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Federal Civil Jurisdiction of Military Justice

Chester B. Gynn, Jr.*

CONTROL EXERCISED by the federal civil courts over courts-martial differs from that found in other types of cases involving the relation of federal and state courts. The federal civil courts are constitutional courts; the military courts are administrative courts established by Congress and empowered by the Constitution; while state courts receive their power from entirely different sovereigns. Thus, to determine the powers of review which federal civil courts have over courts-martial, reference must be made almost exclusively to cases involving courts-martial. Few analogies can be inferred from the ordinary federal-state decisions.

The Constitution of the United States¹ empowers Congress to make rules for the government of, and to regulate, the land and naval forces of the United States. By the Act of 5 May 1950,² the Uniform Code of Military Justice, Congress unified, consolidated, revised and codified the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard. Article 76 of the Uniform Code of Military Justice³ states:

The appellate review of records of trial provided by this code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review, or affirmation as required by this code, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all courts, departments, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73 and to action by the Secretary of a Department as provided in article 74, and the authority of the President.

From this and similar provisions under previous enactments dealing with military justice, it is apparent that the Supreme

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¹ Art. I, Sec. 8, Cl. 14.

² Public Law 506, 81st Congress, c. 169, s. 1, 64 Stat. 108; Title 50, U. S. C. (Chap. 22), Secs. 551-736.

³ Title 50, U. S. C., Sec. 663.

Court has no power to review the action of military tribunals. This was pointed out in an appeal by a civilian of a conviction resulting from a trial before a military commission during the Civil War. This was the case of *Ex parte Valladigham*,⁴ where in an opinion by Mr. Justice Wayne it was declared:

. . . the court cannot, without disregarding its frequent decisions and interpretations of the Constitution in respect to its judicial power, originate a writ of certiorari to review or pronounce any opinions upon the proceedings of a military commission.

The passage of over one hundred years found the Supreme Court maintaining the same position. In an appeal⁵ by an enemy combatant, General Tomoyuki Yamashita, from a conviction rendered by a military tribunal, the Supreme Court stated:

. . . it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court.

Although the above cases, strictly speaking, were not appeals from a court-martial under the Uniform Code of Military Justice, the same general rule applies to courts-martial, as pointed out in the case of *Carter v. Roberts*.⁶

Courts-martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by civil tribunals. . . .

It is obvious from the foregoing that the proceedings, determinations of law and fact, and sentences of courts-martial, are not open to direct review or attack in the Supreme Court, nor in the inferior federal courts. This is not to say that the results of a court-martial are absolutely final and binding. They can be collaterally attacked, as was pointed out in *Givens v. Zerbst*,⁷ where it was said that:

. . . courts-martial are tribunals of special and limited jurisdiction whose judgments are always open to collateral attack.

The courts construe Article 76 of the Uniform Code of Military Justice strictly. While they rule that it prevents direct at-

⁴ *Ex parte Valladigham*, 1 Wall. 243, 17 L. Ed. 589 (1864).

⁵ *Application of Yamashita*, 327 U. S. 1, 66 S. Ct. 340, 90 L. Ed. 499 (1946).

⁶ *Carter v. Roberts*, 177 U. S. 496, 20 S. Ct. 713, 44 L. Ed. 861 (1900).

⁷ *Givens v. Zerbst*, 255 U. S. 11, 41 S. Ct. 227, 65 L. Ed. 475 (1921).

tack on courts-martial, they do not go so far as to say that it prohibits the jurisdiction of a federal civil court in determining the right of a petitioner in a hearing on a petition for a writ of habeas corpus. The method of collateral attack is by a petition for a writ of habeas corpus from a federal civil court.⁸

Before the petitioner can avail himself of habeas corpus proceedings, he must exhaust all his remedies in the courts-martial system regarding appeals, motions for new trial, etc. In *Gusik v. Schilder*,⁹ the court in its opinion stated:

. . . the District Court would not have been justified in entertaining the petition unless the remedy afforded by the Article¹⁰ had first been exhausted. . . . Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.

This position has been followed by the federal courts, as in *Osborne v. Swope*,¹¹ where the court required military remedies to be exhausted. Although these remedies were barred by the statute of limitations, the court would not allow the writ, since the petitioner did not avail himself of the remedies when he had the opportunity.

The historical approach to collateral attack relates to the courts-martial "jurisdiction." Areas into which the federal civil courts will inquire, under "jurisdiction," include: whether the court was properly constituted, whether it had jurisdiction over the person and the offense, and whether it had exceeded its power in imposing sentence. This position was held by the Supreme Court as late as 1950. In *Hiatt v. Brown*,¹² the court emphatically stated:

The Court of Appeals also concluded that certain errors committed by the military and review authorities had deprived respondent of due process. We think the court was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge

⁸ On habeas corpus proceedings in a state court, the state court has no authority to order discharge of a person held under U. S. authority. *Ex parte McMillan*, 15 Ala. App. 571, 74 S. 396 (1917).

⁹ *Gusik v. Schilder*, 340 U. S. 128, 71 S. Ct. 149, 95 L. Ed. 146 (1950).

¹⁰ Article 53 of the Articles of War. (These Articles were superseded by the Uniform Code of Military Justice.)

¹¹ *Osborne v. Swope*, 230 F. 2d 395 (C. C. A. 9, 1956).

¹² *Hiatt v. Brown*, 339 U. S. 103, 70 S. Ct. 495, 94 L. Ed. 691 (1950); rehearing denied 339 U. S. 939, 70 S. Ct. 672, 94 L. Ed. 1356.

advocate's report, the sufficiency of the evidence to sustain the respondent's conviction, the adequacy of the pretrial investigation, and the competency of the law member and defense counsel. . . . It is well settled that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial * * *. The single inquiry, the test, is jurisdiction. In *re Gumley* (1890), 137 U. S. 147, 150; 11 S. C. 54, 34 L. Ed. 636. In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision.

Matters which are properly the subject of inquiry by a federal civil court, as collected in 15 A. L. R. 2d 389-407, follow.

The courts will inquire whether a court-martial had jurisdiction over the accused—for instance, whether the accused was ever inducted into the armed forces. The composition of the court-martial, with regard to numbers and rank, is a subject of inquiry; but prejudice or enmity of a court member appears not to be a ground. The lack of qualifications of the trial advocate was considered to be a procedural error, not subject to review, as was his presence at a closed session of the court. Comments of a trial judge advocate are not subject to a review, although a comment in a closing argument regarding the accused's failure to make a sworn statement was held to be a denial of due process. The courts will discharge a prisoner when it appears that his counsel was so incompetent as to preclude due process of law to the accused. The legality of the sentence is a proper subject for review, but there is conflict as to whether severity of the sentence is a proper subject. Double jeopardy—that is, trial for a crime against federal, non-military, law and later before a court-martial—has been held to be a subject for inquiry, although there are decisions to the contrary. Illegal search and seizure have been held to be proper subjects for inquiry; while the sufficiency of pleadings or the sufficiency of the evidence normally has been held not to be such. Matters which the courts say are not proper subjects include the credibility of witnesses, the admissibility of evidence, confession or admission of accused, the applicability of the statute of limitations, and the record of trial. As was pointed out previously, the federal civil courts historically and traditionally will inquire only into the jurisdiction of the court-martial in an habeas corpus proceeding.

From the previous listing of factors which are the proper subject of inquiry by a federal civil court, the reader will notice that some collateral attacks on courts-martial are made on grounds difficult to reconcile with the "jurisdiction only" rule.

In 1953 the case of *Burns v. Wilson*¹³ arose, in which the Supreme Court extended the "jurisdiction only doctrine" to embrace the position that the invasion of the accused's constitutional rights is a proper subject of inquiry by the federal civil courts. Because of the change of position indicated by this decision, it is well to consider the circumstances of the case. Here three members of the armed forces were accused, tried, and convicted of rape and murder. Two were sentenced to death, the other to life imprisonment. The two who had been sentenced to death brought habeas corpus proceedings based on a number of serious allegations against the authorities, the cumulative effect of which, if true, would be to depict fundamental unfairness which would refuse them the constitutional guarantee of due process. It is important to note that here the court was not inquiring into jurisdiction, but into due process. In the majority opinion, Mr. Chief Justice Vinson, with Justices Reed, Burton, Clark joining, stated:

The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings—of the fair determinations of the military tribunals after all military remedies have been exhausted. Congress has provided that these determinations are "final" and "binding" upon all courts. We have held that this does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner. . . . But these provisions do mean that when a military decision has dealt fairly with an allegation raised in an application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence.

The court then went on to show that the military appeals courts had evaluated these claims fairly—the review was legally adequate—and the court denied the writ. Mr. Justice Jackson concurred in the result. In a separate concurring opinion Mr. Justice Frankfurter declared:

¹³ *Burns v. Wilson*, 346 U. S. 137, 73 S. Ct. 1045, 95 L. Ed. 1508 (1953); rehearing denied 346 U. S. 844, 74 S. Ct. 3, 98 L. Ed. 363.

. . . if imprisonment is the result of a denial of due process, it may be challenged no matter under what authority of Government it was brought about.

Mr. Justice Minton, in a second concurring opinion, stated that the federal civil courts have one function— “. . . to see that the military court has jurisdiction.”

The dissenting opinion was given by Mr. Justice Douglas, with Mr. Justice Black concurring:

Of course the military trials are not governed by the procedure for trials prescribed in the Fifth and Sixth Amendments. . . . Nor do the courts sit in review of the weight of evidence before a military tribunal. . . . But never have we held that all the rights covered by the Fifth and Sixth Amendments were abrogated by Art. I, sec. 8, cl. 14 of the Constitution, empowering Congress to make rules for the armed forces. I think it plain from the text of the Fifth Amendment that the position is untenable. The Fifth Amendment provides: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

What reason is there for making one specific exception for cases arising in the land or naval forces or in the militia if none of the Fifth Amendment is applicable to military trials? Since the requirement for indictment before trial is the only provision of the Fifth Amendment made inapplicable to military trials, it seems to me clear that the other relevant requirements of the Fifth Amendment . . . are applicable to them.

It is interesting to note that only one of the majority opinions upheld the historical concept. The others, as well as the minority opinion, considered the subject of due process and the constitutional rights of the accused.

Inferior court interpretations of the *Burns* case have ranged from a limited conservative construction to a broad liberal view. In *Easley v. Hunter*,¹⁴ the United States Court of Appeals, Tenth Circuit, stated:

¹⁴ *Easley v. Hunter*, 209 F. 2d 483 (C. C. A. 10, 1953).

. . . as we understand the *Burns* decision, it does no more than hold that a military court must consider questions relating to the guarantees afforded an accused by the Constitution and when this is done, the civil courts will not review its action.

The *Easley* interpretation of the *Burns* case was quoted and approved in *Suttles v. Davis*,¹⁵ by the same court of appeals.

A liberal interpretation of the *Burns* case occurred in *DeCoster v. Madigan*,¹⁶ where the Court of Appeals, in releasing the prisoner on a writ of habeas corpus, stated:

. . . a civilian court may look into only the elementary matters of a court-martial's jurisdiction of the person accused and the offense charged and its power to impose the sentence awarded. . . . Several recent cases, however, appear to have expanded the scope of review slightly, or at least, to have shifted the emphasis from mere "jurisdiction" and "power" as the proper subject for a civilian court review to broader considerations of the "fullness" and "fundamental fairness" of the court-martial proceedings.

However, in *Jackson v. Taylor*,¹⁷ a case with substantially the same facts as the *DeCoster* case, the court, although stating it would not decide on the propriety of the habeas corpus proceedings, went ahead to consider the prisoner's petition. The decision was adverse to the petitioner.

Some other recent federal civil cases, decided since *Burns v. Wilson*, are briefly presented, since they indicate the courts' attitude regarding the proper subject of inquiry in an habeas corpus proceeding. *White v. Humprey*¹⁸ considered the denial of due process to the prisoner. In *Mitchell v. Swope*¹⁹ the issues were denial to the prisoner of due process and his rights under the Fifth and Sixth Amendments to the Constitution. *Bourchier v. Van Metre*²⁰ was a case where the court considered jurisdiction, matters of a constitutional nature, and due process, and concluded:

. . . we cannot say that the military tribunals have failed to deal fully and fairly with appellant's contentions and when we so conclude, our limited function is exhausted.

¹⁵ *Suttles v. Davis*, 215 F. 2d 760 (C. C. A. 10, 1954).

¹⁶ *De Coster v. Madigan*, 223 F. 2d 906 (C. C. A. 7, 1955).

¹⁷ *Jackson v. Taylor*, 234 F. 2d 611 (C. C. A. 3, 1956).

¹⁸ *White v. Humprey*, 212 F. 2d 503 (C. C. A. 3, 1954).

¹⁹ *Mitchell v. Swope*, 224 F. 2d 365 (C. C. A. 9, 1955).

²⁰ *Bourchier v. Van Metre*, 223 F. 2d 646 (C. C. A., D. C., 1955).

The question of denial of any basic right guaranteed by the Constitution arose in *Day v. Davis*,²¹ where the conclusion was that there was no such denial. The courts still refuse to consider the sufficiency of the evidence, as is shown by the recent case of *Wilson v. Wilkinson*,²² where the court said:

. . . even if it were inclined to disagree with the verdict, could not consider this question in habeas corpus. This Court is without power to try such issue de novo.

In summary, it can be said that the federal civil courts do not have jurisdiction to hear an appeal from the decisions of courts-martial. Indirect review is possible through the accused's petition for a writ of habeas corpus, although the accused must exhaust his remedies within the courts-martial system before the federal courts will consider this petition.²³ Historically, the jurisdiction of a court-martial has always been a proper subject for inquiry. Recent cases have indicated an enlargement of this concept. Now, consideration of denial of constitutional rights to the accused, including denial of due process or fundamental fairness, are also subjects of inquiry. These areas are presently being defined and interpreted by the federal civil courts, with the result that here the law, as in many other subjects, is in a state of flux. Its development should prove interesting.

²¹ *Day v. Davis*, 235 F. 2d 379 (C. C. A. 10, 1956).

²² *Wilson v. Wilkinson*, 129 F. Supp. 324 (D. C., Penna., 1955).

²³ *Michaelson v. Herren*, 137 N. Y. L. J. (71) 1 (decided Mar. 17, 1957; reported Apr. 12, 1957), C. A. 2, S. D. N. Y.