Masthead Logo

DePaul Law Review

Volume 3
Issue 1 *Fall-Winter 1953*

Article 6

Constitutional Rights of Persons Before a Court Martial

DePaul College of Law

for a period of time before the transfer,[40] or where the donor had a serious disease which was the direct cause of death but which was unknown to him at the time of transfer.[41] A transfer, however, by a person of advanced age who is knowingly suffering from a disease likely to cause death will almost always be included as a gift in contemplation of death.[42]

In summarizing the cases it is apparent that although the Commissioner frequently assesses a deficiency based upon a claim of contemplation of death, the courts have set up a reasonable standard for the determination of the issue. If the estate representative produces proof that the motives of the decedent were those associated with life and that decedent, although of advanced age, was in generally good health or, if suffering from a serious ailment, was unaware of it or optimistic about recovery, the estate representative will be able to overcome the presumption in favor of the Commissioner. Furthermore the amendment enacted in the Revenue Act of 1950 will relieve estates of the expense of litigation in cases where the transfer was completed more than three years prior to donor's death and permit persons now living to give greater consideration to estate planning by making gifts inter vivos as a means of reducing their Federal Estate Tax.

CONSTITUTIONAL RIGHTS OF PERSONS BEFORE A COURT MARTIAL

From the inception of the draft in 1940 to the present, millions of men have been or are in military service. Upon entering the military life the soldier loses his rights under the civil courts and becomes amenable to court martial. Many questions arise as to the constitutional rights of military personnel. When all appellate remedies within the framework of the military courts have been exhausted, there remains only one remedy to secure the constitutional rights of those convicted—the writ of habeas corpus.[1]

Much confusion has plagued the courts in determining the constitutional rights of persons tried by a court martial. Much of this confusion is attributable to the uncertainty of the scope of the habeas corpus review.

In the case of *In re Grimely*[2] the court concluded that the habeas

[40] Llewellyn v. United States, 40 F. 2d 555 (D.C. Tenn., 1929).

[41] Levi v. United States, 14 F. Supp. 513 (Ct. Cl., 1936).

[42] Estate of Wright, 43 B.T.A. 551 (1941).

[1] 62 Stat. 964 (1948), 28 U.S.C.A. § 2241 (1950). "The writ of habeas corpus shall not extend to a prisoner unless he is in custody in violation of the Constitution or the Treaties of the United States."

[2] 137 U.S. 147 (1890).

corpus writ was limited to a determination of whether or not the military court had the right to try the accused for the offense charged and the inquiry was not to extend beyond that point. A later decision modified this concept to include within the scope of habeas corpus the possible deprivation of constitutional rights.[3] The rationale of this decision was that if a court martial had infringed upon the constitutional rights of a person it had thereby exceeded its jurisdiction. Hence the court martial would be without authority to order the confinement of the petitioner.

As a result of this broadened scope of habeas corpus inquiry the courts began to determine the constitutional rights of military personnel tried by a court martial.

When dealing with the rights specifically enumerated in the Constitution the courts at present recognize them as being applicable to the military. Cruel and unusual punishment is specifically prohibited by the Constitution.[4] In *Ex Parte Dickey*[5] it was held that a civil court could not inquire into the severity of a sentence imposed by a court martial. If the court martial was authorized by law to impose the sentence there would be no defect in jurisdiction and no right in the civil court to go beyond that determination. In *Powers v. Hunter*[6] the petitioner had been given the maximum sentence allowed by statute. Here the court held that it could inquire whether the sentence was so severe as to offend the constitutional prohibition against cruel and unusual punishment. In this case the departure from the strict test of jurisdiction laid down in the earlier decisions is clearly illustrated.

On the question of double jeopardy, *United States v. Maney*[7] is merely a reiteration of the earlier decisions which limited the civil courts to the jurisdictional test. But in the case of *Hunter v. Wade*[8] is reflected the later concept of the scope of the habeas corpus inquiry. It was determined in the *Hunter* case that a federal court had the power to decide if the defendant had been placed in double jeopardy by the military tribunal. On appeal the Supreme Court of the United States agreed with the lower court's holding on the applicability of the double jeopardy provision to military personnel, but the high court found as a matter of law that the accused had not been placed in double jeopardy.[9]

The constitutional protection against unreasonable searches[10] as applied to military prisoners was treated in the case of *Richardson v. Zupp*[11] and though the court seemed to regard this protection as being available to

[3] In re Wrublewski, 71 F. Supp. 143 (S.D. Calif., 1947).

[4] U.S. Const., Amend. 8.

[5] 204 Fed. 322 (D.C. Maine, 1913).

[6] 178 F. 2d 141 (C.A. 10th, 1949).

[7] 61 Fed. 140 (C.C. Minn., 1894).

[8] 169 F. 2d 973 (C.A. 10th, 1948).

[9] Hunter v. Wade, 336 U.S. 684 (1949).

[10] U.S. Const. Amend. 4.

[11] 81 F. Supp. 809 (M.D. Pa., 1949).

the prisoner it was decided that the facts did not warrant a finding that such protection had been denied him.

Although the specific guarantees of the Constitution have been extended to military personnel the less definite but basic rights embraced by the due process clause of the Fifth Amendment have not received similar treatment.

In this area the courts have plotted an uncertain path when faced with specific issues. Some decisions have propounded the rule that a person tried by a court martial has none of the due process protections of the Constitution, but that the military law alone constitutes due process for such person.[12] The strongest case recognizing the due process clause as applying to persons before a court martial is *United States v. Hiatt.*[13] Here the court held:

> An individual does not cease to be a person within the protection of the Fifth Amendment because he joins the nation's armed forces. . . . The guarantee that 'no person shall * * * be deprived of life, liberty or property without due process of law,' makes no exceptions in the case of persons in the armed forces. . . . We conclude that it is open for a civil court in a habeas corpus proceeding to consider whether the circumstances in 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. . . .[14]

The courts have stated the principle that military personnel do not have the same due process of law safeguards that a civilian has,[15] the theory being that the rights of men in the armed forces must be conditioned to meet certain overriding demands of discipline and duty.

Earlier, once it had been recognized that civil courts had some appellate power over military courts in matters other than merely that of jurisdiction, the view took hold that the difference in due process rights between civil and military personnel was only in the realm of procedural due process, and in matters of substance the difference evaporated.[16] The procedural due process variation was explained by the theory that each system of jurisprudence is free to establish its own rules of procedure as long as a fair trial can be obtained.[17] However, this rationale has not been borne out and present day cases do not support this view. By their decisions recent cases have held substantive due process of law is also to be measured differently according to whether it be a civilian or soldier before the court upon a writ of habeas corpus.

[12] United States ex rel French v. Weeks, 259 U.S. 326 (1922); and see concurring opinion of Minton, J., in Burns v. Wilson, 73 S. Ct. 1045 (1953).

[13] 141 F. 2d 664 (C.A. 3d, 1944).

[14] Ibid., at 666.

[15] Burns v. Wilson, 73 S. Ct. 1045 (1953).

[16] Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa., 1946).

[17] Andrus v. McCauley, 21 F. Supp. 70 (E.D. Wash., 1936).

In the case of *Burns v. Wilson*[18] a soldier was held incommunicado for five days at the end of which period he signed a confession. The court martial admitted the confession over the objection of defense counsel and testimony of the defendant that it had been coerced and involuntary. Upon habeas corpus such action was held to be no denial of due process under the Fifth Amendment. In contrast, however, it has been held that the admission of such confessions in state courts is a violation of due process of law under the Fourteenth Amendment.[19] In the *Burns* case the court stated that the ruling in *McNabb v. United States*,[20] which held inadmissible a confession obtained from a person held incommunicado by federal authorities for five days, did not control. The court reasoned that the *McNabb* decision resulted solely from the fact that a federal statute requiring immediate arraignment had been violated. But the *McNabb* case specifically stated it was not deciding the constitutional issue when the case could be decided upon the basis of the violation of the federal statute. Also, Mr. Justice Reed in his dissent in the *McNabb* case lamented the decision being made upon the basis of the statute. The dissent stated that the court should have determined whether the facts constituted a violation of due process.

Concerning the right to adequate counsel, the court in *Hiatt v. Brown*,[21] granted a writ of habeas corpus when it found that the petitioner had incompetent counsel at his court martial. Upon appeal, the Supreme Court reversed the court below, holding that it was error to review the competency of counsel to determine compliance with due process of law.[22] In cases before the civil courts it has been held that the right to competent counsel is a part of due process of law. These cases view the defendant's right to a fair trial as being violated by not having competent counsel.[23] Again there has emerged the philosophy that constitutional rights vary according to the status of the particular defendant.

Under the Articles of War[24] and the current Uniform Code of Military Justice[25] a system of pre-trial investigation has been provided by Congress.

[18] 73 S. Ct. 1045 (1953).

[19] Watts v. Indiana, 338 U.S. 49 (1949); Turner v. Pennsylvania, 338 U.S. 69 (1948); Harris v. South Carolina, 338 U.S. 68 (1948).

[20] 318 U.S. 332 (1942).

[21] 175 F. 2d 273 (C.A. 5th, 1949).

[22] Hiatt v. Brown, 339 U.S. 103 (1950).

[23] United States ex rel Feeley v. Regan, 166 F. 2d 976 (C.A. 7th, 1948).

[24] 41 Stat. 802 (1920), 10 U.S.C.A. § 1542 (1927). "No charge shall be referred to trial until a thorough and impartial investigation thereof shall be made."

[25] 64 Stat. 118 (1950), 50 U.S.C.A. § 603 (1951). "No charge or specification shall be referred to a general court martial for trial until a thorough and impartial investigation of all matters set forth has been made. . . ."

Prior to 1949 the courts freely reviewed by way of habeas corpus the adequacy of pre-trial investigation.[26] In 1949, *Humphrey v. Smith*[27] held that civil courts are precluded from inquiry into the adequacy of a pre-trial investigation. The court further voiced the view that even the failure to hold a pre-trial investigation would not destroy the jurisdiction of a court martial. The court concluded that such investigations should be left to the good faith of the army. A strong dissent by three judges was made to this case, and the dissent, it is submitted, seems to be the more desirable view.[28] The majority opinion has been reaffirmed by the Supreme Court in a later case.[29] Apparently, the present court does not regard the failure of a military court to observe the procedure prescribed by Congress as a violation of due process of law.

Erroneous rulings by a court martial on the admission or the exclusion of evidence are held not to be reviewable by the civil courts.[30] It is reasoned that any such error would not go to the jurisdiction of the court martial, the only issue before a civil court in a habeas corpus petition. Here again we have an application of the limited scope which existed earlier. In an earlier decision it had been deemed proper for a civil court to determine if there was any evidence to sustain a conviction.[31] This rule was predicated upon the theory that a person convicted without any evidence has been deprived of his liberty without due process of law and is consonant with decisions involving persons convicted by a civil court.[32]

In summation, the constitutional protections of those in the military service seem to have passed through several phases of recognition. In the early cases no redress of violations was available. The strict test of jurisdiction over the defendant effectively prevented inquiry into the deprivation of constitutional rights. After it had been firmly established that due process of law in civil cases included substantive rights, the courts began to inquire into the observance of these rights in court martials. Concurrently, the courts also made inquiry where specific guarantees of the Constitution were raised in a habeas corpus petition. Commencing with the case of *Humphrey* v. *Smith*[33] in 1949 there has been a noticeable trend back to the strict test of jurisdiction where due process of law

[26] Henry v. Hodges, 171 F. 2d 401 (C.A. 2d, 1948).

[27] 336 U.S. 695 (1949).

[28] "Congressional belief in the importance of preliminary investigation should not now be frustrated by a holding that noncompliance cannot be attacked by habeas corpus." Ibid., at 703.

[29] Hiatt v. Brown, 339 U.S. 103 (1950).

[30] McCellen v. Humphrey, 83 F. Supp. 510 (M.D. Pa., 1949).

[31] Hayes v. Hunter, 83 F. Supp. 940 (D.C. Kan., 1948).

[32] Ex parte Jones, 96 Fed. 200 (C.C. Ala., 1899).

[33] 336 U.S. 695 (1949).

has been put in issue. But where a specific guarantee of the Constitution is alleged the present day courts will probably make inquiry concerning its violation.

The attitude that all citizens except those in the military forces shall have their substantial rights protected seems inconsistent with the spirit of the Constitution. In this area a serious reappraisal of the consequences of this view seems necessary. One remedy might be a post-conviction hearing act similar in principle to the statute recently enacted in Illinois.[34] The Illinois act originated from the confusion generated by the inability of the courts to adjudicate properly the claims of prisoners that constitutional rights had been violated at their trial. This method of review provides a simple, direct hearing and obviates the limitations of habeas corpus.

THE DEFENSE OF ENTRAPMENT

It is well known and well settled that a criminal act and intent are essential elements for the commission of a crime, and want of either of these elements is fatal to criminal prosecution. A successful defense to criminal prosecution is entrapment, the seduction or improper inducement by officers of the law to commit a crime,[1] when it can be shown by the accused that the original intention was not his, or that there was lacking on his part some act necessary to complete the crime.

If the criminal intent originates in the mind of the law enforcer or entrapping person and the accused is lured into the commission of the offense, there can be no conviction.[2] *Rex v. Martin*,[3] an old English case, readily illustrates such entrapment wrongful because of the origin of intent. A prisoner of war, in England, was directed by his keepers to go beyond the parole limits merely so that he could be prosecuted for escape. The prisoner, once beyond the limits, was promptly arrested. The court, however, held that he could not be convicted for escaping or attempting to escape because he had not intended to escape.

Generally, courts have no difficulty in refusing to convict a person where the genesis of the idea or real origin of the criminal act clearly springs, not from the accused, but from the entrapper, and his purpose is to arrest merely for the sake of arresting. Such over-zealous behavior by law officers is not tolerated by the courts in most jurisdictions.[4] Some jurisdictions, however, refuse to excuse the commission of a crime when the initiative or intent did not spring from the accused, and the entrapper's

[34] Ill. Rev. Stat. (1951), c. 38, §§ 826–832.

[1] Morei v. United States, 127 F. 2d 827 (C.A. 6th, 1942).

[2] 15 Am. Jur., Criminal Law § 336 (1938). [3] 168 Eng. Rep. 757 (1811).

[4] Love v. People, 160 Ill. 501, 43 N.E. 710 (1896); Browning v. State, 31 Ala. App. 137, 13 S. 2d 54 (1943).