RECENT CASES

REQUIREMENT OF LOCAL DETENTION FOR FEDERAL HABEAS CORPUS JURISDICTION

Alleging that the executive department had exceeded the deportation authority vested in the president by the Alien Enemy Act of 1798,[1] 120 German nationals, confined at Ellis Island, petitioned the District Court for the District of Columbia for writ of habeas corpus.[2] The Attorney General's motion to dismiss was granted by the district court, and the decision was affirmed by the court of appeals. The Supreme Court held, with three justices dissenting, that the presence of the detained person within the territorial district of the court which is petitioned for a writ of habeas corpus is a prerequisite of jurisdiction. *Ahrens v. Clark.*[3]

This decision was based on a narrow interpretation of the federal habeas corpus statute of 1867, which provides "[t]hat the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions . . . shall have power to grant writs of habeas corpus. . . ."[4] Justice Douglas based the short decision of the Court primarily upon what he regarded as the clear meaning of the phrase "within their respective jurisdictions" as well as upon his view of the legislative history of the statute,[5] the prevailing practice in the lower federal courts,[6] and the general policy considera-

[1] 1 Stat. 577 (1798), 50 U.S.C.A. § 21 (1928).

[2] See Ludecke v. Watkins, 335 U.S. 160 (1948) (writ of habeas corpus to review order of Attorney General held properly dismissed since the Alien Enemy Act precludes judicial review of such executive action); United States ex rel. Kessler v. Watkins, 163 F. 2d 140 (C.C.A. 2d, 1947), cert. den. 332 U.S. 838 (1947) (deportation orders for German alien enemies held not unenforceable on ground that German government had ceased to exist after unconditional surrender and that there was therefore no foreign government as to which there was a declared war); United States ex rel. Schlueter v. Watkins, 158 F. 2d 853 (C.C.A. 2d, 1946)(statute permitting removal of alien enemies upon executive action without court control held constitutional).

[3] 335 U.S. 188 (1948).

[4] 14 Stat. 385 (1867), 28 U.S.C.A. § 452 et seq. (1928).

[5] When the bill embodying the statute was introduced in the Senate, there was an objection that it would permit a "district judge in Florida to bring before him some men convicted and sentenced and held under imprisonment in Vermont or in any of the further States." Cong. Globe, 39th Cong. 2d Sess., at 730 (1867). To meet this objection, the clause "within their respective jurisdictions" was added to the statute. Ibid., at 790.

[6] McGowan v. Moody, 22 App. D.C. 148 (1903); In re Bickley, 3 Fed. Cas. 332, No. 1,387 (D.C.N.Y., 1865); cf. United States ex rel. Harrington v. Schlotfeldt, 136 F. 2d 935, 940 (C.C.A. 7th, 1943); Jones v. Biddle, 131 F. 2d 853 (C.C.A. 8th, 1942); United States ex rel. Belardi v. Day, 50 F. 2d 816 (C.C.A. 3d, 1931); Ex parte Gouyet, 175 Fed. 230 (D.C. Mont.,

tions against movement of prisoners from one district to another.[7]

Justice Rutledge controverted each of the majority's conclusions in his extensive dissent. In his view the words "within their respective jurisdictions" are ambiguous: The statute does not purport to define jurisdiction literally in terms of the locus of the body of the prisoner rather than in terms of some other factor, such as the presence of the jailer.[8] Justice Rutledge's examination of the statute's legislative history disclosed no indication that Congress had considered the issue before the Court. The phrase might well have been inserted to guard against the possibility that the broad words of the statute would permit district judges to issue process against jailers in remote districts as a departure from the usual rule that process does not run beyond the territorial jurisdiction of the issuing court.[9] Moreover, the dissenting opinion argued that the weight of authority in the lower federal courts[10] and a famous dictum by Judge Cooley,[11] cited with approval by the Court as recently as 1944,[12] were opposed to the majority's conclusion. The high cost and administrative burden entailed in transporting prisoners from one district to another could be overcome and the efficacy of the writ preserved if district courts could issue writs in behalf of prisoners detained outside the jurisdiction whenever the jailer was subject to the court's process. The district courts could then refuse to grant the writ if the jailer could persuade them that a more convenient forum was available.[13] In

1909); In re Boles, 48 Fed. 75 (C.C.A. 8th, 1891); see Sanders v. Allen, 100 F. 2d 717 (App. D.C., 1938); Tippitt v. Wood, 140 F. 2d 689 (App. D.C., 1944). But see Ex parte Ng Quong Ming, 135 Fed. 378 (D.C.N.Y., 1905); Ex parte Fong Yim, 134 Fed. 938 (D.C.N.Y., 1905).

[7] The Court pointed to the "opportunities for escape afforded by travel, the cost of transportation, [and] the administrative burden of such an undertaking" as controlling factors. Ahrens v. Clark, 335 U.S. 188, 191 (1948).

[8] The Court had previously stated that if a statute could be construed in either of two ways, only one of which would grant power to issue writs of habeas corpus, the "great importance" of the writ might justify a construction upholding the grant. Whitney v. Dick, 202 U.S. 132, 136 (1906); Ex parte Bollman, 4 Cranch (U.S.) 75 (1807).

[9] Rule 4(f), Federal Rules of Civil Procedure, 28 U.S.C.A. foll. § 723c (1941).

[10] Sanders v. Allen, 100 F. 2d 717 (App. D.C., 1938); Ex parte Young, 50 Fed. 526 (C.C. Tenn., 1892); United States v. Davis, 25 Fed. Cas. 775, No. 14,926 (C.C.D.C., 1839); Ex parte Ng Quong Ming, 135 Fed. 378 (D.C.N.Y., 1905); Ex parte Fong Yim, 134 Fed. 938 (D.C.N.Y., 1905).

[11] In re Jackson, 15 Mich. 416, 439 (1867): "The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. . . . The place of confinement is, therefore, not important to the relief, if the guilty party is within reach of process, so that by the power of the court he can be compelled to release his grasp. The difficulty of affording redress is not increased by the confinement being beyond the limits of the state, except as greater distance may affect it."

[12] Ex parte Mitsuye Endo, 323 U.S. 283, 306 (1944).

[13] See Ahrens v. Clark, 335 U.S. 188, 207 (1948); Beard v. Bennett, 114 F. 2d 578, 580 (App. D.C., 1940). The federal courts frequently decline jurisdiction in habeas corpus proceedings on the ground that the petitioner should exhaust his remedies in the state courts first. Ex parte Hawk, 321 U.S. 114 (1944); Gusman v. Marrero, 180 U.S. 81 (1901); Minnesota v. Brundage, 180 U.S. 499 (1901); A Study of the Illinois Supreme Court, 15 Univ. Chi. L. Rev. 107, 120 et seq. (1947).

the majority's denial of this power to the district courts, Justice Rutledge found a grave impairment of the availability of the writ and a serious infringement of civil liberties.

A 1944 Supreme Court decision, *Ex parte Mitsuye Endo*,[14] was a recognized obstacle in the path of the majority opinion in *Ahrens v. Clark*. In the *Endo* case, after the petitioner had been denied a writ of habeas corpus by the district court, and while her appeal to the circuit court was pending, she was removed from the district. The Court, expressly reserving judgment on the jurisdictional problem[15] decided later in *Ahrens v. Clark*, stated that jurisdiction of the district courts could not be defeated by removal of the petitioner:[16]

> There are expressions in some of the cases which indicate that the place of confinement must be within the court's territorial jurisdiction in order to enable it to issue the writ.... But we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner.[17]

If it is power over the jailer that is essential in habeas corpus proceedings, and if physical power is of the essence of jurisdiction,[18] consistency would require a different result in the *Ahrens* case. If it is the court's power over the place of confinement that is essential, as indicated by the *Ahrens* decision, then different language should have been used in *Ex parte Mitsuye Endo*.

The dilemma presented by the language of the two opinions could have been avoided if the Court had decided whether the Attorney General was the proper respondent in proceedings carried out by officials of the department of immigration under a statute delegating authority to the president. The habeas corpus statute furnishes no solution, providing merely: "The writ shall be directed to the person in whose custody the party is detained."[19] If the Court's sole intention was to require that the petition be brought in the district court having jurisdiction over the place of confinement, the Court could have asserted that a responsible official at the situs of detention was the proper respondent. The need to resort to dubious statutory construction would thus have been obviated. Although some authority supports the "situs of detention" view,[20] the problem of defining "the person in whose custody the party is detained" has received

[14] 323 U.S. 283 (1944).

[15] Ibid., at 305.

[16] But see the cases holding the court to be without jurisdiction where service is made upon the respondent after removal of the petitioner: United States ex rel. Goodman v. Roberts, 152 F. 2d 841 (C.C.A. 2d, 1946), cert. den. 328 U.S. 873 (1946); United States ex rel. Lee Fook Chew v. McNeil, 69 F. 2d 107 (C.C.A. 3d, 1934) (petitioner did not appeal denial of writ until after removal); Ex parte Yee Hick Ho, 33 F. 2d 360 (D.C. Cal., 1929).

[17] 323 U.S. 283, 306 (1944).

[18] McDonald v. Mabee, 243 U.S. 90, 91 (1917).

[19] 14 Stat. 385 (1867), 28 U.S.C.A. § 455 (1928). The wording is only slightly changed in the revised judicial code, 28 U.S.C. § 2243 (1948).

[20] See Sanders v. Bennett, 148 F. 2d 19 (App. D.C., 1945) (warden should have been named rather than official who supervises warden); Jones v. Biddle, 131 F. 2d 853 (C.C.A. 8th, 1942) (warden should have been named as custodian of federal prisoner at Leavenworth rather than Attorney General); McGowan v. Moody, 22 App. D.C. 148 (1903) (Secretary of Navy was not custodian of a marine imprisoned on Guam).

little attention from the courts. The Attorney General, seeking to waive the issue as to the territorial limitation, argued that naming the appropriate official is a mere formality.[21] But it is not surprising in light of the lack of discussion of this issue that some of the German deportees on Ellis Island sought relief in the District Court for the Southern District of New York by service on the district director of immigration,[22] while others sought a remedy in the District of Columbia by service on the Attorney General.

Refusal to adopt the solution that the custodian is necessarily an official at the situs of detention has presented the courts with a number of different jurisdictional variables in habeas corpus proceedings. Before the *Ahrens* decision, courts discussing the situation in which the prisoner was detained in a district of state X and the jailer was in a district of state Y had expressed divergent views as to the jurisdiction of a federal court in Y.[23] Where the prisoner and jailer are both in a district of state X and the petition is filed in a district of state Y, the cases have been unanimous in holding that there is a lack of jurisdiction.[24] If the prisoner is in a district of state X, the jailer in a district of state Y, and the petition is filed in X, the court of X lacks jurisdiction.[25] With respect to another situation, that of Americans imprisoned in foreign territory occupied by American military forces, the majority opinion in the *Ahrens* case reserved judgment. In such a situation no district court would have jurisdiction if it

[21] Ahrens v. Clark, 335 U.S. 188, 200 n. 11 (1948).

[22] See cases cited note 2 supra.

[23] Opinions holding that jurisdiction existed in these circumstances included Sanders v. Allen, 100 F. 2d 717 (App. D.C., 1938); Ex parte Young, 50 Fed. 526 (C.C. Tenn., 1892); United States v. Davis, 25 Fed. Cas. 775, No. 14,926 (C.C.D.C., 1839); Ex parte Ng Quong Ming, 135 Fed. 378 (D.C.N.Y., 1905); Ex parte Fong Yim, 134 Fed. 938 (D.C.N.Y., 1905).

The contrary rule that jurisdiction is lacking unless the place of confinement is within the court's territorial jurisdiction was asserted in In re Bickley, 3 Fed. Cas. 332, No. 1,387 (D.C. N.Y., 1865) (the custodian did not attempt to waive the defect); United States ex rel. Quinn v. Hunter, 162 F. 2d 644 (C.C.A. 7th, 1947) (although both the custodian and prisoner were within the territorial jurisdiction, the warden was present only as a witness in a proceeding to correct the judgment of conviction of the prisoner, and the prisoner was in a marshal's custody for purposes of the proceeding, subject to return to the jurisdiction of confinement as soon as the proceedings were terminated). In cases cited note 24 infra, the assertion of the place of confinement rule was only dictum, since the prisoner and jailer were both outside the jurisdiction. The same is true of the cases cited notes 20 and 16 supra, the actual holdings of those cases being based either on the naming of the wrong respondent or on the fact that the respondents no longer had custody of the petitioners; see also Dorsey v. Gill, 148 F. 2d 857 (App. D.C., 1945); Bowen v. Johnson, 55 F. Supp. 340 (Cal., 1944).

[24] United States ex rel. Harrington v. Schlotfeldt, 136 F. 2d 935 (C.C.A. 7th, 1943); In re Boles, 48 Fed. 75 (C.C.A. 8th, 1891); United States ex rel. Corsetti v. Commanding Officer, 3 F.R.D. 360 (N.Y., 1944); Hauck v. Hiatt, 50 F. Supp. 534 (S.C., 1943); Ex parte Gouyet, 175 Fed. 230 (D.C. Mont., 1909).

[25] Rule 4(f), Federal Rules of Civil Procedure, 28 U.S.C.A. foll. § 723c (1941); see United States ex rel. Quinn v. Hunter, 162 F. 2d 644 (C.C.A. 7th, 1947) (court cannot properly direct its process to warden while warden is outside its territorial jurisdiction). But see Ex parte Farley, 40 Fed. 66, 68 (C.C. Ark., 1889): "The court may grant this great 'writ of right' in every case where a party is restrained of his liberty anywhere in the territorial jurisdiction of the court. . . ."

were determined that the custodian is the actual turnkey or the highest military official in the area of confinement.[26] Yet if the Secretary of Defense or the President is to be regarded as the custodian, then it appears that the *Ahrens* decision denies jurisdiction to the District Court for the District of Columbia because the petitioner is not confined within that district. The Supreme Court has ruled that it does not have original jurisdiction in the circumstances,[27] thus depriving a group of American citizens of the right of habeas corpus unless the individual justices are willing to accept jurisdiction.[28] The resulting deluge of habeas corpus petitions upon each of the Supreme Court justices would be an undesirable result of their acceptance of original jurisdiction.

Because *Ahrens v. Clark* was treated by the court as a simple instance of application for the writ of habeas corpus to the wrong court, a series of far reaching civil liberties problems have been created.[29] Perhaps no habeas corpus remedy now exists for some persons detained in deportation proceedings, incarcerated in an institution for the insane, or held by the military either under the Selective Service Act[30] or pursuant to court-martial proceedings. In many such instances the prisoner is in one district, the jailer in another. The same problem may also arise in habeas corpus petitions by a parent seeking to regain custody of a child. By statutory revision of the judicial code, a remedy has been granted for persons committed pursuant to judicial process in contrast to those detained by executive or private action: Persons in the former category are required to seek their remedy in the court of conviction.[31] Hence, a jurisdictional snarl created in the District of Columbia by *Ahrens v. Clark* has been avoided for future petitioners. The penal institutions and asylums for the nation's capital are located in Virginia, although the custodians are subject to the process of the District of Columbia courts.[32] Hitherto prisoners and inmates have applied to

[26] Cases cited note 24 supra.

[27] Ex parte Betz, Ex parte Durant, Ex parte Wills, Ex parte Cutino, Ex parte Walczak, Ex parte McKinley, Ex parte Murphy, all reported at 329 U.S. 672 (1946). Justices Rutledge and Black were of the opinion that the Court's declining of application for relief by habeas corpus should be without prejudice to filing in the appropriate district court. The question may be asked: What district court is appropriate? Justice Murphy thought the petitions raised questions of jurisdiction and procedure which the Court should determine. Presumably, however, the Supreme Court does not have original jurisdiction because Congress cannot enlarge the original jurisdiction of the Court beyond the cases specified in Article III of the Constitution. B.&O. Ry. Co. v. ICC, 215 U.S. 216 (1909).

[28] A Supreme Court justice may decline to entertain an application for a writ of habeas corpus and may transfer it to the district court having jurisdiction to entertain it. 28 U.S.C. § 2242(b) (1948). The application cannot be transferred "to the district court having jurisdiction to entertain it" if there is no district court with such power. But it may be doubted that the "respective jurisdiction" of a justice extends beyond the limits of the United States.

[29] See Frank, United States Supreme Court: 1947–48, 16 Univ. Chi. L. Rev. 1, 33 (1948) (classifying Ahrens v. Clark as a civil rights case).

[30] 54 Stat. 885 (1940), as amended, 50 U.S.C A. §§ 301–18 (1944).

[31] 28 U.S.C. § 2255 (1948).

[32] This would be true even if they lived in Washington's suburbs in Virginia or Maryland, since each is "in every real sense a member of the District of Columbia community." Langan v. Langan, 150 F. 2d 979, 980 (App. D.C., 1945).

the District of Columbia courts for release.[33] *Ahrens v. Clark* standing alone would have deprived these petitioners of effective habeas corpus relief.[34]

The restrictions on the "freedom writ" introduced by *Ahrens v. Clark* can best be overcome by statute. For the protection of Americans imprisoned abroad by American military personnel, an act has been proposed which stipulates that the Chief Justice of the Supreme Court shall assign to designated district courts the duty of passing on the merits of habeas corpus petitions presented by citizens who are not within the territorial jurisdiction of any federal district court.[35] The Attorney General is to be named respondent in all such proceedings. A similar statute, providing that district courts shall have the power to issue writs if the jailer is subject to process,[36] would seem necessary for effective preservation of one of the most "precious safeguard[s] of personal liberty."[37] One year after the passage of the statute which the *Ahrens* decision has construed restrictively, the Supreme Court said: "[T]he general spirit and genius of our institutions have tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States."[38] The reversal of this trend is not a desirable tendency.

MUTUAL AGREEMENT NOT TO COMPETE AS PRECLUDING RELIEF FOR PATENT INFRINGEMENT

The Kammerer Corporation, holder of a pipe-cutter patent, and its exclusive licensee, Baash-Ross Tool Co., sought damages and an accounting from the defendant, McCullough, for infringement. After the patent was found to be valid and infringed,[1] the defendant raised the defense that the licensing agreement

[33] Burns v. Welch, 159 F. 2d 29 (App. D.C., 1947); Sanders v. Allen, 100 F. 2d 717 (App. D.C., 1938).

[34] In McAffee v. Clemmer (App. D.C., Oct. 18, 1948), the court of appeals relied on Ahrens v. Clark to hold that the District Court of the District of Columbia was without jurisdiction to grant a writ of habeas corpus to a petitioner who had been sentenced by that court and confined in the District of Columbia Reformatory at Lorton, Virginia. The court noted that this decision overruled previous precedents in the same court to the contrary, but made no mention of the section in the new judicial code, 28 U.S.C. § 2255 (1948), which permits the prisoner to make a motion to the court of his conviction at any time "to vacate, set aside or correct the sentence." Another circuit, confronted with the same problem, held that a prisoner, who was sentenced by a federal district court in North Carolina and confined in Georgia, might not seek a writ of habeas corpus in the North Carolina district court. Crowe v. United States, 169 F. 2d 1022 (C.C.A. 4th, 1948).

[35] Wolfson, Americans Abroad and Habeas Corpus, 9 Fed. Bar J. 142 (1948).

[36] Of course, the statute ought to be phrased permissively so that the courts could deny jurisdiction by invoking the doctrine of forum non conveniens. See Rutledge, J., dissenting in Ahrens v. Clark, 335 U.S. 188, 207 (1948).

[37] Bowen v. Johnston, 306 U.S. 19, 26 (1939).

[38] Ex parte Yerges, 8 Wall. (U.S.) 85, 101 (1868).

[1] Kammerer Corp. v. McCullough, 39 F. Supp. 213 (Calif., 1941), aff'd 138 F. 2d 482 (C.C.A. 9th, 1943), cert. den. 322 U.S. 739 (1944), rehearing granted 322 U.S. 766 (1944), writ dismissed and case remanded 323 U.S. 327 (1945).