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MILITARY HABEAS CORPUS: II

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III

HABEAS CORPUS PREREQUISITES

THE doctrine is well established that habeas corpus is an extraordinary remedy which will not ordinarily lie where the law has provided another remedy.[151] The numerical pressure of habeas corpus petitions by all types of prisoners in recent years has reached such proportions as to constitute a major problem in the administration of justice. It has engaged the administrative consideration of judicial officers and been the subject of legislation both federal and state. The Chief Justice of the United States in an address before the American Bar Association on September 7, 1949 strikingly stated the problem and urged "that something should be done to stem the flow."[152]

Something has in fact been done in at least one state,[153] and by

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[151] Sunal v. Large, 332 U.S. 174, 67 S.Ct. 1588 (1947); Adams v. United States, 317 U.S. 269 at 274-275, 63 S.Ct. 236 (1942); Goto v. Lane, 265 U.S. 393 at 401-402, 44 S.Ct. 525 (1924).

[152] Address reported in 70 SUPREME COURT REPORTER, Nov. 15, 1949, p. xiii at xvi-xvii. The Chief Justice in discussing habeas corpus petitions arising out of state convictions said:

". . . the fact that the volume of such petitions has reached the six-hundred mark in each of the past three or four years and that ninety-six out of every one hundred have little or no legal merit suggests that something should be done to try to stem the flow. . . .

"If a state provides a well-defined method by which prisoners can challenge their convictions, and if their allegations are aired in open hearings, most of the charges are either not proved or are found to be far outside the protection of the Due Process Clause. Faced with these facts, the prisoner sees little advantage in further appeal. But until he receives such a hearing, his allegations remain unchallenged and his persistence knows no bounds. I feel safe in estimating that over 75% of the *in forma pauperis* petitions filed last term were cases in which the petitioner had not received a post-conviction hearing in a state court. . . .

"To be concrete, the states should aid in the solution of this problem in several ways. In the first place, they should set up clearly defined post-trial procedures by which prisoners may obtain hearings into the legality of their detention. If the blind alleys are eliminated and the procedure is made definite and precise, the prisoner knows how to challenge his conviction, and he is put to the proof. If his allegations are not borne out by the facts, that is the end of the matter. If his allegations are proved true, the question of unfairness or illegality of his conviction is one of primary importance to the state. It should be to the state's advantage to have that question of law fully and fairly developed in the state courts."

[153] Jenner, "The Illinois Post-Conviction Hearing Act," 9 FEDERAL RULES DECISIONS 347 (1949). See Schilder v. Gusik, (6th Cir. 1950) 180 F. (2d) 662.

Congress in the federal jurisdiction as to both civil[154] and military[155] prisoners. These recent statutory remedies, which have been defined and made prerequisites to habeas corpus, do not constitute a departure from established principles but rather evidence legislative recognition and extension of established Supreme Court doctrine. That a petitioner must first exhaust all other court[156] and administrative remedies[157] be-

[154] 28 U.S.C. (Supp. 3, 1950) §2255 which in pertinent part provides:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

". . . If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. . . .

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

[155] 10 U.S.C. (Supp. 3, 1950) §1525, which is Article of War 53, reads:

"Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided,* That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided,* That only one such application for a new trial may be entertained with regard to any one case; *And provided further,* That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States."

Article of War 50-(h), 10 U.S.C. (Supp. 3, 1950) §1521, in part provides: ". . . orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in Article 53."

[156] Ex parte Hawk, 321 U.S. 114, 64 S.Ct. 448 (1944).

[157] Yakus v. United States, 321 U.S. 414 at 434-435, 64 S.Ct. 660 (1944); United

fore he will be permitted to resort to habeas corpus in a federal court was well established before the enactment of section 2255 of the United States Code and Article of War 53.

The provision of section 2255 which requires a prisoner convicted in a federal court to exhaust his remedy to move for a new trial in the federal district court in which convicted before he may petition for habeas corpus has been held to be constitutional.[158] Not only must the section 2255 remedy be pursued in the district court but if the decision there is adverse to the prisoner he must exhaust his remedy by appeal from the adverse decision upon his section 2255 motion before he may resort to habeas corpus.[159] In the *Meyers* case, while such an appeal was pending from the district court in which the prisoner had been originally convicted, he petitioned for habeas corpus in the District Court for the Eastern District of Virginia in which district he was confined. The court of appeals in affirming the order of the district court dismissing the habeas corpus petition held:

> ". . . the prisoner has no right to relief by habeas corpus where there exists the right to relief under 28 U.S.C.A., Sec. 2255; and the fact that the motion has been denied does not give the right to resort to habeas corpus, even if the movant is entitled to relief, since the remedy in such case is by appeal. Only where the remedy by motion with appeal therefrom is inadequate or ineffective to test the legality of the detention may there be resort to habeas corpus."[160]

The court here, by way of dictum, seems to say that even after a prisoner exhausts his appellate remedies following a section 2255 hearing he is not eligible to seek habeas corpus relief except in rare cases where the section 2255 remedy is inadequate or ineffective. The question arises, does this result in suspending the writ of habeas corpus in contravention of article I, section 9 of the Constitution? On this the Supreme Court has not yet spoken. However, it seems most probable the answer is "no." It is entirely possible to view the section 2255 pro-

States v. Sing Tuck, 194 U.S. 161 at 167-168, 170, 24 S.Ct. 621 (1904); Lee Fong Fook v. Wixon, (9th Cir. 1948) 170 F. (2d) 245 at 246, cert. den. 336 U.S. 914, 69 S.Ct. 604 (1949).

[158] Martin v. Hiatt, (5th Cir. 1949) 174 F. (2d) 350.

[159] Meyers v. Welch, (4th Cir. 1950) 179 F. (2d) 707. This case has a military flavor, though wry, by reason of the fact that the prisoner Meyers, prior to his civil court conviction of subornation of perjury, was a retired air force major general. Weber v. Steele, (8th Cir. 1950) 185 F. (2d) 799, goes farther and requires application to the Supreme Court on certiorari from a denial of §2255 relief, before seeking release on habeas corpus.

[160] Meyers v. Welch, (4th Cir. 1950) 179 F. (2d) 707 at 708.

ceeding itself as a wholly remedial extension of the function of the writ of habeas corpus which enlarges rather than restricts the constitutional guaranty. In any event the extraordinary writ is still available in situations where a section 2255 proceeding is in fact inadequate or ineffective.

It is important to remember the extraordinary nature of habeas corpus, the basic doctrine of the necessity of full exhaustion of all other remedies first, the vast administrative burden that abusive resort to the writ has cast upon the courts and the desire of both the courts and Congress to establish post-conviction hearing procedures which are both more adequate and more conclusive than the traditional writ of habeas corpus *ad subjiciendum*. An evaluation of the effect of Article of War 53 upon military habeas corpus is simplified by having those facts in mind. Article of War 53 is the congressional solution to the problem in military cases just as section 2255 is its solution in civil cases. Federal courts will effectuate the purpose "to stem the flow" by insisting that military prisoners fully exhaust this post-trial proceeding as to all issues before permitting habeas corpus proceedings.

Habeas corpus has been abused by military as well as civil prisoners. For example, William Jackson, a previously convicted felon in civil life, served three years in the Atlanta penitentiary for the burglary of a post exchange. In this one case in three years Jackson filed sixteen different petitions for habeas corpus in the District Court for the Northern District of Georgia,[161] six times lost appeals to the Court of Appeals for the Fifth Circuit,[162] unsuccessfully petitioned the Supreme Court six times,[163] twice sought and was denied declaratory judgment relief in the District Court for the District of Columbia and upon his release at the expiration of his term had pending before the district court his sixteenth petition for habeas corpus. All this was in propria persona without benefit of counsel. One of Jackson's relatively early efforts evoked this comment from the court of appeals:[164] "We think it clear too that applicant, in continually filing groundless applications for writs of habeas corpus has greatly abused the process of the courts. . . ." Jackson

[161] Habeas Corpus Nos. 2198 (79 F. Supp. 74), 2234, 2261, 2308, 2358, 2399, 2407, 2409, 2445 and seven other petitions dismissed in the lower court without filing and without case numbers.

[162] Nos. 12,111 and 12,113 combined [163 F. (2d) 875]; 12402 and 12452 combined [170 F. (2d) 630]; and 12678 [173 F. (2d) 760] and 12981 [179 F. (2d) 680].

[163] Nos. 12,111 and 12,113 combined, cert. den. (332 U.S. 848); Nos. 12402 and 12462 combined, cert. den. (336 U.S. 938); motion for leave to file petition for writ of habeas corpus denied (335 U.S. 805) and No. 12678, cert. den. (339 U.S. 968).

[164] Jackson v. Sanford, (5th Cir. 1948) 170 F. (2d) 630 at 632.

is now back in custody for parole violation and has sought, and been denied, habeas corpus relief from this action of the parole board in *Jackson v. Humphrey*.[165]

The rule that the doctrine of res judicata has no formal application to habeas corpus makes possible this abuse of the writ. This rule is stated in *Innes v. Hiatt*.[166]

Article of War 53 became effective on February 1, 1949 and was implemented in detail by chapter 22 of the *Manual for Courts-Martial*, U. S. Army, 1949 as promulgated by Executive Order No. 10020. It in substance provided that a military prisoner may, within one year after initial appellate review or after the official termination of World War II, apply to the judge advocate general for a new trial, to vacate sentence, and/or restore rights in the court-martial case and that all action taken by the judge advocate general pursuant to such proceedings, shall be binding upon all departments, courts, agencies and officers of the United States. The first court to take notice of this article was the District Court for the District of Columbia on June 14, 1949, in an unreported case denying a petition on the merits.[167] The issue was next raised in three cases[168] in the Northern District of Georgia in which the judge held that a military petitioner need not comply with Article of War 53 but might immediately resort to habeas corpus. These three cases are the only ones in which a court has so ruled and all were reversed and the petitioners remanded to custody in per curiam opinions by the Court of Appeals for the Fifth Circuit. [169]

The first appellate court decision on the point was rendered by the Fifth Circuit in a case in which the District Court for the Southern District of Texas had denied a writ on January 10, 1949 before the effective date of Article of War 53. In this case[170] the appellate court affirmed the district court on the merits and then said:

[165] (D.C. Pa. 1950) 92 F. Supp. 635.

[166] (3d Cir. 1944) 141 F. (2d) 664.

[167] Case No. 3530, Browell v. Johnson. The court said: "The Court further finds, upon consideration of the provisions of Article of War 50(h) and 53 (Public Law 759, 80th Congress, Title II), that the petitioner has failed to exhaust his remedies in that he has not applied to The Judge Advocate General for a new trial or other relief under the provisions of Article of War 53, as amended (Public Law 759, 80th Congress, Title II, Sec. 230) and Chapter XXII of the Manual for Courts-Martial, U.S. Army, 1949, which remedy is readily available to him."

[168] Burchfield v. Hiatt, (D.C. Ga. 1949) 86 F. Supp. 18; Fugate v. Hiatt, (D.C. Ga. 1949) 86 F. Supp. 22; Jackson v. Hiatt, not reported.

[169] Hiatt v. Burchfield; Hiatt v. Fugate; Hiatt v. Jackson, (5th Cir. 1950) 179 F. (2d) 679-680.

[170] Whelchel v. McDonald, (5th Cir. 1949) 176 F. (2d) 260 at 262.

"Habeas corpus to review the action of another court is in its nature extraordinary, and will not be used, if available at all, till other remedies have been exhausted, Goto v. Lane, 265 U.S. 393, 401. . . . See also Ex parte Hawk, 321 U. S. 114. . . . On Feb. 1, 1949, the amended Articles of War, Act of June 24, 1948, 62 Stats. 627 went into effect. Article 53, 10 U.S.C.A. §1525, provides for the grant of a new trial or the vacation of a sentence for a good cause shown within one year after final disposition of a court-martial case; and in cases involving offenses committed during World War II, the application may be made within one year after termination of the war. The action taken on such application is expressly made binding on all courts of the United States. This remedy is much better adapted to reach justice than any within the power of the district court on habeas corpus. That it has not been sought here is within itself a sufficient reason for noninterference."

The *Whelchel* case was decided on July 22, 1949 just one week after the district judge in the *Burchfield, Fugate* and *Jackson* cases, supra, had reached the opposite conclusion. It was upon the authority of the *Whelchel* decision that the latter three cases were reversed on appeal. The district judge who had decided the *Burchfield, Fugate* and *Jackson* cases, after the publication of the *Whelchel* decision, proceeded to dismiss at least thirty-four other pending petitions as premature because no compliance with Article of War 53 was alleged by the petitioner.[171]

The *Whelchel* decision has been followed by an unbroken line of cases[172] approving and extending its doctrine. *Whelchel* assumed, with-

[171] Typical of these cases are Sinclair v. Hiatt, (D.C. Ga. 1949) 86 F. Supp. 828, and Lindsey v. Hiatt, H.C. No. 2470 (D.C. Ga.), unreported. In the former the district court said at 832: "My conclusion is that, upon authority of Whelchel v. McDonald, supra, compliance with Article of War 53 is a condition precedent to the institution of habeas corpus proceedings, except in 'exceptional circumstances where need for the remedy afforded by the writ of habeas corpus is apparent'; and that in the absence here of such showing, the petition should be dismissed without prejudice." In the latter the district court held: "The petition does not allege compliance with Article of War 53 or any exceptional circumstances which would excuse such compliance. . . . The motion to dismiss . . . is sustained, and the petition dismissed as premature, without prejudice, however, to the right to present a new application after compliance with Article of War 53."

[172] Spencer v. Hunter, (10th Cir. 1949) 177 F. (2d) 370; McMahan v. Hunter, (10th Cir. 1950) 179 F. (2d) 661; Simmons v. Hunter, (10th Cir. 1950) 179 F. (2d) 664; Hiatt v. Burchfield, Fugate and Jackson, (5th Cir. 1950) 179 F. (2d) 679-680; Hunter v. Beets, (10th Cir. 1951) 180 F. (2d) 101; Schilder v. Gusik, (6th Cir. 1950) 180 F. (2d) 662; Massey v. Humphrey, (D.C. Pa. 1949) 85 F. Supp. 534; Smith v. Humphrey, (D.C. Pa. 1949) 89 F. Supp. 948; Cochrane v. Zuppan, (D.C. Pa. 1950) 89 F. Supp. 329; and a number of recent unreported cases in the District Court for the Northern District of Georgia. Most of these authorities are cited and followed in Giese v. Chamberlin, (7th Cir. 1950) 184 F. (2d) 404.

out discussing the point, that even though the prisoner's petition had been filed and acted upon in the district court before the effective date of Article of War 53 it was incumbent upon the court of appeals to invoke the rule of exhaustion of remedies when the case came before it. This rule was expressly applied under these circumstances in *McMahan v. Hunter*,[173] after detailed consideration by the court. In *Schilder v. Gusik*[174] the contention was made that Article of War 53 could have no retroactive effect with respect to court-martial sentences imposed, reviewed and approved prior to its effective date, and this contention was held to be without merit since the article in question is remedial. Finally in *Hunter v. Beets*,[175] the court of appeals remanded the prison-

[173] (10th Cir. 1950) 179 F. (2d) 661, cert. den. 339 U.S. 968, 70 S.Ct. 985 (1950). At page 663 the court of appeals said:

"Appellant contends, however, that since the judgment in this case in the United States District Court was entered prior to the effective date of Article of War 53, it cannot retroactively be made to apply to him. . . .

"On October 10, 1949, the Supreme Court denied the petition for certiorari in seven cases (70 S.Ct. 37-50), all filed against Joseph E. Ragen, a warden of an Illinois penal institution, without consideration of the question presented therein and without prejudice to the right of the petitioners to institute proceedings in the state court under the new act passed by the State of Illinois, entitled: 'An Act to provide a remedy for persons convicted and imprisoned in the penitentiary, who assert that rights guaranteed them by the Constitution of the United States or the State of Illinois, or both, have been denied or violated, in proceedings in which they were convicted.' Smith-Hurd Stats. c. 38, §826 et seq. In six of these seven cases, the petition for certiorari had been filed in the Supreme Court prior to the passage of the new Illinois Statute. Thus, the Supreme Court, in effect, held that petitioners were required to exhaust their remedies under the new Statute notwithstanding that it had been passed after their petitions for certiorari were lodged in the Supreme Court.

"We, accordingly, conclude that appellant must first exhaust his remedies under Article of War 53 before he may raise these questions in a Federal District Court, or in this case, on appeal to this court."

[174] (6th Cir. 1950) 180 F. (2d) 662 at 664: "The contention is without merit. Article 53 is a remedial measure. It creates no new offenses, increases no penalties and is not in any respect punitive. It does not, therefore, come within the constitutional condemnation of an *ex post facto* law. It would be an unfortunate result and one clearly not intended, either by amended Articles or the Presidential proclamation, to deny to soldiers convicted before their effective date, while granting to others a review now deemed necessary to protect them against erroneous convictions.

"Rather is it a more salutary principle that now governs this situation. Since the decision in Vandenmark v. Owens-Illinois Glass Co., 311 U.S. 538, . . . there is no longer doubt that the law to be applied by a reviewing court is the law in force when decision is made and not the law as it existed at the time of the trial and judgment. It is a principle that evolves from the earlier case of U.S. v. Schooner Peggy, 1 Cranch 103, . . . and has now been applied by the Courts of Appeal in many cases. Specifically it has been applied by the Fifth Circuit to cases involving convicted soldiers in Whelchel v. McDonald, 176 F. 2d 260, and by the Tenth Circuit in McMahan v. Hunter, Warden, 179 F. 2d 661 and Simmons v. Hunter, Warden, 179 F. 2d 664 and Hunter v. Beets, 180 F. 2d 101."

[175] (10th Cir. 1950) 180 F. (2d) 101, cert. den. 339 U.S. 963, 70 S.Ct. 997 (1950). At 102-103 the court of appeals said:

"That administrative remedy has been available to petitioner at all times since the amended Articles of War became effective, and it has not been invoked. But it is argued that petitioner should not be compelled to exhaust such remedy for the reason that the judgment discharging him from custody was entered before the amended Articles of War

er to custody and held compliance with article 53 to be essential in a case where a writ had been granted by a district court and the prisoner discharged from custody before the effective date of the article.

In none of these cases had the petitioner exhausted his remedies under article 53 at the time of decision and, accordingly, the courts have not had before them the determination of the effect of the language in the article which purports to make all action taken thereunder by the judge advocate general final and conclusive and binding upon all courts. However, three of the cases have discussed this question. *McMahan* simply reserved opinion on the point. *Schilder* read the article so as to give it finality upon the merits only and not so as to preclude ultimate habeas corpus attack in a proper case after unsuccessful resort to the article.[176] Finally, in a per curiam opinion denying a motion for rehearing in *Whelchel v. McDonald*,[177] the court refused to allow the petitioner to amend his motion to show unsuccessful compliance with article 53 after the original appellate decision; it refused to

went into effect and that Article 53 cannot apply retroactively to him. The contention is not well-founded. Even though the post-conviction administrative remedy contained in Article 53 became effective after entry of the judgment in the district court, the exhaustion of that remedy is a prerequisite in a case of this kind to the right to final discharge in habeas corpus. McMahan v. Hunter, supra.

"The judgment is reversed and the cause remanded with directions to restore petitioner to the custody of the warden, without prejudice to the right of petitioner to proceed under Article of War 53, and without prejudice to his right, if any exists, to institute a proceeding in habeas corpus after the exhaustion of the administrative remedy provided in Article 53." The Beets case is cited with approval in Goldstein v. Johnson, (D.C. Cir. 1950) 184 F. (2d) 342.

[176] (6th Cir. 1950) 180 F. (2d) 662 at 665. The court said:

"Another contention of the appellee is that because Article 53 provides that action taken thereunder upon application for a new trial or vacation of sentence is expressly made binding on all of the courts of the United States, the remedy provided by that Article is available to Gusik only upon condition that he surrender his right to challenge the jurisdiction of the military court and his deprivation of constitutional rights by applying for a writ of habeas corpus. This provision, he says, is unconstitutional and he should not be compelled to avail himself of an unconstitutional process. The Tenth Court of Appeals disposes of a similar contention in McMahan v. Hunter, supra, by the observation that it will be time enough to answer the question of finality when it is necessarily involved in an appeal before the court. It seems to us, however, that we meet one aspect of that question now, for it would seem unsound to relegate the appellee to an application for review under Article 53 at the hazard of surrendering important constitutional rights if such hazard exists. Whether the finality provision, literally read, is constitutional or not, we need not decide, for applying the principle of decision so often availed of, that an issue of constitutionality will not be considered if an act may reasonably be so read that constitutional validity appears, it would seem that all that is meant by the finality provision in Article 53 is that decision upon the merits is final and does not go to those contentions which attack decision collaterally. So read the finality created by Article 53 differs in no wise from the finality, in the absence of or after futile appeal, accorded to trial decisions upon consideration of a writ of habeas corpus."

[177] (5th Cir. 1949) 178 F. (2d) 760. Cf. Olsen v. Hiatt, (D.C. Ga. 1950) 89 F. Supp. 174 at 176.

permit the petitioner to assert a new ground of attack upon the judgment of conviction not presented in the district court, and said, "Moreover the last words of the amended Article of War 53, seem to make the action of the Judge Advocate General refusing a new trial binding upon the courts of the United States."

In the *McMahan, Simmons, Beets, Burchfield* and *Jackson* cases, petitions for certiorari were denied by the Supreme Court,[178] thus approving the square holding in those cases that the article 53 remedy must first be exhausted even though not available at the time the district court passed upon the habeas corpus petition.

The other interesting issue as to whether the finality provision of article 53 involved constitutional complications arrested the attention of the Court and it granted certiorari in the *Whelchel* and *Schilder* cases.[179] On principle, the most critical treatment likely to be accorded to this aspect of article 53 is that, suggested by the court of appeals in the *Schilder* case, of construing it as simply reaffirming finality on the merits, and not as precluding habeas corpus proceedings after exhaustion of the article 53 remedy. The intimation, in the *Whelchel* opinion on rehearing, that article 53 action is binding on the courts in habeas corpus, should be considered along with the decision in *Meyers v. Welch,*[180] that section 2255 action precludes subsequent resort to habeas corpus except where it can be shown that the section 2255 remedy is inadequate or ineffective. Also pertinent is the decision in *Barrett v. Hunter*[181] that the order made by the sentencing court under section 2255 is res judicata. In any event such habeas corpus review as may survive after exhausting the article 53 remedy should be confined to the narrow traditional inquiry into jurisdiction only, that is, the rule laid down in *Ex parte Reed*[182] from which the Supreme Court has never departed.[183]

[178] McMahan v. Hunter, 339 U.S. 968, 70 S.Ct. 985 (1950); Simmons v. Hunter, 339 U.S. 968, 70 S.Ct. 984 (1950); Beets v. Hunter, 339 U.S. 963, 70 S.Ct. 997 (1950); Burchfield v. Hiatt, 339 U.S. 987, 70 S.Ct. 1009 (1950); Jackson v. Hiatt, 339 U.S. 968, 70 S.Ct. 985 (1950).

[179] Whelchel v. McDonald, 339 U.S. 977, 70 S.Ct. 1019 (1950); Gusik v. Schilder, 339 U.S. 977, 70 S.Ct. 1014 (1950).

[180] Supra p. 701.

[181] (10th Cir. 1950) 180 F. (2d) 510 at 516. See also Tacoma v. Hiatt, (5th Cir. 1950) 184 F. (2d) 569.

[182] See discussion in part I of this article, 49 MICH. L. REV. 493 at 518-19 (1951).

[183] On December 4, 1950, after this article was written, the Supreme Court unanimously affirmed denial of habeas corpus relief in Whelchel v. McDonald, 340 U.S. 122, 71 S.Ct. 146 (1950). On the same day in Gusik v. Schilder, 340 U.S. 128, 71 S.Ct. 149 (1950), a unanimous Court, speaking through Justice Douglas, upheld the constitutionality of Article 53, employing this unequivocal language (at 132-133):

"An argument is woven around the finality clause of Article 53 as a foundation to a

The value of requiring exhaustion of article 53 relief to the orderly administration of justice has been thoroughly demonstrated. The same district judge who was reversed after granting four writs of habeas corpus,[184] because of alleged disqualification of the law members of the convicting general courts, had before him at least thirty-four other cases involving substantially the same proposition of law. It is reasonable to suppose that the decision on the substantive point would have been the same in all, had not the district court felt bound to follow the *Whelchel* decision and dismissed these cases for non-compliance with article 53.[185] In view of the reversal of the district court by the Supreme Court in *Hiatt v. Brown,* supra, these thirty-four prisoners, if discharged, would have had to be recommitted and the term of their sentences extended by the time they had been at large. The interposition of article 53 prevented the occurrence of this disservice to both the government and the individuals concerned.

Article 53 relief is not a mere will-of-the-wisp and has in fact been more successful from the petitioning prisoners' point of view than have been habeas corpus proceedings. From February 1, 1949 to February

claim of unconstitutionality. The provision is that all action by the Judge Advocate General under Article 53 shall be 'final and conclusive' and shall be 'binding upon all departments, agencies, and officers of the United States.' It is argued that this clause deprives the courts of jurisdiction to review these military judgments and therefore amounts to a suspension of the writ. We do not so read Article 53. Congress was legislating as respects tribunals over which the civil courts have traditionally exercised no power of supervision or review. See *In re Grimley,* 137 U.S. 147, 150. These tribunals have operated in a self-sufficient system, save only as habeas corpus was available to test their jurisdiction in specific cases. We read the finality clause of Article 53 as doing no more than describing the terminal point for proceedings within the court-martial system. If Congress had intended to deprive the civil courts of their habeas corpus jurisdiction, which has been exercised from the beginning, the break with history would have been so marked that we believe the purpose would have been made plain and unmistakable. The finality language so adequately serves the more restricted purpose that we would have to give a strained construction in order to stir the constitutional issue that is tendered.

"Petitioner says that resort to Article 53 will be futile. If it proves to be, no rights have been sacrificed. Habeas corpus will then be available to test any questions of jurisdiction which petitioner may offer."

[184] Brown v. Hiatt, (D.C. Ga. 1948) 81 F. Supp. 647, (5th Cir. 1949) 175 F. (2d) 273, reversed 339 U.S. 103, 70 S.Ct. 495 (1950), rehearing den. 339 U.S. 939, 70 S.Ct. 672 (1950); Burchfield v. Hiatt, (D.C. Ga. 1949) 86 F. Supp. 18, reversed (5th Cir. 1950) 179 F. (2d) 679-680; Fugate v. Hiatt, (D.C. Ga. 1949) 86 F. Supp. 22, reversed (5th Cir. 1950) 179 F. (2d) 679-680; Jackson v. Hiatt, not reported in F. Supp., reversed (5th Cir. 1950) 179 F. (2d) 679-680. The last three cases were reversed for non-compliance with Article of War 53.

[185] Sinclair v. Hiatt, (D.C. Ga. 1949) 86 F. Supp. 828 and the following unreported habeas corpus case numbers, all in the Northern District of Georgia: 2391, 2410, 2411, 2414, 2415, 2430, 2416, 2429, 2427, 2421, 2433, 2418, 2455, 2482, 2446, 2470, 2417, 2456, 2458, 2469, 2479, 2451, 2452, 2453, 2454, 2460, 2463, 2464, 2466, 2474, 2477, 2478 and 2481.

15, 1950 the judge advocate generals of the Army and Air Force received 245 applications under article 53. Of this number 66, or 27 per cent, had been determined by February 15, 1950. Relief was granted in 9 cases, or almost 13 per cent of the applications completed, and 4 per cent of the total filed.[186] A large number of the applications on which action had not been completed involved the point decided by the Supreme Court in *Hiatt v. Brown*, supra, in March 1950 and these were naturally deferred until the Supreme Court had spoken. This is a considerably more liberal result than that produced by the federal courts. At least 324 military prisoners had sought habeas corpus relief since January 1, 1945 up to May 1, 1950. Of that number only one was finally granted release,[187] and in that case the office of the Solicitor General administratively determined not to appeal from the decision of the district court. The record of 4 per cent relief by article 53 as against one-third of one per cent relief by habeas corpus gives meaningful assent to the *Whelchel* decision statement that, "This remedy [Article 53] is much better adapted to reach justice than any within the power of the district court on habeas corpus."[188]

There is great reluctance on the part of some military prisoners to apply for a new trial even where associated with the possibility of other relief. This particularly applies to those convicted of murder or rape and originally given death sentences later reduced by clemency procedures to terms of years. The fate of Palko[189] seems to be well known in penitentiary circles. It will be recalled that Mr. Palko was convicted of murder and sentenced to life imprisonment. From this conviction he sought, and was granted, a new trial, at which he was again convicted and sentenced to death. The Supreme Court approved the death sentence finding it to constitute due process of law. Those who want "out," rather than justice, feel there are possible hazards connected with article 53 not present in habeas corpus. Such feeling patently does not cause article 53 relief to be inadequate or ineffective.

Some prisoners have attempted "hit and run" compliances by filing a petition under article 53 and then within a few days petitioning for habeas corpus alleging that the article 53 petition has been ignored. The district courts have consistently dismissed such petitions holding that

[186] Official figures prepared in the office of the Judge Advocate General of the Army. Since Feb. 15, 1950, AW 53 relief has been granted in several additional cases.

[187] Anthony v. Hunter, (D.C. Kan. 1947) 71 F. Supp. 823.

[188] (5th Cir. 1949) 176 F. (2d) 260 at 263.

[189] Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149 (1937).

the article 53 remedy must be not only initiated, but exhausted, as a prerequisite to habeas corpus.[190]

The general rule that in habeas corpus the petitioner has the burden both to allege and prove all facts necessary to entitle him to relief[191] has been expressly applied to military prisoners[192] and held to require of them allegation and proof of compliance with article 53.[193]

One may safely conclude that article 53 is constitutional, is a substantial right, is remedial in nature, is a mandatory condition precedent to habeas corpus relief, was designed to, and in fact does, "stem the flow" of groundless habeas corpus petitions and affords a remedy "much better adapted to reach justice than any within the power of the district court upon habeas corpus."[194]

IV

TYPES OF MILITARY DETENTION REVIEWABLE

The general rule that only a prisoner in actual custody may maintain a petition for habeas corpus[195] has been expressly applied to those with a military status. Accordingly an appeal from a judgment denying habeas corpus was dismissed where a military prisoner was paroled during its pendency.[196] In *Wales v. Whitney*[197] the Supreme Court held that the then Surgeon General of the Navy, who had been placed under arrest by the Secretary of the Navy and ordered to confine himself to

[190] Typical of these unreported cases are Stevenson v. Hiatt and Gorham v. Hiatt, both G.I. No. 24084, and Fisher v. Hiatt, No. 2523, all in the Northern District of Georgia.

[191] Christakos v. Hunter, (10th Cir. 1947) 161 F. (2d) 692 at 694.

[192] Duval v. Humphrey, (D.C. Pa. 1949) 83 F. Supp. 457 at 461; McClelland v. Humphrey, (D.C. Pa. 1949) 83 F. Supp. 510 at 514; Hayes v. Hunter, (D.C. Kan. 1948) 83 F. Supp. 940 at 945.

[193] Typical are the following unreported cases, all in the Northern District of Georgia: Lindsey v. Hiatt, H.C. No. 2470; Tate v. Hiatt, H.C. No. 2494; Suber v. Hiatt, H.C. No. 2496. This point was presented in the brief and in the argument and was necessary to the decision in Hiatt v. Jackson, (5th Cir. 1950) 179 F. (2d) 679-680.

[194] Whelchel v. McDonald, (5th Cir. 1949) 176 F. (2d) 260 at 263.

[195] McNally v. Hill, 293 U.S. 131, 25 S.Ct. 24 (1934). At page 136, Chief Justice Stone said: "The purpose of the proceeding defined by the statute was to inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the prisoner or his admission to bail, and that only if his detention were found to be unlawful. In this, the Statute conformed to the traditional form of the writ, which put in issue only the disposition of the custody of the prisoner according to law. There is no warrant in either the statute or the writ for its use to invoke judical determination of questions which could not affect the lawfulness of the custody and detention, and no suggestion of such a use has been found in the commentaries on the English common law."

[196] Murray v. Wedemeyer, (9th Cir. 1950) 179 F. (2d) 963, cert. den. 339 U.S. 980, 70 S.Ct. 1025 (1950). Cf. Brewster v. Swope, (9th Cir. 1950) 180 F. (2d) 984 at 986.

[197] 114 U.S. 564 at 570, 5 S.Ct. 1050 (1885). Followed in Goldstein v. Johnson, (D.C. Cir. 1950) 184 F. (2d) 342, which held federal courts have no jurisdiction to grant either declaratory judgment or mandatory injunctive relief to a court martial convict not in custody.

the limits of the City of Washington pending trial by court-martial, was under only moral restraint, and, since not in actual confinement could not obtain habeas corpus relief. The Court said:

> "But neither the Supreme Court of the District nor this court has any appellate jurisdiction over the naval court-martial, nor over offenses which such a court has power to try. Neither of these courts is authorized to interfere with it in the performance of its duty, by way of a writ of prohibition or any order of that nature. The civil courts can relieve a person from imprisonment under order of such court only by writ of *habeas corpus*, and then only when it is made apparent that it proceeds without jurisdiction. If there is no restraint, there is no right in the civil court to interfere. Its power *then* extends no further than to release the prisoner. It cannot remit a fine, or restore to an office, or reverse the judgment of the military court. Whatever effects the decision of the court may have on the proceedings, orders or judgments of the military court, is incidental to the order releasing the prisoner. Of course, if there is no prisoner to release, if there is no custody to be discharged, if there is no such restraint as requires relief, then the civil court has no power to interfere with the military court or other tribunal over which it has by law no appellate jurisdiction."

Assuming, then, actual physical restraint, what different types of military prisoners may seek habeas corpus relief? The inquiry at the moment is limited to the bare right to seek such relief and does not extend to the grounds which warrant granting such relief. This latter question will be considered in Part V. Resort to habeas corpus, after compliance with prerequisites, is open to prisoners confined by sentence of Navy court-martial,[198] Army court-martial,[199] or United States military commission.[200]

Habeas corpus has been sought without avail to avoid the com-

[198] Ex parte Reed, 100 U.S. 13 (1879); Wales v. Whitney, 114 U.S. 564, 5 S.Ct. 1050 (1885); Johnson v. Sayre, 158 U.S. 109, 15 S.Ct. 773 (1895); cf. Smith v. Whitney, 116 U.S. 167, 6 S.Ct. 570 (1886).

[199] Ex parte Mason, 105 U.S. 696 (1882); Carter v. McClaughry, 183 U.S. 365, 22 S.Ct. 181 (1902); Kahn v. Anderson, 255 U.S. 1, 41 S.Ct. 224 (1921); Givens v. Zerbst, 255 U.S. 11, 41 S.Ct. 227 (1921); Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834 (1949); Humphrey v. Smith, 336 U.S. 695, 69 S.Ct. 830 (1949); Hiatt v. Brown, 339 U.S. 103, 70 S.Ct. 495 (1950).

[200] Ex parte Milligan, 4 Wall. (71 U.S.) 2, 107 (1866); Ex parte Yerger, 8 Wall. (75 U.S.) 85 (1869); Ex parte Quirin, 317 U.S. 1, 63 S.Ct. 1 (1942) (This is the case of the five German saboteurs who landed in Florida from a submarine); In re Yamashita, 327 U.S. 1, 66 S.Ct. 340 (1946) (certiorari to the Supreme Court of the Philippines). Cf. Johnson v. Eisentrager, 339 U.S. 763, 70 S.Ct. 158 (1950). The jurisdiction of the "United States Court of the Allied High Commission for Germany, Fourth Judicial District," was upheld against habeas corpus attack in Madsen v. Kinsella, (D.C. W.Va. 1950) 93 F. Supp. 319.

pletion of a voluntary enlistment,[201] and to avoid selective service.[202] It is a proper remedy for one who has recovered his sanity to obtain release from a naval mental institution.[203] In one case it was held that a petitioner who resisted selective service induction was subject to trial only in the civil courts and not by court-martial since he had never been actually inducted.[204]

Resort to the writ by persons of Japanese ancestry detained during World War II in relocation centers did not strictly fall within the scope of military habeas corpus. These relocation centers were operated by the War Relocation Authority, a civilian agency, in which was vested control over the ingress and egress of such evacuees.[205]

In re Territo[206] presented an interesting petition by a prisoner of war who was an American citizen. Born in the United States of Italian parents, Territo was taken to Italy, later impressed into the Italian Army, captured by United States forces during World War II, and removed to the United States as a prisoner of war where he joined the Italian service unit to perform labor for the United States for pay. It was held that neither the petitioner's American citizenship nor Italy's surrender changed his prisoner of war status and that he was not entitled to release.

In at least one case an unusual use was made of habeas corpus to obtain the release, back to military authority for trial, of a soldier who was being held by state civil authorities under indictment for murder of a civilian policeman.[207] In granting his release the district court held that in time of war the military authorities had superior jurisdiction of the offense charged.

[201] McCord v. Page, (5th Cir. 1941) 124 F. (2d) 68. Petitioner's rejected contention was that after voluntarily enlisting he became an ordained minister of the Watch Tower Bible Society and that his religious tenets were incompatible with his military duties to salute the flag and his superiors.

[202] Eagles v. Samuels, 329 U.S. 304, 67 S.Ct. 313 (1946). Petitioner's unsuccessful contention was that the New York City Selective Service Advisory Panel on theological classifications had improperly concluded that petitioner was not "preparing in good faith for a career of service in the practicing rabbinate." Eagles v. Horowitz, 329 U.S. 317, 67 S.Ct. 320 (1946); Sunal v. Large, 332 U.S. 174, 67 S.Ct. 1588 (1947). Cf. Cox v. United States, 332 U.S. 442, 68 S.Ct. 115 (1948) finding to be without merit the contention made by Jehovah's Witnesses, convicted by a civil court of absence without leave from a civilian public service camp, that a local draft board improperly classified petitioners as conscientious objectors rather than exempt ministers of religion.

[203] Overholser v. Boddie, (D.C. Cir. 1950) 184 F. (2d) 240, expressly overruling Overholser v. Treibly, (D.C. Cir. 1945) 147 F. (2d) 705. A detained "sexual psychopath" may test the question of his recovery by habeas corpus, Malone v. Overholzer, (D.C. D.C. 1950) 93 F. Supp. 647 at 648.

[204] Billings v. Truesdale, 321 U.S. 542, 64 S.Ct. 737 (1944).

[205] Ex parte Endo, 323 U.S. 283 at 290, 65 S.Ct. 193 (1944).

[206] (9th Cir. 1946) 156 F. (2d) 142.

[207] Ex parte King, (D.C. Ky. 1917) 246 F. 868.

Normally the petition is brought by the prisoner who seeks his own release. Where the prisoner is a minor, as a procedural matter, the petition for habeas corpus may be maintained by a parent.[208] However, it has been held that a corporate employer had no standing to petition on its own behalf for habeas corpus release of a minor employee from military service under the Selective Service Act.[209] The contention was that the draft board and appeal board had wrongfully refused further deferment as an agricultural worker. In affirming an order denying the writ the court held:

> "The petition here is solely a recital of hardship to the Ranch Company with the prayer, in effect, that Green be ordered back into its service. . . .
>
> "We hold that the Ranch Company cannot plead its sufferings as a basis for its claim that Green is under illegal restraint. . . ."

The court however considered the case on its merits since the petition also recited that it was brought on behalf of H. S. Green, the person inducted.

While the unusual resorts to habeas corpus above discussed are of interest, it should be emphasized that the vast bulk of military habeas corpus petitions are those of prisoners seeking release from confinement imposed by court-martial sentence.

V

GROUNDS FOR HABEAS CORPUS RELIEF

The only ground for habeas corpus relief from confinement imposed by either a civil or military court is that the sentencing court lacked jurisdiction. The inquiry in military habeas corpus may extend to these questions: (1) Was the military court legally constituted? (2) Did it have jurisdiction of the person tried? (3) Did it have jurisdiction of the offense charged? (4) Was the sentence imposed within the maximum limit for the offense? Once these questions are answered in the affirmative the habeas corpus inquiry may go no further. The Supreme Court has never deviated from this fundamental limitation upon the scope of military habeas corpus and has reaffirmed the rule in

[208] Goodman v. Hearn, (5th Cir. 1946) 153 F. (2d) 186; Ex parte Lewkowitz, (C.C. N.Y. 1908) 163 F. 646; Ex parte King, (D.C. Ky. 1917) 246 F. 868. Cf. In re Morrissey, 137 U.S. 157, 11 S.Ct. 57 (1890). See also cases collected at pages 270-271, MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, 1949. A petition may be signed and verified on behalf of another, but the person in custody is the only real party in interest, Nash v. MacArthur, (D.C. Cir. 1950) 184 F. (2d) 606.

[209] Sisquoc Ranch Co. v. Roth, (9th Cir. 1946) 153 F. (2d) 437 at 441.

an unbroken line of cases.[210] Nor may the civil courts, by habeas corpus or otherwise, exercise any supervisory, correcting, appellate or writ of error powers over either court-martial[211] or military commission proceedings.[212] These two basic propositions were clearly and succinctly reaffirmed by the Supreme Court in March 1950, in this language:[213]

> "It is well settled that 'by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial. . . . The single inquiry, the test, is jurisdiction.' *In re Grimley*, 137 U.S. 147, 150 (1890). In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision."

To one not familiar with recent inferior court litigation in this field these points probably appear clearly to be, not only decided law, but correct law. The Supreme Court has always so held and the whole matter might be dropped right here so far as a proper academic statement of the law is concerned. However, the insistent clamors of the petitioners, and their counsel, and a few erroneous decisions by inferior federal courts have obscured the fundamental law of the subject to the point where it is of practical value to catalogue those contentions which have been held not to affect the jurisdiction of military courts and hence not to constitute grounds for habeas corpus relief. When district courts, in releasing habeas corpus petitioners, depart from the fundamental issue of jurisdiction, reversal results.[214]

[210] Dynes v. Hoover, 20 How. (61 U.S.) 65 at 83 (1857); Ex parte Reed, 100 U.S. 13 at 23 (1879); Ex parte Mason, 105 U.S. 696 at 697 (1882); Smith v. Whitney, 116 U.S. 167 at 177-179, 6 S.Ct. 570 (1886); In re Grimley, 137 U.S. 147 at 150, 11 S.Ct. 54 (1890); Johnson v. Sayre, 158 U.S. 109 at 118, 15 S.Ct. 773 (1895); Swaim v. United States, 165 U.S. 553 at 561, 17 S.Ct. 448 (1897); Carter v. Roberts, 177 U.S. 496 at 498, 20 S.Ct. 713 (1900); In re Vidal, 179 U.S. 126 at 127, 21 S.Ct. 48 (1900); Carter v. McClaughry, 183 U.S. 365 at 401, 22 S.Ct. 181 (1902); McClaughry v. Deming, 186 U.S. 49 at 69, 22 S.Ct. 786 (1902); Grafton v. United States, 206 U.S. 333 at 347, 27 S.Ct. 749 (1907); Mullan v. United States, 212 U.S. 516 at 520, 29 S.Ct. 330 (1909); Collins v. McDonald, 258 U.S. 416 at 418, 42 S.Ct. 326 (1922); In re Yamashita, 327 U.S. 1 at 8, 66 S.Ct. 340 (1946); Humphrey v. Smith, 336 U.S. 695 at 696, 69 S.Ct. 830 (1949); Hiatt v. Brown, 339 U.S. 103 at 111, 70 S.Ct. 495 (1950).

[211] Dynes v. Hoover, 20 How. 65 at 83 (1857); Ex parte Reed, 100 U.S. 13 at 23 (1879); In re Grimley, 137 U.S. 147 at 150, 11 S.Ct. 54 (1890); Swaim v. United States, 165 U.S. 553 at 562, 17 S.Ct. 448 (1897); McClaughry v. Deming, 186 U.S. 49 at 69, 22 S.Ct. 786 (1902); Hiatt v. Brown, 339 U.S. 103 at 111, 70 S.Ct. 495 (1950), rehearing den. 339 U.S. 939, 70 S.Ct. 672 (1950).

[212] In re Yamashita, 327 U.S. 1 at 8-9, 66 S.Ct. 340 (1946).

[213] Hiatt v. Brown, 339 U.S. 103 at 111, 70 S.Ct. 495 (1950).

[214] For example, from November 1935 to February 1950, 38 appeals were taken from orders of one of the judges of the District Court for the Northern District of Georgia granting release to habeas corpus petitioners both civil and military. Twenty-eight were re-

The extent, if any, to which habeas corpus inquiry may extend to due process of law considerations, not actually jurisdictional, presents an interesting facet of the general problem of defining the boundaries of due process of law. Four court of appeals decisions have stated that in a habeas corpus proceeding civil courts may consider whether the manner in which a court-martial proceeding was conducted denied due process of law. This proposition was best stated in *Innes v. Hiatt*[215] in which the court found there had been no denial of due process. In *Schita v. King*,[216] where the case was remanded for consideration on the merits of the due process issue, the allegations were not borne out by the proof.

The other two cases, *Smith v. Hiatt*,[217] and *Hiatt v. Brown*,[218] in which the petitioners had been released, were both reversed by the Supreme Court. In the *Smith* case on this point the Supreme Court said:[219]

versed by the court of appeals: (5th Cir. 1935) 80 F. (2d) 258; (5th Cir. 1935) 80 F. (2d) 259; (5th Cir. 1936) 84 F. (2d) 543; (5th Cir. 1936) 84 F. (2d) 559; (5th Cir. 1937) 92 F. (2d) 671; (5th Cir. 1938) 97 F. (2d) 253; (5th Cir. 1938) 99 F. (2d) 1014; (5th Cir. 1938) 99 F. (2d) 1020; (5th Cir. 1938) 99 F. (2d) 1021 (3 cases); (5th Cir. 1938) 99 F. (2d) 1022 (4 cases); (5th Cir. 1938) 99 F. (2d) 1023 (4 cases); (5th Cir. 1938) 99 F. (2d) 1024; (5th Cir. 1940) *115 F. (2d) 435; (5th Cir. 1943) 136 F. (2d) 54; (5th Cir. 1945) *148 F. (2d) 376; (5th Cir. 1948) 170 F. (2d) 473; (5th Cir. 1950) *179 F. (2d) 679-680 (3 cases); (5th Cir. 1950) 180 F. (2d) 453. Nine others affirmed by the court of appeals, but reversed by the Supreme Court, were Zerbst v. Kidwell, 304 U.S. 359, 58 S.Ct. 872 (1938) (8 cases) and *Hiatt v. Brown, 339 U.S. 103, 70 S.Ct. 495 (1950). One was affirmed, (5th Cir. 1943) 136 F. (2d) 106. (*Denotes military cases.) Net result, 37 reversals, 1 affirmance.

[215] (3d Cir. 1944) 141 F. (2d) 664. At p. 666 the court of appeals said:

"We think that this basic guarantee of fairness afforded by the due process clause of the fifth amendment applies to a defendant in criminal proceedings in a federal military court as well as in a federal civil court. . . .

"This is not to say that members of the military forces are entitled to the procedure guaranteed by the Constitution to defendants in the civil courts. As to them due process of law means the application of the procedure of the military law. Many of the procedural safeguards which have always been observed for the benefit of defendants in the civil courts are not granted by the military law. In this respect the military law provides its own distinctive procedure to which the members of the armed forces must submit. But the due process clause guarantees to them that this military procedure will be applied to them in a fundamentally fair way. We conclude that it is open for a civil court in a habeas corpus proceedings to consider whether the circumstances of a court-martial proceeding and the manner in which it was conducted ran afoul of the basic standard of fairness which is involved in the constitutional concept of due process of law and, if it so finds, to declare that the relator has been deprived of his liberty in violation of the fifth amendment and to discharge him from custody."

[216] (8th Cir. 1943) 133 F. (2d) 283, second appeal (8th Cir. 1944) 139 F. (2d) 971, cert. den. 322 U.S. 761, 64 S.Ct. 1273 (1944).

[217] (3d Cir. 1948) 170 F. (2d) 61, reversed sub nom; Humphrey v. Smith, 336 U.S. 695, 69 S.Ct. 830 (1949).

[218] (5th Cir. 1949) 175 F. (2d) 273, reversed 339 U.S. 103, 70 S.Ct. 495 (1950).

[219] Humphrey v. Smith, 336 U.S. 695 at 700-701, 69 S.Ct. 830 (1949), rehearing den. 337 U.S. 934, 69 S.Ct. 942 (1949).

"We hold that a failure to conduct pre-trial investigations as required by Article 70 does not deprive general courts-martial of jurisdiction so as to empower courts in habeas corpus proceedings to invalidate court-martial judgments. . . .

"This court-martial conviction resulting from a trial fairly conducted cannot be invalidated by a judicial finding that the pre-trial investigation was not carried on in the manner prescribed by the 70th Article of War."

This certainly precludes any habeas corpus due process inquiry into pre-trial proceedings and seems to limit due process relief to such circumstances at the trial itself as in themselves would deprive the court-martial of jurisdiction. This position harmonizes with the classic jurisdiction doctrine of *Ex parte Reed*.[220] In the *Brown* case, the Supreme Court even more explicitly stated:[221]

"The Court of Appeals also concluded that certain errors committed by the military tribunal and reviewing authorities had deprived respondent of due process.

"The following instances of error in the military proceedings were cited by the Court of Appeals:

'(1) Accused was convicted on the theory that although he was on duty as a sentry at the time of the offense, it was incumbent upon him to retreat from his post of duty.

'(2) Accused has been convicted of murder on evidence that does not measure to malice, premeditation, or deliberation.

'(3) The record reveals that the law member appointed was grossly incompetent.

'(4) There was no pre-trial investigation whatever upon the charge of murder.

'(5) The record shows that counsel appointed to defend the accused was incompetent, gave no preparation to the case, and submitted only a token defense.

'(6) The appellate reviews by the Army reviewing authorities reveal a total misconception of the applicable law.' 175 F. 2d at 277.

"We think the court was in error in extending its review for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation, and the competence of the law member and defense counsel. *Cf.*

[220] See discussion in part I of this article, 49 MICH. L. REV. 493 at 518-519 (1951).

[221] Hiatt v. Brown, 339 U.S. 103 at 110-111, 70 S.Ct. 495 (1950), rehearing den. 339 U.S. 939, 70 S.Ct. 642 (1950). The enumeration of errors (small type) appears in the Court's footnote number 6, at 110.

> *Humphrey v. Smith*, 336 U.S. 695 (1949). It is well settled that 'by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial. . . . The single inquiry, the test, is jurisdiciton.' *In re Grimley*, 137 U.S. 147, 150 (1890). In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision."

In the *Smith* and *Brown* cases the Court does not blaze a new trail but stands on old familiar ground. It but repeats what it has said before: "To those in the military or naval service of the United States the military law is due process."[222]

A habeas corpus court is not at all concerned with the guilt or innocence or sanity of the accused and will not review the record to determine these issues.[223]

The following are illustrative of allegations of fact which have been held not to constitute grounds for habeas corpus relief in military cases:

1. That a reserve officer was on terminal leave at the time charges were preferred;[224]

2. That there was substantial or complete failure to comply with the pre-trial investigative procedure required by Article of War 70 of 1920;[225]

3. That accused was not represented by counsel at the pre-trial investigation;[226]

[222] Reaves v. Ainsworth, 219 U.S. 296 at 304, 31 S.Ct. 230 (1911); French v. Weeks, 259 U.S. 326 at 335, 42 S.Ct. 505 (1922); Creary v. Weeks, 259 U.S. 336 at 344, 42 S.Ct. 509 (1922).

[223] Ex parte Quirin, 317 U.S. 1 at 25, 63 S.Ct. 1 (1942): "We are not here concerned with any question of the guilt or innocence of petitioners." In re Yamashita, 327 U.S. 1 at 8, 17, 66 S.Ct. 340 (1946): ". . . on application for habeas corpus we are not concerned with the guilt or innocence of petitioners. . . . We do not here appraise the evidence on which petitioner was convicted. . . . These are questions within the peculiar competence of the military officers composing the commission and were for it to decide." Humphrey v. Smith, 336 U.S. 695 at 698, 69 S.Ct. 830 (1949): "But our authority in habeas corpus proceedings to review court-martial judgments does not permit us to pass on the guilt or innocence of persons convicted by courts-martial." Whelchel v. McDonald, (5th Cir. 1949) 176 F. (2d) 260 at 262: "It is no more appropriate for a habeas corpus court to try the sanity of an accused convicted by a court-martial than to try his guilt. Both questions are the responsibility of the court-martial and the reviewing authorities including the President."

[224] Hironimus v. Durant, (4th Cir. 1948) 168 F. (2d) 288, reversing (D.C. W.Va. 1947) 73 F. Supp. 79; cert. den. 335 U.S. 818, 69 S.Ct. 40 (1948). Durant v. Hiatt, (5th Cir. 1949) 177 F. (2d) 373, affirming (D.C. Ga. 1948) 81 F. Supp. 948.

[225] Humphrey v. Smith, 336 U.S. 695 at 700-701, 69 S.Ct. 830 (1949); Hiatt v. Brown, 339 U.S. 103 at 110, 70 S.Ct. 495 (1950).

[226] Romero v. Squier, (9th Cir. 1943) 133 F. (2d) 528 at 532, cert. den. 318 U.S. 785, 63 S.Ct. 982 (1943).

4. That the officer appointed as defense counsel was not a lawyer;[227]

5. That assigned counsel was ordered away during the course of the trial and appellant assumed his own defense after stating in court that he had no objection;[228]

6. That civilian defense counsel was excluded from court while secret maps were placed in evidence but regularly appointed defense counsel was present;[229]

7. That assistant defense counsel was absent where regularly appointed defense counsel was present at all times and accused stated he desired to be defended by the regularly appointed defense counsel and made no objection to the absence of the assistant defense counsel;[230]

8. That the law member of the court-martial was not a Judge Advocate General's Department officer even though such officers did serve on the court in other capacities;[231]

9. That accused was deprived of a jury trial;[232]

10. That, prior to February 1, 1949, no member of the court was an enlisted person;[233]

11. That no Negro was a member of the court which tried a Negro;[234]

12. That the investigating officer was not present at the trial;[235]

13. That there was improperly admitted into evidence a pre-trial confession of the accused;[236]

[227] Altmayer v. Sanford, (5th Cir. 1945) 148 F. (2d) 161 at 162, where the court said: "The appointed counsel, being a commissioned officer admitted to practice before courts-martial, was a competent attorney within the purview of the Sixth Amendment. Romero v. Squier, 9 Cir., 133 F. (2d) 528, certiorari denied, 318 U.S. 785."

[228] Innes v. Crystal, (2d Cir. 1943) 131 F. (2d) 576, cert. den. 319 U.S. 755, 63 S.Ct. 1321 (1943).

[229] Romero v. Squier, (9th Cir. 1943) 133 F. (2d) 528 at 532, cert. den. 318 U.S. 785, 63 S.Ct. 982 (1943).

[230] Flackman v. Hunter, (D.C. Kan. 1948) 75 F. Supp. 871.

[231] Hiatt v. Brown, 339 U.S. 103, 70 S.Ct. 495 (1950); Henry v. Hodges, (2d Cir. 1948) 171 F. (2d) 401 at 403, cert. den. 336 U.S. 968, 69 S.Ct. 937 (1949) expressly approved in Hiatt v. Brown, supra.

[232] Ex parte Milligan, 4 Wall. (71 U.S.) 2 at 123, 138 (1866); Ex parte Mason, 105 U.S. 696 (1882); Ex parte Quirin, 317 U.S. 1 at 40-43, 63 S.Ct. 1 (1942); Reilly v. Pescor, (8th Cir. 1946) 156 F. (2d) 632 at 635, cert. den. 329 U.S. 790, 67 S.Ct. 353 (1946); Innes v. Crystal, (2d Cir. 1943) 131 F. (2d) 576, cert. den. 319 U.S. 755, 63 S. Ct. 1321 (1943); DeWar v. Hunter, (10th Cir. 1948) 170 F. (2d) 993, cert den. 337 U.S. 908, 69 S.Ct. 1048 (1949).

[233] Whelchel v. McDonald, (5th Cir. 1949) 176 F. (2d) 260 at 261, affd. 340 U.S. 122, 71 S.Ct. 146 (1950); DeWar v. Hunter, (10th Cir. 1948) 170 F. (2d) 993 at 997, cert. den. 337 U.S. 908, 63 S.Ct. 1048 (1949).

[234] Jackson v. Gough, (5th Cir. 1948) 170 F. (2d) 630 at 631, cert. den. 336 U.S. 938, 69 S.Ct. 1502 (1949).

[235] Ibid.

[236] Hironimous v. Durant, (4th Cir. 1948) 168 F. (2d) 288 at 294; Brown v. Sanford, (5th Cir. 1944) 170 F. (2d) 344.

14. That no copy of the staff judge advocate review nor of the opinion of the board of review was supplied to the accused or his counsel;[237]

15. That the court failed to find from the evidence that accused had been subjected to entrapment;[238]

16. That secret Army maps which formed the basis of conviction of an officer were not included in the record which was forwarded to the Secretary of War and upon which the sentence was confirmed by the President;[239]

17. That in the absence of bad faith a commanding general decided that the tactical situation required discontinuance of a trial and the transfer of the charges to another headquarters;[240]

18. That a civilian cook on an Army transport who deserted the vessel just as it was leaving a United States port to take troops overseas had not agreed to be subject to Army orders and did not know that he was subject to military law;[241]

19. That charges were not stated with the precision of a common-law indictment;[242]

20. That the accused sought collaterally to contradict or impugn the court-martial record;[243]

21. That the accused was insane either at the time of the offense or at the time of trial;[244]

22. That the accused was at the time of the pre-trial investigation denied an opportunity to cross examine, because they were not available, two witnesses who at the time were one hundred miles away;[245]

23. That accused was mistreated by guards and prisoners while being held in a stockade awaiting trial, in the absence of any evidence that a confession was so obtained;[246]

[237] Weintraub v. Sevenson, (2d Cir. 1948) 165 F. (2d) 756.

[238] Romero v. Squier, (9th Cir. 1943) 133 F. (2d) 528 at 532-533, cert. den. 318 U.S. 785, 63 S.Ct. 982 (1943).

[239] Ibid.

[240] Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834 (1949), rehearing den. 337 U.S. 921, 69 S.Ct. 1152 (1949).

[241] McCune v. Kilpatrick, (D.C. Va. 1943) 53 F. Supp. 80.

[242] Bigrow v. Hiatt, (D.C. Pa. 1947) 70 F. Supp. 826, (3d Cir. 1948) 168 F. (2d) 992.

[243] Whelchel v. McDonald, (5th Cir. 1949) 176 F. (2d) 260 at 262: "It is no more appropriate for a habeas corpus court to try the sanity of an accused convicted by a court-martial than to try his guilt." Affd. 340 U.S. 122, 71 S.Ct. 146 (1950). Cf. Brown v. Sanford, (5th Cir. 1948) 170 F. (2d) 344 at 345.

[244] Ibid.

[245] DeWar v. Hunter, (10th Cir. 1948) 170 F. (2d) 993 at 996, cert. den. 337 U.S. 908, 69 S.Ct. 1048 (1949), rehearing den. 337 U.S. 934, 69 S.Ct. 1493 (1949).

[246] Benjamin v. Hunter, (D.C. Kan. 1947) 75 F. Supp. 775, (10th Cir. 1948) 169 F. (2d) 512. Cf. Durant v. Hiatt, (D.C. Ga. 1948) 81 F. Supp. 948, (5th Cir. 1949) 177 F. (2d) 373. (The Hesse crown jewels theft case.)

24. That accused was prevented from preparing his defense by being refused the privilege of referring to law books;[247]

25. That the same officer served as both president and law member of the court;[248]

26. That there was considerable delay in completing the pre-trial investigation and the trial;[249]

27. That the accused was illegally arrested;[250]

28. That officers from other commands were made available to sit as members of the court and were so detailed;[251]

29. That during the course of the trial the court sat in Germany, reconvened in Washington, D.C., and again reconvened in Germany.[252]

The above list, while representative, is by no means exhaustive of the grounds asserted for habeas corpus relief from court-martial sentences. Often such allegations have not been supported by evidence. None has prevailed. Under the Articles of War effective February 1, 1949, item eight of the foregoing list has been made a jurisdictional requisite to the extent that the law member must be an officer of the Judge Advocate General's Corps or a lawyer officer certified by the Judge Advocate General to be qualified.[253] As to item ten, where requested by him, an enlisted accused is entitled to have at least one-third of the court membership consist of enlisted personnel.[254] As to item four, if the trial judge advocate is a Judge Advocate General's Corps officer or a lawyer, the defense counsel must also be so qualified.[255]

Wherever the Articles of War vest a discretion in the officer appointing a court-martial to select its members, the Supreme Court has consistently refused to review the exercise of that discretion.[256] This rule was reaffirmed in *Hiatt v. Brown*.[257] In that case the contention

[247] Ibid.

[248] Benjamin v. Hunter, (D.C. Kan. 1947) 75 F. Supp. 775 at 781, (10th Cir. 1948) 169 F. (2d) 512.

[249] Durant v. Hiatt, (D.C. Ga. 1948) 81 F. Supp. 948 at 954, (5th Cir. 1949) 177 F. (2d) 373.

[250] Ibid.

[251] Id. at 955.

[252] Ibid.

[253] 10 U.S.C. (1946) §1479, Article of War 8.

[254] 10 U.S.C. (1946) §1475, Article of War 4.

[255] 10 U.S.C. (1946) §1482, Article of War 11.

[256] Mullan v. United States, 140 U.S. 240 at 245, 11 S.Ct. 788 (1891); Bishop v. United States, 197 U.S. 334 at 340, 25 S.Ct. 440 (1905); Swaim v. United States, 165 U.S. 553 at 560, 17 S.Ct. 448 (1897); Kahn v. Anderson, 255 U.S. 1 at 8, 41 S.Ct. 224 (1921); Hiatt v. Brown, 339 U.S. 103 at 110, 70 S.Ct. 495 (1950). Cf. Martin v. Mott, 12 Wheat. (25 U.S.) 19 at 30, 34, 35 (1827).

[257] 339 U.S. 103, 70 S.Ct. 495 (1950).

was advanced that the court-martial was without jurisdiction because, in violation of Article of War 8,[258] a Judge Advocate General's Department officer had been designated trial judge advocate while the law member was a colonel of Field Artillery. The Court said:[259]

"We are unable to agree with the Court of Appeals that this record discloses any disregard of the 8th Article of War in the appointment of the tribunal which convicted respondent. . . .

". . . the availability of an officer as law member was intended by Congress to be a matter within the sound discretion of the appointing authority. Ordinarily the 'availability' of military personnel who are subject to assignment by an appointing authority is understood to depend upon a discretionary determination by the superior. . . . Moreover, the phrase adopted in the 8th Article, 'available *for the purpose,*' expresses a clear intent that the concept of availability should include the exercise of discretion by the appointing authority.

"The 8th Article has also been consistently interpreted and applied by the Army as vesting a discretion in the appointing authority, which when exercised is conclusive in determining not only the accessibility of personnel but also the suitability of the officer detailed as the law member of a general court-martial. CM 231963, *Hatteberg,* 18 B.R. 349, 366-369 (1943); CM ETO 804, *Ogletree,* 2 B.R. (ETO) 337, 346 (1943); CM 209988, *Cromwell,* 9 B.R. 169, 196 (1938); Digest of Opinions of The Judge Advocate General (1912-1940) §365(9). This established interpretation is entitled to great weight in our determination of the meaning of the article. *Cf. United States ex rel. Hirshberg v. Cooke,* 336 U.S. 210, 216 (1949).

"The exercise of the discretion thus conferred on the appointing authority may be reviewed by the courts only if a gross abuse of that discretion would have given rise to a defect in the jurisdiction of the court-martial. However, we need not determine at this time whether the provision of the 8th Article relied upon below imposed a requirement going to the jurisdiction of the court-martial, for nothing in the record here involved indicates that the

[258] Article of War 8 of 1920, 41 Stat. L. 788, 10 U.S.C. (1946) §1479, in pertinent part provided: "The authority appointing a general court martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member."

[259] 339 U.S. 103 at 107-110, 70 S.Ct. 495 (1950).

> discretion of the appointing authority was improperly exercised. Clearly no abuse is disclosed by the appointment of an officer from the Judge Advocate General's Department to a capacity other than law member on the detail, or by reassignment of that officer to other duty at the time of trial, or by the standard of competence in legal matters shown by the law member at the trial."

The Supreme Court has spoken the first and last word on grounds for granting habeas corpus in military cases. In 1879 it said, "Here there was no defect of jurisdiction as to anything that was done. Beyond this we need not look into the record. . . . If error was committed in the rightful exercise of authority, we cannot correct it."[260] In 1950 it said, "The single inquiry, the test, is jurisdiction. . . . In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are also authorized to review its decision."[261] It has never said otherwise.

VI

CONCLUSIONS

The authorities here collected sustain the following military habeas corpus conclusions: (1) That independent military tribunals are as old as the civil courts and are as well rooted in antiquity as the writ of habeas corpus; (2) that military justice comprises a wholly separate system of jurisprudence blessed with both United States Constitutional and Supreme Court sanction; (3) that normally the only court possessing original habeas corpus jurisdiction is the federal district court of the district in which the military prisoner is confined; (4) that all other remedies, including application to the Judge Advocate General for relief under Article of War 53, must be exhausted before resort to habeas corpus is open; (5) that actual confinement must exist to invoke habeas corpus; (6) that the only remedy obtainable in habeas corpus is release from confinement; (7) that a habeas corpus court may not properly inquire into the guilt, innocence, or sanity of a petitioner; (8) that the sole test in habeas corpus is jurisdiction; and finally (9) that if a duly constituted military court had jurisdiction of the person, the offense and the sentence, habeas corpus must be denied.

[260] Ex parte Reed, 100 U.S. 13 at 23 (1879).

[261] Hiatt v. Brown, 339 U.S. 103 at 111, 70 S.Ct. 495 (1950). Followed in McClellan v. Humphrey, (3d Cir. 1950) 181 F. (2d) 757 at 759.