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Habeas Corpus and Court-Martial Prisoners

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HABEAS CORPUS AND COURT-MARTIAL PRISONERS*

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A. Background of the Writ

The origin of habeas corpus is lost in the mists of history.[1] The leading idea, deliverance by summary legal process from illegal confinement, was present in the laws of countries in existence prior to the beginning of the English law and in other countries which derived none of their principles of jurisprudence or rules of procedure from English law. It was known to Roman law and to old Spanish law.[2] It was recognized by the Magna Charta in 1215, although such recognition was probably not a primary purpose of the barons in forcing King John to sign that document.[3] The writ itself originated in the common law of England,[4] where it developed from a procedural writ to one of protection of the individual.[5] In 1679, Parliament passed the famous Habeas Corpus Act,[6] which, however, did not change the nature of the existing common law practice, and excepted treason and felony from its provisions.[7]

The English colonies in America were settled under different forms of colonial government,[8] and the English common law, as such, was held not to apply to them.[9] The English Habeas Corpus Act made no mention of the colonies, and therefore its provisions did not apply to the colonies.[10] The idea of habeas corpus, however, the colonists had brought with them,[11] and the denial of the writ was one of their grievances.[12] Although Queen Anne extended the Habeas Corpus Act to Virginia in 1710,[13] and a few courts in other colonies assumed power

* The opinions or assertions contained in this article are the private ones of the author and are not to be construed as official or as reflecting the views of the Navy Department or the naval service at large.

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1. 25 AM. JUR., *Habeas Corpus* §§ 3, 44 (1940).
2. United States *ex rel.* Wheeler v. Williamson, 28 Fed. Cas. 686, 688, No. 16,726 (E.D. Pa. 1855); HURD, HABEAS CORPUS 131 (2d ed. 1876); LEE, HISTORICAL JURISPRUDENCE 229 (1900).
3. RADIN, ANGLO-AMERICAN LEGAL HISTORY 145 (1936).
4. 25 AM. JUR., *Habeas Corpus* §§ 3, 45 (1940).
5. 3 BL. COMM. *128-29.
6. 31 CAR. 2, c. 2 (1679).
7. 3 BL. COMM. *136-38. See Simmons v. Georgia Iron & Coal Co., 117 Ga. 305, 43 S.E. 780 (1903), for a summary of the history of the writ.
8. REINSCH, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES, 1 ANGLO-AMERICAN LEGAL HISTORY 371 (1907).
9. 1 BL. COMM. *107-08.
10. 1 CHALMERS, POLITICAL ANNALS OF THE PRESENT UNITED COLONIES 678 (1780).
11. *Ex parte* Yerger, 8 Wall. 85, 95, 19 L. Ed. 932 (U.S. 1868).
12. HURD, HABEAS CORPUS 97-100 (2d ed. 1876); 1 CHALMERS, POLITICAL ANNALS OF THE PRESENT UNITED COLONIES 74 (1780).
13. HURD, HABEAS CORPUS 99 (2d ed. 1876).

to issue the writ,[14] there was no general use of the writ.

The only mention of habeas corpus in the Federal Constitution is a provision which requires that "the privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."[15] The Constitutional Convention simply assumed the existence of the famous remedy.[16] The exceptional power to suspend the writ vests in Congress and not in the President.[17] To give life to the writ, Congress provided in the Judiciary Act of 1789[18] that the Supreme Court, circuit courts, and district courts should have power to issue the writs not specially provided for by statute which might be necessary for their respective jurisdictions. The Supreme Court first granted an original writ of habeas corpus in 1795,[19] but a controversy as to whether such action was an exercise of original, as distinguished from appellate, jurisdiction simmered for 61 years[20] until set at rest by a unanimous decision[21] that it must be appellate jurisdiction. There was nothing in the Judiciary Act which gave to federal courts any exclusive power to issue writs of habeas corpus, and the majority of state courts exercised concurrent jurisdiction, even when the petitioner was held in custody of federal authorities.[22] State courts discharged military personnel from the custody of Army and Navy commanders.[23] Some federal district courts objected,[24] and Chief Justice Kent of New York declared that there was no need for state courts to interfere in such cases,[25] but it was not until 1867 that the Supreme Court had an opportunity to rule on the question. In *Abelman v. Booth*,[26] the Court ruled that no state judge or court, after being judicially informed that the party is imprisoned under the authority of United States, has any right to interfere with him. Some state courts

14. Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. REV. 22 (1903); WASHBURN, JUDICIAL HISTORY OF MASSACHUSETTS 195 (1840).
15. U.S. CONST. Art. I, § 9, cl. 2.
16. United States *ex rel.* Wheeler v. Williamson, 28 Fed. Cas. 686, 688, No. 16,726 (E.D. Pa. 1855); Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 493, 508 (1951).
17. *Ex parte* Merryman, 17 Fed. Cas. 144, No. 9487 Cir. Marg. (1861); *Ex parte* Bollman, 4 Cranch 75, 101, 2 L. Ed. 554 (U.S. 1807).
18. 1 STAT. 81 (1789), 28 U.S.C.A. § 451 (1951), as amended, 62 STAT. 694 (1948), 28 U.S.C.A. § 2241 (1951).
19. United States v. Hamilton, 3 Dall. 17, 1 L. Ed. 990 (U.S. 1795).
20. Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 493, 508-15 (1951). The controversy began with *Ex parte* Bollman and *Ex parte* Swartwout, 4 Cranch 75, 2 L. Ed. 554 (U.S. 1807).
21. *Ex parte* Yerger, 8 Wall. 85, 98, 19 L. Ed. 932 (U.S. 1868).
22. HURD, HABEAS CORPUS 153-98 (2d ed. 1876).
23. Case of Emanuel Roberts, 2 Hall's Law J. 192 (Md. 1809); Commonwealth v. Harrison, 11 Mass. 63 (1814); State v. Dimick, 12 N.H. 194, 37 Am. Dec. 197 (1841); Matter of Carlton, 7 Cow. 471 (N.Y. 1828); *In re* Stacy, 10 Johns. 328 (N.Y. 1813); Commonwealth *ex rel.* Webster v. Fox, 7 Barr. 336 (Pa. 1847); *Ex parte* Lockington, Brightley's Rep. 269 (Pa. 1813); Commonwealth v. Murray, 4 Binney 487, 5 Am. Dec. 412 (Pa. 1812).
24. In the matter of Vernaitre, Am. L. J. (N.S.) 438 (1850).
25. In the matter of Jeremiah Ferguson, 9 Johns. 239 (N.Y. 1812).
26. 21 How. 506, 16 L. Ed. 169 (U.S. 1858).

held that the opinion referred only to legally exercised authority, and continued to set free illegally restrained servicemen[27] until this practice was brought to a halt by the clear and unequivocal language in *Tarble's* case[28] in 1871. The first court-martial case to reach the Supreme Court by the use of habeas corpus was Ex parte *Reed* in 1879,[29] ninety years after the adoption of constitutional government. In denying Reed's petition for certiorari, the Court stated that Reed's court-martial had jurisdiction, and that its proceedings could not be collaterally impeached because of mere error or irregularity. The theme that the sentence of a court-martial must be void, and not merely voidable,[30] runs through the entire line of cases to the present time.[31]

As modernly used, habeas corpus is a discretionary writ, extraordinary in nature, issued by a civil court upon a proper cause shown to inquire into the legality of the physical restraint imposed upon the liberty of a person. It is a summary remedy for unlawful restraint, and cannot be used to perform the functions of an appeal. It is well established that a sentence of a federal military tribunal is not subject to direct review by a civil court,[32] since courts-martial are not courts of the federal judicial system,[33] and Congress has conferred no power upon the civil courts to review the determinations of such a tribunal except to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.[34] Legal systems predicated upon organizations of armed forces are of ancient origin, and have long been treated as clear and distinct from the legal systems applicable to the nonmilitary populace.[35] Even under the power to issue writs of habeas corpus, a civil court is limited in its action to the discharge of the petitioner from the custody of those illegally restraining him, and

27. For example, John McConologue's Case, 107 Mass. 154 (1871).
28. 13 Wall. 397, 20 L. Ed. 597 (U.S. 1871).
29. 100 U.S. 13, 25 L. Ed. 538 (1879). The Supreme Court had considered the validity of trials by court-martial in other types of cases, however, such as Wise v. Withers, 3 Cranch 331, 2 L. Ed. 457 (U.S. 1806), in trespass by force and arms; Martin v. Mott, 12 Wheat. 19, 6 L. Ed. 537 (U.S. 1827), in replevin; and Dynes v. Hoover, 20 How. 65, 15 L. Ed. 838 (U.S. 1858), in a damage suit for false imprisonment. In these cases, the Court laid down the rule that civil courts did not have power to alter the sentences of courts-martial which had been regularly convened, had proceeded legally and which had imposed a sentence not forbidden by law; and this rule, ready-made, was applied in habeas corpus cases. See Wurfel, *Military Habeas Corpus*, 49 MICH L. REV. 493, 515-19 (1951).
30. *Ex parte* Reed, 100 U.S. 13, 23, 25 L. Ed. 538 (1879).
31. Hiatt v. Brown, 339 U.S. 103, 70 Sup. Ct. 495, 94 L. Ed. 691 (1950), *rehearing denied*, 339 U.S. 939.
32. *Ex parte* Vallandingham, 1 Wall. 243, 17 L. Ed. 589 (U.S. 1863), in which the Supreme Court held it did not have jurisdiction to review by certiorari the proceedings of a military commission.
33. Dynes v. Hoover, 20 How. 65, 79, 15 L. Ed. 838 (U.S. 1858).
34. Gusik v. Schilder, 340 U.S. 128, 71 Sup. Ct. 149, 95 L. Ed. 146 (1950); *Re* Yamashita, 327 U.S. 1, 66 Sup. Ct. 340, 90 L. Ed. 499 (1946).
35. Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 493-99 (1951).

cannot revise or order the correction of the court-martial sentence under the authority of which he was restrained.[36] If a petitioner is not in confinement or under other physical restraint, as distinguished from moral restraint, such as military arrest or parole, a writ of habeas corpus affords him no relief.[37]

B. Exhaustion of Other Remedies

A system of initial[38] and appellate[39] review of courts-martial is established under the Uniform Code. The record of a court-martial undergoes an intensive review in the department of the armed force to which the accused belongs, and in serious cases may be reviewed by a Court of Military Appeals which is unconnected with any armed force. If the case of the accused is not referred to the Court of Military Appeals by the Judge Advocate General, the accused has the burden of petitioning this court for a review, and must do so, if at all, within thirty days from the time he is notified of the decision of the board of review in his case.[40] If the sentence as approved by the convening authority extends to death, dismissal, dishonorable discharge, bad-conduct discharge, or confinement for one year or more, the accused may petition the Judge Advocate General for a new trial on grounds of newly discovered evidence or fraud on the court, and must do so, if at all, within one year after the convening authority's approval of such sentence.[41]

If these remedies, internal to the military judicial system, do not afford appropriate relief, the accused must turn to the civil courts. If he has, by an invalid court-martial sentence involving dismissal, discharge, or forfeiture of pay, suffered a monetary loss, he may bring suit in the United States Court of Claims.[42] But this court cannot do full justice, for it lacks power to restore the suitor to his former military status, and it has no jurisdiction to relieve from unlawful

36. Wales v. Whitney, 114 U.S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277 (1885); Goldstein v. Johnson, 184 F.2d 342 (D.C. Cir. 1950).

37. *Ibid.* But if the petition is brought by a party in interest other than the person whose release is sought, such as that of a parent to obtain the release of a minor child from the armed forces, the moral restraint incident to the military status of the minor is sufficient, and the restraint is against the rights of the parent. Goodman v. Hearn, 153 F.2d 186 (5th Cir. 1946); *Ex parte* King, 246 Fed. 868 (E.D. Ky. 1917); *Ex parte* Lewkowitz, 163 Fed. 646 (C.C.N.Y. 1908). The result is otherwise, if the person in service is the only real party in interest, though the petition is brought in his behalf by another. Nash v. MacArthur, 184 F.2d 606 (D.C. Cir. 1950).

38. That is, a review by the convening authority or by his superior in command.

39. That is, by the Judge Advocate General, the boards of review and the Court of Military Appeals.

40. Uniform Code of Military Justice, art. 67(c), 64 Stat. 108 (1950), 50 U.S.C.A. §§ 551-736 (1951).

41. UCMJ art. 73, 50 U.S.C.A. § 660 (1951).

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

restraint. To correct an injustice which transcends the pocketbook, the accused looks to the federal district courts. There he finds five possible remedies: mandamus, certiorari, writ of prohibition, declaratory judgment and writ of habeas corpus. But he finds that, for relief from military tribunals, neither mandamus,[43] certiorari,[44] writ of prohibition[45] nor declaratory judgment[46] is available. The sole remaining remedy is that of habeas corpus, available only to an accused under present physical restraint, and then only if all other remedies have first been exhausted.[47]

The doctrine that habeas corpus is an extraordinary remedy which cannot be used until all other remedies which the law has provided have been exhausted was well established prior to any positive legislation on the subject.[48] It was applied by the Supreme Court to petitioners who were tried in state courts, and an appeal from the highest state court to the Supreme Court by appeal or writ of certiorari was made a condition precedent to the right to file a petition for habeas corpus in the federal district courts.[49] The theory of the rule appears to rest upon the principle of federal-state comity, that of avoiding interference with operation of a state's judicial system until the latter has finally disposed of the matter at hand.[50] The very practical reason, however, was to stem the flow of petitions arising out of state convictions.[51] These had reached alarming proportions by 1948, and constituted a major problem in the administration of justice.[52] In that year, Congress transformed the Supreme Court's rule into positive legislation,[53] which

43. United States *ex rel.* French v. Weeks, 259 U.S. 326, 42 Sup. Ct. 505, 66 L. Ed. 965 (1922).

44. *In re* Vidal, 179 U.S. 126, 21 Sup. Ct. 48, 45 L. Ed. 118 (1900).

45. Smith v. Whitney, 116 U.S. 167, 6 Sup. Ct. 570, 29 L. Ed. 601 (1886); Wales v. Whitney, 114 U.S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277 (1885). See United States v. Maney, 61 Fed. 140 (C.C. Minn. 1894).

46. Brown v. Royall, 81 F. Supp. 767 (D.D.C. 1949).

47. Whelchel v. McDonald, 340 U.S. 122, 71 Sup. Ct. 146, 95 L. Ed. 141 (1950); Gusik v. Schilder, 340 U.S. 128, 71 Sup. Ct. 149, 95 L. Ed. 146 (1950).

48. Sunal v. Large, 332 U.S. 174, 67 Sup. Ct. 1588, 91 L. Ed. 1982 (1947); Adams v. United States, 317 U.S. 269, 63 Sup. Ct. 236, 87 L. Ed. 268 (1942); Goto v. Lane, 265 U.S. 393, 44 Sup. Ct. 525, 68 L. Ed. 1070 (1924).

49. *Ex parte* Hawk, 321 U.S. 114, 64 Sup. Ct. 448, 88 L. Ed. 572 (1944). Although the Court, in Wade v. Mayo, 334 U.S. 672, 68 Sup. Ct. 1270, 92 L. Ed. 1647 (1948), retreated from this position by allowing habeas corpus to a petitioner who failed to seek certiorari from a state supreme court, it reaffirmed its former stand in Darr v. Burford, 339 U.S. 200, 70 Sup. Ct. 587, 94 L. Ed. 761 (1950).

50. Comment, 49 MICH. L. REV. 611, 614-17 (1951), expressing the view that comity was an insufficient reason for erecting an additional procedural barrier between the habeas corpus petitioner and adjudication of the merits of his claim.

51. Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 699 (1951).

52. The flow reached the 600 a year mark, 96% of which had little or no legal merit. Address of Chief Justice Vinson before the American Bar Association, Sept. 7, 1949, reported in 70 Sup. Ct. xiii (1949). See 8 F.R.D. 171, 172 (1948); 7 F.R.D. 313 (1947); Comment, 49 MICH. L. REV. 611-12 (1951).

53. 62 STAT. 967 (1948), as amended, 63 STAT. 105 (1949), 28 U.S.C.A. §§ 2254, 2255 (1950).

has been held constitutional[54] and is being enforced.[55]

The rule requiring exhaustion of other remedies was not applied to petitioners held in custody under the authority of a court-martial sentence prior to 1948. No federal-state comity was involved, and such petitioners lacked the regular appeal to courts of the federal system which was available to petitioners convicted in federal district courts. The practical purpose of reducing the increasing flood of petitions for habeas corpus, however, applied to military prisoners,[56] and in 1948 Congress amended the Army's Articles of War[57] to provide, in language almost identical to that of Article 76 of the Uniform Code, for mandatory utilization of the remedies available within the established military judicial system. The provision was held constitutional,[58] and was so interpreted as to make the exhaustion of all available military judicial and administrative remedies a condition precedent to the exercise of the privilege of habeas corpus.[59]

The Uniform Code provides that the prescribed appellate review of records of trial, the proceedings, findings and sentences of courts-martial as approved, reviewed or affirmed as required by the Code, and all dismissals and discharges carried into execution pursuant to such sentences, shall be final and conclusive. It further provides that court-martial orders published 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 a petition for a new trial as provided in Article 73 and to action by the Secretary of a Department as provided in Article 74, and the authority of the President.[60] Prior to the exhaustion of available remedies under the Code, the resort to habeas corpus to test the legality of restraint imposed pursuant to a court-martial sentence is premature and will be ineffective.[61] After such exhaustion, habeas corpus is available, as

54. Martin v. Hiatt, 174 F.2d 350 (5th Cir. 1949). The rule does not deny the privilege of habeas corpus, but merely defines prerequisites to its use.

55. Darr v. Burford, 339 U.S. 200, 70 Sup. Ct. 587, 94 L. Ed. 761 (1950); Weber v. Steele, 185 F.2d 799 (8th Cir. 1950); Meyers v. Welch, 179 F.2d 707 (4th Cir. 1950); Comment, 49 MICH. L. REV. 611 (1951).

56. In the three and one-half years following World War II, Army prisoners alone filed 200 petitions for habeas corpus. *Hearings before the Committee on Armed Services on H.R. 4080,* 81st Cong., 1st Sess. 260, 263 (1949). The rule that the doctrine of res judicata has no formal application to habeas corpus, Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944), permitted abuse of the privilege, and a single petitioner convicted by an Army court-martial is reported to have filed seventeen different petitions, all of which were groundless. Jackson v. Gough, 170 F.2d 630, 632 (5th Cir. 1948); Wurfel, *Military Habeas Corpus,* 49 MICH. L. REV. 699, 702-03 (1951).

57. Art. 53 of the Articles of War of 1948, 10 U.S.C.A. § 1525 (1952).

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

59. Whelchel v. McDonald, 340 U.S. 122, 71 Sup. Ct. 146, 95 L. Ed. 141 (1950); Gusik v. Schilder, 340 U.S. 128, 71 Sup. Ct. 149, 95 L. Ed. 146 (1950).

60. UCMJ art. 76, 50 U.S.C.A. § 663 (1950).

61. Whelchel v. McDonald, 340 U.S. 122, 71 Sup. Ct. 146, 95 L. Ed. 141 (1950); Gusik v. Schilder, 340 U.S. 128, 71 Sup. Ct. 149, 95 L. Ed. 146 (1950).

Congress intended it should be.[62] The finality provision merely describes the terminal point for proceedings within the court-martial system,[63] and when that point is reached, the lawfulness of the action taken under the system is subject to determination in the federal courts.[64] The terminal point of any particular case will depend upon the type of court-martial which imposed the sentence and the type of sentence imposed and approved or confirmed. If a Code remedy is unavailable to a particular accused, no petition for such a remedy is, of course, required of him. Where a Code remedy is available, however, the terminal point is not reached by the mere filing of a petition for such remedy; the remedy must be not only initiated, but exhausted, and federal district courts have consistently dismissed petitions for habeas corpus filed a short time after the submission to a Judge Advocate General of a petition for a new trial.[65] There is no limit of time within which a Judge Advocate General is bound to act upon a petition for a new trial, and a petition for habeas corpus would undoubtedly be allowed after an unreasonable period of time had elapsed without decisive action upon such petition for a new trial. If resort to an available remedy is actually shown to be futile, the federal courts will not consider exhaustion of that remedy a condition precedent to the privilege of habeas corpus;[66] but a mere allegation of futility is insufficient.[67] The burden of proving the exhaustion of available remedies or the futility thereof is upon the petitioner.

The practical effect of the rule requiring exhaustion of all available remedies as a condition precedent to the privilege of habeas corpus is to stem the flow of petitions to the federal civil courts,[68] and to divert the prospective petitioners into the military channels which afford a remedy "much better adapted to reach justice than any within the power of the district court on habeas corpus."[69] The opportunity for effective relief appears to be at least twelve times greater within the

62. *Hearings before the Committee on Armed Services on H.R. 2498*, 81st Cong., 1st Sess. 1963, 1277 (1949). The finality provision does not purport to deprive civil courts of their habeas corpus jurisdiction. Gusik v. Schilder, 340 U.S. 128, 71 Sup. Ct. 149, 95 L. Ed. 146 (1950).

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

64. McGrath v. Kristensen, 340 U.S. 162, 71 Sup. Ct. 224, 95 L. Ed. 173 (1950), citing Gusik v. Schilder, 340 U.S. 128, 71 Sup. Ct. 149, 95 L. Ed. 146 (1950).

65. Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 699, 709-10 (1951), citing unreported cases.

66. "Good judicial administration is not furthered by insistence on futile procedure." Wade v. Mayo, 334 U.S. 672, 681, 68 Sup. Ct. 1270, 92 L. Ed. 1647 (1948).

67. In the *Gusik* case, an allegation of futility was made, and the circuit court said that "it would seem unsound to relegate the appellee to an application for review . . . at the hazard of surrendering important constitutional rights if such a hazard exists." Schilder v. Gusik, 180 F.2d 662, 665 (6th Cir. 1950). The Supreme Court remarked that in this case if resort to the military remedy proves futile, no rights have been sacrificed. Gusik v. Schilder, 340 U.S. 128, 132-33, 71 Sup. Ct. 149, 95 L. Ed. 146 (1950).

68. Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 699, 710 (1951).

69. Whelchel v. McDonald, 176 F.2d 260, 262 (5th Cir. 1949).

military judicial system than it is within the federal civil system under habeas corpus.[70]

C. Scope of the Inquiry

The scope of the inquiry on an attack in a civil court against a court-martial conviction has traditionally been limited to questions of jurisdiction. The Supreme Court has never deviated from that limitation.[71] It applies to habeas corpus proceedings, in which civil courts exercise no supervisory or corrective power over the proceedings of the court-martial.[72] The questions on habeas corpus are whether the court-martial was properly constituted, whether it had jurisdiction over the accused and the offense with which he was charged and whether the sentence was one authorized by law.[73]

The traditional limitation to questions of jurisdiction was applied by federal courts to all habeas corpus proceedings and was not limited to those involving courts-martial.[74] In the nonmilitary cases, the federal courts first began to expand the concept of the term "jurisdiction of the court." In 1888, the Supreme Court permitted habeas corpus to be used to attack the jurisdiction of a federal court by way of a claim of double jeopardy,[75] and in 1907 extended that privilege to a case

70. Of 324 military prisoners who sought habeas corpus relief during five years, only one was finally granted release, and in that one case, Anthony v. Hunter, 71 F. Supp. 823 (D.C. Kan. 1947), the government administratively determined not to appeal. The ground upon which the petitioner won, however, was overruled by the Supreme Court in a later case. This is a success of less than one-third of one percent. Under the rules allowing petitions to the JAG for a new trial or for vacation of sentence, relief during one year was granted in 9 of 245 cases, a success of about four percent. Wurfel, *Military Habeas Corpus*, 49 Mich. L. Rev. 699, 709 (1951); *Hearings before the Committee on Armed Services on H.R. 4080*, 81st Cong., 1st Sess. 260, 263 (1949).

71. Whelchel v. McDonald, 340 U.S. 122, 71 Sup. Ct. 146, 95 L. Ed. 41 (1950); Hiatt v. Brown, 339 U.S. 103, 70 Sup. Ct. 495, 94 L. Ed. 691 (1950); Humphrey v. Smith, 336 U.S. 695, 69 Sup. Ct. 830, 93 L. Ed. 986 (1949); Collins v. McDonald, 258 U.S. 416, 42 Sup. Ct. 326, 66 L. Ed. 692 (1922); Mullan v. United States, 212 U.S. 516, 29 Sup. Ct. 330, 53 L. Ed. 636 (1909); Grafton v. United States, 206 U.S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084 (1907); McClaughry v. Deming, 186 U.S. 49, 22 Sup. Ct. 786, 46 L. Ed. 1049 (1902); Carter v. McClaughry, 183 U.S. 365, 22 Sup. Ct. 181, 46 L. Ed. 236 (1902); *In re* Vidal, 179 U.S. 126, 21 Sup. Ct. 48, 45 L. Ed. 118 (1900); Carter v. Roberts, 177 U.S. 496, 20 Sup. Ct. 712, 49 L. Ed. 861 (1900); Swaim v. United States, 165 U.S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823 (1897); Johnson v. Sayre, 158 U.S. 109, 15 Sup. Ct. 773, 39 L. Ed. 914 (1895); *In re* Grimley, 137 U.S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636 (1890); Smith v. Whitney, 116 U.S. 167, 6 Sup. Ct. 570, 29 L. Ed. 601 (1886); *Ex parte* Mason, 105 U.S. 696, 26 L. Ed. 1213 (1882); *Ex parte* Reed, 100 U.S. 12, 15 L. Ed. 538 (1879); Dynes v. Hoover, 20 How. 65, 15 L. Ed. 838 (U.S. 1857). See also Note, 15 A.L.R.2d 387 (1951).

72. Hiatt v. Brown, 339 U.S. 103, 70 Sup. Ct. 495, 95 L. Ed. 691 (1950), *rehearing denied*, 339 U.S. 939 (1950).

73. See Wurfel, *Military Habeas Corpus*, 49 Mich. L. Rev. 699, 713 (1951); Note, 15 A.L.R.2d 387, 391 (1951), and cases therein cited.

74. *Ex parte* Siebold, 100 U.S. 371, 25 L. Ed. 717 (1879), decided in the same year as *Ex parte* Reed, 100 U.S. 13, 25 L. Ed. 538 (1879), the first military case to reach the Supreme Court on habeas corpus.

75. *Ex parte* Nielsen, 131 U.S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118 (1889).

involving a court-martial.[76] Eight years later, in *Frank v. Mangrum*,[77] a petition alleged mob domination of the court and jury, and the Supreme Court indicated that if the allegation had been proved, habeas corpus relief on the ground of departure from due process of law would have been available. The Court nevertheless adhered to the concept that "the writ of habeas corpus will lie only in case the judgment . . . is shown to be absolutely void for want of jurisdiction," and gave birth to the theory that jurisdiction once acquired may be "lost in the course of proceedings" by a denial of constitutional rights.[78] The doctrine, that if the judicial process be merely a formal one, the courts on habeas corpus will not hesitate to look behind the facade to determine if the petitioner was deprived of his constitutional rights, was clearly stated in *Mooney v. Holohan*,[79] and was reaffirmed in Ex parte *Hawk*.[80] In the celebrated 1938 case of *Johnson v. Zerbst*,[81] the district court had said it was unfortunate that the accused had been deprived of the right to counsel guaranteed by the Sixth Amendment, but that since the court-martial had jurisdiction, the error could not be corrected in a habeas corpus proceeding. The Court of Appeals of the Fifth Circuit, in order to achieve justice in the case, utilized the theory invented by the Supreme Court[82] that jurisdiction, although acquired at the beginning of the trial, "may be lost in the course of proceedings due to failure to complete the court . . . by providing counsel for an accused. . . ." It ruled that "if this requirement of the Sixth Amendment is not complied with, the Court no longer has jurisdiction to proceed." The Supreme Court stated: "The scope of inquiry in habeas corpus proceedings has been broadened — not narrowed — since the adoption of the Sixth Amendment . . . . If the accused . . . is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence . . . ."[83] These conclusions were expanded in 1941 when the Supreme Court in *Walker v.*

76. Grafton v. United States, 206 U.S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084 (1907). The Supreme Court did not use language in this case that confused the meaning of "jurisdiction." It found that in the first trial the court-martial had jurisdiction, but it held, not that the civil court holding a second trial lacked jurisdiction, but that, under the guarantee of the Fifth Amendment, the judgment of the court-martial was final and conclusive on the civil court, and that, without attempting to formulate any rule, this was sufficient to dispose of the case.

77. 237 U.S. 309, 35 Sup. Ct. 582, 59 L. Ed. 969 (1915).

78. 237 U.S. at 327.

79. 294 U.S. 103, 112, 55 Sup. Ct. 340, 79 L. Ed. 791 (1935).

80. 321 U.S. 114, 64 Sup. Ct. 448, 88 L. Ed. 572 (1944).

81. 304 U.S. 458, 58 Sup. Ct. 1019, 82 L. Ed. 1461 (1938).

82. In Frank v. Mangum, 237 U.S. 309, 35 Sup. Ct. 582, 59 L. Ed. 969 (1915).

83. Johnson v. Zerbst, 304 U.S. 458, 463, 58 Sup. Ct. 1019, 82 L. Ed. 1461 (1938). This same theory of jurisdiction being lost in the course of proceedings was utilized by the Court of Claims in Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947).

Johnston[84] held that if the petitioner's allegations that he had not been informed of his right to counsel and that the prosecutor had deceived and coerced him into pleading guilty were true, they justified a collateral attack on the trial court's judgment. A year later, the Supreme Court extended the scope of habeas corpus by stating it was not restricted to the question of want of jurisdiction. In *Waley v. Johnston*,[85] where petitioner had been convicted on a plea of guilty, coerced by a federal law enforcement officer, the Court said:

> "The issue here was appropriately raised by the habeas corpus petition. The facts relied on are dehors the records and their effect on the judgment was not open to consideration and review on appeal. In such circumstances, the use of the writ in the federal courts to test the constitutional validity of the conviction for crime is not restricted to these cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it."[86]

The first indication of a break in the long line of federal cases which reiterated the doctrine that jurisdiction of the court-martial was the only subject of inquiry in habeas corpus was the decision in 1943 by the Court of Appeals of the Eighth Circuit in the case of *Schita v. King*.[87] The court looked behind the jurisdictional question and sent a habeas corpus petition back to the district court for rehearing where the uncontroverted allegations indicated that the particular petitioner had been sentenced to prison in an unfair court-martial proceeding. The court concluded that in view of the trend of modern Supreme Court decisions granting habeas corpus to persons convicted by state courts under circumstances showing a want of due process of law, petitioner was entitled to release if his allegations were true.[88] One year later, the Court of Appeals of the Third Circuit in *United States* ex rel. *Innes v. Hiatt*[89] held that the basic guarantee of fairness afforded by the due process clause of the Fifth Amendment applied to federal military courts as well as to federal civil courts, and that an individual does not cease to be a person within the protection of the Fifth Amendment because he has joined the armed forces. In line with these authorities, habeas corpus came to be regarded as available to test the validity of a judgment of a court-martial attacked on the ground that constitutional rights of the accused had been disregarded.[90]

84. 312 U.S. 275, 61 Sup. Ct. 574, 85 L. Ed. 830 (1941).
85. 316 U.S. 101, 62 Sup. Ct. 964, 86 L. Ed. 1302 (1942).
86. 316 U.S. at 104-05.
87. 133 F.2d 283 (8th Cir. 1943).
88. *Id.* at 287.
89. 141 F.2d 664 (3d Cir. 1944).
90. Hunter v. Wade, 169 F.2d 973 (10th Cir. 1948), *aff'd*, 336 U.S. 684 (1949), *rehearing denied*, 337 U.S. 921 (1949); Powers v. Hunter, 178 F.2d 141 (10th Cir. 1949), *cert. denied*, 339 U.S. 986 (1950); Sweeney v. Hiatt, 89 F. Supp. 416 (N.D. Ga. 1949); Flackman v. Hunter, 75 F. Supp. 871 (D. Kan. 1948), *appeal dismissed*, 173 F.2d 899 (10th Cir. 1949); Anthony v. Hunter, 71 F. Supp. 823

There seems little question but that the Supreme Court would again, if called upon, uphold that availability.[91] It has, however, cast some doubt as to the extent of the permissible inquiry when the attack is made on the ground of a denial of due process of law. In *Hiatt v. Brown*,[92] while reaffirming in traditional language that "the single inquiry, the test, is jurisdiction" without explaining to what extent the concept of jurisdiction had been expanded, the Court said:

> "We think the court [of appeals] 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 pre-trial investigation, and the competence of the law member and defense counsel."

This language does not seem to be aimed at ending all inquiry into due process,[93] but rather at keeping such inquiry within bounds.

Within the scope of inquiry in a habeas corpus proceeding are the following:

(1) The status of a person as subject to court-martial jurisdiction, such as whether the accused was ever inducted or enlisted,[94] whether an enlistment was void or voidable,[95] whether a reservist was lawfully placed in an active duty status[96] and whether an officer on terminal leave was subject to trial.[97]

(2) The offense charged as one within the cognizance of a court-martial, such as whether an offense mistakenly alleged to have been

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(D. Kan. 1947); Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa. 1946). See Note, 15 A.L.R.2d 387, 392-94 (1951).

91. During the hearings on the Code, the case of Wade v. Hunter, 336 U.S. 684, 69 Sup. Ct. 834, 93 L. Ed. 974 (1949), was decided. This case is set out in full text and by commentaries in the hearings. *Hearings before the Committee on Armed Services on H.R. 2498*, 81st Cong., 1st Sess. 241 (1949); *Hearings before the Committee on Armed Services on H.R. 4080*, 81st Cong., 1st Sess. 168, 185, 322, 323 (1949). While the Supreme Court avoided decision on the double jeopardy issue presented, and resolved the case on another ground, it was stated by Brigadier General Franklin Riter of the Army that both the majority and dissenting opinions were based upon the premise that the Fifth Amendment is applicable to the military judicial process. SEN. REP. No. 486, 81st Cong., 1st Sess. 186 (1949). The Court found no fault in the use of a violation of protection against double jeopardy as a ground for habeas corpus.

92. 339 U.S. 103, 110, 70 Sup. Ct. 495, 94 L. Ed. 691 (1950), *rehearing denied*, 339 U.S. 939.

93. Some writers have so construed it. Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 699, 714 (1951).

94. United States v. McIntyre, 4 F.2d 823 (9th Cir. 1925).

95. *In re* Grimley, 137 U.S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636 (1890).

96. United States *ex rel.* Pasela v. Fenno, 167 F.2d 593 (2d Cir. 1948), *cert. denied*, 335 U.S. 806.

97. Hironimus v. Durant, 168 F.2d 288 (4th Cir. 1948), *cert. denied*, 335 U.S. 818.

committed in wartime could be tried by court-martial,[98] or whether an offense is one triable only in state courts.[99]

(3) The composition of the court-martial, such as whether the law officer was eligible,[100] whether the members were legally competent,[101] whether trial and defense counsel in a general court-martial were duly qualified and certified,[102] whether the legal qualifications of the defense counsel in a special court-martial complied with the requirements of the Code[103] or whether the officials of the court were sworn.[104]

(4) The legality, as distinguished from the severity,[105] of the sentence imposed, such as whether the sentence was cruel and unusual,[106] whether the deprivation of some other constitutional guarantee was so prejudicial to the accused as to cause the court-martial to lose in the course of proceedings jurisdiction to render a finding and sentence[107] or whether the punishment imposed exceeds, in kind or in amount, the limit authorized by the Code.[108]

Among the allegations made in petitions for habeas corpus which are *not* grounds sufficient for such relief are the following:

(1) Failure to conduct a thorough and impartial pre-trial investigation prior to a trial by general court-martial.[109]

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98. Johnson v. Biddle, 12 F.2d 366 (8th Cir. 1926).

99. But the question of the sufficiency of a charge based upon the general article has always been avoided by civil courts. United States v. Maney, 61 Fed. 140 (C.C. Minn. 1894). See Swaim v. United States, 165 U.S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823 (1897).

100. Under UCMJ art. 26(a), 50 U.S.C.A. § 590 (1951). The qualification of the law officer under the Code is jurisdictional; and the decision in Hiatt v. Brown, 339 U.S. 103, 70 Sup. Ct. 495, 94 L. Ed. 691 (1950), that a civil court cannot extend its inquiry to the competency of the law member of the court-martial related to a nonjurisdictional matter under the now repealed Articles of War and is not applicable to cases under the Code.

101. Under UCMJ art. 25, 50 U.S.C.A. § 589 (1951). McClaughry v. Deming, 186 U.S. 49, 22 Sup. Ct. 786, 46 L. Ed. 1049 (1902).

102. Under UCMJ art. 27(a) and (b), 50 U.S.C.A. § 591 (1951).

103. Under UCMJ art. 27(c), 50 U.S.C.A. § 591 (1951).

104. See 13 OPS. ATT'Y GEN. 374 (1871).

105. *Ex parte* Dickey, 204 Fed. 322 (D. Me. 1913).

106. Powers v. Hunter, 178 F.2d 141 (10th Cir. 1949), *cert. denied*, 339 U.S. 986 (1950).

107. See discussion in second and third paragraphs under B, Scope of the Inquiry, *supra*. A complete lack of evidence supporting a conviction may be a subject to inquiry, Hayes v. Hunter, 83 F. Supp. 940 (D. Kan. 1948), whereas if there is any such evidence of record the sufficiency of it is not a subject of inquiry. Hiatt v. Brown, 339 U.S. 103, 70 Sup. Ct. 495, 94 L. Ed. 691 (1950). That habeas corpus should be available to an accused deprived of substantial rights was recognized in the hearings on the Code. *Hearings before the Committee on Armed Services on H.R. 2498*, 81st Cong., 1st Sess. 1063, 1277 (1949). *Hearings before the Committee on Armed Services on H.R. 4080*, 81st Cong., 1st Sess. 260, 263 (1949).

108. Under UCMJ arts. 18, 19, 20 and 56, 50 U.S.C.A. §§ 578, 579, 580 and 637 (1951).

109. Expressly made nonjurisdictional by UCMJ art. 32(d), 50 U.S.C.A. § 603 (1951), following the decision in Humphrey v. Smith, 336 U.S. 695, 69 Sup. Ct. 830, 93 L. Ed. 986 (1949), that the mere failure to conduct such an

(2) Failure to provide counsel for the accused at the pre-trial investigation.[110]

(3) Absence of defense counsel and assumption of his own defense by the accused without objection.[111]

(4) Exclusion of civilian defense counsel during presentation of secret official documents, leaving appointed defense counsel present.[112]

(5) Absence of assistant defense counsel without objection by the accused.[113]

(6) Lack of Negro members of a court trying a Negro accused.[114]

(7) Erroneous admission into evidence of an extrajudicial confession.[115]

(8) Erroneous inferences made from the evidence.[116]

(9) Failure to furnish the accused with a copy of the opinion of the staff judge advocate or legal officer.[117]

(10) Lack of knowledge of a civilian subject to the Code that he was so subject.[118]

(11) Technical sufficiency of pleadings charging an offense cognizable by a court-martial.[119]

(12) Mistreatment while in custody awaiting trial.[120]

(13) Delay in completing investigation and trial where not substantially prejudicial to the accused's defense.[121]

(14) Illegal apprehension or arrest.[122]

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investigation does not invalidate an otherwise valid court-martial subsequently held. Hiatt v. Brown, 339 U.S. 103, 70 Sup. Ct. 495, 94 L. Ed. 691 (1950), closes the door to consideration of the adequacy of such investigation.

110. Expressly made nonjurisdictional by UCMJ art. 32(d), 50 U.S.C.A. § 603 (1951). See Romero v. Squier, 133 F.2d 528 (9th Cir. 1943), *cert. denied,* 318 U.S. 785.

111. Innes v. Crystal, 131 F.2d 576 (2d Cir. 1943), *cert. denied,* 319 U.S. 755.

112. Romero v. Squier, 133 F.2d 528 (9th Cir. 1943), *cert. denied,* 318 U.S. 785.

113. Flackman v. Hunter, 75 F. Supp. 871 (D. Kan. 1948).

114. Jackson v. Gough, 170 F.2d 630 (5th Cir. 1948), *cert. denied sub nom.* Jackson v. Hiatt, 336 U.S. 938 (1949).

115. *Ibid.*

116. Romero v. Squier, 133 F.2d 528 (9th Cir. 1943), *cert. denied,* 318 U.S. 785.

117. Weintraub v. Swenson, 165 F.2d 756 (2d Cir. 1948).

118. McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943).

119. Bigrow v. Hiatt, 79 F. Supp. 826 (M.D. Pa. 1947), *aff'd,* 168 F.2d 992 (3d Cir. 1948); *Ex parte* Dickey, 204 Fed. 322 (D. Me. 1913).

120. Benjamin v. Hunter, 75 F. Supp. 775 (D. Kan. 1947), *aff'd,* 169 F.2d 512 (10th Cir. 1948). Being handcuffed during trial is not a ground for relief. McClellan v. Humphrey, 83 F. Supp. 510 (M.D. Pa. 1949), *aff'd,* 181 F.2d 757 (3d Cir. 1950).

121. Durant v. Hiatt, 81 F. Supp. 948 (N.D. Ga. 1948), *aff'd,* 177 F.2d 373 (5th Cir. 1949).

122. *Ibid.*

(15) Movement of court from one place of convening to another during trial.[123]

(16) Insufficiency of the evidence, where there is not a complete lack of evidence supporting conviction.[124]

(17) Credibility of witnesses.[125]

(18) Bar of the statute of limitations.[126]

D. Jurisdiction to Issue the Writ

The district courts of the United States have power to issue writs of habeas corpus "within their respective jurisdictions."[127] Usually the petitioner and his jailer are within the territorial jurisdiction of the same district court which is the proper court to issue the writ. When the petitioner is physically confined within the territorial jurisdiction of one district court, no other district court can issue the writ.[128] When a petitioner who has the privilege of the writ is confined outside the territorial jurisdiction of all district courts, whether he can obtain the writ depends upon the presence within the territorial jurisdiction of some district court of a proper respondent.[129] If there is no proper respondent there, the writ cannot issue.[130] If there is, and the writ is directed to him, it seems that it can issue.[131] A proper respondent includes not only the person with immediate physical custody of the petitioner, but also persons who have lawful authority to effect the release of the petitioner.[132] The petitioner must be held "in custody in

123. *Ibid.*

124. Montalvo v. Hiatt, 174 F.2d 645 (5th Cir. 1949), *cert. denied*, 338 U.S. 874; Henry v. Hodges, 171 F.2d 401 (2d Cir. 1948), *cert. denied*, 336 U.S. 968 (1949); Krull v. Hiatt, 74 F. Supp. 349 (M.D. Pa. 1947); *Ex parte* Potens, 63 F. Supp. 582 (E.D. Wis. 1945). Includes insufficiency of evidence of sanity of the accused. Whelchel v. McDonald, 340 U.S. 122, 71 Sup. Ct. 146, 95 L. Ed. 141 (1950).

125. McDaniel v. Hiatt, 78 F. Supp. 573 (M.D. Pa. 1948).

126. *Ex parte* Townsend, 133 Fed. 74 (D. Neb. 1904).

127. 62 Stat. 964 (1948), 28 U.S.C.A. § 2241(a) (1951).

128. Ahrens v. Clark, 335 U.S. 188, 68 Sup. Ct. 1443, 92 L. Ed. 1898 (1948).

129. In the only case prior to World War II directly raising the problem of a person confined outside the United States under authority of a court-martial, habeas corpus in the District of Columbia was denied partly on the ground that the writ, in favor of a United States marine, was directed to the Secretary of the Navy when it should have been directed to the President. This decision seems somewhat tenuous. McGowan v. Moody, 22 App. D.C. 148 (D.C. Cir. 1903).

130. United States *ex rel.* Harrington v. Schlotfeldt, 136 F.2d 935 (7th Cir. 1943); Fiedler v. Shuttleworth, 57 F. Supp. 591 (W.D. Pa. 1944).

131. Otherwise, the statute limiting jurisdiction to issue the writ must be unconstitutional, since Congress cannot suspend the writ except in cases of invasion or rebellion. Eisentrager v. Forrestal, 174 F.2d 961, 967 (D.C. Cir. 1949), *reversed on other grounds sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1950); *In re* Bush, 84 F. Supp. 873 (D.D.C. 1949); Comment, 49 Mich. L. Rev. 870, 874-77 (1951).

132. Johnson v. Eisentrager, 339 U.S. 763, 766-67, 70 Sup. Ct. 936, 94 L. Ed.

violation of the Constitution, laws, or treaties of the United States,"[133] and must derive his right from one of those sources of the supreme law of our land.[134] No such right is held by a nonresident alien confined abroad,[135] and the right of a nonresident alien enemy confined within the territorial jurisdiction of a district court cannot be exercised during the period of hostilities.[136]

The Supreme Court has power to issue writs of habeas corpus.[137] It may issue an original writ on the theory of the exercise of its appellate jurisdiction if the case is one in which the commitment of the petitioner was by the judicial authority of the United States,[138] because it has the power of appellate review over such commitments. It may exercise such power either by granting a writ[139] or by certiorari,[140] when an application for the writ is made to another court over which it has jurisdiction. Military courts are not courts of the federal judicial system,[141] and there being no power of appellate review in the Supreme Court, any original writ for discharge of a prisoner held under authority of a military court would not be an exercise of appellate jurisdiction.[142] The original jurisdiction of the Supreme Court is limited by the Constitution[143] and cannot be enlarged by legislative action.[144] Whether and to what extent the issuance of a writ of habeas corpus on the theory of an exercise of the original jurisdiction of the court is possible has been a disputed matter.[145] While a justice of the Supreme Court may exercise his power in any part of the United States,[146] the Court has

1255 (1950); *see Ex parte* Endo, 323 U.S. 283, 304-05, 65 Sup. Ct. 208, 89 L. Ed. 243 (1944); Comment, 49 MICH. L. REV. 870, 871-73 (1951); 63 HARV. L. REV. 531, 534 (1950).

133. 62 STAT. 965 (1948), 28 U.S.C.A. § 2241(c)(3) (1951).

134. See Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949).

135. Johnson v. Eisentrager, 339 U.S. 763, 768, 785, 70 Sup. Ct. 936, 94 L. Ed. 1255 (1950). But the writ appears to be available to such petitioners for the determination of the question of jurisdiction. *In re* Yamashita, 327 U.S. 1, 66 Sup. Ct. 340, 90 L. Ed. 499 (1946); Homma v. Patterson, 327 U.S. 759, 66 Sup. Ct. 515, 90 L. Ed. 992 (1946). See *Ex parte* Quirin, 317 U.S. 1, 63 Sup. Ct. 2, 87 L. Ed. 3 (1942).

136. See Homma v. Patterson, *supra* note 135 at 768-77; Gordon, *The Right of Alien Enemies to Sue in American Courts*, 36 ILL. L. REV. 809 (1942); Note, 12 GEO. WASH. L. REV. 55 (1943).

137. *Ex parte* Bollman, 4 Cranch 75, 2 L. Ed. 554 (U.S. 1807); United States v. Hamilton, 3 Dall. 17, 1 L. Ed. 490 (U.S. 1795).

138. *Ex parte* Yerger, 8 Wall. 85, 19 L. Ed. 932 (U.S. 1868); Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 493, 508-15 (1951).

139. As in *Ex parte* Quirin, 317 U.S. 1, 63 Sup. Ct. 2, 87 L. Ed. 3 (1942), and *In re* Yamashita, 327 U.S. 1, 66 Sup. Ct. 340, 90 L. Ed. 499 (1946).

140. As in Johnson v. Eisentrager, 339 U.S. 763, 70 Sup. Ct. 936, 94 L. Ed. 1255 (1950).

141. Dynes v. Hoover, 20 How. 65, 15 L. Ed. 838 (U.S. 1857); *In re* Vidal, 179 U.S. 126, 21 Sup. Ct. 48, 45 L. Ed. 118 (1900).

142. *Ex parte* Vallandigham, 1 Wall. 243, 17 L. Ed. 589 (U.S. 1863).

143. U.S. CONST. Art. III, § 2.

144. Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60 (U.S. 1803).

145. See discussion in Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 493, 508-15 (1951).

146. *Ex parte* Clarke, 100 U.S. 399, 25 L. Ed. 715 (1879).

consistently refused to entertain original petitions of persons confined abroad whether citizens[147] or aliens.[148]

It is settled law that state courts are without power to issue writs of habeas corpus for prisoners held in custody under or by color of the authority of the United States, or committed for trial before some court of the United States.[149]

The American view of the rule of international law concerning visiting armed forces in a friendly foreign country is that the members of such forces are exempt from the civil and criminal jurisdiction of that foreign country and are subject to the military law of their own government.[150] American writers on international law have adopted this view,[151] but it has not become international law by virtue of such adoption and has not always been followed by foreign countries.[152] Awkward situations are generally avoided by the concluding of an agreement between the two countries prior to the entrance of the forces of one into the territory of another. Where our forces were in friendly foreign territory prior to the effective date of such an agreement and a foreign court issued a writ of habeas corpus to inquire into the restraint of a member of our forces held under a court-martial sentence, our government, as a matter of high policy, decided not to plead sovereign immunity and to submit to the jurisdiction of the foreign court.[153] The *Manual for Courts-Martial* provides that

147. *In re* Bush, 336 U.S. 971, 69 Sup. Ct. 943, 93 L. Ed. 1122 (1949); Bird v. Johnson, 336 U.S. 950, 69 Sup. Ct. 877, 93 L. Ed. 1105 (1949); *Ex parte* Betz, 329 U.S. 672, 67 Sup. Ct. 39, 91 L. Ed. 593 (1946).

148. *In re* Hans, 339 U.S. 976, 70 Sup. Ct. 1007, 94 L. Ed. 1381 (1950); *In re* Buerger, 338 U.S. 884, 70 Sup. Ct. 183, 94 L. Ed. 543 (1949); *In re* Heim, 335 U.S. 856, 69 Sup. Ct. 126, 93 L. Ed. 404 (1948); *In re* Eckstein, 335 U.S. 851, 69 Sup. Ct. 79, 93 L. Ed. 399 (1948); *In re* Krautwurst, 334 U.S. 826, 68 Sup. Ct. 1328, 92 L. Ed. 1754 (1948); Everett v. Truman, 334 U.S. 824, 68 Sup. Ct. 1081, 92 L. Ed. 1753 (1948); Brandt v. United States, 333 U.S. 836, 68 Sup. Ct. 603, 92 L. Ed. 1119 (1948); *In re* Eichel, 333 U.S. 865, 68 Sup. Ct. 787, 92 L. Ed. 1144 (1948); Milch v. United States, 332 U.S. 789, 68 Sup. Ct. 92, 92 L. Ed. 371 (1947).

149. Tarble's Case, 13 Wall. 397, 2 L. Ed. 597 (U.S. 1871); Ableman v. Booth, 21 How. 506 (U.S. 1858); 62 STAT. 96 (1948), as amended, 63 STAT. 105 (1949), 28 U.S.C.A. § 2241(c) (1950).

150. Expressed by Chief Justice Marshall in Schooner Exchange v. M'Faddon, 7 Cranch 116, 3 L. Ed. 287 (U.S. 1812).

151. 1 HYDE, INTERNATIONAL LAW § 247, pp. 819-20 (2d rev. ed. 1945); LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW § 107, p. 225 (7th ed. 1923); 1 OPPENHEIM, INTERNATIONAL LAW § 445, pp. 759-60 (7th ed. 1948); WILSON, HANDBOOK OF INTERNATIONAL LAW § 54, p. 155 (3d ed. 1939); WOOLSEY, INTERNATIONAL LAW § 68 (5th ed. 1891).

152. It was held not to be the British rule by a judge in Papua, New Guinea, during World War II. Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 493, 525 (1951).

153. This occurred in the Philippines between the time of Philippine independence (July 4, 1946) and the effective date (March 14, 1947) of the Military Bases Agreement. The Philippine Supreme Court expressly affirmed the doctrine of sovereign immunity in this and in one subsequent case, but in another case which arose outside the terms and during the existence of the Military Bases Agreement it granted the writ and discharged the petitioner from custody. For a discussion of these cases, see Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 493, 524-27 (1951).

habeas corpus process of a foreign court shall not be obeyed,[154] leaving the decision in each case for determination at the policy-making level.

When the ground for habeas corpus is unlawful restraint under the authority of a tribunal international in character, no American court has jurisdiction to grant the writ.[155] Although a military tribunal is appointed by an American officer, it is international in character if the appointing officer was acting under the authority of a body of that character, such as a four-power Control Council.[156] The actual result is, as reasonable and practicable as it may be from our unilateral point of view, that persons so restrained have no forum competent to determine the issue and do justice.[157] The World Court as yet has no habeas corpus jurisdiction, and it is upon that court that the jurisdiction over the persons convicted and confined by international tribunals would, and some day, may, be logically conferred.[158]

154. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 216.
155. Hirota v. MacArthur, 338 U.S. 197, 69 Sup. Ct. 1283, 93 L. Ed. 1902 (1948); Flick v. Johnson, 174 F.2d 983 (D.C. Cir. 1949).
156. Flick v. Johnson, 174 F.2d 983 (D.C. Cir. 1949).
157. See Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587, 644 (1949).
158. Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 493, 528 (1951).