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Grant F. Watson

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## The Scope of Review Over Courts-Martial on Habeas Corpus\*

It has frequently been held that the scope of review which may be obtained on a petition for a writ of habeas corpus is limited to an examination of the jurisdiction of the tribunal under sentence of which the petitioner is being held.<sup>1</sup> This has been applied equally to sentences of civil courts<sup>2</sup> and of military tribunals.<sup>3</sup> It has been said that the writ of habeas corpus may not be used as a writ of error to obtain a review of questions of law and fact.<sup>4</sup>

A decision which reviews more than mere jurisdiction is unusual and is worthy of analysis. Such is the case of *Hicks v. Hiatt*.<sup>5</sup> The petitioner, Hicks, sought and obtained a writ of habeas corpus addressed to Hiatt, the warden of the federal penitentiary at Lewisburg, Pa. Petitioner was serving time in the penitentiary under sentence of a court-martial, which had found him guilty of committing rape while serving as a private in the 8th Air Force in England. It was clear from the allegations and proof before the district court that the proceedings were fraught with error, much of which was highly prejudicial to the petitioner. The court found the four errors occurred during the pre-trial investigation:<sup>6</sup> (1) the pre-trial investigator failed to warn Hicks that his statements would be used against him;<sup>7</sup> (2) the investigator failed to examine all the witnesses requested by Hicks;<sup>8</sup> (3) petitioner was not permitted to examine adverse witnesses during the investigation;<sup>9</sup> and (4) the investigator mistakenly suppressed a considerable body of evidence tending to show that the complaining witness had a poor reputation for chastity.<sup>10</sup> Furthermore, a number of errors occurred during and after the trial: (1) petitioner was cross-examined as to matters irrelevant but degrading to him and persistent reference was made thereto by the prosecution;<sup>11</sup> (2) a witness was permitted

\* This case note also appeared in (1946) 41 Illinois Law Review 260.

<sup>1</sup> Ferris & Ferris, *The Law of Extraordinary Legal Remedies* (1926) §18.

<sup>2</sup> *Ex parte Watkins*, 3 Peters 193 (1830); *Young v. Sanford*, 147 F. (2d) 1007 (C.C.A. 5th, 1945).

<sup>3</sup> *Ex parte Reed*, 100 U.S. 13 (1879); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Carter v. McClaughry*, 183 U.S. 365 (1902); *Romero v. Squier*, 133 F. (2d) 528 (C.C.A. 9th, 1943).

<sup>4</sup> *Ex parte Reed*, 100 U.S. 13 (1879); *Ex parte Yarbrough*, 110 U.S. 651 (1884).

<sup>5</sup> 64 F. Supp. 238 (M.D. Pa. 1946).

<sup>6</sup> It has been held that pre-trial errors as reflected in the proceedings proper may be so prejudicial as to be vitiating. *McNabb v. United States*, 318 U.S. 332 (1943); *United States v. Mitchell*, 322 U.S. 65 (1944); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).

<sup>7</sup> In fact the investigator told Hicks that anything he said would be used in his own behalf. This was violative of paragraph 35a of the Manual for Courts-Martial, United States Army (1928).

<sup>8</sup> This violated Article 70 of the Articles of War, 41 Stat. 802 (1920), 10 U.S.C.A. §1542 (1927), and paragraph 35a of the Manual for Courts-Martial, United States Army (1928). It should be noted that in the military service one of the purposes for the pre-trial investigation is to procure evidence for the defense as well as for the prosecution.

<sup>9</sup> *Ibid.*

<sup>10</sup> The investigator was apparently unaware that such evidence is highly relevant to the defense in a rape case. In thus failing to investigate thoroughly, the investigator violated Article 70 of the Articles of War, 41 Stat. 802 (1920), 10 U.S.C.A. §1542 (1927), and paragraph 35a of the Manual for Courts-Martial, United States Army (1928).

<sup>11</sup> This violated Article 24 of the Articles of War, 41 Stat. 792 (1920), 10 U.S.C.A. §1495 (1927) and paragraphs 122a and 121b of the Manual for Courts-Martial, United States Army (1928).

to testify to matters that were hearsay and irrelevant but prejudicial to petitioner; (3) no evidence was adduced concerning the reputation for chastity of the complaining witness;<sup>12</sup> (4) in closing the judge advocate was permitted to make prejudicial statements concerning petitioner's failure to make a sworn statement during the investigation;<sup>13</sup> (5) the court-martial admitted certain testimony that was obviously based entirely upon the supposition of the witness; (6) the recommendation for clemency made by all the members of the court-martial to the convening authority indicated that the members entertained a reasonable doubt as to whether the complaining witness consented to the act;<sup>14</sup> and (7) the reviewing authorities found no error in the proceedings. The district court held that a civil court could in a habeas corpus proceeding determine whether the military trial had been basically so unfair that the petitioner was being deprived of his liberty without due process of law. Applying the rule to the facts in the case, the court found that there had been such an accumulation of prejudicial errors as to constitute a deprivation of due process<sup>15</sup> and ordered Hicks' release.

In so holding the court followed an earlier case in the same circuit<sup>16</sup> in which the petitioner, a soldier, was in the custody of the same warden under sentence of a court-martial. The court held<sup>17</sup> in that case that habeas corpus may be used to test the validity of a conviction where the constitutional rights of the accused have been disregarded and where those rights cannot be preserved by means other than by habeas corpus. It was held that this particularly applied to a deprivation of due process of law. In articulating this rule the court pointed out that a citizen does not give up all his constitutional rights when he becomes a member of the armed forces, and that, although procedurally due process in a military tribunal differs quite materially from that in a civil court, nevertheless it is essential that this procedure be applied "in a fundamentally fair way."<sup>18</sup>

The application of this rule is not entirely devoid of precedent. It seems to be well established that in deportation cases habeas corpus may be used to examine the hearing which the alien had before the immigration authorities for the purpose of determining whether it was fair,<sup>19</sup> even to the extent of ascertaining whether or not there was some evidence to support the deportation order.<sup>20</sup> Of course, in the deportation cases the judicial review of the order which the

<sup>12</sup> Defense counsel seems to have been unaware that there was a large body of evidence on this point and did not press it.

<sup>13</sup> This violated the Fifth Amendment of the Constitution and Article 24 of the Articles of War, 41 Stat. 792 (1920), 10 U.S.C.A. §1495 (1927).

<sup>14</sup> Paragraph 78a of the Manual for Courts-Martial, United States Army (1928) states: "In order to convict of an offense the court must be satisfied, beyond a reasonable doubt, that the accused is guilty thereof."

<sup>15</sup> Cf. *Colyer v. Skeffington*, 265 Fed. 17 (D.C. Mass. 1920).

<sup>16</sup> *United States ex rel. Innes v. Hiatt*, 141 F. (2d) 664 (C.C.A. 3rd, 1944).

<sup>17</sup> *Id.* at 666.

<sup>18</sup> *Ibid.*

<sup>19</sup> *United States ex rel. Tisi v. Tod*, 264 U.S. 109 (1924); *Bridges v. Wixon*, 326 U.S. 135 (1945).

<sup>20</sup> See *Bridges v. Wixon*, 326 U.S. 135, 149 (1945) and *United States ex rel. Vajtauer v. Comr. of Immigration*, 273 U.S. 103, 106 (1927) wherein Mr. Justice Stone said, "Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on habeas corpus."

alien might obtain was limited.<sup>21</sup> Therefore, it may be that the real reason for extending the review in these cases beyond the confines of mere jurisdiction is that habeas corpus is the only recourse which the alien has in order to protect his constitutional right to due process of law.

Likewise in certain criminal cases before the civil courts the broader rule has been followed.<sup>22</sup> In cases where an accused has been convicted of a crime in a state court proceeding, which violated the due process clause of the Fourteenth Amendment, the federal courts have granted habeas corpus, particularly where the unfair circumstances were outside the original record.<sup>23</sup> In other cases where habeas corpus was sought in the state courts and denied by them, the United States Supreme Court has, on certiorari to the denial, examined the original proceedings and where it found a deprivation of due process has reversed the state courts and directed a writ to be issued.<sup>24</sup> The fact that these cases are of relatively recent vintage gives rise to the impression that the trend is toward a broader scope of review on habeas corpus.<sup>25</sup>

However, this trend has not heretofore been observable in cases where the proceedings of military tribunals have been brought before the civil courts.<sup>26</sup> The courts have evidently been reluctant to interfere with the exercise by the military of its disciplinary powers, and so the rule has been that, while military tribunals are inferior courts of limited jurisdiction and their decisions are therefore subject to collateral attack,<sup>27</sup> the scope of that attack is limited to the question of jurisdiction. The broadening of this rule in the two *Hiatt* cases<sup>28</sup> is a development to be expected in the light of the demand for democratization of the armed forces. The application of this broader rule has been made particularly in those civil cases where the constitutional rights of the petitioner had little or no other safeguard. The federal courts have always been the last resort for the protection of those rights. In view of the possibility in the military courts just as in the civil courts that cases may arise where essential fairness is not given, it would seem proper for the federal courts to be considered also the last resort for protection of the constitutional rights of military personnel.

Whether the Supreme Court would review in a habeas corpus case the application of due process in a military court is as yet a matter

<sup>21</sup> The Immigration Act, 39 Stat. 874 (1917), 8 U.S.C.A. §173 (1942), had no provision for appeal from the decision of the Secretary of Labor. Likewise, there is now no provision for appeal from the decision of the Attorney General, 39 Stat. 889 (1917), 8 U.S.C.A. §155 (1942).

<sup>22</sup> *Johnson v. Zerbst*, 304 U.S. 458 (1938) (accused counterfeiters denied right of counsel).

<sup>23</sup> *Moore v. Dempsey*, 261 U.S. 86 (1923) (negroes convicted by mob dominated court); *Waley v. Johnston*, 316 U.S. 101 (1942) (coerced plea of guilty). Cf. *Mooney v. Holohan*, 294 U.S. 103 (1935) (where World War I bomb thrower had not exhausted remedy on appeal, habeas corpus was denied).

<sup>24</sup> *Smith v. O'Grady*, 312 U.S. 329 (1941) (duped plea of guilty without counsel); *Lisenba v. California*, 314 U.S. 219 (1941) (admission of coerced confessions).

<sup>25</sup> Note (1935) 35 Col. L. Rev. 404.

<sup>26</sup> Stein, *Judicial Review of Determinations of Federal Military Tribunals* (1941) 11 Brooklyn L. Rev. 30; Note (1939) 7 Geo. Wash. L. Rev. 503. See also, *Dynes v. Hoover*, 61 U.S. 65 (1857); *In re Grimley*, 137 U.S. 147 (1890); *Collins v. McDonald*, 258 U.S. 416 (1922).

<sup>27</sup> See *Ex parte Watkins*, 28 U.S. 193, 209 (1830).

<sup>28</sup> Cf. *Ex parte Benton*, 63 F. Supp. 808 (N.D. Cal. 1945).

for conjecture, inasmuch as the *Hicks* case will not be appealed.<sup>29</sup> The decisions in *Ex parte Quirin*<sup>30</sup> and *Application of Yamashita*<sup>31</sup> would seem to indicate that it would not.<sup>32</sup> However, it might well be pertinent to observe, as possible grounds for distinction, that the defendant in the *Yamashita* case was an enemy belligerent, captured by American military forces, and tried by a military commission, as opposed to an American soldier tried by court martial; and that the errors alleged in no way violated any act of Congress or other applicable law; therefore, an accumulation of such alleged errors could not be considered a deprivation of due process.<sup>33</sup> At any rate in both dissenting opinions the view was taken that the way was open on habeas corpus to protect the right to due process of law of one convicted by a military tribunal.<sup>34</sup>

If there is actually a trend toward a broader scope of review on habeas corpus, the future may bring forth more cases like *Hicks v. Hiatt*. A strong argument on the point can be made, and those courts in which the problem arises will find it necessary to weigh the question carefully. There may be many cases where the constitutional rights of a petitioner cannot be protected without looking beyond jurisdiction. In those cases it would seem that in order to do substantial justice it will be necessary for the courts to determine whether the petitioner has had a fair hearing by examining the proceedings.

Grant F. Watson.

<sup>29</sup> At the time that the decision was filed the court was apparently unaware that four days previously the War Department had issued an order restoring Hicks to duty. See footnote 28, *Hicks v. Hiatt*, 64 F. Supp. 238, 250 (1946).

<sup>30</sup> 317 U.S. 1 (1942).

<sup>31</sup> — U.S. —, 66 S. Ct. 340 (1946). See Note (1946) 40 Ill. L. Rev. 546.

<sup>32</sup> The statement in *Ex parte Quirin* on the point was clearly dictum.

<sup>33</sup> It is not clear whether Chief Justice Stone intended to limit the scope of review in cases arising out of such unusual circumstances as the *Yamashita* trial or in all cases originating in military tribunals when he said, "We cannot say that the commission, in admitting evidence to which objection is now made, violated any act of Congress, treaty or military command defining the commission's authority. For reasons already stated we hold that the commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is 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. Nothing we have said is to be taken as indicating any opinion on the question of the wisdom of considering such evidence, or whether the action of the 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." — U.S. —, 66 S. Ct. 340, 351 (1946).

<sup>34</sup> Mr. Justice Murphy in his dissent. — U.S. —, 66 S. Ct. 340, 355 (1946) said, "I do not feel that we should be confined by the traditional lines of review drawn in connection with the use of the writ by ordinary criminals who have direct access to the judiciary in the first instance. Those held by the military lack any such access; consequently the judicial review available by habeas corpus must be wider than usual in order that proper standards of justice may be enforceable."