Michigan Law Review

Volume 49 | Issue 6

1951

HABEAS CORPUS-JURISDICTION OF FEDERAL COURTS TO REVIEW JURISDICTION OF MILITARY TRIBUNALS WHEN THE PRISONER IS PHYSICALLY CONFINED OUTSIDE THE UNITED STATES

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COMMENTS

HABEAS CORPUS—JURISDICTION OF FEDERAL COURTS TO REVIEW JURISDICTION OF MILITARY TRIBUNALS WHEN THE PRISONER IS PHYSICALLY CONFINED OUTSIDE THE UNITED STATES—The question of the power of federal courts to issue the writ of habeas corpus for a prisoner confined outside the territorial United States has not as yet been completely answered. Until recently, there were few instances in which anyone was confined outside the United States under the authority of the United States. However, during and since World War II, American military tribunals have exercised power over citizens and aliens, civilians and military personnel, in many parts of the world, and especially in Germany and Japan.[1] Because of this extended use of military tribunals, the question of the power of federal courts to review their proceedings has become acute, especially since these courts alone can provide judicial review.[2] It has long been settled that courts can review the proceedings of military tribunals, on habeas corpus, to determine whether the tribunal acted within its jurisdiction.[3] The problem here rather involves federal jurisdiction to grant habeas corpus when the petitioner is not physically confined within the territorial jurisdiction of the court.

I

Jurisdiction when the Tribunal is Constituted under the Authority of the United States

A. Jurisdiction of District Courts

The present Judicial Code gives to the district courts the power to issue the writ of habeas corpus "within their respective jurisdictions."[4] This is interpreted to mean territorial jurisdiction.[5] The first question

[1] As to the nature of the power of these tribunals generally, see: Fairman, "Some New Problems of the Constitution Following the Flag," 1 STAN. L. REV. 587 (1949).

[2] No review by courts of the foreign country is possible; Johnson v. Eisentrager, 339 U. S. 763 at 797, 70 S. Ct. 936 (1950) (dissenting opinion). No review by state courts is possible; Ableman v. Booth, 21 How. (62 U.S.) 506 (1858); Tarble's Case, 13 Wall. (80 U.S.) 397 (1871).

[3] 2 SPELLING, INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES §1176 (1901); FERRIS, THE LAW OF EXTRAORDINARY LEGAL REMEDIES §84 (1926); Ex parte Milligan, 4 Wall. (71 U.S.) 2 (1866); Wales v. Whitney, 114 U.S. 564, 5 S.Ct. 1050 (1885); In re Grimley, 137 U.S. 147, 11 S.Ct. 54 (1890); Carter v. McClaughry, 183 U.S. 365, 22 S.Ct. 181 (1902); Ex parte Quirin, 317 U.S. 1, 63 S.Ct. 2 (1942); In re Yamashita, 327 U.S. 1, 66 S.Ct. 340 (1946). Cf. Ex parte Mason, 105 U.S. 696 (1881) and CORWIN, TOTAL WAR AND THE CONSTITUTION 121 (1947).

[4] 62 Stat. L. 964 (1948), 28 U.S.C. (1950) §2241(a).

[5] Robertson v. Railroad Labor Board, 268 U.S. 619, 45 S.Ct. 621 (1925); Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 65 S.Ct. 716 (1945).

then is the basis of jurisdiction for issuing the writ. The generally accepted common law view has been that it is enough that the respondent, the one having custody of the prisoner, be within the jurisdiction, since the writ runs to him. The leading expression of this view is by Judge Cooley in the case of *In the Matter of Jackson*,[6] where he said:

> "The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. . . . The whole force of the writ is spent upon the respondent. . . . The place of confinement is therefore not important to the relief, if the guilty power is within reach of process, so that by the power of the court he can be compelled to release his grasp. . . . The important question is, where is the power of control exercised?"[7]

The *Jackson* case itself is not authority on this point,[8] but there are many cases supporting this statement.[9] Some of these cases present a somewhat different situation from that of military tribunals abroad, in that they involve a person, previously within the jurisdiction, who has been removed by the respondent, or by someone acting under his directions.[10] It is difficult to see, however, how such prior confinement

[6] 15 Mich. 417 (1867).

[7] In the Matter of Jackson, 15 Mich. 417 at 439-40 (1867).

[8] The case involved an application for the writ on behalf of a minor who had been taken to Canada to evade the proceeding. The court unanimously agreed to dismiss the petition, because it found that respondent no longer had control of the child. It was equally divided on this question of jurisdiction.

[9] United States v. Davis, (D.C. Cir. 1839) 5 Cranch C.C. 662, 25 F. Cas. 775, No. 14,926; Ex parte Young, (C.C. Tenn. 1892) 50 F. 526; Sanders v. Allen, (D.C. Cir. 1938) 100 F. (2d) 717; Sanders v. Bennett, (D.C. Cir. 1945) 148 F. (2d) 19; Ex parte Fong Yim, (D.C. N.Y. 1905) 134 F. 938; Ex parte Ng Quong Ming, (D.C. N.Y. 1905) 135 F. 378; Rivers v. Mitchell, 57 Iowa 193, 10 N.W. 626 (1881); People ex rel. Billotti v. New York Juvenile Asylum, 57 App. Div. 383, 68 N.Y.S. 279 (1901); People ex rel. Dunlap v. New York Juvenile Asylum, 58 App. Div. 133, 68 N.Y.S. 656 (1901); Breene v. Breene, 51 Colo. 342, 117 P. 1000 (1911); Shaw v. Shaw, 114 S.C. 300, 103 S.E. 526 (1920); In re Emerson, 107 Colo. 83, 108 P. (2d) 866 (1940); Crowell v. Crowell, 190 Ga. 501, 9 S.E. (2d) 628 (1940); Queen v. Barnardo, 23 Q.B.D. 305 (1889); Queen v. Barnardo, 24 Q.B.D. 283 (1890); King v. Crewe, [1910] 2 K.B. 576. *Contra*: In re Bickley, (D.C. N.Y. 1865) 3 F. Cas. 332, No. 1387; Shirakura v. Royall, (D.C. D.C. 1948) 89 F. Supp. 711, 713. Cf. Dorsey v. Gill, (D.C. Cir. 1945) 148 F. (2d) 857.

[10] This was not true, however, in the following cases: Sanders v. Allen, (D.C. Cir. 1938) 100 F. (2d) 717; Sanders v. Bennett, (D.C. Cir. 1945) 148 F. (2d) 19 (both involved prisoners held in the District of Columbia prison, which is located in Virginia); Ex parte Fong Yim, (D.C. N.Y. 1905) 134 F. 938; Ex parte Ng Quong Ming, (D.C. N.Y. 1905) 135 F. 378 (both involved Chinese who were physically confined in another district under the authority of the Chinese Exclusion Agent); King v. Crewe, [1910] 2 K.B. 576 (confinement in English protectorate). Sanders v. Allen and Sanders v. Bennett, supra, have been overruled by McAffee v. Clemmer, (D.C. Cir. 1948) 171 F. (2d) 131, on the authority of Ahrens v. Clark, 335 U.S. 188, 68 S.Ct. 1443 (1948).

within the territory affects the jurisdiction of the court as of the time that the writ is issued.[11]

Statutes similar to the federal one have not prevented courts from reaching the result expressed by Cooley.[12] However, the federal statute has not been so interpreted. The Supreme Court touched the problem in *Ex parte Endo*,[13] where petitioner was within the district where the action was begun, but was removed while the appeal was pending. The Court held that in spite of the removal, the district court had jurisdiction when a respondent who has custody of the prisoner is within the district.[14] But this dictum was repudiated in *Ahrens v. Clark*;[15] there petitioners, held in New York, sought the writ in the District of Columbia, naming the Attorney General as respondent. The Court interpreted the statute to mean that a district court cannot issue the writ when the prisoner is physically confined within the territorial jurisdiction of another district court, but expressly left open the question of jurisdiction when the prisoner is confined outside the jurisdiction of any district court.[16]

Before World War II, only one case directly raised the problem as to a person confined outside the United States under sentence of a military tribunal. *McGowan v. Moody*[17] involved a marine convicted of larceny on the island of Guam and imprisoned there. He sought release by habeas corpus in the District of Columbia, naming the Sec-

[11] Cf. McGowan v. Moody, (D.C. Cir. 1903) 22 App. D.C. 148 at 163: "On account of the special circumstances,—the removal of the party affected to another jurisdiction in order to successfully defy the process of the courts charged with his protection and the continued detention by the same wrongdoer, who remained within the reach of the court,—the cases were treated substantially as if the unlawful detention was actually maintained, as it was virtually, within the limits of the State."

[12] People ex rel. Billotti v. New York Juvenile Asylum, 57 App. Div. 383, 68 N.Y.S. 279 (1901); People ex rel. Dunlap v. New York Juvenile Asylum, 58 App. Div. 133, 68 N.Y.S. 656 (1901) (statute conferred jurisdiction when the person was imprisoned or restrained of his liberty "within the state"); Crowell v. Crowell, 190 Ga. 501, 9 S.E. (2d) 628 (1940) (action to be brought "where the illegal detention exists"); In the Matter of Jackson, 15 Mich. 417 (1867), where the statute limited jurisdiction to persons confined "within the state," Judge Cooley saying at 439: ". . . I should not concede that, within the words employed, the actual presence of the body of the petitioner within the state was a controlling circumstance."

[13] 323 U.S. 283, 65 S.Ct. 208 (1944).

[14] "But we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner." Ex parte Endo, 323 U.S. 283 at 306, 65 S.Ct. 208 (1944).

[15] 335 U.S. 188, 68 S.Ct. 1443 (1948). The Court based its decision largely on the legislative history of this section. For a criticism of this interpretation of the history, see: Fairman, "Some New Problems of the Constitution Following the Flag," 1 STAN. L. REV. 587 (1949).

[16] Ahrens v. Clark, 335 U.S. 188 at 192, 68 S.Ct. 1443 (1948).

[17] (D.C. Cir. 1903) 22 App. D.C. 148.

retary of the Navy as respondent. The court denied the writ, partly on the basis that it did not have jurisdiction because of the place of confinement, and partly on the basis that the Secretary of the Navy was not a proper respondent.[18]

This presents another problem raised by these cases, that of finding a proper respondent. It is clear that if the confinement is elsewhere and there is no respondent having custody within the territorial jurisdiction, a court cannot issue the writ.[19] By necessity, the one having immediate physical custody will be located where the petitioner is. Thus for the writ to be available at all in this situation, it must run not only to the one with immediate physical custody of the prisoner, but also to those who have power over him to compel him to release the prisoner; there is ample authority allowing this.[20] However, it is not always easy to determine who has such power. In the *McGowan* case, the writ was directed to the Secretary of the Navy; one of the grounds for the court's decision was that he was not the correct respondent. The court indicated that in this situation, the writ should be directed to the President of the United States.[21]

This whole question of jurisdiction was directly presented in the case of *Johnson v. Eisentrager*.[22] The petitioners were twenty-one German nationals who were members of German armed forces stationed in China during World War II. They were captured and charged with continuing military activity against the United States, after the surrender of Germany, by furnishing information about American forces to the Japanese. They were convicted by an American military commission in China for violating the laws of war, and were later transferred to an army prison in Germany. They then applied for habeas corpus to the District Court for the District of Columbia. The writ was directed to the Secretary of Defense, the Secretary of the Army, the Chief of Staff of the Army, and the Joint Chiefs of Staff of the

[18] McGowan v. Moody, (D.C. Cir. 1903) 22 App. D.C. 148 at 163 and 164. The jurisdictional statute was somewhat narrower than the present Judicial Code, but the court did not base its decision on the language of the statute.

[19] In re Boles, (8th Cir. 1891) 48 F. 75; United States ex rel. Belardi v. Day, (3d Cir. 1931) 50 F. (2d) 816; United States ex rel. Harrington v. Schlotfeldt, (7th Cir. 1943) 136 F. (2d) 935; Ex parte Gouyet, (D.C. Mont. 1909) 175 F. 230; Fiedler v. Shuttleworth, (D.C. Pa. 1944) 57 F. Supp. 591.

[20] Cases cited in note 9 supra; In re Matthews, 12 Ir. Com. Law Rep. 233 (1859); In re Ning Yi-Ching, 56 T.L.R. 3 (1939). See also: Ex part Endo, 323 U.S. 283 at 304, 305, 65 S.Ct. 208 (1944). *Contra:* Jones v. Biddle, (8th Cir. 1942) 131 F. (2d) 853, cert. den. 318 U.S. 784, 63 S.Ct. 856 (1943); Sanders v. Bennett, (D.C. Cir. 1945) 148 F. (2d) 19.

[21] McGowan v. Moody, (D.C. Cir. 1903) 22 App. D.C. 148 at 164.

[22] 339 U.S. 763, 70 S.Ct. 936 (1950).

United States. The district court denied their petition on the authority of *Ahrens v. Clark*. The court of appeals reversed,[23] and held that the statute allows the writ as long as the district court has territorial jurisdiction over "officials who have directive power over the immediate jailer."[24] Habeas corpus cases generally hold that the writ will run to the superior of the jailer,[25] but the court of appeals specifically states that it does not rely on these cases.[26] The court rather relies on this interpretation of the statute, which it says is necessary to keep the statute from being unconstitutional, since Congress cannot suspend the writ except in cases of invasion or rebellion, and thus cannot deprive the federal courts of jurisdiction in the proper case for the writ.[27] This reasoning required the court to find that petitioners had a constitutional right to the writ of which Congress could not deprive them.[28]

The Supreme Court reversed this decision,[29] and held that the district court did not have jurisdiction. The basis for the decision is not entirely clear.[30] The Court discusses practical[31] and policy[32] reasons for refusing jurisdiction; it also discusses the rule that nonresident alien enemies cannot maintain an action in American courts during the

[23] Eisentrager v. Forrestal, (D.C. Cir. 1949) 174 F. (2d) 961.

[24] Id. at 967.

[25] See note 20 supra.

[26] Eisentrager v. Forrestal, (D.C. Cir. 1949) 174 F. (2d) 961 at 968.

[27] ". . . Whatever may be the lack of forum in other cases, the Constitution specifically prohibits that result in respect to habeas corpus. Congress cannot suspend that privilege, unless there be invasion or rebellion." Id. at 967.

[28] Id. at 963 and 965.

[29] Johnson v. Eisentrager, 339 U.S. 763, 70 S.Ct. 936 (1950), Justices Black, Douglas, and Burton dissenting. Cf. In re Ning Yi-Ching, 56 T.L.R. 3 (1939); 6 SOLICITOR 196 (1939).

[30] It is not entirely clear that the decision is based on a lack of jurisdiction. The court says that petitioners were given the same preliminary hearing as were Quirin and Yamashita, and adds at 781: "We arrive at the same conclusion the Court reached in each of those cases, viz.: that no right to the writ of *habeas corpus* appears." The Court then examined the merits of the contentions made by petitioners; this can have no bearing on determining whether there was jurisdiction, as pointed out by Justice Black in his dissent at 792. However; the Court concludes its opinion by saying at 790-1: "Since in the present application we find no basis for invoking federal judicial power in any district, we need not debate as to where, if the case were otherwise, the petition should be filed."

[31] The Court at 778-9 discusses the burden that might be placed on the Army if it had to transport the prisoners before the Court. Walker v. Johnson, 312 U.S. 275, 61 S.Ct. 574 (1941), recognizes that it is not always necessary to bring petitioner before the court. Ex parte Quirin, 317 U.S. 1, 63 S.Ct. 2 (1942), and In re Yamashita, 327 U.S. 1, 66 S.Ct. 340 (1946), were determined on the merits without the prisoners being produced before the Court.

[32] The Court concludes at 779 that if this petition is a matter of right, it is available also during active hostilities, and trials at that time would "hamper the war effort and bring aid and comfort to the enemy," and "diminish the prestige of our commanders, not only with enemies but with wavering neutrals." Justice Black in his dissent at 796 recognizes that it would not be available during hostilities, but only after surrender.

period of hostilities,[33] but it seems doubtful that this is the basis for the decision.[34] The result is not based on the fact alone that petitioners were enemy aliens, since the Court does not overrule *Ex parte Quirin*[35] and *In re Yamashita*,[36] in which cases the Court took jurisdiction as to applications by enemy aliens. It can hardly be said that the result is based on a narrow interpretation of the statute, as in the *Ahrens* case. The statute is not even mentioned in the decision, and if that were the basis, the extended discussion of the rights of aliens[37] would be irrelevant, since a person confined abroad is no more within the territorial jurisdiction of a court if he is a citizen than if he is an alien. In addition, the Court is willing to assume that respondents have lawful authority to effect the release of the prisoners.[38] The true basis seems to be that aliens are entitled to constitutional rights and the protection of American courts only when present within the territorial jurisdiction of those courts; since petitioners were alien enemies who at no time, as captives, were within the territorial jurisdiction of any federal court, they had no rights enforceable in such courts.[39]

The Court discusses only constitutional rights of petitioners, as opposed to statutory rights.[40] It is true that the court of appeals based

[33] Johnson v. Eisentrager, 339 U.S. 763 at 768-77, 70 S.Ct. 936 (1950).

[34] First, it is not clear that this case arose during hostilities so as to come within the rule; the Court at 779 refers to the ". . . present twilight between war and peace." Second, the Court says at 777: "The foregoing [discussion of rights of nonresident enemy aliens] demonstrates how much further we must go if we are to invest these enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts." This would not indicate a decision on this point. Third, it would be hard to reconcile this result with the Quirin and Yamashita cases, which the Court does not purport to overrule, since those petitioners would not seem to be within the classification of residents. See 27 YALE L.J. 104 (1917). Fourth, This would be a new application of the rule. The reason for the rule is that the right to sue is of assistance to trade, and since all intercourse with the enemy is unlawful, the right to sue is suspended. See Gordon, "The Right of Alien Enemies to Sue in American Courts," 36 ILL. L. REV. 809 (1942); 12 GEO. WASH. L. REV. 55 (1943). The rule has been applied, it seems, only when the nonresident alien enemy is seeking to recover property from a resident. Fifth, the application of the doctrine is now limited to situations where the judgment "would give aid and comfort to the other side." Birge-Forbes Company v. Heye, 251 U.S. 317 at 323, 40 S.Ct. 160 (1920). There is dictum to the same effect in Ex parte Kawato, 317 U.S. 69, 63 S.Ct. 115 (1942). Such aid and comfort it seems must be of a material nature. Even if that limitation is not imposed, it would seem that habeas corpus here could give aid and comfort only during hostilities, and as stated in note 32, it is not necessary to extend the right to such period.

[35] 317 U.S. 1, 63 S.Ct. 2 (1942).

[36] 327 U.S. 1, 66 S.Ct. 340 (1946). *Accord:* Homma v. Patterson, 327 U.S. 759, 66 S.Ct. 515 (1946).

[37] Johnson v. Eisentrager, 339 U.S. 763 at 768-77, 70 S.Ct. 936 (1950).

[38] "The Court of Appeals assumed, and we do likewise, that . . . respondents named in the petition have lawful authority to effect their release." Id. at 766-7.

[39] Id. at 768, 785.

[40] Id. at 785. The Court does state at 768 that nothing in any statute confers any right to bring the action, but there is no discussion of this.

its decision on such rights,[41] but this alone should not decide the question. The Judicial Code provides for the use of habeas corpus when a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States."[42] Absent the territorial jurisdiction problem, even if the prisoners had no constitutional rights, the writ should be available to determine whether the military tribunal was without jurisdiction because of statute or treaty.[43] The latter seems to be the holding of the *Quirin* and *Yamashita* cases.[44] As long as the prisoner was sentenced by officers of the United States, the writ of habeas corpus should be available to test the propriety of the action of these officials.[45] This interpretation would mean that Congress could take away such jurisdiction, but until it does, it would seem that petitioners have a statutory right to the writ,[46] and there is authority for saying that there is a court with jurisdiction;[47] the *Ahrens* case does not compel a contrary result.[48]

[41] Eisentrager v. Forrestal, (D.C. Cir. 1949) 174 F. (2d) 961 at 968.

[42] 62 Stat. L. 965 (1948), 28 U.S.C. (1950) §2241(c)(3).

[43] The Court has said in reference to this provision: "This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction." Ex parte McCardle, 6 Wall. (73 U.S.) 318 at 325 (1867).

[44] "Finally, we held in *Ex parte Quirin*, . . . as we hold now, that Congress by sanctioning trials of enemy aliens by military commission for offenses against the law of war had recognized the right of the accused to make a defense. . . . It has not foreclosed their right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial." In re Yamashita, 327 U.S. 1 at 9, 66 S.Ct. 340 (1946). See, also, Perlman, "Habeas Corpus and Extraterritoriality: A Fundamental Question of Constitutional Law," 36 A.B.A.J. 187 at 189 (1950).

[45] "We think that constitutional prohibitions apply directly to acts of Government, or Government officials, and are not conditioned upon persons or territory." Eisentrager v. Forrestal, (D.C. Cir. 1949) 174 F. (2d) 961 at 965. "I would hold that our courts can exercise it [habeas corpus jurisdiction] whenever any United States official illegally imprisons any person in any land we govern." Justice Black, dissenting; Johnson v. Eisentrager, 339 U.S. 763 at 798, 70 S.Ct. 936 (1950). See also Fairman, "Some New Problems of the Constitution Following the Flag," 1 STAN. L. REV. 587 (1949).

[46] The following provision of the statute would cover this case if literally interpreted: "The writ of habeas corpus shall not extend to a prisoner unless . . . (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations." 62 Stat. L. 965 (1948), 28 U.S.C. (1950) §2241(c)(4). But the legislative history of this provision shows that: "The object was to allow a foreigner, prosecuted in one of the States of the Union for an offence committed in that State, but which he pleads has been committed under authority of his own sovereign or the authority of the law of nations, to be brought up on that issue before the only competent judicial power to decide upon matters involved in foreign relations or the law of nations." In re Neagle, 135 U.S. 1 at 71, 10 S.Ct. 658 (1889).

[47] See note 9 supra.

[48] Ahrens v. Clark, 335 U.S. 188 at 192, 68 S.Ct. 1443 (1948).

The effect of the *Eisentrager* case is that the jurisdiction of district courts is limited to physical confinements within the territorial United States when the petitioner is an enemy alien. It seems that the Supreme Court here went out of its way to deny to alien enemies access to our courts for habeas corpus. The holding is that there is a lack of jurisdiction in the federal courts, but this result is based on a lack of constitutional right, and not on the jurisdictional statute. By not extending the *Ahrens* case to a petitioner confined outside the jurisdiction of any district court, the Court avoided the application of the decision in the *Eisentrager* case to American citizens abroad; it expressly states that they are outside the scope of the holding.[49] At the same time, the Court settled the troublesome problem of the constitutional rights of nonresident enemy aliens.[50]

The question as to the rights of citizens confined abroad remains.[51] Only one recent case has passed on an application by a citizen to a district court. *In re Bush*[52] holds that the district court had jurisdiction to hear an application from an American confined abroad, but the decision is based solely on the decision of the court of appeals in the *Eisentrager* case, and that is now reversed. The Supreme Court, however, left the way open to allow such applications under the present statute. Such a result would be reasonable under the statute, and in accord with the common law background of the writ.[53]

B. Original Jurisdiction of the Supreme Court

The Judicial Code would not seem to give the Supreme Court any wider territorial jurisdiction than the district courts combined to issue habeas corpus.[54] Thus there is no more reason for holding that the Supreme Court has jurisdiction to issue the writ to those confined

[49] "With the citizen we are now little concerned, except to set his case apart as untouched by this decision. . . ." Johnson v. Eisentrager, 339 U.S. 763 at 769, 70 S.Ct. 936 (1950).

[50] The Court states its purpose to "consider questions basic to alien enemy and kindred litigation which for some years have been beating upon our doors." Id. at 768.

[51] The Government in the Eisentrager case argued that habeas corpus was not available to citizens abroad.

[52] (D.C. D.C. 1949) 84 F. Supp. 873.

[53] See note 9 supra.

[54] "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." 62 Stat. L. 964 (1948), 28 U.S.C. (1950) §2241(a). A justice of the Supreme Court may exercise his power in any part of the United States; Ex parte Clarke, 100 U.S. 399 (1879). But this limits the territorial jurisdiction of the Supreme Court and its members to the same degree that it limits that of the district courts. See note 5 supra.

abroad than there is for holding that a district court has. In addition, there is the constitutional limitation on the original jurisdiction of the Court.[55]

It is clear that the Supreme Court has the power to issue habeas corpus, in the exercise of its original jurisdiction or in the exercise of its appellate jurisdiction.[56] Jurisdiction is defined as appellate when there is a commitment by the judicial authority of the United States.[57] However, the Court has held that a military tribunal is not a court within the meaning of the Constitution and the federal jurisdiction statute,[58] and thus that an original writ issued by it to one confined under the sentence of such a tribunal is not an exercise of appellate jurisdiction.[59] But when there is an application for habeas corpus to another court over which it has jurisdiction, the Supreme Court can grant an original writ in the exercise of its appellate jurisdiction,[60] or review the decision of the lower court by the writ of certiorari.[61]

In the past several years, there have been a number of original applications to the Supreme Court by aliens confined abroad by military tribunals; with one exception these have been denied for lack of jurisdiction, usually by a divided court.[62] In *Hirota v. MacArthur*, the Court

[55] U.S. Const., Art. III, §2; Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803).

[56] 1 BAILEY, THE LAW OF JURISDICTION §315 (1899); United States v. Hamilton, 3 Dall. (3 U.S.) 17 (1795); Ex parte Burford, 3 Cranch (7 U.S.) 448 (1806); Ex parte Bollman, 4 Cranch (8 U.S.) 75 (1807); In re Kaine, 14 How. (55 U.S.) 103 (1852); Ex parte Hung Hang, 108 U.S. 552, 2 S.Ct. 863 (1883).

[57] Ex parte Yerger, 8 Wall. (75 U.S.) 75 at 99 (1868). For specific examples see: Ex parte Bollman, 4 Cranch (8 U.S.) 75 (1807); Ex parte Watkins, 7 Pet. (32 U.S.) 568 (1833); Ex parte Parks, 93 U.S. 18 (1876); Ex parte Virginia, 100 U.S. 339 (1879); Ex parte Siebold, 100 U.S. 371 (1879); In re Burrus, 136 U.S. 586, 10 S.Ct. 850 (1890). Cf. In the Matter of Metzger, 5 How. (46 U.S.) 176 (1847).

[58] Ex parte Vallandigham, 1 Wall. (68 U.S.) 243 (1863); In re Vidal, 179 U.S. 126, 21 S.Ct. 48 (1900); Ex parte Quirin, 317 U.S. 1, 63 S.Ct. 2 (1942); In re Yamashita, 327 U.S. 1, 66 S.Ct. 340 (1946). Cf. Runkle v. United States, 122 U.S. 543, 7 S.Ct. 1141 (1887).

[59] Ex parte Vallandigham, 1 Wall. (68 U.S.) 243 (1863).

[60] Ex parte Quirin, 317 U.S. 1, 63 S.Ct. 2 (1942); In re Yamashita, 327 U.S. 1, 66 S.Ct. 340 (1946).

[61] This was the procedure followed in Johnson v. Eisentrager, 339 U.S. 763, 70 S.Ct. 936 (1950).

[62] The Court was unanimous in denying the petition in In re Eichel, 333 U.S. 865, 68 S.Ct. 787 (1948). In Brandt v. United States, 333 U.S. 836, 68 S.Ct. 603 (1948), the Court denied the petition, Justices Black, Murphy, and Rutledge stating that the petition should be set for hearing on the question of the jurisdiction of the Court. In the following cases, the petition was denied by an equally divided Court, Justices Black, Douglas, Murphy, and Rutledge stating that the petition should be set for hearing on jurisdiction of the court: Milch v. United States, 332 U.S. 789, 68 S.Ct. 92 (1947); Everett v. Truman, 334 U.S. 824, 68 S.Ct. 1081 (1948); In re Krautwurst, 334 U.S. 826, 68 S.Ct. 1328 (1948); In re Ehlen, 334 U.S. 836, 68 S.Ct. 1491 (1948); In re Gronwald, 334 U.S. 857, 68 S.Ct. 1522 (1948); In re Stattmann, 335 U.S. 805, 69 S.Ct. 18 (1948); In re Vetter, 335 U.S. 841, 69 S.Ct. 59 (1948); In re Eckstein, 335 U.S. 851, 69 S.Ct. 79 (1948); In re Heim, 335

agreed to hear argument on the question of its jurisdiction,[63] but then disposed of the case on another ground.[64] Citizens have also made such applications, and here, too, the Court has refused to assume jurisdiction.[65]

This result seems clearly to be justified; the number of applications alone shows that the questions should be decided at the trial court level.[66] And since the territorial basis for jurisdiction is the same in the Supreme Court as in the district courts, this rule will not result in the denial of the writ to anyone who would otherwise be entitled to it.

II

Jurisdiction When the Tribunal is Constituted under International Authority

It seems clearly settled now that an alien imprisoned by an international tribunal cannot apply to an American court for habeas corpus.[67] The only question then is to determine what constitutes an international tribunal. The tribunal that tried Hirota was composed of eleven judges from eleven nations, chosen by General MacArthur as Supreme Commander for the Allied Powers, under authority delegated to him by the Far Eastern Commission. This Commission was composed of representatives of eleven nations, and was established by the Moscow Agreement of December 27, 1945.[68] The tribunal that tried Flick was appointed by the Military Governor of the American

U.S. 856, 69 S.Ct. 126 (1948); In re Dammann, 336 U.S. 922, 69 S.Ct. 644 (1949) (in this and the following cases, the dissenters wanted a hearing to settle what remedy, if any petitioners had); In re Muhlbauer, 336 U.S. 964, 69 S.Ct. 930 (1949); In re Felsch, 337 U.S. 953, 69 S.Ct. 1523 (1949). Justice Jackson took no part in any of these decisions. In In re Buerger, 338 U.S. 884, 70 S.Ct. 183 (1949), Justice Douglas did not take part either, and the rest of the Court was unanimous in denying the petition. And in In re Hans, 339 U.S. 976, 70 S.Ct. 1007 (1950), the petition was denied, Justices Black and Douglas voting to deny it without prejudice to making application in a district court.

[63] 335 U.S. 876, 69 S.Ct. 157 (1948). Justice Jackson voted for the first and only time in this series of cases to break the deadlock and allow the Court to hear argument as to jurisdiction.

[64] Hirota v. MacArthur, 338 U.S. 197, 69 S.Ct. 197, 1238 (1948).

[65] Ex parte Betz, 329 U.S. 672, 67 S.Ct. 39 (1946); Bird v. Johnson, 336 U.S. 950, 69 S.Ct. 877 (1949); In re Bush, 336 U.S. 971, 69 S.Ct. 943 (1949).

[66] See note 62 supra; these cases involved applications from over 200 persons. As to the nature of the allegations, see Fairman, "Some New Problems of the Constitution Following the Flag," 1 STAN. L. REV. 587 (1949).

[67] Hirota v. MacArthur, 338 U.S. 197, 69 S.Ct. 197, 1238 (1948); Flick v. Johnson, (D.C. Cir. 1949) 174 F. (2d) 983. Cf. Shirakura v. Royall, (D.C. D.C. 1948) 89 F. Supp. 711, 713.

[68] Hirota v. MacArthur, 338 U.S. 197 at 206-7, 69 S.Ct. 1238 (1948) (concurring opinion).

Zone, under authority of the Control Council, which Council was composed of representatives of the four occupying powers in Germany. The court held that the tribunal was international in character, since its jurisdiction stemmed directly from the Control Council.[69]

This result is reasonable, and required as a practical matter.[70] It cannot be contended that the authority of our courts extends to acts of officials not under the authority of our government. In addition, the Judicial Code does not provide for jurisdiction here.[71] No case has yet involved a citizen imprisoned by an international tribunal, but it would seem that the courts should reach the same result, since the same compelling reasons apply.[72]

Conclusion

Prisoners confined by international tribunals, and enemy aliens confined by American tribunals outside the territorial United States now have no access to our courts to obtain habeas corpus. The rights of American citizens abroad have not as yet been authoritatively determined. The Court thus far, as to citizens, has held only that it will not entertain an original application.[73] This is required by precedent, and is reasonable. There is ample authority for allowing citizens to seek habeas corpus in the district where the superior of the jailer is found,[74] and the Supreme Court has been careful not to exclude this possibility.

There is no justification for saying that an American citizen by going abroad loses his constitutional or statutory rights in relation to action by his government. Perhaps this problem is not too acute, since the armed forces return military prisoners serving more than six months to prisons within the United States,[75] and once they are returned, clearly they can apply to the district court in the district in which in

[69] Flick v. Johnson, (D.C. Cir. 1949) 174 F. (2d) 983 at 984-6. In addition, as to what constitutes an international tribunal, see: Perlman, "Habeas Corpus and Extraterritoriality: A Fundamental Question of Constitutional Law," 36 A.B.A.J. 187 at 250-1 (1950).

[70] See Fairman, "Some New Problems of the Constitution Following the Flag," 1 STAN. L. REV. 587 at 644 (1949).

[71] Provision is made for habeas corpus when a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 62 Stat. L. 965 (1948), 28 U.S.C. (1950) §2241(c)(3). This would not seem to extend beyond confinement under the authority of the United States. See note 45 supra.

[72] Cf. Hirota v. MacArthur, 338 U.S. 197 at 205, 69 S.Ct. 1238 (1948) (concurring opinion).

[73] See note 65 supra.

[74] See note 20 supra, and also 63 HARV. L. REV. 531 at 534 (1950).

[75] Perlman, "Habeas Corpus and Extraterritoriality: A Fundamental Question of Constitutional Law," 36 A.B.A.J. 187 at 190 (1950).

they are imprisoned.[76] But this is obviously not a complete solution. The present statute can reasonably be interpreted to give citizens abroad the right of habeas corpus, but if the courts do not so interpret it, the situation should be immediately corrected by statute.[77]

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[76] In re Ross, 140 U.S. 453, 11 S.Ct. 897 (1891); Collins v. McDonald, 258 U.S. 416, 42 S.Ct. 326 (1922); Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834 (1949); Humphrey v. Smith, 336 U.S. 695, 69 S.Ct. 830 (1949); Hironimus v. Durant, (4th Cir. 1948) 168 F. (2d) 288; Hicks v. Hiatt, (D.C. Pa. 1946) 64 F. Supp. 238.

[77] For a proposed statute, see Wolfson, "Americans Abroad and Habeas Corpus," 9 FED. B.J. 142 (1948). See also 47 MICH. L. REV. 128 (1948); 16 UNIV. CHI. L. REV. 335 (1949).