ticed in state and local elections,[41] but this limitation makes the curtailment of "legal" discrimination in federal elections none the less desirable.

CIVIL JURISDICTION TO REVIEW COURT-MARTIAL PROCEEDINGS

The petitioner, a private in the United States Army, was tried and convicted by an army general court-martial in Germany in April 1945 on charges of rape and sodomy. The petitioner sought release from imprisonment by writ of habeas corpus in a federal district court, claiming that the court-martial had failed to acquire jurisdiction and that he had been denied due process of law. The court, through examination of a transcript of the record of the trial, and from oral testimony of an officer who had been connected with the proceedings, found that in pre-trial examinations the accused, petitioner, was not present at the interrogation of witnesses; that he was then confronted by witnesses only during an informal "viewing" in which accused was lined up with other soldiers and the witnesses were asked to identify the persons they thought had committed the alleged attacks; that at no time during such examinations was he informed of his right to, or given an opportunity to, cross-examine any of the witnesses; that he was brought to trial two days after charges had been served on him; that a medical officer who had never had any experience in defending was appointed as his counsel and that he had only a short conversation with this counsel before the trial; that he had expressed his desire to have as his counsel a certain officer, known to have had experience in defending, and that this officer was never obtained as counsel; and that witnesses requested by him were not produced at the trial. The court held that by reason of failure to comply with Article of War 70[1] with respect to pre-trial investigation, the court-martial was without jurisdiction to try the petitioner, and granted a writ of habeas corpus for his discharge from custody. *Anthony v. Hunter*.[2]

During periods of war, the prodigiously increased burden of administering military law reveals inadequacies and inefficiencies which are not otherwise apparent.[3] The inevitable result of the necessity for speedy military justice administered under the stress of wartime circumstances is the existence of shocking miscarriages of justice and extreme severity of punishment. An equally inevitable aftermath of war is a deluge of litigation in the civil courts, in which

[41] Arkansas has recognized this state of the law by separating the primaries for state and federal officials. Ark. Acts 1945, c. 107, held constitutional in Adams v. Whitaker, 195 S.W. 2d 634 (Ark., 1946). But for a broader view see Professor Kallenbach's article, op. cit. supra note 39, at 731 n. 48, where it is pointed out that constitutional support for the power of Congress to nullify the poll tax in *all* elections could be held to stem from Article IV, Section 4 of the Constitution, which guarantees a republican form of government to the states.

[1] 41 Stat. 802 (1920), 10 U.S.C.A. § 1542 (1946).

[2] 71 F. Supp. 823 (Kan., 1947).

[3] Rheinstein, Military Justice, in Puttkammer, War and the Law 155, 159 (1944).

those convicted by military tribunals seek to gain their freedom or mitigation of their punishments. The question as to the scope of review exercisable by the courts over the proceedings of military tribunals then becomes one of first importance.

The theory of a fundamental dichotomy between the systems of military and civil justice has long been the basis of the reluctance of civil courts to question the decisions of military tribunals.[4] Thus, under the Constitution, courts-martial form no part of the judicial system of the United States.[5] It is now established that it is improper to seek relief in the civil courts from decisions of military tribunals by means of the writs of mandamus,[6] prohibition,[7] and certiorari.[8] However, courts-martial have been characterized as inferior courts of limited and special jurisdiction, and, as such, their decisions are open to collateral attack.[9] Virtually the only means for such attack is the writ of habeas corpus.[10]

In the instant case, the petitioner claimed his right to release by habeas corpus on two grounds. He maintained first that the military court was without jurisdiction to try him because the provisions of Article of War 70 which provide for thorough and impartial pre-trial investigation had not been complied with.[11] His second contention was based on this same assertion, along with objections to the failure of the reviewing authority to set aside the verdict for insufficiency of evidence, the denial of witnesses and of opportunity to prepare for trial, the denial of counsel of his own choosing, the designation of an incompetent person as counsel, the alleged disqualification of certain members of the court-martial,[12] and the failure to advise petitioner as to his rights. The petition-

[4] See United States v. Clark, 31 Fed. 710, 713 (C.C. Mich., 1887); Smith v. Whitney, 116 U.S. 167, 178 (1886); Ex parte Henderson, 11 Fed. Cas. 1067, 1069, No. 6347 (C.C. Ky., 1878); Lobb, Civil Authority versus Military, 3 Minn. L. Rev. 105, 116 (1919).

[5] United States v. McDonald, 265 Fed. 754 (N.Y., 1920), appeal dismissed, 256 U.S. 705 (1920); Ex parte Dickey, 204 Fed. 322 (Me., 1913); In re Vidal, 179 U.S. 126 (1900); United States v. Maney, 61 Fed. 140 (C.C. Minn., 1894); Arnold, Military Law, 10 Encyc. Soc. Sci. 453, 455 (1933).

[6] United States v. Weeks, 259 U.S. 326 (1922).

[7] Wales v. Whitney, 114 U.S. 564 (1885). But see Smith v. Whitney, 116 U.S. 167 (1886); United States v. Maney, 61 Fed. 140 (C.C. Minn., 1894).

[8] In re Vidal, 179 U.S. 126 (1900).

[9] Ex parte Watkins, 3 Pet. (U.S.) 193, 202 (1830).

[10] Stein, Judicial Review of Determinations of Federal Military Tribunals, 11 Brooklyn L. Rev. 30, 60 (1941).

[11] 41 Stat. 802 (1920), 10 U.S.C.A. § 1542 (1946). These provisions, so far as they are pertinent to this case, are as follows:

"No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. . . . . At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused.

"In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him."

[12] The facts concerning this claim are not mentioned by the court. They involve substantially the contentions that the alleged "law" member of the court-martial was not a lawyer and

er argued that these errors individually and collectively constituted a denial of due process which entitled him to release by writ of habeas corpus.

The latter contention of the petitioner raises the issue of the denial of constitutional rights. An early rule was that in habeas corpus proceedings the court is limited solely to a consideration of the jurisdiction of the court below, and that as to matters other than this the proceedings and findings of that court are unassailable.[13] In the early history of the United States, one of the most important uses of habeas corpus in the federal courts was to secure the release of federal officers who had been imprisoned through proceedings in state courts.[14] Dissatisfaction with early limitations upon the federal courts in such cases prompted a series of extensions by Congress of the scope of inquiry permissible,[15] culminating with the acts of 1867 by which the scope of inquiry was extended to include a consideration of whether the prisoner "is in custody in violation of the Constitution or of a law or treaty of the United States."[16] Since the introduction of this provision, and especially in the last two decades, there has been an increasing readiness on the part of the federal courts and the Supreme Court to grant relief to persons convicted in state courts where it appears that they were denied due process of law.[17] Unfortunately, in some of these cases the courts have not recognized the statutory provisions as actual extensions of the scope of inquiry beyond that allowed under the old rule. In attempting to grant relief and yet maintain the old rule, they proceeded upon the theory that where a trial is conducted in such an unfair and unwarranted manner that "the whole proceeding is a mask"[18] and due process is denied, the trial court has abused its power and loses jurisdiction to pronounce the sentence.[19] The result has been an

was not from the Judge Advocate General's Department. Article of War 8, 41 Stat. 788 (1920), 10 U.S.C.A. § 1479 (1928) requires that the law member be from the Judge Advocate General's Department whenever possible.

[13] Ex parte Watkins, 3 Pet. (U.S.) 193 (1830); In re Metzger, 5 How. (U.S.) 176 (1847); Ex parte Siebold, 100 U.S. 371 (1879); In re Savin, 131 U.S. 267 (1888); Glasgow v. Moyer, 225 U.S. 420 (1911); Henry v. Henkel, 235 U.S. 219 (1914); Knewel v. Egan, 268 U.S. 442 (1924).

[14] In re Neagle, 135 U.S. 1, 70–73 (1889). [15] Ibid.

[16] 14 Stat. 385, c. 28 (1867), 28 U.S.C.A. § 453 (1928). It is quite probable that even without the statute the courts would have made this extension under the Fourteenth Amendment.

[17] Pyle v. Kansas, 317 U.S. 213 (1942); 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); Bowen v. Johnston, 306 U.S. 19 (1939); Johnson v. Zerbst, 304 U.S. 458 (1938); Mooney v. Holohan, 294 U.S. 103 (1935); Moore v. Dempsey, 261 U.S. 86 (1923). The two most recent Supreme Court decisions on this point, Carter v. Illinois, 329 U.S. 173 (1947), and Craig v. Harney, 67 S. Ct. 1249 (1947), are also cited by the Court in support of the position that in the inquiry into whether or not due process has been denied, the court may admit evidence "dehors the record."

[18] Moore v. Dempsey, 261 U.S. 86, 91 (1923).

[19] In Johnson v. Zerbst, 304 U.S. 458 (1938), where the petitioner had been tried and convicted in a state court without assistance of counsel, the Supreme Court said, "If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction. . . ." Ibid., at 468.

unwarranted confusion in the application of the term "jurisdiction."

Despite this extension with respect to review of state court decisions, the courts until very recently have persisted in applying the old rule where the decision under attack is that of a military court.[20] This may undoubtedly be accounted for by the courts' reluctance to interfere with military affairs, along with their recognition that the Congressional action in extending the scope of habeas corpus was aimed primarily at providing a broader ground for attack on the decisions of state courts. In 1943, however, the Circuit Court of Appeals for the Eighth Circuit broke away from the strict rule and held that a petitioner is entitled to release on habeas corpus petition if it appears that he was denied due process in a court-martial proceeding.[21] A year later, the Circuit Court of Appeals for the Third Circuit in a lengthy dictum recognized that procedural due process is not the same for members of the armed forces as it is for other persons, and that for them it is the application of the procedure of military law.[22] The court asserted, nevertheless, that ". . . . the due process clause guarantees to them that this military procedure will be applied to them in a fundamentally fair way."[23] This dictum was relied on in the controversial case of *Hicks v. Hiatt*,[24] where relief was granted to a petitioner on the grounds that numerous errors in a court-martial proceeding, with respect primarily to introduction and exclusion of evidence, collectively resulted in a "fundamentally unfair" application of military procedure, and thus was a denial of due process. In the *Hicks* case, the errors considered sufficient to warrant relief were less important than

[20] See McClaughry v. Deming, 186 U.S. 49 (1901); Ex parte Reed, 100 U.S. 13 (1879); Dynes v. Hoover, 20 How. (U.S.) 65 (1857); Carter v. McClaughry, 105 Fed. 614 (C.C. Kan., 1901), aff'd 183 U.S. 365 (1902); Wales v. Whitney, 114 U.S. 564 (1885); Carter v. Woodring, 92 F. 2d 544 (App. D.C., 1937), cert. den. 302 U.S. 752 (1937); Rose v. Roberts, 99 Fed. 948 (C.C.A. 2d, 1900); Ex parte Henderson, 11 Fed. Cas. 1067, No. 6347 (C.C. Ky., 1878). Even in these cases, however, there are to be found some extensions of the common law rule, one of the most frequent being the inclusion in the inquiry of a consideration of whether or not the sentence pronounced conformed with the law. There are also found dicta to the effect that relief may be granted on habeas corpus where it appears that not all of the statutory regulations governing the proceedings of the court-martial had been compiled with. Dynes v. Hoover, supra; Runkle v. United States, 122 U.S. 543, 556 (1887). If such dicta were to be taken at face value, it would constitute a tremendous extension of the scope of habeas corpus. That it has not been so taken by the courts is apparent from the notable absence of cases granting relief on this ground.

[21] Schita v. King, 133 F. 2d 283 (C.C.A. 8th, 1943). Upon a rehearing in the district court, the petitioner failed to prove the alleged irregularities in the court-martial proceedings and the writ was dismissed. Schita v. Cox, 139 F. 2d 971 (C.C.A. 8th, 1944).

[22] United States v. Hiatt, 141 F. 2d 664 (C.C.A. 3d, 1944). The distinction between procedural due process for members of the armed forces and procedural due process for other persons was made by the Supreme Court in Reaves v. Ainsworth, 219 U.S. 296, 304 (1910).

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

[24] 64 F. Supp. 238 (Pa., 1946). On January 24, 1946, subsequent to the rendering of the opinion, the court issued an order dismissing the proceedings in habeas corpus as moot. Ibid., at 250. This case is noted in 13 Univ. Chi. L. Rev. 494 (1946); 41 Ill. L. Rev. 260 (1946); 24 Tex. L. Rev. 503 (1946); 37 J. Crim. L. 304 (1946).

the obvious travesties of justice which have impelled the Supreme Court to grant similar relief, and the position which would be taken by the Supreme Court on a decision such as that in the *Hicks* case is far from certain.[25] The facts in the instant case present a much stronger argument that due process was denied. Nevertheless, in view of the previously mentioned distinction between military and civil due process, it is questionable whether even these errors would be considered by the Supreme Court as constituting a denial of due process warranting relief. It was undoubtedly a realization of the dubious character of the *Hicks* decision which motivated the present court to sidestep the due process question and base its decision upon the lack of jurisdiction of the court-martial because of its obvious failure to comply with Article of War 70.

In basing its decision on this jurisdictional point, the court was on firmer ground. Prior to 1920 there was little statutory regulation of trial procedure for courts-martial and, consequently, the convening officers were given considerable license in such matters. The general dissatisfaction with the manner in which the system of military justice functioned during the first World War prompted the extensive revision of the Articles of War in 1920,[26] which included the introduction of procedural regulations such as Article 70. Though the requirements of this Article have been criticized as unwarrantably complex and cumbersome,[27] Congress deemed them necessary as part of an important general reform aimed at the safeguarding of the rights of the accused. In view of their introduction under these circumstances, the license assumed by convening officers in cases such as the present is indefensible. In 1924 the Judge Advocate General of the Army handed down an opinion that:

The provisions of Article of War 70 with reference to investigating charges are mandatory and there must be a substantial compliance therewith before charges can be legally referred for trial. A court-martial is without jurisdiction to try an accused upon charges referred to it for trial without having first been investigated in sub-

[25] The main contentions of the petitioner in the Hicks case were that the investigating officer had failed to investigate contentions of the accused which were relative to the charges, that irrelevant and hearsay evidence was introduced against the accused, that evidence favorable to the accused was excluded, that accused was found guilty where there was no proof of guilt beyond a reasonable doubt, and that the reviewing authority abused its power by failing to order a new trial. The Supreme Court and the federal courts have adhered strictly to the rule that in habeas corpus proceedings errors of an evidentiary nature will not be reviewed, inasmuch as to do so would be to perform the function of an appellate court. In re Yamashita, 327 U.S. 1 (1946); Miller v. Hiatt, 141 F. 2d 690 (C.C.A. 3d, 1944); McMullen v. Squier, 144 F. 2d 703 (C.C.A. 9th, 1944); Ex parte Quirin, 317 U.S. 1 (1942); Carpenter v. Hudspeth, 112 F. 2d 126 (C.C.A. 10th, 1940); Harlan v. McGourin, 218 U.S. 442 (1910). It does not seem likely that the Supreme Court would abandon this rule and inquire into questions such as weight of evidence in a habeas corpus proceeding even where denial of due process is alleged.

[26] The New Articles of War, 21 Col. L. Rev. 477 (1921); Bauer, The Court-Martial Controversy and the New Articles of War, 6 Mass. L.Q. 61 (1921); Ansell, Military Justice, 5 Corn. L.Q. 1 (1919); Bogert, Courts-Martial: Criticisms and Proposed Reforms, 5 Corn. L.Q. 18 (1919).

[27] The New Articles of War, 21 Col. L. Rev. 477, 480 (1921).

stantial compliance with the provisions of Article of War 70 and, in such a case, the court-martial proceedings are void ab initio.[28]

As was pointed out by the respondent, however, this opinion was expressly overruled in an opinion of the Board of Review of the Army in 1943, in which it was declared that the provisions of the Article were purely directory, and that failure to comply with them had no effect whatever on the validity of the proceedings unless it could be shown that the failure "injuriously affected substantial rights" of the accused.[29]

The court in the instant case, observing that "little light is shed upon the problem by the conflicting administrative rulings,"[30] determined that "full exploration of the question seems to be dictated."[31] It found that the only case decided by an appellate court bearing on the point was that of *Reilly v. Pescor*,[32] in which it was held that the provisions of Article of War 70 are mandatory and that substantial compliance with them is a jurisdictional requirement. It is interesting to note that the decision in that case was based almost entirely on the 1924 opinion of the Judge Advocate General. Of course, the opinions of the Judge Advocate General and the Board of Review have no binding effect upon the civil courts in the interpretation of the Articles, but it does seem incongruous to cite one of these opinions in support of a position when the opinion has since been expressly overruled. Having discussed the opinion in the *Reilly* case, the court went on to consider the Article itself and the relevant sections of the Army Manual for Courts-Martial, and found that "both clearly indicate that the impartial investigation contemplated should be conducted upon the charges and specifications as formally prepared rather than to determine whether charges will be made."[33] The court concluded that had the sequence specified in the provisions been the only matter deviated from, such error might be overlooked, but that in view of the failure to comply with other requirements, such as that declaring the accused's right to cross-examine witnesses, the court was bound to act. It said:

[28] Digest of Ops., Judge Adv. Gen., 1912–40, § 428 (1), at 292 (1924).

[29] C.M. 229477, Floyd, 17 B.R. 149 (1943). Not mentioned by the court are a number of subsequent holdings of the Board of Review which have adopted the position set forth in this opinion: C.M. 235407, Claybourn, 22 B.R. 34 (1943); C.M. 237032, Nelson, 23 B.R. 34 (1943); C.M. 251311, Watts, 33 B.R. 195 (1944); C.M. 257806, Engels, 37 B.R. 231 (1944); C.M. 273791, Gould, 45 B.R. 29 (1945); C.M. (ETO) 17056, Boger, 31 B.R. (ETO) 341 (1945); C.M. (ETO) 4570, Hawkins, 13 B.R. (ETO) 57 (1945). The test of "injuriously affecting substantial rights," which is applied by the Board of Review in all of these cases, is taken from Article of War 37, 41 Stat. 794 (1920), 10 U.S.C.A. § 1508 (1946), which provides: "The proceedings of a court-martial shall not be held invalid, nor the findings of sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused. . . . ."

[30] Anthony v. Hunter, 71 F. Supp. 823, 830 (Kan., 1947).

[31] Ibid.

[32] 156 F. 2d 632 (C.C.A. 8th, 1946), cert. den. 67 S. Ct. 353 (1946).

[33] Anthony v. Hunter, 71 F. Supp. 823, 831 (Kan., 1947).

. . . . the defects pointed out above are, in the studied judgment of this court, too serious to be ignored. The Congress, in its wisdom, has prescribed the procedure to be followed. It has stated categorically what must be done. Whether failure to do the things required be construed as a defect precluding the acquiring of jurisdiction or whether the failure be held to deprive the accused of the due process contemplated by the organic law, the result is the same. Relief should be granted. . . . .[34]

Essentially, the court has adopted the "substantial compliance" test as it was set out in the opinion of the Judge Advocate General and the *Reilly* case. By holding substantial compliance with the provisions of the Article to be mandatory, failure of the court-martial to comply becomes per se an error "injuriously affecting substantial rights" of the accused. The court's position seems to be fundamentally sound. As has been noted, the provisions involved here were adopted as part of a general reform of the Articles of War, the chief purpose of which was to correct conditions which had resulted in an undesirable, inefficient, and in many cases unjust administration of military justice and had led to violent public criticism of the court-martial system. In the light of these considerations, it does not seem logical to assume that Congress adopted these provisions with the intention that they should merely provide a suggested method of procedure, the failure to comply with which would in no way affect the validity of subsequent proceedings. It would rather seem that Congress felt that the imposition of a regulated procedure was one of the means by which the rights of the accused could be better protected. Nor does the interpretation of the provisions as mandatory open the floodgates for the release of unquestionably guilty persons through the mere showing that insignificant procedural requirements were not fulfilled. The notion of "substantial compliance" is flexible, and the courts will be rightly hesitant to hold that insignificant defects preclude substantial compliance.[35]

The court's evasion of the due process question was wise from a tactical point of view. It appears from the language of the opinion, however, that, had the court not been able to grant relief on any other ground, it might well have adopted the position taken in *Hicks v. Hiatt*, and granted relief on the ground of denial of due process.[36] Such action would certainly be justifiable, for where a proceeding is as patently unfair as that of the court-martial in the instant case, the interest in protecting the fundamental rights of the accused outweighs

[34] Ibid.

[35] In Ex parte Smith, 72 F. Supp. 935 (Pa., 1947), the court denied relief on allegation of petitioner that the originator of the charges on which the accused had been tried and convicted before a court-martial had also conducted the pre-trial examination and as such was "ineligible to be the impartial investigator under the 70th Article of War." The court held that this was not a sufficient showing to warrant relief where it appeared affirmatively that in all respects other than this the Article of War was fully complied with and the examination was conducted in a fair and impartial manner.

[36] Toward the end of the opinion the court states that the errors ". . . . individually and collectively might have justified this court in plagiarizing some of the language used by Judge Biggs . . . . in Hicks v. Hiatt. . . . ." Anthony v. Hunter, 71 F. Supp. 823, 831 (Kan., 1947).

any policy notion as to the extent to which the civil courts should interfere with the military.

UNCONSTITUTIONALITY OF ILLINOIS DIVORCE ACT

The rising tide of family dissolution has at last attracted the attention of the Illinois legislature. In the 1947 session, several pieces of new "husband and wife" legislation were placed on the statute books.[1] Unfortunately, these acts are at best only a surface medication for a serious and many-faceted social problem. Even more unfortunately, the little assistance they promised to courts now struggling with crowded dockets and inadequate administrative facilities has been drastically curtailed by the decision of the Illinois Supreme Court in *Hunt v. Cook County*[2] holding that the Domestic Relations Act,[3] the most important of the statutes, is unconstitutional.

The Domestic Relations Act would set up, "in judicial circuits of 500,000 or more," a Divorce Division with masters in chancery to hear complaints for divorce, annulment, separate maintenance, petitions regarding custody of children, alimony, and child support. The principal purpose of the Act is to provide reconciliation machinery. For example, one provision allows the court to impound the records for at least thirty days after filing of the complaint in any action in which the rights of minor children are involved,[4] so as to prevent undesirable publicity during the time in which reconciliation will be attempted and to protect minor children from embarrassment. Other provisions require the payment of alimony and support directly to the Divorce Division (unless the court otherwise directs),[5] and allow the court to require reports on the welfare of the children from any person or agency to whom custody is awarded.[6]

The direct supervision given to the court over the payment of alimony and support is one of the most important features of the act. Judge Robson of the Superior Court of Cook County, in a comprehensive analysis of Cook County's problem with the children of divorced parents, has shown that the inadequacy of the financial protection they receive is increased by the fact that many support orders are in arrears because the mother has no funds with which to engage an attorney, and the orders are either abandoned or allowed to accumulate until

[1] Ill. Ann. Stat. (Smith-Hurd, 1947) c. 68, § 34 (limiting recovery in alienation of affections actions to actual damages and expressly barring recovery of punitive, exemplary, vindictive, or aggravated damages); ibid., c. 68, § 41 (substantially identical statute on criminal conversation actions); ibid., c. 40, § 13 (extending in injunction powers of court in divorce actions to restrain third party's interference with possibility of reconciliation or other amicable adjustment of the suit); ibid., c. 40, § 19 (allowing court to modify permanent alimony decree in proceeding separate and subsequent to divorce action upon obtaining jurisdiction of the person of defendant unless alimony was expressly waived or denied, or another settlement made); ibid., c. 37, § 105 (new divorce statute).

[2] 398 Ill. 412, 76 N.E. 2d 48 (1947).

[3] Ill. Ann. Stat. (Smith-Hurd, 1947) c. 37, § 105.

[4] Ibid., at § 105.10. [5] Ibid., at § 105.15. [6] Ibid., at § 105.16.