RECENT CASES

Jurisdiction—Review of Courts-Martial by Civil Courts. [Federal].—Petitioner, a private in the United States Army, was convicted of rape by an army court-martial at Corby, England, and sentenced to a prison term of twenty-five years. Asserting that he was denied due process of law by the military authorities before and during the course of his trial, petitioner sought release by writ of habeas corpus in a federal district court. *Held*, the procedures of the military law were not applied to petitioner in "a fundamentally fair way" thus depriving him of liberty without due process of law in violation of the Fifth Amendment of the Constitution. Petitioner ordered discharged from custody.[1] *Hicks v. Hiatt.*[2]

A long line of federal cases has reiterated the doctrine that while courts-martial are ". . . . inferior courts of limited jurisdiction, whose judgments may be questioned collaterally,"[3] they form no part of the judicial system of the United States and their proceedings, within the limits of their jurisdiction, cannot be controlled or reversed by the civil courts.[4] Only if there is an absolute want of power and not merely a defective exercise of jurisdiction, is the sentence void and subject to revision by the civil courts.[5] No inquiry into the innocence or guilt of the accused is permissible.[6] The civil courts have thus limited their

[1] The court's opinion was filed on January 15, 1946. Prior thereto on January 11th, the Restoration Section of the Correction Division of the War Department acting on a review of the Donald Hicks court-martial proceeding, vacated the original court-martial sentence and restored Hicks to duty. On January 24th the court issued an order dismissing the proceedings in habeas corpus as moot. Hicks v. Hiatt, 64 F. Supp. 238, 250 (Pa., 1946). The Assistant United States Attorney, representing respondent, wrote, "No Order of Discharge having been entered no appeal was possible . . . . if such an Order of Discharge had been entered an appeal would unquestionably have been taken." Letter from Herman F. Reich, Assistant United States Attorney, Middle District, Pennsylvania, dated May 1, 1946.

[2] 64 F. Supp. 238 (Pa., 1946).

[3] Ex parte Watkins, 3 Pet. (U.S.) 193, 209 (1830).

[4] The leading case is Dynes v. Hoover, 20 How. (U.S.) 65 (1857); Ex parte Reed, 100 U.S. 13 (1879); Carter v. McClaughry, 183 U.S. 365 (1902); Sanford v. Robbins, 115 F. 2d 435 (C.C.A. 5th, 1940); Mosher v. Hudspeth, 123 F. 2d 401 (C.C.A. 10th, 1941); Ex parte Potens, 63 F. Supp. 582 (Wis., 1945); cf. Ex parte Quirin, 317 U.S. 1 (1942); Application of Yamashita, 66 Sup. Ct. 340 (1946).

[5] Carter v. McClaughry, 183 U.S. 365, 401 (1902). Thus the validity of a court-martial sentence was upheld by the Supreme Court where the same officer was a complainant, testified as a witness, and sat and passed judgment as a member of the court-martial. Keyes v. United States, 109 U.S. 336 (1883).

[6] Swaim v. United States, 165 U.S. 553, 566 (1897); see Ex parte Quirin, 317 U.S. 1, 25 (1942); Application of Yamashita, 66 Sup. Ct. 340, 344 (1946). The latter two cases deal with special military tribunals, not courts-martial, but the rule on this point is the same.

inquiries to whether the court-martial had jurisdiction of the person and subject matter, whether it was legally constituted, whether the proceedings conformed to the governing statutory regulations, and whether the sentence pronounced by the court-martial was within its powers.[7]

In view of the traditional Anglo-American distrust of the military[8] it is not readily apparent why the federal courts disavowed all appellate jurisdiction over military tribunals.[9] The constitutional argument is that since Congress is authorized to provide for the government of the armed forces by Article I of the Constitution and since the federal judiciary is set up under Article III, that therefore courts-martial ". . . . are no part of the judicial branch of the government but [are] instrumentalities of the executive provided for disciplinary purposes."[10]

The underlying policy argument with which this interpretation has been fortified is that military law is a peculiar body of law separate from and foreign to the common law and therefore beyond the purview of common-law judges. Not only are common-law judges held not competent to administer this law, but it is further argued that any attempt by them to do so would undermine military discipline and impair the efficiency of the armed forces.[11]

[7] Cases cited in note 4, supra. While there is considerable dicta stating that courts-martial proceedings must conform to the governing statutory regulations, no writ of habeas corpus has ever been granted because of a court-martial's failure to so conform. This can best be understood in terms of the summary nature of courts-martial and the considerable leeway given commanding officers in the use of courts-martial as courts of punishment before the revision of the Articles of War in 1920. Procedural safeguards such as pre-trial investigations, or the accused's right to counsel of his own choice were not required by the statute and consequently the civil courts were reluctant to disturb findings on procedural grounds when the procedural requirements were so ill-defined. Such reluctance has not been in order since the 1920 reforms.

[8] The English fear of the standing army is reflected in the annual Mutiny Acts, military codes passed by Parliament which along with the military appropriation had to be passed yearly, thus keeping the army under legislative control. This device of limited military appropriations was incorporated in the United States Constitution, Article I, Section 8. Most of the state constitutions framed during the Revolutionary War contained declarations to the effect that the military should be under strict subordination to and control of the civil power. See argument for petitioner in Ex parte Milligan, 4 Wall. (U.S.) 2, at 37 (1866); Glenn, The Army and the Law 34 (Schiller's ed., 1943); 1 Winthrop, Military Law and Precedents 8 (2d ed., 1896).

[9] "Throughout the reported cases [English], from 1786 to the present day, there appears a conflict between two principles: the protection of the fundamental rights of the subject from unlawful and undue invasion; and the desirability, on the grounds of discipline and efficiency, of leaving matters of military law and discipline exclusively to the jurisdiction of military tribunals." 24 Can. Bar Rev. 210, 211 (1946).

[10] Arnold, Military Law, 10 Encyc. Soc. Sci. 453, 455 (1933); In re Vidal 179 U.S. 126 (1900); Ex parte Dickey, 204 Fed. 322 (Me., 1913); United States v. Maney, 61 Fed. 140 (C.C. Minn., 1894). This argument is augmented by Article II, Section 2 of the Constitution, making the president commander-in-chief of the armed forces.

[11] See Smith v. Whitney, 116 U.S. 167, 178 (1886); United States v. Clark, 31 Fed. 710, 713 (C.C. Mich., 1887); Ex parte Henderson, 11 Fed. Case No. 6, 349, at 1069 (C.C. Ky., 1878); see also Fletcher v. United States, 26 Ct. Cl. 563 (1891) making the point that a court-martial is "a court of honor" and that, "in military life there is a higher code termed honor which holds

This dubious rationale has been parroted by the courts without re-examination well up to the present time.[12] In 1943, however, the eighth circuit court of appeals looked behind the jurisdictional question and sent a habeas corpus petition back to the district court for rehearing in a case where the uncontroverted allegations indicated that the petitioner had been sentenced to prison by an army court-martial in a patently unfair proceeding.[13] Stating that "the judgment [of the court-martial] did not carry with it the presumptions of legality and validity which protect the judgment of a civil court of general jurisdiction against collateral attack,"[14] the court concluded that in view of the trend of modern Supreme Court decisions granting habeas corpus petitions to persons convicted by state courts under circumstances showing a want of due process of law,[15] petitioner was entitled to release, if his allegations were true.[16] One year later the third circuit court of appeals, by way of dicta, elaborated upon this fresh approach:

> . . . . the military law provides its own distinctive procedure to which the members of the armed forces must submit. But the due process clause guarantees to them that this military procedure will be applied to them *in a fundamentally fair way*. We conclude that it is open for a civil court in a habeas corpus proceeding to consider whether the circumstances of a court martial proceeding and the manner in which it was conducted ran afoul of the basic standard of fairness which is involved in the constitutional concept of due process of law and, if it so finds, to declare that the relator has been deprived of his liberty in violation of the fifth amendment and to discharge him from custody.[17]

It is this dicta upon which the court in the instant case relies, but the granting of habeas corpus by the court on the grounds that the petitioner had been deprived ". . . . of the substance of a fair trial" and further, that "the procedures of the military law . . . . had not been applied to Hicks in a fundamentally fair way"[18] is based upon errors which fall far short of the deprivations of due process which the courts have required in previous habeas corpus cases applying the "fundamental fairness" test.[19] The errors cited to support the conclusion

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its society to stricter accountability, and it is not desirable that the standard of the army should come down to the requirements of the criminal code." Lobb, Civil Authority versus Military, 3 Minn. L. Rev. 105, 116 (1919); Winthrop, op. cit. supra, note 8, at 62.

[12] Ex parte Potens, 63 F. Supp. 582 (Wis., 1945). Several state court decisions, in dealing with state militias, broke away from the federal precedents. Garling v. Van Allen, 55 N.Y. 31 (1873); Higgins v. Stotesbury, 182 App. Div. 691, 169 N.Y. Supp. 998 (1918); see Lobb, op. cit. supra, note 11, at 115.

[13] Schita v. King, 133 F. 2d 283 (C.C.A. 8th, 1943). [14] Ibid., at 287.

[15] Waley v. Johnston, 316 U.S. 101 (1942); Walker v. Johnston, 312 U.S. 275 (1941); Smith v. O'Grady, 312 U.S. 329 (1941); Chambers v. Florida, 309 U.S. 227 (1940); Johnson v. Zerbst, 304 U.S. 458 (1938).

[16] Upon rehearing, the alleged irregularities in the court-martial proceedings were not proved by petitioner and the writ of habeas corpus was dismissed. Aff'd, Schita v. Cox, 139 F. 2d 971 (C.C.A. 8th, 1944).

[17] United States v. Hiatt, 141 F. 2d 664, 666 (C.C.A. 3d, 1944) (italics added).

[18] Hicks v. Hiatt, 64 F. Supp. 238, 250 (Pa., 1946). [19] Cases cited in note 15, supra.

reached here are several. (1) When first arrested, Hicks, by being wrongfully told that any information he gave would be used to help him, was induced to make a false statement which was used to discredit him at the trial.[20] (2) Hicks's contentions as to prior carnal knowledge of Mrs. Murray, the complaining witness, were not completely investigated by the investigating officer.[21] (3) Irrelevant and hearsay evidence damaging to Hicks was allowed to be introduced at the trial.[22] (4) Evidence favorable to Hicks was excluded at the trial.[23] (5) Evidence favorable to Hicks was not introduced at the trial by Hicks' counsel.[24] The court-martial found Hicks guilty without his guilt being proved beyond a reasonable doubt.[25] (7) The reviewing authorities abused their legal discretion by not ordering a new trial.

The federal courts have been uniformly strict in finding lack of due process in criminal proceedings only in cases of out and out travesties of justice such as the procuring of a confession by torture,[26] or conviction in a trial dominated by mob violence,[27] and in not applying the remedy to errors of an evidentiary nature.[28]

[20] Hicks told the military policeman that he spent the balance of the night after the alleged rape at a near-by barracks when actually he was at the home of another married woman. This was brought out by cross-examination at the trial which served to incriminate and degrade Hicks although it had no relation to the crime charged. Hicks v. Hiatt, 64 F. Supp. 238, 243 (Pa., 1946).

[21] Hicks named three friends who he said knew of his prior association with Mrs. Murray. The investigating officer had two of these men meet her but when they denied ever having seen her with Hicks, the third witness was, erroneously, not taken to see her. Further, considerable evidence as to Mrs. Murray's unchaste reputation in the community was ignored due to a mistaken belief as to its inadmissibility as evidence under the hearsay rule. Ibid., at 242.

[22] A clerk present at the pre-trial interrogation of Hicks was allowed to testify that Hicks was an evasive and reluctant witness. The trial judge advocate was permitted to make statements as to Hicks' failure to make a sworn statement before trial which were improper. The town constable was allowed to testify as to the thickness of a party wall between Mrs. Murray's and a neighbor's apartment though he had never measured the wall. This evidence tended to show that Mrs. Murray's screams would not have been heard next door. Ibid., at 241.

[23] Evidence as to Mrs. Murray's unchaste reputation was excluded. Ibid., at 241–42.

[24] Hicks asked his counsel to call three townspeople he knew to testify as to Mrs. Murray's unchaste reputation but this was not done. Ibid., at 245.

[25] In a letter to the reviewing authorities requesting clemency five days after passing sentence, the president of the court-martial indicated that there was doubt in the court's mind as to whether Mrs. Murray took all normal precautions to avoid the act of sexual intercourse. Ibid., at 247.

[26] Brown v. Mississippi, 297 U.S. 278 (1936).

[27] Moore v. Dempsey, 261 U.S. 86 (1923). Justice Frankfurter, concurring in Malinski v. People of State of New York, 324 U.S. 401, 416 (1945), points out that a finding of violation of the due process clause in a criminal proceeding requires of the reviewing court ". . . . an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . ."; see Lisbena v. California 314 U.S. 219, 236 (1941). The district court in the instant case conceded that ". . . . no one intended to deny the petitioner a fair trial. . . . ." Hicks v. Hiatt, 64 F. Supp. 238, 249 (Pa., 1946).

[28] Harlan v. McGourin, 218 U.S. 442 (1910); McMullen v. Squier, 144 F. 2d 703 (C.C.A. 9th, 1944); Miller v. Hiatt, 141 F. 2d 690 (C.C.A. 3d, 1944); Carpenter v. Hudspeth, 112 F. 2d 126 (C.C.A. 10th, 1940).

While the reviewing authority exercising appellate jurisdiction should have negated the proceedings in this case, the writ of habeas corpus is a particularly clumsy device for rectifying such errors. Habeas corpus is a summary proceeding.[29] It was not originally developed, nor is it now appropriate to use it for securing an additional review of a trial already carried to finality by a court having jurisdiction which has been exercised lawfully. Irregularities not working a substantial injustice are not within its scope.[30]

Aside from the questionable applicability of the court's remarks in *United States v. Hiatt* to the circumstances in the principal case, it is not certain whether the dictum in that case would be accepted by the Supreme Court. In *Application of Yamashita*[31] the majority of the Court reaffirmed the traditional rule that civil courts would look only to the jurisdiction of the military tribunal. However, they were careful to point out that it was "unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied."[32] The significance of this remark seems apparent in view of the nationality of the petitioner and the nature of the crimes charged. The Yamashita case did not raise questions as to the fairness of the American court-martial system.

It is the current popular dissatisfaction with the way the court-martial system has functioned during the war which may best explain the unusual result in *Hicks v. Hiatt*.[33] This dissatisfaction has resulted to some extent from the malfunctioning of a legal system burdened with historical anachronisms and ". . . . elaborated for an army of professionals rather than an army of drafted citizen-soldiers."[34] It has been due partly to the inexperience and, all too often,

[29] See the Judicial Code, Rev. Stat. § 761 (1875), 28 U.S.C.A. § 461 (1928).

[30] While evidentiary errors could appropriately be reviewed by mandamus, prohibition, or certiorari, the federal courts have always refused to exercise such appellate jurisdiction over courts-martial. In proceedings other than habeas corpus they have passed upon the jurisdiction of military tribunals only in suits before the Court of Claims to recover pay or in civil suits for false arrest. This denial of appellate jurisdiction by the federal courts is by now so thoroughly ingrained in the law that it would require an act of the legislature to change it. See Stein, Judicial Review of Courts Martial, 11 Brooklyn L. Rev. 30, 60 (1941). In a recent Canadian case a writ of prohibition was granted to prevent a new trial by court-martial of a soldier freed on habeas corpus after a prior military proceeding. King v. Thompson, O.W.N. 217 (1946), noted in 24 Can. Bar Rev. 210 (1946).

[31] 66 Sup. Ct. 340 (1946).

[32] Ibid., at 351.

[33] "After the termination of the present war, the American system of military justice will, in all probability, become a subject of criticism and reform. This is likely to happen not because the American system is inadequate or unfair but simply because a war of the magnitude of the present one constitutes a test which the American system has not undergone before and which will suggest improvements even in the best system of military justice." Rheinstein, Military Justice, in Puttkammer, War and the Law 155, 159 (1943).

[34] Ibid. See Ansell, Some Reforms in Our System of Military Justice, 32 Yale L. J. 146 (1922); N.Y. Times, p. 1, col. 3 (April 21, 1946); Chicago Daily News, p. 9, col. 1 (Nov. 1, 1945); Baldwin, The G. I. and the Brass, 58 Infantry Journal, No. 5, at 13 (May, 1946); Rosenblatt, Justice on a Drumhead, 162 Nation, No. 17, at 501 (April 27, 1946). But see,

to the outright incompetence of an administering personnel untrained in the law and faced with a huge legal task. A still greater source of dissatisfaction has been the uneven and haphazard way in which the regulations have been applied at different times and places and among different units. But by far the basic failure of military justice in this war has been the unequal manner in which punishments have been meted out to enlisted men on the one hand and to officers on the other. This double standard of justice, so foreign to basic Anglo-American doctrines of fair play, has been brought to public attention as never before.[35]

Another explanation of the result of this case is the nature of the crime of rape itself. It is not a crime exclusively within the purview of military law as is, for example, "conduct unbecoming an officer," or "conduct prejudicial to good order."[36] It is particularly amenable to false charges and raises very delicate problems of proof.[37] Finally, the army has been uniformly severe in punishing convictions for rape.[38] Thus, in a close case such as this a common-law judge would readily tend to be extra-sensitive to procedural errors which have prejudiced the accused and lead to conviction and sentence.

Many reforms in military law and procedures are now being considered. Among them are a requirement that trained lawyers responsible only to the judge-advocate general sit on courts-martial, a differentiation in treatment of personnel in combat zones and in areas where more normal conditions prevail,

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Greenbaum, The Case for Army Justice, 162 Nation, No. 22, at 658 (June 1, 1946). Ansell points out that the American system of military justice is, in its essentials, the medieval British code based on personal fealty, a code long ago cast aside by the English. Ansell, supra, at 148.

[35] See materials cited in note 34, supra. One example was the Selfridge Field army scandal. The commanding officer of the field, a colonel, along with lower ranking field personnel, was engaged in selling promotions and transfers to enlisted men. He had, in addition, misappropriated government property, accepted bribes, was often drunk, and finally brought the matter to a head by shooting a Negro private while drunk. A court-martial found him guilty of "conduct prejudicial to good order and military discipline" and "careless use of firearms" and sentenced him to reduction to the rank of captain with promotion barred for three years. A master sergeant, implicated in the selling of the transfers, received a dishonorable discharge and eighteen months imprisonment at hard labor. This shocking disparity in punishment received wide publicity and caused great public indignation. 42 Time, No. 11, at 67 (Sept. 13, 1943); 42 Time, No. 13, at 65 (Sept. 27, 1943); 42 Time, No. 16, at 64 (Oct. 18, 1943).

[36] Articles of War 95 and 96, 41 Stat. 806 (1920), 10 U.S.C.A. §§ 1567, 1568 (1927). During peacetime, military personnel charged with rape or murder committed in the United States must be tried by the civil courts. Articles of War 92, 41 Stat. 805 (1920), 10 U.S.C.A. § 1564 (1927).

[37] "In a case in which a man is charged with a sexual offense against a female the words of Sir Matthew Hale relative to rape should be remembered: 'It is an accusation easy to be made and hard to be proved, but harder to be defended by the party accused though innocent.' " Moriarty, Police Law 78 (8th ed., 1945).

[38] The Articles of War provide that, "Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life as a court-martial may direct." Art. of War 92, 41 Stat. 805 (1920), 10 U.S.C.A. § 1564 (1927).

stricter requirements of thorough and impartial pre-trial investigation,[39] a reduction in the punishment for rape, and some measure of control over courts-martial proceedings by civil authorities.[40] The abandonment of the principle, deeply imbedded in our system of military justice, that courts-martial are not courts of law but mere instruments of command for the purpose of enforcing discipline, is long overdue.[41]

The instant case suggests that the civil courts are prepared to ignore traditional concepts in order to correct abuses by military courts. However, it is apparent that the reforms needed today call for comprehensive revision of military law and courts-martial procedure by Congress and not a piecemeal and uncertain attack by the civil courts.

Personal Property—Possession—Finder's Right to Chattel Superior to Owner of Premises—[England].—The defendant purchased a house in 1938, but he did not occupy it. The house remained unoccupied until it was requisitioned by the Army in 1940. The plaintiff, a soldier, was stationed in the house when he found a brooch in the crevice of a window frame. He turned it over to the police, who, unable to find the true owner, gave it to the defendant. The plaintiff sued for the return of the brooch or its value. *Held*, the plaintiff is entitled to judgment because the defendant had neither known of the brooch nor had he ever had physical possession of the premises on which it was found. The true owner being undiscovered, the finder has good title. *Hannah v. Peel.*[1]

[39] Specifically, the recommendations are that failure to have a thorough and impartial pre-trial investigation and further, the use of oppressive and threatening practices to force admission in investigation would be *jurisdictional errors*. In England, "it is firmly established in military law that the investigation of the case by the commanding officer, in the prescribed manner, is vital to the jurisdiction of a court-martial." 24 Can. Bar Rev. 210, 211 (1946); cf., suggested reforms of the English court-martial system in an earlier period, 47 Law Times 219 (1869).

[40] See N.Y. Times, § 1, p. 1, col. 3 (April 21, 1946), listing the suggested reforms to the Articles of War made by a special subcommittee of the House of Representatives Military Affairs Committee. Other recommendations included placing enlisted men on courts-martial when enlisted men are being tried, giving increased publicity to courts-martial and inviting public attendance, providing for more adequate reviews of proceedings. See Rosenblatt, op. cit. supra, note 34, for additional recommendations. The War Department has appointed an advisory board on military justice with members selected by the American Bar Association to review the entire court-martial procedure.

[41] See Ansell, op. cit. supra, note 34, at 149; Bruce, Double Jeopardy and Courts-Martial, 3 Minn. L. Rev. 484 (1919). There is much to be learned from the military law of other countries. In England ". . . . the High Court can control the proceedings of courts-martial by means of the prerogative writs, by actions for damages and for injunctions against individual officers who exceed their jurisdiction . . . . and by criminal prosecutions of such officers. . . . ." 75 L. J. 336 (1933). In Nazi Germany and France there were two different systems of military justice for war and peace, professional lawyers sat on the courts-martial, appellate courts were provided for full review and in Germany enlisted men sat on courts-martial. Rheinstein, op. cit. supra, note 33, at 168, 170.

[1] [1945] K.B. 509.