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MILITARY HABEAS CORPUS: I

Seymour W. Wurfel
Judge Advocate General's Corps, United States Army; member, California bar

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Seymour W. Wurfel†

Preliminary Considerations

THE mobilization of over twelve million persons into the armed forces in World War II made necessary a vastly expanded resort to court martial proceedings to enforce the criminal law. The trial by military tribunals of civilian employees of the military establishment in overseas areas and of prisoners of war and war crimes defendants added substantially to the number confined by military authority. On January 31, 1950, there remained in federal penal institutions 2508[1] prisoners serving civilian type felony sentences imposed by military tribunals.[2] Before World War II, legal problems arising from attempts to invoke the remedy of habeas corpus by military prisoners were rare and were primarily of historical and academic interest. In the past five years the quantitative pressure of this military prisoner population has produced a substantial volume of case law in the field of military habeas corpus, has caused the United States Supreme Court to review the subject, and has made it one of practical interest to the private practitioner as well as the military lawyer.

Accuracy requires expansion of the concise title "Military Habeas Corpus" to "A Brief Study of the History of Military Tribunals and the Scope of Habeas Corpus Review of Detention Imposed by Military Authority." The material lends itself to the following organizations: I. Historical Background; II. Habeas Corpus Jurisdiction; III. Habeas Corpus Prerequisites; IV. Types of Military Detention Reviewable; V. Ground for Habeas Corpus Relief; and VI. Conclusions.

I

HISTORICAL BACKGROUND

A. Early Military Law and Tribunals

The purpose of this section is to demonstrate the long historical separation of military and civil courts. Legal systems predicated upon

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† Lieutenant Colonel, Judge Advocate General's Corps, United States Army; member, California bar.—Ed.

[1] From official records compiled by the Corrections Branch, Adjutant General's Office, Department of the Army, from periodic wardens' reports.

[2] Only those sentenced to serve terms of more than one year for felonies involving moral turpitude are sent to federal penal institutions. All other military prisoners including all those guilty of purely military offenses are confined in post guardhouses, rehabilitation centers or United States Disciplinary Barracks. ARMY REGULATIONS 600-375, ¶9.

military organizations are of ancient origin. The feudal law was made known to the Romans in the first century B.C. by the Teutons and was utilized by the Roman Emperor, Alexander Severus. The Goths, Huns, Franks, Vandals and Lombards upon the decline of the Roman Empire borrowed from it the feudal law and carried it into Europe as an instrument of their military policy and it became the "law of nations" of the western world of that time. The hard core of feudal law was predicated upon a military society in which a state of war was the normal condition.[3] By the eleventh century, feudal law had been codified in Lombardy as the *Libri Feudorum*.[4] This well-developed continental feudal system was brought to England by William the Conqueror in 1066 and imposed on the simpler feudal system already existing in Britain.[5] It is of considerable academic interest that at least one creditable legal scholar maintains the primary purpose of the magnates and the barons in 1215 in the Magna Carta was to preserve their feudal law prerogatives against encroachment by the Crown rather than to establish a declaration of the rights of free men.[6] The Court Baron of the feudal lord, which was also known as the earl's court, exercised both criminal and civil feudal law jurisdiction over knights, tenants, and vassals from before Magna Carta until well into the sixteenth century during the reign of Elizabeth.[7]

The Court of the Constable existed in medieval England apart from and in addition to the common law, equity, canon and admiralty courts.[8] From the time of William, the Constable, under direction of the king, was commander of the Royal Army. He presided over a court assisted by the Marshal and three doctors of the civil law, and by a clerk who was the trial judge advocate of that day since his duty was to prosecute all delinquents brought before the court for trial.[9] The Constable's Court exercised criminal jurisdiction over offenses of soldiers and others against Articles of War promulgated by the king for the government of his Army on expeditions to the continent. It also had jurisdiction of the acts of rebels within the realm and in civil contract matters growing out of war beyond the realm.[10] As a Court of Chivalry it decided

[3] 2 BLACKSTONE, COMMENTARIES, Cooley ed., 45-46 (1899).
[4] RADIN, ANGLO-AMERICAN LEGAL HISTORY 145 (1936).
[5] Id. at 119, 152. Also, DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES, 3d ed., 13 (1915).
[6] RADIN, ANGLO-AMERICAN LEGAL HISTORY 152-155 (1936).
[7] Id. at 139-140.
[8] FAIRMAN, THE LAW OF MARTIAL RULE, 2d ed., 1-2 (1943).
[9] DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES, 3d ed., 13-14 (1915).
[10] FAIRMAN, THE LAW OF MARTIAL RULE, 2d ed., 3 (1943).

questions of injury to honor, of pedigree, precedent, and heraldry.[11] In 1384 Parliament imposed legislative restraint upon the civil jurisdiction of the Constable's Court[12] and in 1399 upon its criminal jurisdiction.[13]

Dating back to the Conquest, the Earl Marshal was the high officer next in rank to the Constable. His original duties were those of marshaling the king's army and resembled those now performed by the Adjutant General. The office of Constable ceased to exist in 1521[14] when it reverted to the Crown upon the attainder of the incumbent Edward, Duke of Buckingham, for high treason. Thereafter the Constable's duties devolved upon the Earl Marshal, and the Constable's Court became the Marshal's Court from which is derived the present term court-martial.[15] The last case tried before the Marshal was in 1737 but the function persisted, and as early as 1642 the House of Lords and the Commons had concurred in legislation authorizing military commanders to punish soldiers by martial law.[16] Gradually the place of the Marshal and his assistants had been taken by military officers detailed for the purpose and the court came to be convened in pursuance of a commission issued by the Crown to a proper military commander.[17] When armies were sent abroad authority was delegated to the commander "to execute marshall law, and, upon trial by an orderly court, . . . to inflict punishment. . . ."[18]

Originally the Articles of War were framed by the king and proclaimed solely by his authority. This procedure must be contrasted with the later British practice, and that which has always prevailed in the American service, whereby the Articles of War are exclusively statutory enactments of the legislative body.[19] The earliest English Articles of War were promulgated in 1190 by Richard I as an ordinance.[20] Its

[11] DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES, 3d ed., 2, 14, footnote 3 (1915). For a history of the Court of Chivalry, see THE ENGLISH MANUAL OF MILITARY LAW 7.

[12] 8 Richard II, c. 5.

[13] 1 Henry IV, c. 14.

[14] This was the thirteenth year of the reign of Henry VIII.

[15] DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES, 3d ed., 13-14 (1915).

[16] FAIRMAN, THE LAW OF MARTIAL RULE, 2d ed., 6, 12 (1943).

[17] DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES, 3d ed., 15 (1915).

[18] Commission to Sir Thomas Baskerville, June 10, 1597. CAMDEN SOCIETY, THE EGERTON PAPERS 246, from FAIRMAN, THE LAW OF MARTIAL RULE, 2d ed., 6 (1943).

[19] FAIRMAN, THE LAW OF MARTIAL RULE, 2d ed., 6 (1943).

[20] The entire ordinance as reprinted in 2 WINTHROP, MILITARY LAW, appendix 3 (1886) reads:

"ORDINANCE OF RICHARD I—A.D. 1190.

["Chiefly meant to prevent disputes between the soldiers and sailors, in their voyage

terms impel the conclusion that it was efficacious in achieving its purpose "to prevent disputes between the soldiers and sailors." Richard's approach to the problems of "unification" and a joint operation possess the merits of vigor and simplicity.

Following this classic pronouncement of Richard I, successive Articles of War were issued by royal fiat or royal delegation as occasion required. Only a few of these need be noted. In 1385 Richard II proclaimed Articles of War comprising twenty-four paragraphed items governing not only the conduct of soldiers but providing in detail for the division of the arms and mounts of those taken prisoner.[21]

Similar military codes establishing separate military tribunals are to be found in other European countries at an early date. The first French ordinance of military law dated back to 1378 and the first German Kriegsartikel to 1487. Other celebrated Articles of War were those of the Franks under Emperor Charles V in 1532, of the Netherlands in 1590, of Louis XIV in 1651 and 1665, of Peter the Great in 1715 and of Empress Maria Theresa in 1768.[22] Perhaps the most famous were the elaborate Articles of War issued in 1621 by King Gustavus Adol-

to the holy land." 2 GROSE, HIST. ENG. ARMY 83.]

"Richard, by the grace of God, King of England, Duke of Normandy and Aquitaine, and Earl of Anjou, to all his subjects about to proceed by sea to Jerusalem, greeting. Know ye, that we, with the common consent of fit and proper men, have made the enactments, underwritten. Whoever shall slay a man on ship-board, he shall be bound to the dead man and thrown into the sea. If he shall slay him on land he shall be bound to the dead man and buried in the earth. If any one shall be convicted, by means of lawful witnesses, of having drawn out a knife with which to strike another, or shall strike another so as to draw blood, he shall lose his hand. If, also, he shall give a blow with his hand, without shedding blood, he shall be plunged in the sea three times. If any man shall utter disgraceful language or abuse, or shall curse his companion, he shall pay him an ounce of silver for every time he has so abused him. A robber who shall be convicted of theft shall have his head cropped after the manner of a champion,* [*Champions hired to fight legal duels, in cases of murder and homicides, had their hair clipped close to their heads. (Note by Samuel)] and boiling pitch shall be poured thereon, and then the feathers of a cushion shall be shaken out upon him, so that he may be known, and at the first land at which the ship shall touch, he shall be set on shore. Witness myself, at Chinon."

21 Reprinted in 2 WINTHROP, MILITARY LAW, appendix 4-7 (1886). The preamble recites:

"These are the Statutes, Ordinances, and Customs, to be observed in the Army, ordained and made by good consultation and deliberation of our Most Excellent Lord the King Richard, John Duke of Lancaster, Seneschall of England, Thomas Earl of Essex and Buckingham, Constable of England, and Thomas de Mowbray, Earl of Notingham, Mareschall of England, and other Lords, Earls, Barons, Banneretts, and experienced Knights, whom they have thought proper to call unto them; then being at Durham the 17th day of the Month of July, in the ninth Year of the Reign of our Lord the King Richard II." Representative of its Articles is: "III. Item, that none be so hardy as to rob and pillage the church, nor to destroy any man belonging to holy church, religious or otherwise, nor any woman, nor to take them prisoners if not bearing arms; nor to force any woman, upon pain of being hanged."

22 MUNSON, MILITARY LAW 5 (1923).

phus of Sweden. These contained one hundred and sixty-seven articles, a number of which, by their careful provision for court procedure, indicated concern for what currently would be characterized as "due process of law."[23] Early British interest in the rudiments of military "due process" was evidenced by some of the provisions in the Prince Rupert Articles of 1672,[24] in the English Military Discipline of James II of 1686,[25] and in the Articles of James II of 1688.[26]

The English Parliament first directly entered the field of military law with the passage of the Mutiny Act.[27] It was initially adopted in

[23] Reprinted in 2 WINTHROP, MILITARY LAW, appendix 8-23 (1886). Illustrative are:

"142. In our highest Marshall Court, shall our General be President; in his absence our Field Marshall; when our Generall is present his associates shall be our Field Marshall first, next him our Generall of the Ordnance, Sergeant Major Generall; Generall of the Horse, Quartermaster General; next to them shall sit our Muster-Masters and all our Colonells, and in their absence their Lieutenant Colonells, and these shall sit together when there is any matter of great importance in controversie. . . .

"144. All these Judges both of higher and lower Courts, shall under the blue Skies thus sweare before Almighty God, that they will inviolably keep this following oath unto us: I.R.W. doe here promise before God upon his holy Gospell, that I both will and shall judge uprightly in all things according to the Lawes of God, of our Nation, and these Articles of Warre, so farre forth as it pleaseth Almighty God to give me understanding; neither will I for favour nor for hatred, for good will, feare, ill will, anger, or any gift or bribe whatsoever, judge wrongfully; but judge him free that ought to be free, and doom him guilty, that I finde guilty; as the Lord of Heaven and Earth shall help my soule and body at the last day, I shall hold this oath truly."

[24] Reprinted in DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES, 3d ed., appendix A, 567-580 (1915). The 74th and last Article thereof reads:

"Whatever is to be published, or generally made known, shall be done by beat of drum or the sound of trumpet, that so no man may pretend ignorance thereof.

"And after that whoever shall be found disobedient, or faulty, against what is thus published shall be punish'd according to these Articles, or the quality of the fact."

[25] Reprinted in 2 WINTHROP, MILITARY LAW, appendix 24-25 (1886). The following is a typical excerpt:

"If the Councel of War, or Court-martial be held to judge a Criminal, the President and Captains having taken their places, and the prisoner being brought before them, And the Informations read, the President Interrogates the Prisoner about all the Facts whereof he is accused, and having heard his Defence, and the Proof made or alleged against him, He is ordered to withdraw, being remitted to the care of the Marshal or Jaylor. Then every one judges according to his Conscience, and the Ordnances of the Articles of War. The Sentence is framed according to the Plurality of Votes, and the Criminal being brought in again, The Sentence is Pronounced to him in the name of the Councel of War, or Court-Martial.

"When a Criminal is Condemned to any Punishment, the Provost Martial causes the sentence to be put in execution; And if it be a publick Punishment, the Regiment ought to be drawn together to see it, that thereby the Soldiers may be deterred from offending. Before a Soldier be punished for any infamous Crime, he is to be publickly Degraded from his Arms, and his coat stript over his ears."

[26] Reprinted in 2 WINTHROP, MILITARY LAW, appendix 26-37 (1886), Article LXI thereof provides:

"If any Person be committed by the Provost Martial's own Authority without other Command, he shall acquaint the General or other Chief Commander with the Cause within twenty-four hours, and the Provost-Martial shall thereupon dismiss him unless he have Order to the contrary."

[27] Statutes of the Realm 55, 1 W & M, c. 5, Reprinted in 2 WINTHROP, MILITARY LAW, appendix 38-39 (1886). Paragraph 10 directs:

"And noe Sentence of Death shall be given against any offender in such case by any

the time of William III in 1689 as a result of the mutiny and desertion of Scotch troops adhering to the Stuart cause in the rebellion of 1686. Its purpose was to deprive the crown of any army for more than one year at a time by limiting army appropriations and the authority to define and punish military offenses to one year. Thereafter, annual mutiny acts were passed which made mutiny and desertion punishable by court-martial, but left all other matters affecting discipline to regulation by royal prerogative as before, thus sanctioning the then existing Articles for the government of the British Army. Not until 1881 were the Mutiny Act and the Articles of War consolidated by Parliament into the Army Annual Act.[28] Thus military law in time of peace did not come into existence in statutory form until the passage of the Mutiny Act. The system of governing troops in time of war by Articles of War issued under the prerogative power of the Crown continued from the conquest until superseded by corresponding statutory power[29] in 1803.[30] All earlier British ordinances and Articles of War remained in force only during the service of the troops for whose government they were issued and ceased to operate upon the conclusion of peace.[31] Since 1881 Parliament each year passes the Army Annual Act which includes the Articles of War and British military justice is dependent upon this annual parliamentary approval.

The various Articles of War and other military laws herein mentioned are illustrative only and do not by any means comprise a complete list. Although remaining substantially unchanged in matters essential to discipline, new editions of Articles were issued from time to time, especially during the last half of the eighteenth century. For example from 1766 to 1775 seven sets of British Articles were issued.[32]

The foregoing summary clearly establishes that throughout British history in time of war, from the Conquest to the American Revolution, military laws and tribunals entirely separate from the civilian laws and

Court Martiall unless nine of thirteene Officers present shall concur therein. And if there be a greater number of officers present, then the judgment shall passe by the concurrence of the greater part of them soe sworne, and not otherwise; and noe Proceedings, Tryall or Sentence of Death shall be had or given against any offender, but betweene the houres of eight in the morning and one in the afternoone."

[28] GLENN AND SCHILLER, THE ARMY AND THE LAW, rev. ed., 34-35 (1943) and WINTHROP, MILITARY LAW AND PRECEDENT, 2d ed., 19-20 (1920).

[29] 43 Geo. III, c. 20

[30] DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES, 3d ed., 339 (1915).

[31] MUNSON, MILITARY LAW 6 (1923).

[32] DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES, 3d ed., 340 (1915).

courts were employed to administer justice in the armed forces.[33] It is important to keep this in mind while examining the history of American military law and in considering the applicability of the writ of habeas corpus to military tribunal proceedings.

B. *American Military Law and Tribunals*

The substance of the original American Articles of War has been traced to the Code of Gustavus Adolphus of 1621 and to the British Articles of 1774.[34] The first Articles of War drafted on American soil for American troops were those adopted by the Provisional Congress of Massachusetts Bay on April 5, 1775, for observance by Massachussetts troops.[35] They consisted of fifty-three articles and spoke of ". . . the duty we owe . . . to the king." These were followed by Articles enacted June 30, 1775, by the second Continental Congress[36] consisting

[33] Dynes v. Hoover, 20 How. (61 U.S.) 65, 83 (1857).

[34] DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES, 3d ed., 340-1 and 581-601, appendix B, at which the British Articles of 1774 are reprinted. Also WINTHROP, MILITARY LAW AND PRECEDENT, 2d ed., 19 (1920).

[35] Reprinted in 2 WINTHROP, MILITARY LAW, appendix 61-67 (1886). Its preamble reads in part:

"Whereas the lust of power which of old oppressed, persecuted and exiled our pious and virtuous ancestors from their fair possessions in Britain, now pursues with ten-fold severity us, their guileless children, who are unjustly and wickedly charged with licentiousness, sedition, treason and rebellion; and being deeply impressed with a sense of the almost incredible fatigues and hardships our venerable progenitors encountered, who fled from oppression for the sake of civil and religious liberty for themselves and their offspring, and began a settlement here on bare creation at their own expense; and having seriously considered the duty we owe to God, to the memory of such invincible worthies, to the King, to Great Britain, our country, ourselves, and posterity, do think it our indispensable duty, by all lawful ways and means in our power, to recover, maintain, defend and preserve the free exercise of all those civil and religious rights and liberties, for which many of our forefathers fought, bled, and died, and to hand them down entire for the free enjoyment of the latest posterity. . . .

"And whereas the great law of self-preservation may suddenly require our raising and keeping an Army of observation and defense, in order to prevent or repel any further attempt to force the late cruel and oppressive Acts of the British Parliament, which are evidently designed to subject us and the whole Continent to the most ignominious slavery. And whereas, in case of raising and keeping such an Army, it will be necessary that the Officers and Soldiers in the same be fully acquainted with their duty, and that the Articles, Rules and Regulations thereof be made as plain as possible; and having great confidence in the honour and public virtue of the inhabitants of this Colony that they will readily obey the officers chosen by themselves, and will cheerfully do their duty when known, without any such servere Articles and Rules, (except in capital cases) and cruel punishments as are usually practiced in Standing Armies, and will submit to all such Rules and Regulations as are founded in Reason, honor and virtue. It is, therefore,

"*Resolved,* That the following Articles, Rules and Regulations for the Army, that may be raised for the defense and security of our lives, liberties, and estates, be, and are hereby earnestly recommended to be, strictly adhered to, by all Officers, Soldiers, and others concerned, as they regard their own honour and the publick good."

[36] George Washington was a member of the legislative committee. WINTHROP, MILI-

of sixty-nine articles. The preamble recited that "His Majesty's most faithful subjects . . . are reduced to a dangerous . . . situation by . . . the British minister . . . and oppressive acts of the British Parliament. . . ." Sixteen additional articles were enacted November 7, 1775.[37]

On September 20, 1776, American Articles of War consisting of eighteen sections each containing from two to seventeen articles were enacted by the Continental Congress. This revision was made at the suggestion of General Washington.[38] The work of revision was performed by a congressional committee composed of John Adams, Thomas Jefferson, John Rutledge, James Wilson, and R. R. Livingston.[39] This document was the first to speak of ". . . the respective Armies of the United States" and omitted all reference to the Crown.[40]

In a period of eighteen months patriots of the Revolution had transformed the British military legal system into an American institution considered to be appropriate for the government of an Army of freemen fighting for freedom. American courts-martial had already become

TARY LAW AND PRECEDENT, 2d ed., 21 (1920). These articles are reprinted in 2 WINTHROP, MILITARY LAW, appendix 68-76 (1886). The preamble reads:

"*Whereas* His Majesty's most faithful subjects in these colonies are reduced to a dangerous and critical situation by the attempts of the British minister to carry into execution by force of arms several unconstitutional and oppressive acts of the British parliament for laying taxes in America, to enforce the collection of those taxes, and for altering and changing the constitution and internal police of some of these colonies, in violation of the natural and civil rights of the colonies;

"*And whereas* hostilities have been actually commenced in Massachusetts Bay by the British troops under the command of General Gage, and the lives of a number of the inhabitants of that colony destroyed; the town of Boston not only having been long occupied as a garrisoned town in an enemy's country, but the inhabitants thereof treated with a severity and cruelty not to be justified even towards declared enemies;

"*And whereas* large reinforcements have been ordered, and are soon expected, for the declared purpose of compelling these colonies to submit to the operation of the said acts; which hath rendered it necessary, and an indispensable duty, for the express purpose of securing and defending these colonies, and preserving them in safety against all attempts to carry the said acts into execution, that an armed force be raised sufficient to defeat such hostile designs, and preserve and defend the lives, liberties and immunities of the colonists; for the due regulating and well ordering of which;

"*Resolved,* That the following Rules and Articles be attended to and observed by such forces as are or may hereafter be raised for the purposes aforesaid."

[37] Reprinted in WINTHROP, MILITARY LAW, appendix 76-78 (1886). DAVIS, A TREATISE ON THE MILITARY LAWS OF THE UNITED STATES, 3d ed., 342 (1915).

[38] DAVIS, A TREATISE ON THE MILITARY LAWS OF THE UNITED STATES, 3d ed., 342 (1915).

[39] WINTHROP, MILITARY LAW AND PRECEDENT, 2d ed., 22 (1920).

[40] Art. 1, §XIV of these Articles, reprinted in WINTHROP, MILITARY LAW AND PRECEDENT, 2d ed., 79-92 (1920), provides:

"A general court-martial in the United States shall not consist of less than thirteen commissioned officers, and the president of such court-martial shall not be the commander-in-chief or commandant of the garrison where the offender shall be tried, nor be under the degree of a field officer."

recognized agencies of American justice. John Marshall, then a twenty-two year old captain-lieutenant of infantry, was, at Valley Forge in the bitter fall of 1777, appointed "Deputy Judge Advocate in the Army of the United States," in addition to his other duties.[41] Thus John Marshall was a party to the shaping of American military law more than ten years before there was a Supreme Court of the United States and more than twenty years before he became Chief Justice of the United States.

Other pre-constitutional developments in the Articles of War are worthy of note. By Congressional resolution of May 27, 1777, the general or commander-in-chief was given power to pardon or mitigate punishments authorized by the Articles of War.[42] The most important of other amendments made was that accomplished by congressional resolution on May 31, 1786, reducing the required membership of courts-martial.[43] It was the Articles of 1776 plus these amendments which continued in force at and after the adoption of the Constitution.[44] It should be observed that from the very beginning American Articles of War have been wholly statutory products of congressional exercise of legislative power[45] and that the jurisdiction of American courts-martial has always been exclusively criminal.[46]

In approaching the constitutional treatment of military law and tribunals it should be remembered that military men were active in the Constitutional Convention and as constitutional advocates. General Washington was unanimously elected to serve as president of the Constitutional Convention.[47] It was largely due to the vast influence of Washington[48] and the active oratorical espousal of Federalist leader John Marshall[49] that the Virginia convention in June 1788 gave its sorely-needed ratification to the Constitution.[50] How then did this in-

[41] 1 BEVERIDGE, THE LIFE OF JOHN MARSHALL 119, 138 (1916).

[42] DAVIS, A TREATISE ON THE MILITARY LAWS OF THE UNITED STATES, 3d ed., 342 (1915).

[43] WINTHROP, MILITARY LAW AND PRECEDENT, 2d ed., 23 (1920) says:

"The occasion of this Amendment, as expressed in the preamble of the Resolution of Congress, was the fact that the pre-existing Articles failed to make adequate provision for the trial of offenders 'serving with small detachments,' those articles requiring that a general court-martial should consist of thirteen members, and a regimental or garrison court of five members; in the new section the number of the inferior court was fixed at three, and the minimum of the general court at five—limitations which have subsisted to the present time." The same minimum court membership is currently required by Articles of War 5 and 6 [62 Stat. L. 628, §§204, 205 (1948), 10 U.S.C. §§1476, 1477].

[44] WINTHROP, MILITARY LAW AND PRECEDENT, 2d ed., 22 (1920).

[45] Id. at 21.

[46] Id. at 107.

[47] VAN DOREN, THE GREAT REHEARSAL 24 (1948).

[48] Id. at 218.

[49] Id. at 224.

[50] Id. at 230.

fant instrument of government deal with the ancient yet virile institution of military law and its tribunals?

The Constitution vested in Congress power "To define and punish . . . Offenses against the Law of Nations";[51] "To declare War . . . and make Rules concerning Captures on Land and Water";[52] "To raise and support Armies . . .";[53] "To provide and maintain a Navy";[54] "To make Rules for the Government and Regulation of the land and naval Forces";[55] "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions";[56] and "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States. . . ."[57] As to the President, the Constitution provided that he ". . . shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States";[58] ". . . and shall Commission all the Officers of the United States."[59]

The Third Amendment provided: "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." Pursuant to the Fifth Amendment, "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."

In *Houston v. Moore,* Justice Washington who wrote the Supreme Court opinion said:

> "But military offenses are not included in the act of Congress conferring jurisdiction upon the circuit and district courts; no person has ever contended that such offenses are cognizable before the common law courts. The militia laws have, therefore, provided, that the offence of disobedience to the president's call upon the militia, shall be cognizable by a court-martial of the United States; but an exclusive cognizance is not conferred upon that court, as it had been upon the common law courts, as to other

[51] Art. I, §8, cl. 10.
[52] Art. I, §8, cl. 11.
[53] Art. I, §8, cl. 12.
[54] Art. I, §8, cl. 13.
[55] Art. I, §8, cl. 14.
[56] Art. I, §8, cl. 15.
[57] Art. I, §8, cl. 16.
[58] Art. II, §2, cl. 1.
[59] Art. II, §3.

offences, by the judiciary act. It follows, then, as I conceive, that jurisdiction over this offence remains to be concurrently exercised by the national and state courts-martial, since it is authorized by the laws of the state, and not prohibited by those of the United States."[60]

In 1857, in *Dynes v. Hoover*, the Court, after citing the pertinent constitutional provisions, held:

"These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."[61]

It is significant that since the Bill of Rights no constitutional amendment has dealt with a military subject. Apparently, the American people have continued satisfied with the views expressed in this field by the founding fathers.

Under its power "to make Rules for the Government and Regulation of the land and naval Forces" Congress has perpetuated and from time to time changed the Articles of War. The first United States Congress by Act of September 29, 1789,[62] recognized the existing military establishment and provided that the troops thus recognized should "be governed by the rules and articles of war which have been established by the United States in Congress assembled, or by such rules and articles of war, as may hereafter by law be established."

The Articles of War of 1806[63] consisting of 101 articles superseded all other enactments on the subject and reverted to consecutive numbering without division into sections. These Articles, except for minor amendments, remained in force until 1874,[64] thus withstanding the tests of the War of 1812, the Mexican War, the Civil War and part of the Indian Wars. During the War of 1812 four articles were amended, during the Seminole wars three were amended and one added and in the Civil War seventeen articles were amended and eight added.[65]

[60] 5 Wheat. (18 U.S.) 1 at 27 (1820).
[61] 20 How. (61 U.S.) 65 at 79 (1857).
[62] 1 Stat. L. 95-96 (1789).
[63] 2 Stat L. 359 (1806). Reprinted in 2 WINTHROP, MILITARY LAW, appendix, 98-111 (1886).
[64] WINTHROP, MILITARY LAW AND PRECEDENT, 2d ed., 23 (1920) and DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES, 3d ed., 343 (1915).
[65] MUNSON, MILITARY LAW 7 (1923).

The Confederate States supplemented these Articles of 1806 by a Congressional Act of October 9, 1862,[66] establishing a separate court of three civilian judges appointed by the president of the Confederacy with jurisdiction over all offenses cognizable by courts-martial. These tribunals were entirely separate from the civil courts.[67]

The Articles of War of 1874[68] consisted of 128 Articles[69] and were essentially a restatement of the Articles of 1806.[70] The Articles of War of 1916[71] which became effective March 1, 1917, were the first complete revision of military law in one hundred and ten years and eliminated much obsolete material. These, in turn, were amended but not completely revised by the Articles of 1920.[72] The 1920 Articles consisting of 121 articles embraced certain changes considered desirable as a result of World War I experience and are of importance since, with minor amendments in 1937[73] and 1942,[74] they are the Articles which governed the Army throughout World War II. Accordingly these Articles of 1920 have been subjected to the scrutiny of the federal courts in the habeas corpus litigation of recent years. It was the Army system of justice prevailing under these Articles of 1920 of which the War Department Advisory Committee on Military Justice[75] spoke when it said: ". . . that the innocent are almost never convicted and the guilty seldom acquitted."[76]

Based upon World War II experience and the recommendations of the Advisory Committee, the Articles of 1920 were, without change in total number, substantially amended in 1948,[77] effective February 1,

[66] Reprinted in 2 WINTHROP, MILITARY LAW, appendix 318-320 (1886).

[67] For an interesting account of courts-martial and military courts in the Confederacy see ROBINSON, JUSTICE IN GREY 362-382 (1941).

[68] U.S. Rev. Stat. passed at the first session of the 43d Congress, 1873-74, 2d ed., Tit. XIV, §1342, p. 230-242 (1878).

[69] Reprinted in 2 WINTHROP, MILITARY LAW, appendix, 112-125 (1886).

[70] MUNSON, MILITARY LAW 7 (1923).

[71] 39 Stat. L. 619 at 650-670 (1916).

[72] 41 Stat. L. 787 (1920), 10 U.S.C. (1946) §§1471-1593a.

[73] 50 Stat. L. 724 (1937), 10 U.S.C. (1946) §§1522, 1542, amending arts. 50½ and 70.

[74] 56 Stat. L. 732 (1942), 10 U.S.C. (1946) §1522, amending art. 50½; 56 Stat. L. 1050 (1942), 10 U.S.C. (1946) §1586 (1942), amending art. 114; and 56 Stat. L. 1051 (1942), 10 U.S.C. (1946) §1524, amending art. 52.

[75] The members of this Committee popularly known as the "Vanderbilt Committee" were, at the request of the Secretary of War, nominated by the American Bar Association in 1946 to hold hearings and to formulate recommendations for the improvement of the system of military justice. The chairman was Judge Arthur T. Vanderbilt of New Jersey and its distingiushed membership included Judge Morris A. Soper of the United States Court of Appeals for the Fourth Circuit, Justice Alexander Holtsoff of Washington, D.C., and Judge Frederick E. Crane of New York.

[76] REPORT OF ADVISORY COMMITTEE ON MILITARY JUSTICE, p. 3.

[77] 62 Stat. L. 604 at 627-644 (1948), 10 U.S.C. (1950 Supp.) c. 36.

1949. The only new provision of these 1948 articles which has yet been construed by the federal courts is Article 53 which will be discussed in Part III.

Public Law 506 (81st Congress, 2d session), approved May 5, 1950, established a "Uniform Code of Military Justice" for the Army, Air Force, Navy, Marine Corps and Coast Guard. Its 140 articles made substantial revisions in both trial and appellate review procedure, especially so far as the Navy, Marine Corps and Coast Guard are concerned. This act is effective May 31, 1951.

Finally, it is important to distinguish courts-martial from the administrative agency tribunals which have sprung up since Congress created the Interstate Commerce Commission. Almost without exception the decisions of these late-comers in the field of adjudication are subject to direct appellate review by the federal courts, either under their individual basic acts or pursuant to section 10 of the Administrative Procedure Act.[78] Not so courts-martial, which under the Articles of War[79] have their own appellate procedure wholly apart from the Federal Courts. In the Administrative Procedure Act, Congress went to great pains in section 2(a) to provide, ". . . there shall be excluded from the operation of this Act . . . (2) courts martial and military commissions. . . ." This serves to underscore the basic legal proposition that the federal courts have no appellate jurisdiction over courts-martial and that the court-martial system is a separate jurisdiction wholly apart from the civil federal judiciary.

C. The Writ of Habeas Corpus

> "The writ of habeas corpus is of immemorial antiquity. It is deduced by the standard writers on the English law from the great charter of King John. It is unquestionable, however, that it is substantially of much earlier date; and it may be referred without improbability, to the period of the Roman invasion. Like the trial by jury, it entered into the institutions of Rome before the Christian era, if not as early as the times of the republic. Through the long series of political struggles which gave form to the British constitution, it was claimed as the birthright of every Englishman, and our ancestors brought it with them as such to this country. At the common law, it issued whenever a citizen was de-

[78] 60 Stat. L. 237 (1946), 5 U.S.C. (1950 Supp.) c. 19.

[79] Articles of War 47, 48, 49, 50, 51 [10 U.S.C. (1950 Supp.) §§1518, 1519, 1520, 1521, 1523]. The immunity of courts martial proceedings from the provisions of the Administrative Procedure Act is judicially recognized in Goldstein v. Johnson, (D.C. Cir. 1950) 184 F. (2d) 342.

nied the exercise of his personal liberty, or was deprived of his rightful control over any member of his household, his wife, his child, his ward, or his servant. It issued from the courts of the sovereign, and in his name, at the instance of any one who invoked it, either for himself or another. It commanded, almost in the words of the Roman edict,— 'De libero homine exhibendo' (D. 43, T. 29), — that the party under detention should be produced before the court, there to await its decree. It left no discretion with the party to whom it was addressed. He was not to constitute himself the judge of his own rights or of his own conduct; but to bring in the body, and to declare the cause wherefore he had detained it; and the judge was then to determine whether that cause was sufficient in law or not. Such in America, as well as England, was the well known, universally recognized writ of habeas corpus."[80]

Blackstone traced the ancestry of the writ of habeas corpus back through Coke and Bracton to the ancient writ *de odio at atia.*[81] Radin has established that it was this writ *de odio et atia* which Magna Carta provided should "be denied to no man,"[82] but also has shown that it differed in material respects from the modern writ of habeas corpus.[83]

Habeas corpus in the form pertinent to this study is spoken of by Blackstone in this language:

"... the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum;* directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum,* to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf.

[80] This succinct statement of the historical aspect of the writ of habeas corpus was made in 1855 by Judge John K. Kane of the Federal District Court for the Eastern District of Pennsylvania in United States v. Williamson, 28 F. Cas. No. 16,726, p. 686 at 688 (1855).

[81] 3 BLACKSTONE, COMMENTARIES, Cooley, 4th ed., 128-129 (1899):

"The writ de odio et atia was anciently used to be directed to the sheriff, commanding him to inquire whether a prisoner charged with murder was committed upon just cause of suspicion, or merely *propter odium et atium,* for hatred and ill-will; and if upon the inquisition due cause of suspicion did not appear, then there issued another writ for the sheriff to admit him to bail. This writ, according to Bracton, *(i)* ought not to be denied to any man, it being expressly ordered to be made out *gratis,* without any denial, by *magna carta,* c. 26, and statute West. 2, 13 Edw. 1, c. 29. But the statute of Gloucester, 6 Edw. I, c. 9, restrained it in the case of killing by misadventure or self-defense, and the statute 28 Edw. III, c. 9, abolished it in all cases whatsoever: but as the statute 42 Edw. III, c. 1, repealed all statutes then in being, contrary to the great charter, Sir Edward Coke is of opinion . . . that the writ *de odio et atia* was thereby revived."

[82] RADIN, ANGLO-AMERICAN LEGAL HISTORY 209 (1936).

[83] Id. at 209-211 for a discussion of the writ *de odio et atia.*

> "... THIS IS A HIGH PREROGATIVE WRIT, and therefore by the common law issuing out of the court of king's bench not only in term-time, but also during the vacation by a *fiat* from the chief justice or any other of the judges, and running into all parts of the king's dominions; for the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained wherever that restraint may be inflicted."[84]

Judge-made law in the reign of Charles I held that a prisoner committed by special command of the king or by the lords of the privy council could not be granted either release or bail upon habeas corpus even though held without any cause assigned. The oppressive denial by King's Bench of habeas corpus relief to Jenks, who was in 1676 committed by the king in council for a turbulent speech at Guildhall, resulted in the Habeas Corpus Act of 31 Charles II, c. 2.[85] Interestingly enough this famous act excepted treason and felony and addressed itself to granting bail rather than testing jurisdiction. Today it would no doubt be considered a most inadequate remedy. The Habeas Corpus Act did not change the nature of the common law proceeding or the practice of the courts in granting the writ.[86] *Bushell's* case,[87] decided before the Habeas Corpus Act, firmly established that the Court of Common Pleas in England, although it possessed no criminal jurisdiction, had the common law power to issue writs of habeas corpus.

The American colonists brought with them the writ of habeas corpus.[88] The Articles of Confederation contained no provision concerning habeas corpus and the only constitutional treatment of the subject was in Article I, Section 9, Clause 2, which requires that "the Privilege of the Writ of Habeas Corpus shall not be suspended unless when in cases of Rebellion or Invasion the public safety may require it." Thus

[84] 3 BLACKSTONE, COMMENTARIES, Cooley ed., 131 (1899).

[85] Id. at 134-136. In part this Act provided:

"That on complaint and request in writing by or on behalf of any person committed and charged with any *crime* (unless committed for treason or felony expressed in the warrant . . .); the lord chancellor or any of the twelve judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall . . . award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. . . . 3. That the writ shall be returned and the prisoner brought up, within a limited time according to the distance, not exceeding in any case twenty days."

[86] Simmons v. Georgia Iron & Coal Co., 117 Ga. 305, 43 S.E. 780 (1903). This case contains an interesting statement of the history of the writ of habeas corpus.

[87] Reported in Sir Thomas Jones 18, 84 Eng. Rep. 1123; stated in Wood's case, 3 Wils. 175, 95 Eng. Rep. 996 (1771); restated in Ex parte Bollman, 4 Cranch (8 U.S.) *75 at *80-81 (1807).

[88] Ex parte Yerger, 8 Wall. (75 U.S.) 85 at 95 (1868).

it may be said that the Constitution simply assumed the existence of the remedy of habeas corpus.[89] Chief Justice Marshall expressed the opinion in 1807, in *Ex parte Bollman,*[90] that the exceptional power to suspend the writ vested in Congress and not the President, and this was reaffirmed by Chief Justice Taney on circuit in 1861 in *Ex parte Merryman.*[91]

The earliest pronouncement of the United States Supreme Court on habeas corpus was made in 1795 in an original proceeding in which the Court admitted to bail in the sum of $4000 a defendant charged with treason in the federal district court for Pennsylvania.[92] In an original proceeding in 1806 the Supreme Court again granted habeas corpus, to a person committed in Alexandria, Virginia, upon failure to post a peace bond in the sum of $4000, upon the ground that the warrant did not state an offense. In spite of his own momentous decision in *Marbury v. Madison,*[93] that the Supreme Court under the Constitution did not have original jurisdiction to issue a writ of mandate, Chief Justice Marshall speaking for the Court granted the writ of habeas corpus.[94] The following year in 1807 in *Ex parte Bollman and Swartwout,* supra, Chief Justice Marshall, as spokesman for the majority of a divided Court, again granted an original application for habeas corpus. That this was an original application by these petition-

[89] United States v. Williamson, 28 F. Cas. No. 16,726, p. 686 at 688 (1855) contains the following account of the deliberations of the Constitutional convention on this matter: "When the federal convention was engaged in framing a constitution for the United States, a proposition was submitted to it by one of the members, that 'the privileges and benefits of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner; and shall not be suspended by the legislature except upon the most urgent and pressing occasions.' See the Madison Papers (vol. 3, 1365). The committee to whom this was referred for consideration, would seem to have regarded the privilege in question as too definitely implied in the idea of free government to need any formal assertion or confirmation; for they struck out that part of the proposed article in which it was affirmed, and retained only so much as excluded the question of its suspension from the ordinary range of congressional legislation. The convention itself must have concurred in their views; for in the constitution, as digested, and finally ratified, and as it stands now, there is neither enactment nor recognition of the privilege of this writ, except as it is implied in the provision that it shall not be suspended. It stands then under the constitution of the United States, as it was under the common law of English America, an indefeasible privilege, above the sphere of ordinary legislation."

[90] 4 Cranch (8 U.S.) *75 at *101 (1807).

[91] 17 F. Cas. No. 9487, p. 144 (1861).

[92] United States v. Hamilton, 3 Dall. (3 U.S.) 17 (1795).

[93] 1 Cranch (5 U.S.) 137 (1803).

[94] Ex parte Burford, 3 Cranch (7 U.S.) 448 (1806). The Chief Justice said: "There is some obscurity in the act of congress, and some doubts were entertained by the court as to the construction of the constitution. The court, however, in favor of liberty, was willing to grant the *habeas corpus*. But the case of *United States* v. *Hamilton,* 3 Dall. 17, is decisive. It was there determined, that this court could grant a *habeas corpus*; therefore, let the writ issue, returnable immediately, together with a certiorari, as prayed."

ers, who were co-conspirators with Aaron Burr,[95] is made clear from the statement in the dissenting opinion of Justice Johnson, that, "the prisoners are in confinement under a commitment ordered by the superior court of the District of Columbia, upon a charge of high treason. This motion has for its object their discharge or admission to bail, under an order of this court. . . ."[96] In granting the writ Marshall made the singular pronouncement that, "The decision that the individual shall be imprisoned, must always precede the application for a writ of *habeas corpus,* and this writ must always be for the purpose of revising that decision, and therefore, appellate in its nature."[97] The holding was that all habeas corpus petitions are addressed to the appellate jurisdiction of the Court and hence properly lie. That the Court so intended was highlighted by the powerful dissent of Associate Justice William Johnson who said, ". . . the principle in *Marbury v. Madison* applies as much to the issuing of a *habeas corpus* in a case of treason, as to the issuing of a *mandamus* in a case not more remote from the original jurisdiction of this court."[98]

[95] Ex parte Bollman and Swartwout, 4 Cranch (8 U.S.) *75 at *118 (1807).

[96] Id. at 101.

[97] Id. at 100. At page 100 the Chief Justice said:

"If the act of Congress gives this court the power to award a writ of *habeas corpus* in the present case, it remains to inquire whether that act be compatible with the constitution. In the *mandamus case* (*Marbury* v. *Madison,* 1 Cr. 175), it was decided, that this court would not exercise original jurisdiction, except so far as that jurisdiction was given by the constitution. But so far as that case has distinguished between original and appellate jurisdiction, that which the court is now asked to exercise is clearly appellate. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail.

"It has been demonstrated at the bar, that the question brought forward on a *habeas corpus,* is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned, is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore, these questions are separated, and may be decided in different courts. The decision that the individual shall be imprisoned, must always precede the application for a writ of *habeas corpus,* and this writ must always be for the purpose of revising that decision, and therefore, appellate in its nature."

[98] Id. at *105. In dissent Justice Johnson said, at *104-5:

"It appears to my mind, that the case of *Hamilton* bears upon the face of it evidence of its being entitled to little consideration, and that the authority of it was annihilated by the very able decision in *Marbury v. Madison.* In this case, it was decided, that congress could not vest in the supreme court any original powers beyond those to which this court is restricted by the constitution. That an act of congress vesting in this court the power to issue a writ of *mandamus,* in a case not within their original jurisdiction, and in which they were not called upon to exercise an appellate jurisdiction, was unconstitutional, and void. In the case of *Hamilton,* the court does not assign the reasons on which it founds its decision, but it is fair to presume, that they adopted the idea which appears to have been admitted by the district-attorney in his argument, to wit, that this court possessed a concurrent power with the district court in admitting to bail. Now, a concurrent power in such a case must be an original power, and the principle in *Marbury v. Madison* applies as much to the issuing of a *habeas corpus* in a case of treason, as to the issuing of a *mandamus* in a case not more remote from the original jurisdiction of this court. Having thus disembar-

This interesting controversy of original versus appellate jurisdiction simmered for sixty-one years until reviewed in 1868 in *Ex parte Yerger*.[99] In that case a private citizen held upon a charge of murder for trial by a military commission applied to a federal circuit court for habeas corpus relief and the writ being there dismissed petitioned the Supreme Court for certiorari to grant the writ denied below. The contention was that the Congressional Act of March 27, 1868, passed to divest the Supreme Court of jurisdiction in *McCardle's Case*[100] had deprived it of all habeas corpus jurisdiction. The Court in rejecting the assertion said:

> "We are obliged to hold, therefore, that in all cases where a Circuit Court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the Circuit Court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded."[101]

This pronouncement established what has ever since been the law on this jurisdictional issue.

The amazing thing about the otherwise able opinion of Chief Justice Solmon Portland Chase in *Ex parte Yerger* was its complete misconstruction of Marshall's decision in *Ex parte Bollman and Swartwout*. Chase deemed the Court bound by *Ex parte Bollman and Swartwout* to limit its habeas corpus activities to its appellate jurisdiction only and indicated that if the matter were one of first impression he would favor extending the original jurisdiction of the Supreme Court to

rassed the question from the effect of precedent, I proceed to consider the construction of the two sections of the judiciary act above referred to.

"It is necessary to premise, that the case of treason is one in which this court possesses neither original nor appellate jurisdiction. The 14th section of the judiciary act, so far as it has relation to this case, is in these words: 'All the before-mentioned courts (of which this is one) of the United States shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.' I do not think it material to the opinion I entertain, what construction is given to this sentence. If the power to issue the writs of *scire facias* and *habeas corpus* be not restricted to the cases within the original or appellate jurisdiction of this court, the case of *Marbury v. Madison* rejects the clause as unavailing; and if it relate only to cases within their jurisdiction, it does not extend to the case which is now moved for."

[99] 8 Wall. (75 U.S.) 85 at 98 (1868).
[100] 7 Wall. (74 U.S.) 506 (1868).
[101] 8 Wall. (75 U.S.) 85 at 103 (1868).

petitions for habeas corpus.[102] The unanimous Court in the *Yerger* case while purporting to follow the decision in *Bollman and Swartwout* actually rejected it and adopted the minority views expressed by Justice Johnson. In this curious situation the Court while professing adherence to the doctrine of stare decisis was unwittingly pursuing the doctrine of self correction. That Chief Justices Marshall and Chase, of all people, should have been the contrivers of this double legal legerdemain calls to mind that "to err is human."

Chief Justice Chase in *Ex parte Yerger* either ignored or overlooked two cases which followed the original rule of the *Hamilton* case. The first of these is *Ex parte Kearney*[103] in 1822 in which the Court through Justice Joseph Story affirmed its jurisdiction to entertain original applications for habeas corpus, but disclaimed any appellate jurisdiction at all in criminal cases and denied the writ.[104] The other case is *Ex*

[102] Id. at 97. Chief Justice Chase said:

"If the question were a new one, it would, perhaps, deserve inquiry whether Congress might not, under the power to make exceptions from this appellate jurisdiction, extend the original jurisdiction to other cases than those expressly enumerated in the Constitution; and especially, in view of the constitutional guaranty of the writ of *habeas corpus*, to cases arising upon petition for that writ.

"But in the case of *Marbury v. Madison*, it was determined, upon full consideration, that the power to issue writs of mandamus, given to this court by the 13th section of the Judiciary Act, is, under the Constitution, as appellate jurisdiction, to be exercised only in the revision of judicial decisions. And this judgment has ever since been accepted as fixing the construction of this part of the Constitution.

"It was pronounced in 1803. In 1807 the same construction was given to the provision of the 14th section relating to the writ of *habeas corpus*, in the case of *Bollman and Swartwout*.

"The power to issue the writ had been previously exercised in *Hamilton's case* (1795), and in *Burford's case* (1806), in neither of which cases does the distinction between appellate and original jurisdiction appear to have been made.

"In the case of *Bollman and Swartwout*, however, the point was brought distinctly before the court; the nature of the jurisdiction was carefully examined, and it was declared to be appellate. The question then determined has not since been drawn into controversy."

[103] 7 Wheat. (20 U.S.) 37 (1822).

[104] Id. at *41. ". . . Upon the argument of this motion, two questions have been made: first, whether this court has authority to issue a *habeas corpus*, where a person is in jail, under the warrant or order of any other court of the United States; secondly, if it have, whether, upon the facts stated, a fit case is made out, to justify the exercise of such an authority.

"As to the first question, it is unnecessary to say more, than that the point has already passed *in rem judicatam* in this court. In the case of *Bollman and Swartwout* (4 Cranch 75), it was expressly decided, upon full argument, that this court possessed such an authority, and the question has ever since been considered at rest.

"The second point is of much more importance. It is to be considered, that this court has no appellate jurisdiction confided to it in criminal cases, by the laws of the United States. It cannot entertain a writ of error, to revise the judgment of the circuit court, in any case where a party has been convicted of a public offence. And, undoubtedly, the denial of this authority proceeded upon great principles of public policy and convenience. If every party had a right to bring before this court every case, in which judgment had passed against him, for a crime, or misdemeanor or felony, the course of justice might be

parte Watkins,[105] decided in 1830. Chief Justice Marshall in the *Watkins* opinion again reviewed and affirmed the doctrine of Supreme Court habeas corpus jurisdiction as contained in the *Hamilton, Burford,* and *Bollman and Swartwout* cases, distinguishing them only to the extent of pointing out that in each the prisoner had not yet been confined under the judgment of a court. In denying the writ in the *Watkins* case Marshall rested his decision on the ground that as the statutes then stood the Supreme Court had no appellate power to revise circuit court decisions in criminal cases and could not usurp that power by the instumentality of habeas corpus.[106] The ratio decidendi was that the Court might not do by indirection what it could not do directly, not that it lacked original jurisdiction in habeas corpus.

In *Ex parte Dorr,*[107] the Court held that it could not issue a habeas corpus to bring up a prisoner in custody under a sentence of a state court since this power was not given to it under section 14 of the Judiciary Act of 1789, but did not go into the question of appellate as distinguished from original jurisdiction.[108]

The cases of *Metzger,*[109] *Kaine,*[110] and *Wells,*[111] cited in the *Yerger*

materially delayed and obstructed, and in some cases, totally frustrated. If, then, this court cannot directly revise a judgment of the circuit court in a criminal case, what reason is there to suppose, that it was intended to vest it with the authority to do it indirectly?"

[105] 3 Pet. (28 U.S.) *193 (1830).

[106] Id. at *207: "The cases are numerous, which decide, that the judgments of a court of record, having general jurisdiction of the subject, although erroneous, are binding, until reversed. It is universally understood, that the judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world; and that this apparent want of jurisdiction can avail the party only on a writ of error. This acknowledged principle seems to us, to settle the question now before the court. The judgment of the circuit court, in a criminal case, is, of itself, evidence of its own legality, and requires for its support, no inspection of the indictment on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising decisions. We cannot usurp that power, by the instrumentality of the writ of *habeas corpus.* The judgment informs us, that the commitment is legal, and with that information, it is our duty to be satisfied."

[107] 3 How. (44 U.S.) 103 (1845).

[108] Id. at 105: "Neither this nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness. And it is immaterial whether the imprisonment be under civil or criminal process. As the law now stands, an individual, who may be indicted in a Circuit Court for treason against the United States, is beyond the power of federal courts and judges, if he be in custody under the authority of a state.

"Dorr is in confinement under the sentence of the Supreme Court of Rhode Island, consequently this court has no power to issue a *habeas corpus* to bring him before it. His presence here is not required as a witness, but to signify to the court whether he desires a writ of error to bring before this tribunal the record of his conviction."

[109] 5 How. (46 U.S.) 176 (1847).

[110] 14 How. (55 U.S.) 103 (1852).

[111] 18 How. (59 U.S.) 307 (1855).

case, serve only to emphasize the confusion of the Court as to the nature of its habeas corpus jurisdiction. In *Kaine*, an eight judge Court split three ways in extended and inconclusive opinions. Four judges, without squarely meeting the issue of jurisdiction, denied the writ of habeas corpus on the merits.[112] Justice Curtis concurred, but only upon the ground that the Court did not have jurisdiction to entertain the application, and in so doing shed some new factual light on the *Burford* case but challenged even the appellate jurisdiction of the Supreme Court in habeas corpus.[113] Three judges dissented on the ground that

[112] In re Kaine, 14 How. (55 U.S.) 103 at 116 (1852) four judges through Justice Catron said: "After Kaine had been committed by the Commissioner, the Circuit Court was applied to, by petition, for writs of *habeas corpus* and *certiorari*, to bring up the prisoner and proceedings before that court. The writs were issued, and a very thorough examination had of the law and the facts. The court decided that the commitment was, in all respects, legal and proper, concurred with the Commissioner's decision, and ordered the prisoner to be remanded to the custody of the marshal, under the commitment of the Commissioner. . . .

"After this careful consideration of the case, in open court, the Circuit Judge granted a second writ of *habeas corpus*, and thereby stayed the warrant for Kaine's extradition, awarded by the Secretary of State, and which had been delivered to the British authorities; and the matter was again brought before that judge, at chambers, but not deeming it proper to act, he adjourned the proceeding, as presented to him, into this court; and of the case thus presented, we are called on to take jurisdiction. Cognizance could only be taken of the matter, on the assumption that original jurisdiction existed in the Circuit Judge to act, but on which he did not act; and the case comes here as one of original jurisdiction, which we are called on to exercise; and as the Constitution declares that this court shall only have appellate powers, in cases like this, it follows that the transfer made by the Circuit Judge is of no validity, and must be rejected. Foreseeing that we might thus hold, the counsel for the prisoner, Kaine, also moved this court, on petition, with the papers and proceedings presented to the Circuit Judge annexed thereto, for writs of *habeas corpus* and *certiorari*, to bring up the defendant, and the record from the Circuit Court, to the end of having the decision of the court examined here."

[113] Id. at *124:

"There are two cases which have been chiefly relied on at the bar. The first is *Ex parte Burford*, 3 Cranch, 448. As this case has many facts in common with the case at bar, it is necessary carefully to examine it. Without detailing the preliminary proceedings, it will be sufficient to say, that Burford was committed to the jail of the county of Washington, in the District of Columbia, by a warrant of certain justices of the peace, which was defective, because it did not state 'some good cause certain, supported by oath.' That he was brought before the Circuit Court for the District of Columbia, upon a writ of *habeas corpus*, and, after a hearing, [was by that court remanded to jail, appears] . . . from the original record in this court. . . .

"This case is relied upon as a decision to show, that although this court cannot, as was held in *Metzger's case*, issue a writ of *habeas corpus* to examine the validity of the warrant of the Commissioner; yet, if the Circuit Court, has, by such a writ, examined its validity, pronounced it valid, and therefore dismissed the writ, and ordered the prisoner to be continued in the custody of the marshal, this court may, upon a writ of *habeas corpus*, examine that decision, and reverse it, if found erroneous.

"Before considering whether the decision in *Burford's case*, goes this length, I think it consistent with the profoundest respect for the very eminent judges who sat in that case, to say, that it does not appear that the question now made, was by them examined and considered, or that they themselves would have deemed it foreclosed by that decision.

". . . I cannot doubt, therefore, that if at that time the further question had arisen whether the court had also jurisdiction to examine a cause of commitment by a Commis-

the petition should be granted on the merits and because the Court had jurisdiction under the *Hamilton* case without regard to whether the circuit court had passed upon a petition for habeas corpus.[114]

In *Ex parte Wells*, by a six to three decision, the Court assumed true appellate jurisdiction in a habeas corpus proceeding. Wells had been convicted of murder in the District of Columbia and sentenced to be hanged. President Fillmore granted a pardon conditioned upon Wells being imprisoned for life. Wells petitioned the Circuit Court of the District of Columbia for a writ of habeas corpus which was denied, and appealed from this decision. After considering the validity of the conditional pardon the Court affirmed the order of the court below. The majority did not discuss the jurisdiction issue, but two judges dissented on the ground that the Court had no jurisdiction.[115]

sioner, after the Circuit Court had reviewed that cause, and pronounced it sufficient, the court would have thought it necessary to consider that question also *de novo*, upon all its grounds, and would not have treated *Burford's* case as a sufficient basis on which to rest their decision."

[114] Id. at *146, Justice Nelson, with whom Chief Justice Taney and Justice Daniel concurred, said: ". . . I cannot but think the denial of the power to grant to writ of *habeas corpus*, in this case, is calculated to shake the authority of a long line of decisions in this court, from *Hamilton's case*, decided in 1795, down to the present one. That case, as understood and expounded in the case of Bollman and Swartwout, in 1807, which received the most deliberate consideration of the court, and to which the doctrine in *Hamilton's case* was applied, held that this great writ was within the cognizance of the court, under the 14th section of the Judiciary Act, in all cases where the prisoner was restrained of his liberty, 'under, or by color of the authority of the United States,' and no case has held the contrary since that decision, with the exception of that of Metzger, decided in 1847, which, I have already stated, stands alone, but which distinctly admits the power and jurisdiction of the court in the case before us. . . .

"Upon the whole, I am satisfied, that the prisoner is in confinement under the treaty and act of Congress, without any lawful authority. I am of opinion, therefore, that the writ of *habeas corpus* should issue in the case, to bring up the prisoner."

[115] Ex parte Wells, 18 How. 307 at 330 (1855). In the dissenting opinion Justice McLean at 330, said: ". . . the petitioner is imprisoned under a criminal sentence of the circuit court, either as originally pronounced, or as modified by the order of the circuit court made under the writ of *habeas corpus*. That original or modified criminal sentence is the cause of his commitment. Though this court has no jurisdiction by writ of error to revise such a sentence, and has deliberately decided, in *ex parte Watkins*, that a writ of *habeas corpus* cannot be made a writ of error for such a purpose, yet by a writ of *habeas corpus* we do revise such a sentence in this case.

"It seems to me that the refusal of a writ of error in criminal cases is not only idle, but mischievous, if a writ of *habeas corpus*, which is certainly a very clumsy proceeding for the purpose, may be resorted to, to bring the record of every criminal case, of whatever kind, before this court.

"With deference for the opinions of my brethren, in my judgment, it goes very little way towards avoiding the difficulty to hold that, before one under a criminal sentence of a circuit court can thus attack his sentence collaterally, in a court which cannot review it by any direct proceeding, he must first apply to the circuit court for a writ of *habeas corpus*; and if the writ, or his discharge under it, be refused, he may then bring into action the appellate power of this court, and by a writ of *habeas corpus* out of this court stop the execution of a sentence, which we have no power to reverse. Few questions come before

From this review of the state of the authorities at the time the *Yerger* case came before the Court it is apparent that Chief Justice Chase rendered a great service by his opinion. Since he brought authority out of chaos in a field where certainty was imperative his treatment of the earlier cases should be cheerfully condoned. Since the *Yerger* case courts have been content to cite it as the basic authority on the point.[116] The rule proscribing original jurisdiction (except as to ambassadors, public ministers and consuls) was from 1946 to 1950 repeatedly reaffirmed in denying, to over two hundred persons convicted of war crimes by American Military Government Courts in Germany, motions for leave to file petitions for original writs of habeas corpus in the Supreme Court.[117] That the point still is not without difficulty is demonstrated by the four to four division of the Court in these cases. Justice Jackson having disqualified himself, half of the balance of the court felt that the doctrine of lack of original jurisdiction should be reexamined.

Although the Supreme Court at an earlier date had addressed itself to the subject of military habeas corpus in the case of military commission prisoners[118] it was not until 1879 that the Court first had before it

this court which may affect the general course of justice more deeply than questions of jurisdiction. This great remedial writ of *habeas corpus*, so efficacious and prompt in its action, and so justly valued in our country, may become an instrument to unsettle the nicely adjusted lines of jurisdiction, and produce conflict and disorder. If the true sphere of its action, and the precise limits of the power to issue it, should become in any degree confused or indistinct, serious consequences may follow—consequences not only affecting the efficient administration of the criminal laws of the United States, but the harmonious action of the divided sovereignties by which our country is governed. For these reasons, though sensible of the bias, which, I suppose, every one has in favor of this process, I have heretofore felt, and now feel, constrained to examine with care the question of our jurisdiction to issue it; and being of opinion that this court has not power to inquire into the validity of the cause of commitment stated in this petition, I think it should be dismissed for that reason."

[116] For example, Ex parte Parks, 93 U.S. 18 at 23 (1876).

[117] Milch, et al. v. United States, 332 U.S. 789, 68 S.Ct. 92 (1947); Brandt, et al. v. United States, 333 U.S. 836, 68 S.Ct. 603 (1948) (In this group of cases only three judges dissented); Everett v. Truman, 334 U.S. 824, 68 S.Ct. 1081 (1948); In re Krautwurst, et al., 334 U.S. 826, 68 S.Ct. 1328 (1948); In re Ehlen, Girke, et al., 334 U.S. 836, 68 S.Ct. 1431 (1948); In re Gronwald, et al., 334 U.S. 857, 68 S.Ct. 1522 (1948). Full citations of all these petitions are collected in footnote 1 to the opinion in Johnson v. Eisentrager, 339 U.S. 763 at 768, 70 S.Ct. 936 (1950).

[118] Ex parte Milligan, 4 Wall. (71 U.S.) 2 (1866) and Ex parte Yerger, 8 Wall. (75 U.S.) 85 (1868). It is beyond the scope of this article to pursue the niceties of distinction between various types of military jurisdiction other than to set forth here the classic definition given by Chief Justice Chase in his separate concurring opinion in Ex parte Milligan at page 141:

"There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of

a habeas corpus proceeding involving detention resulting from a court-martial conviction.[119] That these two ancient elements of Anglo-American law, a court-martial sentence and a habeas corpus petition each in its own right antedating Magna Carta, should have continued in their respective separate courses without meeting in Supreme Court litigation until after ninety years of American constitutional government is indeed remarkable. It is indicative of the fundamental autonomy of the American courts-martial system.

At this point the reader may have in mind *Martin v. Mott,*[120] and *Dynes v. Hoover,*[121] and be preparing to do battle against the proposition above stated. True, in earlier cases the Supreme Court had passed upon other collateral attacks against courts-martial proceedings but never by habeas corpus.

The earliest case with a military background to engage the attention of the Supreme Court was that of *Wise v. Withers,*[122] in which Marshall wrote the opinion in 1806. Wise, a federal justice of the peace, sued Withers, the collector of military fines, in an action of trespass vi et armis for entering Wise's house and removing his goods. The Circuit Court of the District of Columbia sustained a demurrer and upon writ of error the Supreme Court reversed the lower court. The Chief Justice said:

> ". . . the court must, in conformity with that import, declare that a justice of the peace, within the District of Columbia, is exempt from the performance of militia duty. It follows . . . that a court-martial has no jurisdiction over [him] as a militiaman; he could never be legally enrolled; and it is a principle, that a decision

invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights." The extension of the President's military government jurisdiction to tribunals established in the United States occupation zone of Germany by the State Department, as distinguished from Department of Army tribunals, was approved in Madsen v. Kinsella, (D.C. W.Va. 1950) 93 F. Supp. 319.

[119] Ex parte Reed, 100 U.S. 13 (1879).
[120] 12 Wheat. (25 U.S.) 19 (1827).
[121] 20 How. (61 U.S.) 65 (1857).
[122] 3 Cranch (7 U.S.) 330 at 337 (1806).

of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers."

The point of decision was that since the court-martial did not have jurisdiction of the person its decision was a nullity.

In *Houston v. Moore,*[123] in 1820, the Court on writ of error to the Supreme Court of Pennsylvania affirmed that court's judgment upholding the constitutionality of a sentence of a state court-martial punishing disobedience to the call of the President. The majority of the Court held:

"The state court-martial had a concurrent jurisdiction with the tribunal pointed out by the acts of congress, to try a militiaman who had disobeyed the call of the president, and to enforce the laws of congress against such delinquent; and that this authority will remain to be so exercised, until it shall please congress to vest it exclusively elsewhere, or until the state of Pennsylvania shall withdraw from their court-martial the authority to take such jurisdiction."

In *Martin v. Mott,* supra, Mott had been convicted and fined by a court-martial for failing to enter the service as a militiaman in the War of 1812 after having been required so to do by the President of the United States. The defendant Martin, deputy marshal, had levied execution on goods of Mott to satisfy the court-martial fine. Mott brought a possessory action in the New York Supreme Court to recover these goods and was given judgment on the pleadings which was affirmed by the New York Court of Errors. On writ of error the Supreme Court reversed the judgments and upheld the jurisdiction of the court-martial to try militiamen lawfully called into the service of the United States. It also sustained the unlimited constitutional power of the President to call forth the militia to repel invasion by extending this power to the threat of invasion. This attempted collateral attack of the court-martial sentence was in replevin. It did not and could not involve habeas corpus since Mott was not in custody.

In *Ex parte Vallandigham,*[124] in 1863 the Court held it did not have jurisdiction to review by certiorari the proceedings of a military commission. In *Dynes v. Hoover,* supra, a sailor convicted by a navy court-martial of attempting to desert brought a civil action in the Circuit Court for the District of Columbia against the United States

[123] 5 Wheat. (18 U.S.) 1 at 31 (1820).
[124] 1 Wall. (68 U.S.) 243 (1863).

Marshal for damages for false imprisonment. The Supreme Court on writ of error affirmed the judgment of the circuit court in favor of the defendant.[125]

As already indicated the historical threads of courts-martial and habeas corpus proceedings first met in *Ex parte Reed,* supra. The petitioner, a navy paymaster's clerk, contested the jurisdiction of a naval court-martial convened on board the United States ship "Essex" at Rio de Janeiro to try, convict and sentence him for malfeasance. The Circuit Court of the United States for the District of Massachusetts denied the writ and remanded the petitioner to naval custody. The Supreme Court in denying Reed's petition for certiorari laid down the narrow limits of habeas corpus inquiry into confinement adjudged by courts-martial in this language:

> "The court had jurisdiction over the persons and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis, and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances. The exercise of discretion, within authorized limits, cannot be assigned for error and made the subject of review by an appellate court.

[125] Dynes v. Hoover, 20 How. (61 U.S.) 65 at 81-82 (1857). In speaking of courts martial sentence the Court said:

". . . When confirmed, it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the *subject-matter or charge,* or one in which having jurisdiction over the subject-matter, it has failed to observe the rules prescribed by the statute for its exercise. . . .

"When we speak of *proceedings* in a cause, or for the organization of the court and for trials, we do not mean mere irregularity in practice on the trial, or any mistaken rulings in respect to evidence or law, but of a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law. . . .

"With the sentences of courts martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts. But we repeat, if a court martial has no *jurisdiction over the subject-matter of the charge* it has been convened to try, or shall inflict a punishment *forbidden by the law,* though its sentence shall be approved by the officers having a revisory power of it, *civil courts* may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction, and give him redress."

"We do not overlook the point that there must be jurisdiction to give the judgment rendered, as well as to hear and determine the cause. If a magistrate having authority to fine for assault and battery should sentence the offender to be imprisoned in the penitentiary, or to suffer the punishment prescribed for homicide, his judgment would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed. Every act of a court beyond its jurisdiction is void, *Cornett v. Williams,* 20 Wall. 226; *Windsor v. McVeigh,* 93 U.S. 274; 7 Wait's Actions and Defences, 181. Here there was no defect or jurisdiction as to any thing that was done. Beyond this we need not look into the record. Whatever was done, that the court could do under any circumstances, we must presume was properly done. If error was committed in the rightful exercise of authority, we cannot correct it.

"A writ of *habeas corpus* cannot be made to perform the functions of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be, not merely erroneous and voidable, but absolutely void. *Ex parte Kearney,* 7 Wheat. 38; *Ex parte Watkins,* 3 Pet. 193; *Ex parte Milligan,* 4 Wall. 2.

"The application of the petitioner is, therefore, denied."[126]

The above language made directly applicable to habeas corpus proceedings the limitations already imposed by the Court in *Dynes v. Hoover,* supra, on collateral attacks against courts-martial sentences in general.

Although a few inferior federal courts have wavered, the Supreme Court has never departed in any particular from the original forthright pronouncement in *Ex parte Reed.* As we shall see later in Part V, the Court had occasion in March 1950[127] to reaffirm with force and clarity this doctrine. Thus history merges into current problems in the field of military habeas corpus.

II

JURISDICTION

The next subject for consideration is what courts have habeas corpus jurisdiction to inquire into confinement imposed by military authority.

A. State Courts

In 1871 in *Tarble's Case,*[128] the Court, through Justice Stephen J.

[126] 100 U.S. 13 at 23 (1879).

[127] Hiatt v. Brown, 339 U.S. 103, 70 S.Ct. 495 (1950) rehearing denied 339 U.S. 939, 70 S.Ct. 672 (1950).

[128] 13 Wall. (80 U.S.) 397 (1871).

Field, established the rule that a state court has no jurisdiction to test the validity of the confinement of a person pursuant to color of federal military authority. Tarble had, while under eighteen years of age, enlisted in the Army representing his age as twenty-one. Shortly thereafter he deserted, was later apprehended, and confined under charges of desertion awaiting trial by court-martial. A Wisconsin court commissioner on petition of Tarble's father issued a writ of habeas corpus, conducted a hearing, and ordered Tarble released. The Supreme Court of Wisconsin affirmed this order and the Supreme Court on writ of error reversed the state court.[129] The Court simply applied to federal military confinement the general rule previously announced in *Ableman v. Booth*.[130] Chief Justice Chase alone dissented. The decision in *Tarble's* case has never since been challenged in the Supreme Court and is controlling today.

B. Federal Courts

That in proper cases and within proper limits the federal courts have habeas corpus jurisdiction to examine detention imposed by military authority was definitely established at least as early as *Ex parte*

[129] Id. at 411:

". . . the State judge or State court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority, the validity of which is to be determined by the Constitution and laws of the United States. If a party thus held be illegally imprisoned it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release.

"This limitation upon the power of State tribunals and State Officers furnishes no just ground to apprehend that the liberty of the citizen will thereby be endangered. The United States are as much interested in protecting the citizen from illegal restraint under their authority, as the several States are to protect him from the like restraint under their authority, and are no more likely to tolerate any oppression. Their courts and judicial officers are clothed with the power to issue the writ of *habeas corpus* in all cases, where a party is illegally restrained of his liberty by an officer of the United States, whether such illegality consist in the character of the process, the authority of the officer, or the invalidity of the law under which he is held. And there is no just reason to believe that they will exhibit any hesitation to exert their power, when it is properly invoked. Certainly there can be no ground for supposing that their action will be less prompt and efficient in such cases than would be that of State tribunals and State officers.

"It follows, from the views we have expressed, that the court commissioner of Dane County was without jurisdiction to issue the writ of *habeas corpus* for the discharge of the prisoner in this case, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer of the United States, under claim and color of the authority of the United States, as an enlisted soldier mustered into the military service of the National government; and the same information was imparted to the commissioner by the return of the officer. The commissioner was, both by the application for the writ and the return to it, apprised that the prisoner was within the dominion and jurisdiction of another government, and that no writ of *habeas corpus* issued by him could pass over the line which divided the two sovereignties."

[130] 21 How. (62 U.S.) 506 (1858).

Milligan, supra, was discussed at some length in Part I, and need not be here elaborated. The question as to what federal court shall exercise this jurisdiction requires some inquiry. The statute[131] alone is not crystal clear and resort must be had to the case authority.

It may be safely said that the normal tribunal for an original habeas corpus petition is the federal district court of the district in which the military prisoner is confined,[132] that the courts of appeal decline such original jurisdiction and that the Supreme Court denies that it has such jurisdiction.[133] Beyond these basic principles interesting problems arise.

In *Hirota, Dohihara, Kido, et al. v. MacArthur,* the Court in a per curiam, six to one, opinion denied prisoners sentenced by the International Military Tribunal sitting in Tokyo, Japan, leave to file petitions for writs of habeas corpus on the ground that no United States court had power to set aside a judgment of an international tribunal.[134] Justice Murphy dissented; Justice Jackson disqualified himself; Justice Rutledge reserved decision, which he did not render prior to his death; and six months later Justice Douglas filed a separate concurring opinion.[135] He expressed the view that the acts of an American general

[131] Title 28, United States Code, §2241, in pertinent part provides:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

"(b) The Supreme Court any justice thereof and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) he is in custody under or by color of the authority of the United States or is committed for trial before some court thereof."

[132] Ahrens v. Clark, 335 U.S. 188, 68 S.Ct. 1443 (1948).

[133] See authorities collected in footnote 117 supra.

[134] 338 U.S. 197, 69 S.Ct. 1238 (1949). The per curiam opinion at page 198, read: "The petitioners, all residents and citizens of Japan, are being held in custody pursuant to the judgments of a military tribunal in Japan. Two of the petitioners have been sentenced to death, the others to terms of imprisonment. They filed motions in this Court for leave to file petitions for *habeas corpus*. . . .

"We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States. The United States and other allied countries conquered and now occupy and control Japan. General Douglas MacArthur has been selected and is acting as the Supreme Commander for the Allied Powers. The military tribunal sentencing these petitioners has been set up by General MacArthur as the agent of the Allied Powers.

"Under the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners and for this reason the motions for leave to file petitions for writs of *habeas corpus* are denied."

[135] Justice Douglas said, in part at page 204: "I assume that we have no authority to review the judgment of an international tribunal. But, if as a result of unlawful action, one of our Generals holds a prisoner in his custody, the writ of *habeas corpus* can effect

wherever performed and regardless of their international character should be subject to the scrutiny of United States courts since the superiors of all American generals are physically present and subject to such jurisdiction and may be required to issue orders controlling the conduct of their subordinates. His concurrence was based on the ground that the control of enemy prisoners was a political question exclusively within the foreign affairs powers of the President and hence not subject to judicial review. These views of Justice Douglas did not receive the concurrence of any other member of the Court.

The Court of Appeals for the District of Columbia followed the *Hirota* case as controlling in affirming an order of the district court denying a petition for habeas corpus made on behalf of a German citizen held in custody by American Army forces in Germany while serving a sentence imposed by "Military Tribunal IV."[136] Upon finding that this was an international tribunal it was held that the district court had no jurisdiction.

a release from that custody. It is the historic function of the writ to examine into the cause of restraint of liberty. We should not allow that inquiry to be thwarted merely because the jailer acts not only for the United States but for other nations as well." At page 207: ". . . To this court the Supreme Commander appointed from names submitted by the respective nations eleven judges—one each from the United States, China, United Kingdom, Russia, Australia, Canada, France, The Netherlands, New Zealand, India, and the Philippines. So I think there can be no serious doubt that, although the arrangement is in many respects amorphous and though the tribunal is dominated by American influence it is nonetheless international in character. But it should be noted that the chain of command from the United States to the Supreme Commander is unbroken. It is he who has custody of petitioners. It is through that chain of command that the writ of *habeas corpus* can reach the Supreme Commander." At page 215: "The conclusion is therefore plain that the Tokyo Tribunal acted as an instrument of military power of the Executive branch of government. It responded to the will of the Supreme Commander as expressed in the military order by which he constituted it. It took its law from its creator and did not act as a free and independent tribunal to adjudge the rights of petitioner under international law. As Justice Pal said, it did not therefore sit as a judicial tribunal. It was solely an instrument of political power. Insofar as American participation is concerned, there is no constitutional objection to that action. For the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say."

[136] Flick v. Johnson, (D.C. Cir. 1949) 174 F. (2d) 983 at 986: "Concededly, the International Military Tribunal, established under the London Agreement, was a court of international character. How, then, can it be said that Military Tribunal IV was not of the same character, with its existence and jurisdiction rooted in the sovereignty of the Four Powers, exercised jointly through the supreme governing authority of the Control Council? We think, therefore, that the tribunals established under its authority were legitimate and appropriate instruments of judicial power for the trial of war criminals. (See 39 Am. J. Int'l. Law, 1945, at pg. 525.)

"Accordingly, we are led to the final conclusion that the tribunal which tried and sentenced Flick was not a tribunal of the United States. Hence the District Court was without power to review its judgment and sentence. Hirota case, supra."

This same court of appeals, however, in *Eisentrager v. Forrestal*[137] elected to follow the Douglas dictum in *Hirota* that the federal district courts for the District of Columbia have habeas corpus jurisdiction over persons scattered over the world in foreign countries if held in American military custody because the superiors in the chain of command of all American generals are to be found within the jurisdiction of the District of Columbia and so may be required by that court to issue orders releasing persons so held. Eisentrager and the other petitioners were German nationals in United States Army custody in Germany, pursuant to conviction in China by an exclusively United States Military Commission, for law of war violations committed in China. The court of appeals reversed the district court dismissal for lack of jurisdiction, and remanded for consideration on the merits. The Supreme Court granted certiorari.[138] This necessitated a choice between the conflicting views of Justices Douglas and Black, on the one hand, and on the other, those expressed by the majority of the Court in *Ahrens v. Clark*, supra, that only the district court of the district in which petitioner is confined has habeas corpus jurisdiction. The former view not only partakes of the spirit of the knight-errant on a white charger with a roving commission to go about doing good, but entirely ignores the limited and wholly statutory nature of federal district court jurisdiction. The latter view, as here applied, is consistent with *Downes v. Bidwell* doctrine,[139] that the Constitution does not, per se, follow the flag. Since constitutional benefits do not flow to those in territory permanently acquired by the United States, unless and until Congress formally incorporates such territory, it is difficult to work out a legal right for an enemy alien in foreign, albeit occupied, territory to invoke such constitutional benefits. Congress, assuredly, has taken no steps to incorporate Western Germany as a territory of the United States.

The Court in its six to three *Eisentrager* decision[140] reversed the court of appeals and affirmed the judgment of the district court that

[137] (D.C. Cir. 1949) 174 F. (2d) 961.

[138] Sub nominee Johnson v. Eisentrager, 338 U.S. 877, 70 S.Ct. 158 (1949). Fairman, "Some New Problems of the Constitution Following the Flag," 1 STANFORD L. REV. 587 at 631-643 (1949), presents a detailed discussion of the problem involved in the Eisentrager case.

[139] 182 U.S. 244, 21 S.Ct. 770 (1901). Also Hawaii v. Mankichi, 190 U.S. 197, 23 S.Ct. 787 (1903); Dorr v. United States, 195 U.S. 138, 24 S.Ct. 808 (1904). Rasmussen v. United States, 197 U.S. 516, 25 S.Ct. 514 (1905). Madsen v. Kinsella, (D.C. W.Va. 1950) 93 F. Supp. 319, follows the Dorr case in denying relief to an American citizen.

[140] Johnson v. Eisentrager, 339 U.S. 763, 70 S.Ct. 936 (1950). Followed in Nash v. MacArthur (D.C. Cir. 1950) 184 F. (2d) 606 at 608.

it was without jurisdiction. Justices Black, Douglas and Burton dissented. The majority expressly reserved decision in event the petitioner were an American citizen since that state of facts was not before the Court. Justice Jackson speaking for the Court did say, "Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar." The decision differentiated not only between citizens and aliens, but between aliens of friendly and enemy countries, and further divided the latter into resident and nonresident enemy aliens. The door was left just barely ajar for all but the nonresident enemy alien. The Court also adverted to the fact that except for the English-speaking peoples the writ of habeas corpus is generally unknown and that no reciprocity could be expected, and concluded that such extraterritorial application of organic law would be opposed to the practice of every modern government. It held that the Constitution does not confer immunity from military trial and punishment upon an alien enemy engaged in the service of a government at war with the United States, and that it was within the jurisdiction of a military commission to try these prisoners.

Among the sturdy foundation timbers relied upon in the construction of the majority opinion were included *Ahrens v. Clark*, supra; *Downes v. Bidwell*, supra; and the rule of *United States v. Curtis-Wright Corp.*,[141] that the President is exclusively responsible for the conduct of foreign affairs.

The *Eisentrager* decision is not only sound in principle, but is of great practical importance to the Department of National Defense in the discharge of those portions of its combat and occupational missions which fall within the jurisdiction of military commissions. The Court aptly said, "The obvious importance of these holdings to both judicial administration and military operations impelled us to grant certiorari." It also, with commendable realism declared, "The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy."

C. Foreign Courts

The current foreign policy of the United States, including as it does military alliances and military assistance agreements results in the continuing presence of American military forces within the sovereign territory of friendly foreign nations. The international law problems as to

[141] 299 U.S. 304, 57 S.Ct. 216 (1936).

the exercise of criminal and civil jurisdiction over such visiting forces present a broad and interesting field of inquiry beyond the scope of this paper. The basic rule as to trial jurisdiction so far as American courts are concerned, was established by Chief Justice Marshall in 1812, in the leading case of *Schooner Exchange v M'Faddon*[142] and has been followed at least by the American writers on international law.[143] It is to the effect that where a foreign army, or fleet, marches through, sails over, or is stationed in the territory of another state, with whom the foreign sovereign to whom they belong is in amity, its members are exempt from the civil and criminal jurisdiction of the place and are subject to the military law of their own government.

A practical difficulty however may arise from the fact that the international law view of the guest sovereign on this point may be in conflict with the American view. The author was confronted with this situation in New Guinea in 1948 in a case involving American graves registration military personnel. The wartime agreement by which Australia and the United States had expressly and reciprocally vested jurisdiction over armed force members in the nation which they served had expired. The volume containing the report of *Schooner Exchange v. M'Faddon,* brought in by air from Manila, was submitted to the one and only judge of the civil court for all of Papua and the portion of New Guinea mandated to Australia. After a careful reading of the opinion, this jurist in substance said, "Very interesting, but not the British rule, and of course not binding on this court." Practical action ultimately resulted in the United States exercising jurisdiction in this case but this disposition did not flow from any meeting of the minds of the representatives of the two sovereignties as to a controlling international rule of jurisdiction. Express reciprocal legislation, or at least a definitive reciprocal agreement, is essential wherever forces are to be maintained in foreign countries.

Philippine Republic independence on July 4, 1946 gave rise to the first occasions for a foreign court to be petitioned to exercise habeas corpus inquiry over American courts-martial sentences. The Military Bases Agreement[144] which became effective on March 14, 1947 con-

[142] 7 Cranch (11 U.S.) 116 (1812).

[143] 1 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES, 2d rev. ed., §247, 819-820 (1945); LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW, 6th ed., §107, 246 (1915); 1 OPPENHEIM, INTERNATIONAL LAW, 5th ed., §445, 662-663 (1937); WOOLSEY, INTERNATIOAL LAW, 5th ed., §68 (1891); WILSON, HANDBOOK OF INTERNATIONAL LAW §50, 148-149 (1910); Panama v. Schwartzfiger, 21 AM. J. INT. L. 182 (1927); McNAIR AND LAUTERPACHT, ANNUAL DIGEST, Case No. 114 (1927-1928).

[144] Agreement Between the United States of America and the Republic of the Philip-

tained complicated jurisdictional provisions making the same individual subject to the jurisdiction of the Philippine civil courts or American courts-martial depending on the place and nature of the act.[145] This situation gave rise to three original habeas corpus proceedings in the Supreme Court of the Philippines. The first of these cases arose early in 1947 after Philippine independence and before the effective date of the Military Bases Agreement. It was then decided in Washington as a policy matter that the representatives of the United States in the Philippines should not plead sovereign immunity and should submit to the jurisdiction of the Philippine courts.

The Philippine Supreme Court, not at all embarrassed by any distinctions between original and appellate jurisdiction, proceeded to exer-

pines concerning Military Bases. This Agreement was executed on behalf of the United States by American Ambassador Paul V. McNutt pursuant to Congressional authority vested in the President of the United States to enter into an executive agreement, and on behalf of the Philippine Republic by its President, Manuel Roxas, and was subsequently ratified by the Philippine Senate. U.S. DEPT. OF STATE TREATIES AND OTHER INTERNATIONAL ACTS SERIES 1775.

[145] Article XIII in part provided:

"1. The Philippines consents that the United States shall have the right to exercise jurisdiction over the following offenses:

(a) Any offense committed by any person within any base except where the offender and the offended parties are both Philippine citizens (not members of the armed forces of the United States on active duty) or the offense is against the security of the Philippines;

(b) Any offense committed outside the bases by any member of the armed forces of the United States in which the offended party is also a member of the armed forces of the United States; and

(c) Any offense committed outside the bases by any member of the armed forces of the United States against the security of the United States.

"2. The Philippines shall have the right to exercise jurisdiction over all other offenses committed outside the bases by any member of the armed forces of the United States.

"3. Whenever for special reasons the United States may desire not to exercise the jurisdiction reserved to it in paragraphs 1 and 6 of this Article, the officer holding the offender in custody shall so notify the fiscal (prosecuting attorney) of the city or province in which the offense has been committed within ten days after his arrest, and in such a case the Philippines shall exercise jurisdiction.

"4. Whenever for special reasons the Philippines may desire not to exercise the jurisdiction reserved to it in paragraph 2 of this Article, the fiscal (prosecuting attorney) of the city or province where the offense has been committed shall so notify the officer holding the offender in custody within ten days after his arrest, and in such a case the United States shall be free to exercise jurisdiction. If any offense falling under paragraph 2 of this Article is committed by any member of the armed forces of the United States

(a) While engaged in the actual performance of a specific military duty, or

(b) During a period of national emergency declared by either government and the fiscal (prosecuting attorney) so finds from the evidence, he shall immediately notify the officer holding the offender in custody that the United States is free to exercise jurisdiction. In the event the fiscal (prosecuting attorney) finds that the offense was not committed in the actual performance of a specific military duty, the offender's commanding officer shall have the right to appeal from such finding to the Secretary of Justice within ten days from the receipt of the decision of the fiscal and the decision of the Secretary of Justice shall be final."

cise original jurisdiction. The first of these cases[146] was brought by two American civilian employees of the United States Army, then being held in confinement awaiting trial by court-martial for misappropriation of United States Government property, claiming that as civilians they could be prosecuted only in the civil courts of the Philippines. So far as American law was concerned, these civilian employees of the Army overseas were, under Article of War 2, subject to military law. The Philippine Supreme Court by a ten to one decision in an opinion written by Chief Justice Moran dismissed the writ, held that the petitioners were persons subject to American military law, and expressly affirmed the doctrine of *Schooner Exchange v. M'Faddon* without any consideration of the effect of the provisions of the Military Bases Agreement.

The next petition[147] involved a Filipino civilian employee of the United States Army who had been convicted by court-martial of misappropriating United States property from the port area in the City of Manila. His contention was that under the Military Bases Agreement the United States had relinquished the exercise of all jurisdiction within the City of Manila. The Court, again speaking through its Chief Justice, construed an ambiguous provision of the Military Bases Agreement relative to jurisdiction in the port area, and granted the writ on the ground that the United States had no jurisdiction over offenses committed within the territorial limits of the City of Manila.

In the last of these unusual cases[148] a Filipino civilian employee of the United States Army had been convicted by court-martial of misappropriating United States property from an American base not within the City of Manila. He contended that the provision of Article XIII of the Military Bases Agreement vesting jurisdiction in the United States under these circumstances was violative of the Constitution of the Philippine Republic and hence void. This contention raised an issue which was considered to be exclusively one for Philippine determination and the petition was resisted by an assistant attorney general of the Philippine Republic. The Philippine Supreme Court, Justice Paras writing the opinion, upheld the constitutionality of the Military Bases Agreement, dismissed the petition, and again affirmed the principle of *Schooner Exchange v. M'Faddon.*

[146] Tubb and Tedrow v. Griess, Supreme Court of the Philippines, General Register No. L-1325, April 7, 1947.

[147] Miquiabas v. Commanding General, Supreme Court of the Philippines, General Register No. L-1988, Feb. 24, 1948.

[148] Dizon v. Commanding General, Supreme Court of the Philippines, General Register No. L-2110, July 22, 1948.

It must be stressed that these three cases are most unusual and might never have reached decision if the United States had elected to raise the issue of sovereign immunity. The Manual[149] then in effect did not cover the situation, it presumably not previously having arisen. The new Manual provides that habeas corpus process of a foreign court will not be obeyed.[150] This gives an answer to the judge advocate in the field, but due to the delicate considerations of diplomatic policy which will inevitably be involved it is believed that the answer can be neither so simple nor so final. The new Manual provision clearly requires report to higher authority and contemplates a policy decision in each case. Pending such decision the judge advocate on the ground must seek continuance of a proceeding which is normally characterized by its summary nature. It seems essential that reciprocal jurisdictional agreements be simple, crystal clear, and cover expressly, not only trial but also habeas corpus or similar process where such is known to the law of the other sovereign.

D. World Court

Any discussion of habeas corpus in the sphere of the court of international justice necessarily involves academic speculation. However, it is not beyond the realm of possibility that the rule of *Hirota v. MacArthur* may someday lead to a treaty-created habeas corpus jurisdiction of the World Court to inquire into the jurisdiction of international military tribunals. On the other hand it may be urged that the resort to force implicitly prerequisite to the convening of international military tribunals is antithetical to ultimate extension of the rule of law in this particular to the international sphere. Military tribunals constituted by a single sovereign would presumably not come within the sphere of such a convention or multilateral treaty.

[To be concluded]

149 MANUAL FOR COURTS-MARTIAL, U.S Army (1928, revised to 1942).

150 MANUAL FOR COURTS-MARTIAL, U.S. Army (1949) p. 263, ¶186, provides: "A court or judge of a foreign country has no authority to inquire into the legality of restraint upon any person held by United States military authority. Any process in the nature of a writ of habeas corpus issued by any foreign court or judge to any officer acting in his official capacity as an officer of the United States will not be obeyed, but its issuance will be reported to the commander of the United States force within whose command the person restrained is located and to The Judge Advocate General of the Army. Except as authorized by Headquarters, Department of the Army, no officer of the Army of the United States will subject himself, in his command capacity, to the jurisdiction of any foreign court for such purpose."