183 U.S. 151 (1901); Huss v. New York & Porto Rico Steamship Co., 182 U.S. 392 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Dooley v. United States, 182 U.S. 222 (1901); Goetze v. United States, 182 U.S. 221 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901).

[25] *See* King v. Morton, 520 F.2d 1140, 1143 n.2 (D.C. Cir. 1975).

[26] 182 U.S. 244 (1901).

[27] *Id.* at 277 (quoting U.S. CONST. art. I, § 8, cl. 1). The Court noted that while the inhabitants of a domestic territory "are entitled under the principles of the Constitution to be protected in life, liberty and property," the Constitution does not expressly limit the powers of Congress to regulate territories. 182 U.S. at 283, 285. The Court, however, declined to hold that congressional power is unrestrained in this area. *Id.* at 283.

[28] 182 U.S. at 287. In contrast, the Court in De Lima v. Bidwell, 182 U.S. 1 (1901), the first case in the *Insular* series, concluded that "Porto Rico was not a foreign country" for tariff law purposes. It was held that duties exacted upon merchandise imported from Puerto Rico were illegal. *Id.* at 200.

[29] 182 U.S. at 200.

[30] *Id.* at 286. *See also* Dooley v. United States, 182 U.S. 151 (1901). Justice Harlan, in a separate dissenting opinion, argued that despite the Court's holding in *De Lima* that Porto Rico was a domestic territory rather than a foreign country, the plurality's opinion in *Downes* approved of congressional discretion which would effectively "exclude the Constitution from a domestic territory." 182 U.S. at 386 (Harlan, J., dissenting).

The Court in *Hawaii v. Mankichi*[31] addressed the issue of whether, in the interim between the annexation of a territory and its formal incorporation as part of the United States, Congress, by resolving to continue the existing territorial municipal legislation which was not contrary to the United States Constitution, intended "to abolish at once" a criminal justice system which was incompatible with the fifth and sixth amendments.[32] Under that system, Mankichi was convicted of manslaughter without the benefit of indictment by grand jury and a unanimous twelve man jury.[33] The Court found such a Congressional intent permissible if it was for the purpose of maintaining "the peace and good order of the community."[34] Although it found that any newly enacted legislation must be in conformity with the United States Constitution, the Court determined "that it could not have been within the contemplation of Congress" to give immediate effect to the requirements of the fifth and sixth amendments without providing for the implementation of a new judicial system.[35] In any event, the Court concluded that the rights to an indictment by grand jury and a trial by jury were not fundamental.[36] Therefore, the criminal procedure under which Mankichi was convicted was constitutional.[37] Thus, only fundamental rights applied to unincorporated territories. Justice Harlan, in a separate dissent, argued that any territory over which the United States is sovereign is entitled to be protected by the full ambits of the Constitution.[38] The Justice stated that regardless of "what the apparent necessities of the hour" appeared to be, "the Constitution is the supreme law in every territory."[39]

In *Dorr v. United States*,[40] an action for criminal libel which took place in the unincorporated territory of the Philippine Islands, the Court denied the defendant's demand for a jury trial.[41] The issue

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[31] 190 U.S. 197 (1903).

[32] *Id.* at 209-11, 214-15.

[33] *Id.* at 198.

[34] *Id.* at 215-17.

[35] *Id.* at 215-16.

[36] *Id.* at 217-18. As a foundation for this conclusion the Court noted:

> that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but . . . the two rights alleged to be violated in this case are not fundamental in their nature.

*Id.*

[37] *See id.* at 217-18.

[38] *Id.* at 236-41 (Harlan, J., dissenting).

[39] *Id.* at 240, 241 (Harlan, J., dissenting).

[40] 195 U.S. 138 (1904).

[41] *Id.* at 139, 149.

raised was whether, in the absence of a congressional statute, trial by jury must be afforded to an accused tried in the Philippines.[42] The Court concluded that unless a particular territory was incorporated into the United States, Congress may enact laws governing the acquisition "subject to such constitutional restrictions upon the powers of that body as are applicable to the situation."[43] The majority expressed concern that if the United States was mandated to afford to an accused a trial by jury wherever it asserted jurisdiction, regardless of the capabilities of the native inhabitants, an injustice could result.[44] Unless and until Congress incorporated a territory into the United States, the requirements of a jury trial could "provoke disturbance rather than . . . aid in the orderly administration of justice."[45] The Court held that the Constitution "of its own force" requires that Congress extend only fundamental rights to an unincorporated territory.[46] The right to trial by jury, a non-fundamental right, did not have to be included in the unincorporated territory's criminal justice system.[47] In *Balzac v. Porto Rico*,[48] the Court reiterated that since "Porto Rico" was not a formally incorporated territory of the United States, the sixth amendment right to trial by jury was not binding upon the Puerto Rican legislature.[49]

The application of the Constitution to foreign lands under American occupation became an issue once again as a consequence of the cessation of hostilities after World War II. In 1957, in *Reid v. Covert*,[50] the Supreme Court declared that in capital cases, United States citizens who were accompanying members of the United States armed forces overseas could not be tried by military court martial[51] but must be held to answer on a presentment or indictment of a grand jury and afforded the right to a trial by jury.[52] The plurality

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[42] *Id.* at 139.

[43] *Id.* at 143.

[44] *Id.* at 148.

[45] *Id.*

[46] *Id.* at 146-49.

[47] *Id.* at 147-49.

[48] 258 U.S. 298 (1922).

[49] *Id.* at 304-09.

[50] 354 U.S. 1 (1957).

[51] Justice Black, writing for the plurality, took the view that civilian dependents accompanying the armed forces overseas could not be court martialed "for their offenses." *Id.* at 40-41. Justices Frankfurter and Harlan, in separate concurring opinions, found that only capital offenses were exempt from military jurisdiction. *Id.* at 49 (Frankfurter, J., concurring); *id.* at 65 (Harlan, J., concurring). Thus, the Court's holding was restricted to capital offenses.

[52] *Id.* at 5. The war powers possessed by Congress and the Executive under the United States Constitution's article I, § 8, clause II and article III, § 2, clause I were held not to allow "military trial of civilians accompanying the armed forces overseas . . . where no actual hostili-

opinion stated, without reservation, that when the United States acts against its own citizens abroad it cannot do so outside the purview of the Bill of Rights and the Constitution.[53] In implicitly overruling *In re Ross*,[54] which held that the Constitution had no effect outside of the United States,[55] the *Reid* decision stated that *Ross* "should be left as a relic from a different era."[56] The Court also found the *Insular Cases* to be of no precedential value.[57] Those cases were distinguished as dealing with territorial administration, often "with wholly dissimilar traditions and institutions,"[58] while *Reid* concerned the constitutional rights of United States citizens abroad.[59]

Justice Harlan, in his concurring opinion, observed that the importance of *In re Ross* and the *Insular Cases* could not be overlooked.[60] Citing *Balzac v. Porto Rico* as an example, Justice Harlan concluded "that there is no rigid rule that [a] jury trial must *always* be provided . . . if the circumstances are such that trial by jury would be impractical and anomalous."[61] "[W]hat *Ross* and the *Insular Cases* [held] is that the particular local setting, the practical

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ties [were] under way." *Id.* at 34-35. Conceding that military courts have improved in terms of the addition of more procedural rights, the Court pointed out that "[l]ooming far above all other deficiencies . . . is the absence of trial by jury before an independent judge." *Id.* at 37.

Mr. Justice Harlan, in a concurring opinion, considered the issue to be "*which* guarantees of the Constitution *should* apply in view of the particular circumstances, the practical necessities, and the possible alternatives." *Id.* at 75 (Harlan, J., concurring) (emphasis in original).

[53] *Id.* at 5-6. Mr. Justice Black expressed the plurality's opinion in these terms:

> When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.

*Id.* at 6. Noting that the Court in *Dorr* suggested that only fundamental rights apply abroad, Justice Black found it "anomalous to say that" a trial by jury is not a fundamental right. *Id.* at 8-9.

Justice Black noted that the United States had entered into executive agreements with Great Britain and Japan. *Id.* at 15 & n.9, 16 & n.30. The countries stipulated that any offenses committed in Japan or in Great Britain by United States military servicemen or their dependents would be tried by court martial. *Id.* at 15. Justice Black rejected the notion that an executive agreement could emancipate a branch of the government from acting within the confines of the Constitution. *Id.* at 16. The *Reid* Court noted that pursuant to the supremacy clause of the Constitution the United States is not permitted to enter "international agreement[s] without observing constitutional prohibitions." *Id.* at 17.

[54] *Id.* at 10-13.

[55] 140 U.S. at 464. *See* text accompanying note 23 *supra*.

[56] 354 U.S. at 12. The Court noted that *Ross* "[has] long since been directly repudiated by numerous cases." *Id.*

[57] *Id.* at 14.

[58] *Id.*

[59] *Id.* *See* notes 24-49 *supra* and accompanying text.

[60] 354 U.S. at 74 (Harlan, J., concurring).

[61] *Id.* at 74-75 (Harlan, J., concurring) (emphasis in original).

necessities, and the possible alternatives are relevant to . . . whether [a] jury trial *should* be deemed . . . necessary."[62]

The Court in *Kinsella v. Singleton*[63] extended *Reid* to apply to civilian dependents charged with noncapital offenses.[64] The Court based its holding "on the 'status' of the accused, rather than on the nature of the offense" as determinative of military jurisdiction.[65]

Several lower federal courts have also been confronted with the question of the Constitution's applicability overseas. The results have not always been congruous. The United States District Court for the District of Columbia held, on two separate occasions,[66] that military dependents who are United States citizens residing in the Ryukyu Islands (Okinawa) were entitled to indictment by grand jury and trial by jury in conformity with article III and the fifth and sixth amendments of the United States Constitution.[67]

In contrast, the United States District Court for the Western District of Oklahoma, in *Williamson v. Alldridge*,[68] held that a United States serviceman charged with a non-service connected offense need not be afforded the rights of indictment by grand jury and trial by jury.[69] The court, relying upon the then repudiated decision in *In re Ross*,[70] incorrectly reasoned that "[t]he United States Constitution [was] not present in Okinawa."[71]

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[62] *Id.* at 75 (Harlan, J., concurring) (emphasis in original).

[63] 361 U.S. 234 (1960).

[64] *Id.* at 248-49. To permit the prosecution of noncapital crimes by military tribunals could lead to a situation in which military authorities downgrade what would otherwise be a capital offense to nullify the *Reid* mandate. *Id.* at 244-45.

[65] *Id.* at 243. Justice Clark cited as support Toth v. Quarles, 350 U.S. 11 (1955). 361 U.S. at 239. *Toth* involved the court martial of a discharged soldier for a crime committed while still in military service. *Id.* The Court held that the necessary and proper clause was an insufficient foundation to sustain an expansion of courts martial jurisdiction to persons who were not members of the armed forces. *Id.* at 239-40. Justice Clark viewed military jurisdiction as one which should be narrowly drawn so as to ensure "'discipline among troops in active service.'" *Id.* (quoting Toth v. Quarles, 350 U.S. 11, 22 (1955)). *Cf.* Williamson v. Alldridge, 320 F. Supp. 840 (W.D. Okla. 1970) (serviceman charged with non-service related offense not entitled to jury trial). *See also* Relford v. United States Disciplinary Commandant, 401 U.S. 355 (1971); O'Callahan v. Parker, 395 U.S. 258 (1969).

[66] Nicholson v. McNamara, Habeas Corpus No. 141-61 (D.D.C., filed Nov. 15, 1963) [hereinafter Nicholson, No. 141-61]; Ikeda v. McNamara, Habeas Corpus No. 416-62 (D.D.C., filed Oct. 19, 1962) [hereinafter Ikeda, No. 416-62.].

[67] Nicholson, No. 141-61 at 4; Ikeda, No. 416-62 at 4.

[68] 320 F. Supp. 840 (W.D. Okla. 1970).

[69] *Id.* at 841, 843.

[70] *See* text accompanying notes 54-56 *supra*.

[71] 320 F. Supp. at 842-43. Insofar as the United States Constitution was not binding upon American officials in Okinawa, the court stated that any constitutional rights afforded to those prosecuted by the United States would be "only [those] rights existing at the pleasure of the President." *Id.* at 843.

More recently, the United States Court of Appeals for the District of Columbia in *King v. Morton*[72] considered the question whether an American citizen charged with a crime in American Samoa, an unincorporated territory of the United States, was entitled to a jury trial.[73] Citing the *Insular Cases*, *Mankichi*, *Dorr* and *Balzac* as standing for the proposition "that only 'fundamental' constitutional rights apply to unincorporated territories such as American Samoa," the defendant contended that since the Supreme Court in *Duncan v. Louisiana* and *Baldwin v. New York* had held the right to trial by jury to be fundamental, the right should apply to American Samoa.[74] Addressing this contention, the court noted that the cases cited by the defendant held that the right to trial by jury, which was not a fundamental right at that point in time, did not apply to unincorporated territories.[75] The court concluded that these cases were not overruled by the *Duncan* and *Baldwin* decisions which dealt with the application of that right in the United States, not in unincorporated territories.[76] Concluding that the resolution of the issue did not turn on key phrases "such as 'fundamental [rights]' or 'unincorporated territory,' " the circuit court stated that "the present case . . . can be reached only by applying the principles of the earlier cases, as controlled by their respective contexts, to the situation as it exists in American Samoa today."[77] The case was remanded to the lower court for a determination of whether a Samoan jury could render a just verdict "without being unduly influenced by [Samoan] customs and traditions of which the criminal law takes no notice."[78] On remand, the district court concluded that a jury trial must be afforded.[79]

The court in *United States, as the United States Element, Allied Kommandatura, Berlin v. Tiede*,[80] viewed the question presented to be a narrow one: "whether friendly aliens, charged with [non-

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[72] 520 F.2d 1140 (D.C. Cir. 1975).

[73] *Id.* at 1142. King was tried and convicted of violating the income tax laws of American Samoa. *Id.* A pre-trial motion for trial by jury was denied by the Trial Division of the High Court of American Samoa, *id.*, a Samoan Court formed under the auspices of the United States Secretary of Interior. *See id.* at 1142-44. The district court dismissed the case for lack of jurisdiction. *Id.* On appeal, the circuit court, noting probable jurisdiction, *id.* at 1148, advised the district court on remand to decide the constitutional question subsequent to a reevaluation of the jurisdictional question. *Id.* at 1146.

[74] *Id.* at 1146-47.

[75] *Id.* at 1147.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977).

[80] 86 F.R.D. 227 (U.S. Ct. for Berlin 1979).

military] offenses in a United States court in Berlin, under the unique circumstances of the continuing . . . occupation of Berlin, have a right to a jury trial."[81] In an opinion written by Judge Stern, the court first embarked on "an extensive account and analysis of the history of the occupation of Berlin [and] the jurisdictional basis of [the] Court."[82] In light of this historical backdrop, Judge Stern took judi-

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[81] *Id.* at 244. The court noted that rules governing the United States Court for Berlin were "adopted almost verbatim [from] the Federal Rules of Criminal Procedure and the Federal Rules of Evidence; the exception related to jury trials." *Id.* at 238.

[82] *Id.* at 228. In describing the occupation of Germany and Berlin by Allied Forces, the court evaluated the occupation to be one which had undergone substantial transition. *Id.* at 229-35. Immediately following the defeat of Germany in June, 1945, the Allies were responsible for all functions of government at the various local, municipal, and state levels. *Id.* at 229-30. Beginning in 1949, despite Soviet Union activities which were obstructive to the everyday operation of Allied Government, France, Great Britain, and the United States (the Western Allies) gradually abdicated their governmental authority to the German people. *Id.* at 231. During this period, Western Allied military government terminated and was replaced by a civilian Allied administration. *Id.* Allied civilian governmental functions in the American zones of responsibility then became subject to the direction of the United States Department of State rather than the Defense Department. *Id.* In 1955 the "Federal Republic [of Germany] assumed full sovereign control over its territory." *Id.* at 232. However, the occupation of Berlin continued. *Id.* Local authorities in the Western sectors of Berlin were authorized "to exercise all rights, powers and responsibilities . . . subject to certain reservations." *Id.* at 234. Those reservations included "the right [of the Western Allies] to assume full authority over Berlin where 'essential to security or to preserve democratic government, or in the pursuance of the international obligations of their governments,' " and " 'the right to intervene, in an emergency, and issue orders to ensure the security, good order and financial and economic stability of the City.' " *Id.* at 233-34 (quoting Protocol of Proceedings of Crimea (Yalta) Conference, Feb. 11, 1945, *reprinted in* COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, 92d Cong., 1st Sess., DOCUMENTS ON GERMANY, 1944-1971 (Comm. Print 1971)).

The jurisdictional basis and source of power of the United States Court for Berlin is an intricate and interesting area which would furnish an ample body of material for a separate casenote. See 86 F.R.D. at 235-44, 253-56 for the court's analysis of the jurisdiction of the United States Court for Berlin and the scope of its judicial review. For purposes of this note, which addresses the narrow issue of the right to trial by jury, the following summary must be sufficient.

This occupation court and its predecessors were created by laws promulgated by the Allied High Commission and the United States High Commission. *Id.* at 236-37. The United States Court for Berlin is an "instrumentality" of the United States and falls within the province of the United States Ambassador to the Federal Republic of Germany and the United States Department of State. *Id.* at 237. Because it is a creature of presidential power, it is an article II court and not an article III court. *Id.* The United States Court for Berlin shares concurrent criminal jurisdiction with Berlin courts in the American sector of Berlin, "except to the extent that the American Sector Commandant withdraws jurisdiction from the German courts in a given case." *Id. Tiede* was the first case heard by the United States Court for Berlin, which was established in 1955. *Id.* at 237.

In terms of the scope of judicial review, the court rejected that it "[was] not an independent tribunal established to adjudicate the rights of the defendants and lack[ed] the power to make a ruling contrary to the foreign policy interests of the United States." *Id.* at 239-42. Judge Stern further declared that the court, not the United States Secretary of State, was the sole determinator of what rights should be afforded to defendants in the United States Court for Berlin. *Id.* at 241-42. Thus, it was held that the United States Constitution was the sole guide-

cial notice that the occupation of "Berlin in 1979 is unique in the annals of international relations;"[83] the occupation was characterized as protective in nature.[84] The court did not assess whether Berlin was an unincorporated or an incorporated territory of the United States.[85]

*In re Ross*[86] served as the court's starting point for its inquiry as to the scope of extraterritorial application of American law.[87] After citing *Ross* for the proposition that the guarantees of the United States Constitution have no effect outside its home boundaries,[88] Judge Stern quickly pointed out that *Ross* "was for all practical purposes repudiated."[89]

The court classified the subsequent cases addressing the *Ross* issue into two categories: first, those cases where United States control of an area was utilized as the jurisdictional basis for the Constitution's application, second, those cases where American citizenship served as the jurisdictional basis for the Constitution's application.[90]

The court found the *Insular Cases* and their progeny representative of the first line of decisions.[91] Acknowledging that the *Insular Cases* had only created disparity in this area of the law,[92] the court noted that it was not until *Dorr v. United States* that "reasonable consistency and unanimity of opinion" was reached by the Supreme Court.[93] In *Dorr* the Supreme Court determined that only fundamental rights applied to unincorporated territories; the rights to indictment by grand jury and trial by jury were found not to be fundamental rights.[94] Judge Stern then turned to *Balzac v. Porto Rico*, the last case in the category pertaining to an American controlled

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post for the court and not the foreign policy concerns of the United States. *Id.* The Constitution was deemed to not only have provided the impetus for the court's actions but also to have dictated the actions of any "United States authorit[y] [which] exercised governmental powers in any geographical area—whether at war or in times of peace." *Id.* at 242. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866). If the American authorities were not governed by the Constitution, the court feared the possibility of "untrammeled discretion." 86 F.R.D. at 242-43, 243 n.68.

[83] 86 F.R.D. at 245.

[84] *Id.* at 245-46, 256.

[85] *See id.* at 249.

[86] 140 U.S. 453 (1891).

[87] 86 F.R.D. at 247. See notes 16-23 *supra* and accompanying text for a detailed discussion of *Ross*.

[88] 86 F.R.D. at 247.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.* at 247-48.

[93] *Id.* at 248. *See* text accompanying notes 40-47 *supra*.

[94] 86 F.R.D. at 248. *See* text accompanying notes 45-47 *supra*.

area,[95] assessing its holding to be an affirmation of the *Dorr* proposition.[96] Summarizing the *Insular Cases* as both mandating constitutional protections for incorporated territories and implying that only fundamental rights applied to unincorporated territories,[97] the court distinguished these decisions from the situation presented in *Tiede*. The *Insular Cases* were interpreted as addressing the issue of which constitutional protections benefitted an accused "in a territory administered . . . by the United States . . ., *regardless of whether the United States itself was the prosecuting authority.*"[98] Using *Balzac* as an example, Judge Stern pointed out that the defendant was tried in a local Puerto Rican court.[99] Therefore, the *Insular Cases* would be relevant only if the defendants were subjected to the jurisdiction of a German court presiding in the American zone of Berlin.[100] In contrast, *Tiede* involved an American court sitting in the American sector of Berlin.[101] Accordingly, the court concluded that the *Insular Cases* were of no precedential value.[102]

Even if the *Insular Cases* were relevant to *Tiede*, the court observed that their viability was questionable as a result of the decision involving American citizenship as a basis for the extraterritorial application of the United States Constitution.[103] In *Reid v. Covert*,[104] the Supreme Court considered the right to trial by jury in United States military tribunals in foreign countries to criminal defendants who were civilian dependents to American servicemen.[105] The *Reid* court, reasoning that "the Constitution follows the Flag," concluded that such defendants could not be court martialed but must be tried in conformity with the United States Constitution.[106] Finding this logic to be "irrefutable," the *Tiede* court concluded that the Constitution applies abroad.[107] The court then noted that the holdings in the *Insular Cases*—that trial by jury was not a fundamental right—had been "authoritatively voided"[108] by the United States Supreme Court

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[95] 86 F.R.D. at 249.
[96] *Id.*
[97] *Id.*
[98] *Id.* (emphasis in original).
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] 354 U.S. 1 (1957).
[105] 86 F.R.D. at 249-50. *See* text accompanying notes 50-59 *supra*.
[106] 86 F.R.D. at 250.
[107] *Id.*
[108] *Id.* at 252.

decision in *Duncan v. Louisiana*.[109] *Duncan* held the right to trial by jury to be " '*fundamental to the American scheme of justice*' " when an accused is charged with a serious crime.[110] Regarding the conjunction of the holdings in *Reid* and *Duncan* to be dispositive of the issue presented in *Tiede*, Judge Stern concluded "that, absent the most extraordinary circumstances, the rights accorded defendants tried in *American courts* abroad should not differ from those accorded defendants tried in American courts in the United States."[111] Thus, the defendants' demand for a jury trial was granted.[112] Judge Stern then directed the clerk of the court to summon "500 veniremen drawn from a cross-section of the German population of the United States Sector of Berlin" and stated that if the United States authorities failed to comply with the directive, the "charges lodged against these defendants [would] be dismissed."[113]

In the interim between the granting of the jury trial and the direction to the clerk of the court to summon the jury panel, an additional determination was made which was reflected in the transcript of the proceedings but not in the published opinion.[114] The court analyzed whether the citizens of Berlin would be competent to serve on an American-styled jury.[115] Judge Stern looked to the *Nicholson*, *Ikeda* and *King* cases for guidance on this issue.[116] In *Nicholson* and *Ikeda* the United States District Court for the District of Columbia determined that a trial by jury was constitutionally required in Okinawa, an area occupied by United States authorities after World War II.[117] The *Tiede* court paralleled the circumstances in Okinawa with those existing in Berlin.[118] In both instances occupation courts were asserting jurisdiction over "an area which had been under the authority of an enemy in war, which had been defeated."[119]

Judge Stern then turned to the American Samoan cases of *King v. Morton* and its successor, *King v. Andrus*.[120] The court recognized that the *King* cases "may not be exactly on point" since an occupation

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[109] 391 U.S. 145 (1968).

[110] 86 F.R.D. at 252 (emphasis in *Tiede*) (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

[111] 86 F.R.D. at 252.

[112] *See id.*

[113] *Id.* at 261.

[114] *See* Pre-trial Proceedings Transcript, *supra* note 10, at 239-46A.

[115] *Id.*

[116] *Id.* at 239-43.

[117] *See* text accompanying notes 66-67 *supra*.

[118] Pre-trial Proceedings Transcript, *supra* note 10, at 241.

[119] *Id.*

[120] *Id.* at 241-42.

court was not involved there.[121] Furthermore, Judge Stern noted that a jury was "required as a matter of constitutional law . . . on a *Balzac* type analogy."[122] However, the *Tiede* court observed that an evidentiary hearing was held in *King v. Andrus* to aid the court in its determination as to whether American Samoans "weren't fit and competent to be jurors."[123]

The court in *Tiede* noted that "[o]ne unifying principle emerges from the Okinawa cases, the American Samoan cases and . . . the Berlin case. In each instance the prosecution argued that a trial by jury should not be granted because the local populace was incompetent to man the jury."[124]

After reviewing treatises, law review articles and a study addressing the German judicial system, the court observed "that the jury system, as we know it in the United States, is not foreign to the traditions and culture of Germany . . . [though] they decided to dispense with it in 1925."[125] Judge Stern stated that "[u]nder the circumstances as they exist today . . . the availability of a jury, the traditions of jury trials within this area, [and] the fact that there is something close to . . . citizen participation in the administration of justice [in Germany] today," the people of Berlin could serve as jurors in the United States court for Berlin.[126] Therefore, the court concluded that "it [could not] be said that it would either be impossible or impractical or anomalous under our Constitution to convene a jury."[127]

Although Judge Stern declared the *Insular Cases* to be "inapposite" to *Tiede*,[128] he relied on *King*, an extension of the *Insular Cases* and the *Balzac* line of decisions, as support in assessing the feasibility of implementing the right to trial by jury. While the *Insular Cases* and their litany were declared to be questionable in terms of their

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[121] *Id.* at 241.

[122] *Id.* at 241-42.

[123] *Id.* at 242.

[124] *Id.*

[125] *Id.* at 243, 245. In contemporary German trials, where an accused is charged with a serious crime, "lay judges sit side by side with professional judges." Casper & Zeisel, *Lay Judges in the German Courts*, 1 J. LEGAL STUD. 135, 140-41 (1972). *See generally* J. LANGBEIM, COMPARATIVE CRIMINAL PROCEDURE: GERMANY (1977). The defendants in *Tiede* would have been entitled, therefore, to lay participation in their German trial if the United States had not withdrawn the case from the local jurisdiction.

[126] Pre-trial Proceedings Transcript, *supra* note 10, at 245-46. It bears mention that a jury composed of twelve West Berlin citizens' convicted Tiede of taking a hostage and acquitted him on the remaining charges. Trial Transcript, *supra* note 1, at 2937-38.

[127] Pre-trial Proceedings Transcript, *supra* note 10, at 239. *See* text accompanying notes 60-62 *supra*.

[128] 86 F.R.D. at 249.

viability,[129] *Tiede* took into account an underlying concern that arose in some of those decisions: whether a foreign populace which follows dissimilar customs and jurisprudential standards can render a just and proper verdict in an American-styled proceeding.[130] As a result, this line of cases can neither be totally ignored nor lightly dismissed.

*Tiede* is the culmination of a steady progression of decisions which have applied constitutionally guaranteed procedural protections to judicial proceedings abroad. The original concept of hinging those rights upon a "controlled area" theory has apparently been abandoned,[131] and the focus of inquiry has been shifted to a liberal construction of explicit constitutional language.[132] It is reasonable to conclude that the *Insular Cases* were not binding in this particular instance in determining whether the defendants were entitled to trial by jury in the United States Court for Berlin. Berlin is neither an incorporated nor unincorporated territory of the United States; it is not even an area ceded to the United States pursuant to a treaty.[133] Instead, it is a city occupied for its own defense by its allies.[134] For if Berlin was perceived to be a "controlled area" within the context of the *Insular Cases*, a difficult dilemma would be presented. Under a "controlled area" theory the local German courts situated in the American sector of Berlin would be required to administer justice, with all its fundamental necessities, in the American tradition.[135] An American court would be hard-pressed to justify the imposition of such a procedural system upon a functioning and capable foreign local judiciary.

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[129] *Id.*

[130] Balzac v. Porto Rico, 258 U.S. 298, 309-10 (1922); Dorr v. U.S., 195 U.S. 138, 148 (1904); King v. Morton, 520 F.2d 1140, 1147 (D.C. Cir. 1975). *See* Reid v. Covert, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring).

[131] For a discussion of the *Insular Cases* by the *Tiede* court, see text accompanying notes 91-102 *supra*. *See also* Reid v. Covert, 354 U.S. 1, 14 (1957).

[132] 86 F.R.D. at 259. Article III, § 2 of the United States Constitution states in pertinent part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. CONST. art. III, § 2. Furthermore, the sixth amendment states:

> In all criminal prosecutions, the *accused* shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

U.S. CONST. amend. VI (emphasis added).

[133] *See* notes 82-85 *supra* and accompanying text.

[134] *See* notes 82-84 *supra* and accompanying text.

[135] *See* notes 36-37 *supra* and accompanying text; text accompanying notes 43-47 & 94-101 *supra*.

In *Tiede* a workable and realistic approach was achieved by relying upon case law which mandates that American citizenship provides the rationale for the extraterritorial extension of the right to trial by jury. *Tiede* seized upon this doctrine and expanded its reach to any person who is brought before an American tribunal, absent "extraordinary circumstances." [136]

The right to trial by jury, as contained in the sixth amendment of the United States Constitution, is an integral aspect of the American concept of justice —wherever it may be administered. Historically, it has been regarded as a buffer which is strategically placed between an accused and a "corrupt or overzealous prosecutor and . . . [a] compliant, biased, or eccentric judge." [137] The elimination of such a fun-

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[136] 86 F.R.D. at 252. The only component that would interfere with such a conclusion would be the presentation of "the most extraordinary circumstances." *Id.* Judge Stern found no extraordinary circumstances to exist in *Tiede*. *Id.*

Among those elements which would constitute extraordinary circumstances would be the prosecution of defendants who were "enemy nationals, enemy belligerents or prisoners of war." *Id.* at 244-45, 252-53. *See* Johnson v. Eisentrager, 339 U.S. 763 (1950); Homma v. Patterson, 327 U.S. 759 (1946); *In re* Yamashita, 327 U.S. 1 (1946). The prosecution's position was that the defendants in *Tiede* were aliens and therefore could not be beneficiaries of a jury trial since prior judicial proceedings in occupation courts only spoke to the rights of American citizens. 86 F.R.D. at 259. The court deemed this argument to be without merit, finding that these "friendly" aliens were protected by the explicit language contained in the fifth amendment of the United States Constitution, as well as by international agreement. *Id.* at 259-60. *See* Memorandum in Opposition to Defendants' Motion Regarding the Application of the Constitution of the United States to These Proceedings, at 21-22, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979) [hereinafter Memorandum in Opposition].

The quality of the crime, e.g., a war crime, can also be considered as an exception to Judge Stern's general rule. 86 F.R.D. at 244-45. *See* Johnson v. Eisentrager, 339 U.S. 763 (1950); *Ex parte* Quirin, 317 U.S. 1 (1942).

Finally, the nature of a military tribunal which presides "in wartime or during the belligerent occupation of enemy territory before the termination of war" is a factor that is capable of creating an extraordinary circumstance. 86 F.R.D. at 244-45. *See* Madsen v. Kinsella, 343 U.S. 341 (1952); *Ex parte* Quirin, 317 U.S. 1 (1942). The *Tiede* court rejected the prosecution's sweeping contention that an accused could not be adjudged by a jury in a military commission setting, finding that the cases proffered did not support such a conclusion. 86 F.R.D. at 253-56. *See* Memorandum in Opposition, *supra*, at 18-21. *Quirin* was distinguishable in that it looked at the type of crime the defendants were charged with and not the character of a military commission. 86 F.R.D. at 253-54. *Madsen*, on the other hand, never reached the issue of whether Mrs. Madsen was entitled to a trial by jury in a military tribunal. *Id.* at 254-55. To the contrary, Mrs. Madsen claimed "that she should have been tried by a general court-martial." *Id.* at 255. Additionally, Judge Stern noted that *Madsen* was decided prior to *Duncan* and, at the time of the *Madsen* trial, the United States was still technically at war with Germany. *Id.* at 255-56. In support of the conclusion that civil occupation courts by nature do not proscribe trial by jury, *Tiede* cited *Nicholson v. McNamara* and *Ikeda v. McNamara*. *Id.* at 256-59. For discussion of these cases, see text accompanying notes 66-67 *supra*.

[137] Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

damental right should only occur under the most compelling and exigent conditions, involving the gravest consequences. *Tiede* is meaningful in that it appreciates the essence of this basic right and warmly embraces it.

*Lynn D. Healy*