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Constitutional Law - Due Process - Scope of Inquiry in Habeas Corpus Petitions from Military Prisoner

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CONSTITUTIONAL LAW—DUE PROCESS—SCOPE OF INQUIRY IN HABEAS CORPUS PETITIONS FROM MILITARY PRISONERS—Petitioners, military personnel, were convicted by courts martial of rape and murder. After exhausting military appellate remedies, they petitioned federal civil courts for writs of habeas corpus on the ground that they had been convicted in proceedings denying them basic constitutional rights. The petitions were denied. On appeal, *held*, affirmed, two justices dissenting. When the record shows that military courts have fairly considered all of the allegations of the petitioners and have found no denial of constitutional rights, civil courts in habeas corpus proceedings will not hear evidence on the merits of the allegations. *Burns v. Wilson*, 346 U.S. 137, 73 S.Ct. 1045 (1953).

Civil courts have the power to issue writs of habeas corpus for military prisoners.¹ Traditionally, the inquiry has been limited to determining whether military courts had jurisdiction as to the person, the offense, and the power to impose the sentence.² Civil courts do not have jurisdiction to review the proceedings for error,³ as error can be reached only in direct review by military appellate courts. Habeas corpus is a collateral and not a direct attack on the legality of the sentence as a basis for detention, and to secure release by this writ the sentence must be wholly void for lack of jurisdiction, and not merely voidable for error.⁴ However, in recent civil cases the courts have extended the scope of inquiry in habeas corpus proceedings beyond the technicalities of jurisdiction to determine whether the petitioner was convicted after being denied constitutional rights.⁵ The underlying theory is that by depriving the accused of his constitutional rights, the court is divested of the jurisdiction

¹ *Ex parte Milligan*, 4 Wall. (71 U.S.) 2 (1866); *Ex parte Reed*, 100 U.S. 13 (1879); *McClaghry v. Deming*, 186 U.S. 49, 22 S.Ct. 786 (1902).

² "The single inquiry, the test, is jurisdiction." *In re Grimley*, 137 U.S. 147 at 150, 11 S.Ct. 54 (1890); *Hiatt v. Brown*, 339 U.S. 103, 70 S.Ct. 495 (1950); 25 AM. JUR., Habeas Corpus §99 (1940); Wurfel, "Military Habeas Corpus," 49 MICH. L. REV. 493, 699 at 714, n. 210 (1951). This was the basis of Justice Minton's concurring opinion.

³ *In re Vidal*, 179 U.S. 126, 21 S.Ct. 48 (1900); *Ex parte Vallandigham*, 68 U.S. 243 (1864); *Hiatt v. Brown*, note 2 *supra*.

⁴ *McClaghry v. Deming*, note 1 *supra*; *Ex parte Siebold*, 100 U.S. 371 (1879); 25 AM. JUR., Habeas Corpus §§27, 28 (1940).

⁵ *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938); *Waley v. Johnson*, 316 U.S. 101, 62 S.Ct. 964 (1942); *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177 (1942); 39 C.J.S., Habeas Corpus §15 (1944).

which it originally had.⁶ Courts martial derive jurisdiction from statutes, and if the statutes are not precisely followed, the court martial is without jurisdiction to act.⁷ It would seem that the Constitution no less than the statutes controls courts martial, so that deviation from its standards also would divest the military court of jurisdiction. Of the personal rights contained in the Fifth and Sixth Amendments, military personnel are specifically denied only one, the right to indictment by grand jury, and by implication the remaining rights should apply to them.⁸ These rights may be modified somewhat by the requirements of discipline, but they cannot be completely ignored merely because a person is in uniform. Federal courts have jurisdiction to issue habeas corpus when a military prisoner's constitutional rights have been violated.⁹ The rule has been stated as follows: ". . . It is open for a civil court in a habeas corpus proceeding 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."¹⁰ The Court in the present case was willing to inquire beyond the traditional limit of jurisdiction to determine whether the defendants were subjected to "fundamental unfairness."¹¹ The difference of opinion arose over how to determine whether this had happened. The majority finds that when it is established in habeas corpus proceedings that a reviewing military court¹² has fairly heard the charges of unfairness, its decision is binding on civil courts, while the dissenting justices argue that habeas corpus can issue if the facts show the military court erred in applying the standards of due process formulated by civil courts. The traditional limitation of jurisdiction leaves military courts practically free to act as they will and is no real protection of constitutional rights of military personnel. A balance must be struck between protecting these rights and allowing military courts discretion to accommodate the requirements of discipline. The decision in the principal case affords more protection to individual rights than the traditional limited inquiry without unduly intruding into the area of military law, for military courts, more familiar with the problems involved, are given some finality of decision. The "funda-

⁶ *Waley v. Johnson*, note 5 *supra*; *Brock v. Hudspeth*, (10th Cir. 1940) 111 F. (2d) 447; Schwartz, "Habeas Corpus and Court-Martial Deviations from the Articles of War," 14 *Mo. L. Rev.* (1949); cases cited in principal case at 154.

⁷ *Flackman v. Hunter*, (D.C. Kan. 1948) 75 F. Supp. 871; *McClaghry v. Deming*, note 1 *supra*.

⁸ *Shapiro v. United States*, (Ct. Cl. 1947) 69 F. Supp. 205.

⁹ 28 U.S.C. (Supp. V, 1952) §2241.

¹⁰ *United States ex rel. Innes v. Hiatt*, (3d Cir. 1944) 141 F. (2d) 664 at 666; *Hicks v. Hiatt*, (D.C. Pa. 1946) 64 F. Supp. 238.

¹¹ Principal case at 142.

¹² The Uniform Code of Military Justice requires approval of a court martial's sentence by the convening Officer, 50 U.S.C. (Supp. V, 1952) §652, and the Board of Review in the Judge Advocate General Department, *id.*, §653. An appeal may then be taken to the Court of Military Appeals to correct alleged error below. *Id.*, §654.

mental fairness" implicit in the Fifth Amendment¹³ requires a fair hearing before a competent tribunal. A court martial has jurisdiction to hear these cases,¹⁴ and when the charges of deprivation of constitutional rights are fairly heard by competent military appellate courts, this review is the constitutional fundamental fairness to which the defendant is entitled. After it is established that this military review is fair, there would seem to be no reason to allow the defendant to repeat his argument in a civil court, for the civil courts reserve power to issue habeas corpus if the allegations are not fairly considered, and this should be adequate insurance against the military court's abusing its power.¹⁵

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¹³ *United States ex rel. Innes v. Hiatt*, note 10 *supra*.

¹⁴ Uniform Code of Military Justice, 50 U.S.C. (Supp. V, 1952) §577.

¹⁵ See generally 15 A.L.R. (2d) 389 (1951); Wurfel, "Military Habeas Corpus," 49 MICH. L. REV. 493, 699 (1951); Antieau, "Courts-Martial and the Constitution," 33 MARQ. L. REV. 25 (1949).