Journal of Criminal Law and Criminology

Volume 37 | Issue 1 Article 5

1946

Legal Abstracts and Notes

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Recommended Citation

Legal Abstracts and Notes, 37 J. Crim. L. & Criminology 58 (1946-1947)

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LEGAL ABSTRACTS AND NOTES

Judicial Review of War Crime Trials*

THE methods adopted by the United States and the other allied nations for the prosecution of the Axis war criminals present one of the most critical developments in the aftermath of the recent world conflict. Especially is this evident in the recent trial of General Tomoyuki Yamashita[1] in which a military commission found the Japanese General guilty of a violation of the law of war.

A review of the events preceding the trial is necessary for a complete understanding of the problems involved. From October 9, 1944, to September 2, 1945, petitioner was the Commanding General of the 14th Army Group of the Imperial Japanese Army, with headquarters in the Philippines. During that time, while the American forces were engaged in the reconquest of the islands, many atrocities were committed on the civilian population by the retreating and generally disorganized troops under Yamashita's command. On September 3, 1945, Yamashita surrendered and became a prisoner of war. On September 12th, by direction of the President, the Joint Chiefs of Staff of the American Military Forces instructed General MacArthur, Commander in Chief, United States Army Forces, Pacific, to proceed with the trial, before appropriate military tribunals, of such Japanese war criminals "as may have or may be apprehended." By order of General MacArthur on September 24, 1945, General Wilhelm D. Styer, Commanding General, United States Army Forces, Western Pacific, was directed to proceed with the trial of the petitioner. This order was accompanied by rules and regulations prescribed by General MacArthur for the trial of war criminals.[2] On the next day, September 25th, by order of General Styer, petitioner was charged with a violation of the

* By Ellis E. Fuqua, a senior law student in the Northwestern University School of Law. [This comment is also appearing in the current issue of the Illinois Law Review.]

[1] Application of Yamashita, Yamashita v. Styer, —— U. S. ——, 66 S. Ct. 340 (1946). See also Application of Homma, Homma v. Styer, —— U.S. ——, 66 S. Ct. 515 (1946) decided on the authority of the principal case.

[2] § 16 of those regulations is especially pertinent:

"§16. Evidence. a. The commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion *would have probative value in the mind of a reasonable man.* In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

(1) Any document which appears to the commission to have been signed or issued officially by any officer, department, agency, or member of the armed forces of any government, without proof of the signature or of the issuance of the document.

(2) Any report which appears to the commission to have been signed or issued by the International Red Cross or a member thereof, or by a medical doctor or any medical service personnel, or by an investigator or intelligence officer, or any other person whom the commission finds to have been acting in the course of his duties when making the report.

(3) *Affidavits, depositions, or other statements* taken by an officer detailed for that purpose by military authority.

(4) Any diary, letter or other document appearing to the commission to contain information relating to the charge.

(5) A copy of any document or other secondary evidence of its contents, if the commission believes that the original is not available or cannot be produced without undue delay. . . ." (Italics supplied.)

law of war. The charge alleged that while commander of Japanese Armed Forces at war with the United States and its allies, the general unlawfully disregarded and failed to discharge his duty as commander to control operations of members of his command in permitting such members to commit atrocities and other high crimes against people of the United States and the Philippine Islands. On October 8, 1945, petitioner, after pleading not guilty to the charge, was held for trial before the military commission, a staff of defense counsel was appointed and a bill of particulars was filed. Three weeks later, on October 29th, a supplemental bill of particulars, containing fifty-nine additional specifications was filed, and on that same day, after a motion for continuance had been denied, the trial commenced. On December 7, 1945, the commission found the petitioner guilty of the offense as charged and he was sentenced to be hanged.

The Supreme Court, in denying the petition for writ of habeas corpus and prohibition and affirming a similar decision of the Supreme Court of the Philippine Islands, held that the military commission was lawfully created to try the petitioner, that the petitioner was charged with a violation of the law of war, and that the trial procedure provided for was proper. In considering the authority to create the commission Mr. Chief Justice Stone, speaking for the majority of the Court, held first, that the order for the appointment of the commission conformed to the established policy of the government[3] and to higher commands authorizing the action,[4] and second, that there was no objection to the convening of the commission, at least before peace had been declared by treaty or proclamation of the political branch of the government.[5] Mr. Justice Rutledge, dissenting, felt that the commission was invalid, not only because of the rules and regulations accompanying General MacArthur's directive,[6] but also because of the lack of military necessity after hostilities had ended.[7]

By referring to the Annex of the Fourth Hague Convention,[8] the

[3] —— U. S. ——, 66 S. Ct. 340, 345 (1946). In a proclamation of July 2, 1942, the President proclaimed that enemy belligerents who, during time of war entered the United States or any territorial possession thereof and who violate the law of war, should be subject to the law of war and to the jurisdiction of military tribunals. 56 Stat. 1964, 7 Fed. Reg. 5103 (1942).

[4] By direction of the President, the Joint Chiefs of Staff of the American Military Forces, on September 12, 1945, instructed General MacArthur, Commander in Chief, United States Army Forces, Pacific, to proceed with the trial, before appropriate military tribunals, of such Japanese war criminals "as have been or may be apprehended."

[5] See Glueck, By What Tribunal Shall War Offenders Be Tried? (1943) 56 Harv. L. Rev. 1057, 1059, citing J. A. G., 1912 (I — c 8a (3) (b) [4]). Not only do cases in our military history support the view taken by the majority of the Court, United States v. Anderson, 76 U. S. 56, 70, (1869); The Protector, 79 U. S. 700, 702 (1871); McElrath v. United States, 102 U. S. 426, 438 (1880); Kahn v. Anderson, 255 U. S. 1, 9 (1920); but also Japan by her acceptance of the Potsdam Declaration and her surrender, acquiesced to the trials of those guilty of the law of war.

[6] See *supra* note 2.

[7] —— U. S. ——, 66 S. Ct. 340, 362 (1946).

[8] "Art. 1 lays down as a condition which an armed force must fulfil in order to be accorded the rights of lawful belligerents, that it must 'be commanded by a person responsible for his subordinates.' " 36 Stat. 2277, 2295 (1907). "Art. 43... requires that the commander of a force occupying enemy territory, as was petitioner, 'shall take all the measures in his power to restore and insure, as far as possible, public order and

Tenth Hague Convention[9] and the Geneva Red Cross Convention of 1929[10] the majority found that there was a duty imposed on the petitioner to take such appropriate measures as were within his power to protect prisoners of war and the civilian population, and that the allegation preferred against him of a violation of that duty charged him with a violation of the law of war.[11] Mr. Justice Murphy, whose dissenting opinion dealt almost entirely with this point, felt that references to the Hague Conventions and the Geneva Red Cross Convention were not applicable, that there was no historical precedent establishing such action as a violation of the law of war and that in a situation such as was presented here, where troops under the petitioner's command were in retreat and completely disorganized, the mere inability to control troops under fire or attacked by superior forces could not be made the basis of a charge of violating the law of war.[12]

The petitioner's trial was conducted in conformity with General MacArthur's directive which provided for the admission of such evidence as in the opinion of the commission "would have probative value in the mind of a reasonable man," including specifically depositions, affidavits, and hearsay and opinion evidence.[13] This procedure was in direct conflict with rules governing admissibility of evidence before military tribunals in Articles 25[14] and 38[15] of the Articles of War and Article 63[16] of the Geneva Convention of 1929,

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safety, while respecting, unless absolutely prevented, the laws in force in the country.'" 36 Stat. 2306 (1907).

[9] "Art. 19... relating to bombardment by naval vessels, provides that Commanders in Chief of the belligerent vessels 'must see that the above Articles are properly carried out.'" 36 Stat. 2389 (1907).

[10] "Art. 26... makes it 'the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing Articles, [of the Convention] as well as for unforeseen cases.'" 47 Stat. 2047, 2092 (1929).

[11] —— U. S. ——, 66 S. Ct. 340, 348 (1946). It seems well settled that the charge against the accused in a trial before a military tribunal need not be as specific as a common law indictment. Collins v. McDonald, 258 U. S. 416 (1922).

[12] —— U. S. ——, 66 S. Ct. 340, 353-9 (1946). Mr. Justice Murphy admits, however, that "this is not to say that enemy commanders may escape punishment for clear and unlawful failure to prevent atrocities." *Id.* at 359. It would seem that in order to find that no such duty existed here it would be necessary to examine the evidence presented in the case. It is well recognized that such is not the function of the Court in reviewing a conviction on habeas corpus. See cases cited *infra*, notes 31-39.

[13] See *supra* note 2.

[14] Art. 25 is as follows: "A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before *any military court or commission in any case not capital*,... provided, that testimony by deposition may be adduced for the defense in capital cases." (Italics supplied.) 41 Stat. 792 (1922), 10 U.S.C.A. § 1496.

[15] Art. 38 reads: "The President may, by regulations which he may modify from time to time prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, *military commissions*, and other military tribunals, which regulations shall insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: Provided, that nothing contrary to or inconsistent with these Articles shall be so prescribed." (Italics supplied.) 41 Stat. 794 (1920), 10 U.S.C.A. § 1509.

[16] Art. 63 reads: "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." 47 Stat. 2052 (1929).

all in effect prohibiting the use of hearsay evidence in capital cases, and hence, if either the Articles of War or the Geneva Convention were applicable to the trial, then the order creating the commission would be invalid and the commission would have no jurisdiction. In reviewing the proceedings before the commission the majority considered first the Articles of War and held that neither Article 25 nor Article 38 was applicable to the trial of an enemy combatant by a military commission for violations of the law of war but only in courts-martial proceedings.[17] The court reasoned that Congress provided in the Articles of War for the procedure to be used in the trial of "persons subject to military law" as enumerated in Article 2;[18] that in merely recognizing by reference the traditional jurisdiction of military commissions over enemy combatants in Article 15[19] Congress did not thereby subject to the Articles of War persons other than those mentioned in Article 2, nor did it confer the benefits of the Articles on such persons. But Mr. Justice Rutledge reasoned in his dissent that the congressional recognition of the military commission in Article 15 and of the reference made to military commissions in Articles 25 and 38 indicate that those Articles were applicable to this proceeding; that since Section 16[20] of the provisions accompanying the directive from General MacArthur was in conflict with the Articles, the commission was invalidly constituted and so had no jurisdiction.[21]

There was similar disagreement between Mr. Chief Justice Stone and Mr. Justice Rutledge as to the applicability of Articles 60[22] and 63[23] of the Geneva Convention of 1929, the former interpreting those articles of the Convention in which Articles 60 and 63 were included as applying only to prosecutions of crimes committed by prisoners of war,[24] and the latter, to enemy combatants as well.[25]

The most significant aspect of the case would seem to be the question of due process under the Fifth Amendment. Few elements of a fair trial in our conception of criminal jurisprudence were present. The charge against the petitioner was insufficient to indicate what specific acts were alleged in order that a defense could be prepared; the commission denied the defense adequate time in which to prepare the defense; and depositions, affidavits, hearsay and opinion evidence were admitted in direct violation of the constitutional rights of the accused to confront the witnesses against him.[26]

[17] —— U. S. ——, 66 S. Ct. 340, 349 (1946).

[18] 41 Stat. 787 (1920), 10 U.S.C.A. § 1473. Art. 2 has been held to apply not only to members of the Armed Forces, but also to "all retainers to the camp and all persons accompanying or serving with the armies of the United States. . . ."

[19] Art. 15 reads: "The provisions of these Articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions...or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions...or other military tribunals." 41 Stat. 789 (1920), 10 U.S.C.A. § 1486.

[20] See *supra* note 2.

[21] —— U. S. ——, 66 S. Ct. 340, 369-374 (1946).

[22] Art. 60 provides that: "At the opening of a judicial proceeding directed against a prisoner of war the detaining power shall advise the representative of the protecting power thereof as soon as possible and always before the date set for the opening of the trial." 47 Stat. 2052 (1929).

[23] See *supra* note 16.

[24] —— U. S. ——, 66 S. Ct. 340, 350 (1946).

[25] *Id.* at 376.

[26] *Id.* at 365-378.

The majority opinion turned the question aside with the brief statement that "the commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts."[27]

The Articles of War, passed by Congress pursuant to authority granted by Article 1, Section 8, of the Constitution,[28] provide for courts-martial and in Article 15[29] thereof recognized the common law military commission as the proper tribunal in which to try offenses against the rules of warfare as established by international law, that is, offenses against the common law of war.[30] It has been generally held that judicial review of decisions of military tribunals[31] is limited to a determination of three questions: whether the court was properly constituted,[32] whether it had jurisdiction of the person[33] and the subject matter,[34] and whether it had power to impose the sentence.[35] Thus there can be no judicial review of the guilt or innocence of the prisoner,[36] and however erroneous the proceedings or findings of the military tribunal may be, they can not

[27] *Id.* at 351.

[28] U. S. Const. Art. I, § 8, Cl. 10, 12, 13, 14, 16.

[29] See *supra* note 19.

[30] Speaking at the hearings before the Committee on Military Affairs, House of Representatives, 62nd Cong. 2d Sess., in support of the passage of Article 15 of the Articles of War, General Crowder said: "In our war with Mexico two war courts were brought into existence by orders of General Scott, *viz.* the military commission and the council of war. By the military commission General Scott tried cases cognizable in time of peace by civil courts, and by the council of war he tried offenses against the laws of war. The council of war did not survive the Mexican war period and in our subsequent wars its jurisdiction has been taken over by the military commission, which during the Civil War tried more than two thousand cases. While the military commission has not been formally authorized by statute, its jurisdiction as a war court has been upheld by the Supreme Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved."

[31] On this question generally see Covington, Judicial Review of Courts-Martial (1939) 7 Geo. Wash. L. Rev. 503, and authorities cited therein; Stein, Judicial Review of Determinations of Federal Military Tribunals (1941) 11 Brooklyn L. Rev. 30.

[32] McClaughry v. Deming, 186 U. S. 49 (1902); Kahn v. Anderson, 255 U. S. 1 (1920); *Ex parte* Milligan, 71 U. S. 2 (1866).

[33] VanMehren v. Sirmyer, 36 F. (2d) 876 (C.C.A. 8th, 1929); United States v. Bullard, 290 Fed. 704 (C.C.A. 2nd, 1923); Hoskins v. Poll, 239 Fed. 279 (C.C.A. 5th, 1917).

[34] *Ex parte* Reed, 100 U. S. 13 (1879); Collins v. McDonald, 258 U. S. 416 (1922). For possibility of loss of jurisdiction during proceedings, see *Ex parte* Lange, 85 U. S. 163 (1873).

[35] Carter v. McClaughry, 183 U. S. 365 (1902); *Ex parte* Dickey, 204 Fed. 322 (D. C. Me., 1913).

[36] *Ex parte* Quirin, 317 U. S. 1 (1942), Note (1943) 37 Ill. L. Rev. 265, presented to the Court a petition for habeas corpus to review the trial before a military commission of eight German saboteurs for violations of the law of war and the Articles of War under a Presidential Proclamation. The Court held that they were not entitled to a jury trial because military proceedings have never been considered judicial and since the Sixth Amendment, providing for jury trials in criminal cases by judicial courts, provided for in Article III of the Constitution, does not apply to proceedings before a military commission even though the criminal courts were functioning in the United States and no martial law had been declared. The Court distinguished *Ex parte* Milligan, 71 U. S. 2 (1866), which was the first case to review a trial before a military commission. The Court there held that a twenty year resident of Indiana, neither a belligerent nor a prisoner of war, was not subject to a military tribunal where there was no actual rebellion and the courts were functioning. See also Smith v. Whitney, 116 U. S. 167, 177 (1886); Dynes v. Hoover, 61 U. S. 65 (1857).

be reviewed collaterally[37] or by habeas corpus[38] but must be left to be corrected by the proper military authority.[39]

The petitioner in the present case claimed that the commission was without authority and jurisdiction because the order governing the evidence which the commission might admit and the rulings of the commission admitting such evidence were in violation of the Articles of War, the Geneva Convention and the Fifth Amendment.[40] Mr. Chief Justice Stone examined the order from General MacArthur to determine whether it violated the Articles of War or the Geneva Convention and found neither applicable, and that therefore there was no jurisdictional defect to void the judgment.[41] However, when he came to consider the Fifth Amendment, he held only that no question of due process was reviewable by the Court.[42] The reason for the distinction between statutory and constitutional safeguards would seem to be that an order permitting evidence in violation of a statute would be void and would oust the military tribunal of jurisdiction, while only the actual admission of such evidence would violate due process.[43] Thus, since the Court cannot review the rulings of the military tribunal as to the admission of evidence, there can be no judicial review of the due process objection.[44]

The effect of this decision would seem to be that there is absolutely no judicial review of the trial of an enemy combatant by a duly authorized military commission with jurisdiction and that there is no prescribed procedure except that which may be provided for by the commanding officer ordering the commission. The reasoning of the Court cannot be questioned. It would seem to be only the basic assumption, that there should be no judicial review of an authorized military tribunal with jurisdiction, that can and should be attacked.[45] A recent Circuit Court of Appeals case, *United States* ex rel. *Innes v. Hiatt*,[46] indicates a trend on the part

[37] Dynes v. Hoover, 61 U. S. 65 (1857); Swain v. United States, 165 U. S. 553, 561 (1897); Keyes v. United States, 109 U. S. 336, 340 (1883); Carter v. Woodring, 92 F. (2d) 544 (App. D.C. 1937).

[38] *Ex parte* Vallandingham, 68 U. S. 243 (1863); *In re* Vidal, 179 U. S. 126 (1900); Collins v. McDonald, 258 U. S. 416 (1922); *Ex parte* Smith, 47 F. (2d) 257 (S.D.Me., 1931). See Note (1935) 35 Col. L. Rev. 404, indicating a trend in the direction of review of the proceedings in civil cases as to due process objections.

[39] See 41 Stat. 797 (1920), as amended by 50 Stat. 724 (1937), 10 U.S.C.A. § 1522 (1940). "If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions. Principal case at 344-345. See Dynes v. Hoover, 61 U. S. 65 (1857); Runkle v. United States, 122 U. S. 543, 555-556 (1886); Carter v. McClaughry, 183 U. S. 365 (1902); Collins v. McDonald, 258 U. S. 416 (1922). *Cf.* Matter of Moran, 203 U. S. 96, 105 (1906).

[40] See majority opinion at 343.

[41] *Id.* at 349-352.

[42] See *supra* note 27.

[43] See Castillo v. McConnico, 168 U. S. 674, 680 (1898); Straus v. Foxworth, 231 U. S. 162 (1913).

[44] Mr. Chief Justice Stone specifically leaves open the questions of the wisdom of considering such evidence and whether the action of a military tribunal in admitting evidence, which Congress or controlling military command has directed to be excluded, may be drawn in question by petition for habeas corpus or prohibition.

[45] *Cf.* Covington, Judicial Review of Courts Martial (1939) 7 Geo. Wash. L. Rev. 503.

[46] 141 F. (2d) 664 (C.C.A. 3rd, 1944). See Dorsey v. Gill, 148 F. (2d) 857, 872 (App. D.C. 1945).

of the civil courts towards reviewing the proceedings before a military tribunal where there has been a violation of the constitutional rights of the accused. Although the court held that the action of the court-martial in calling in the prosecutor in the absence of the accused and asking him to produce evidence did not violate due process where no more evidence was in fact produced, yet the court reasoned that since habeas corpus will protect one who has been convicted in a civil court in disregard of his constitutional rights where such remedy is the only effective means of preserving those rights,[47] and that since one does not lose his fundamental rights to a fair trial by being called into the military service, the civil courts on petition for habeas corpus should 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.[48]

The reasoning in this case would seem equally applicable to a military commission. The Fifth Amendment uses the language "*no person* shall . . . be deprived of life, liberty, or property without due process of law."[49] (Italics supplied.) No exception is made as to those who are accused of war crimes or to those who possess the status of an enemy belligerent. The Court is here faced with a case which has received widespread attention and which will act as a precedent in future trials of violations against the law of nations, and it would seem that in proceedings before a tribunal for which there may be no statutory procedural requirements the Court should exercise great care to see that our American concepts of fair trial are preserved.

[47] The court cited Moore v. Dempsey, 261 U. S. 86, 91 (1923) (Mob domination of trial); Mooney v. Holohan, 294 U. S. 103 (1935) (perjured testimony deliberately used); Johnson v. Zerbst, 304 U. S. 458 (1938) (no representation by counsel).

[48] See also *Ex parte* Benton, 63 F. Supp. 808 (N.D. Cal. 1946) in which the District Court, although dismissing the petition for writ of habeas corpus, held that where there is a denial of due process under the military law apparent from the whole record, a writ of habeas corpus will issue.

[49] U. S. Const. Amend. V. The Fifth Amendment has been consistently applied in deportation proceedings against aliens. See Ng Fung Ho v. White, 259 U. S. 276 (1922); *Ex parte* Eguchi, 58 F. (2d) 417 (D.C. Cal. 1932).