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HABEAS CORPUS AND COURT-MARTIAL DEVIATIONS FROM THE ARTICLES OF WAR

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"A civilian entering the army must of course surrender many of the safeguards which protect his civilian liberties. . . . The civilian must realize that in entering the army he becomes a member of a closely knit community whose safety and effectiveness are dependent upon absolute obedience to the high command; and that for his own protection, as well as for the safety of his country, army justice must be swift and sure and stern. He must realize the truth of what was well said by Lord Birkenhead in commenting on the British system of military justice that 'where the risks of doing one's duty is so great, it is inevitable that discipline should seek to attach equal risks to the failure to do it.' "[1]

This is true even with regard to the "fundamentals of fair play"[2] embodied in the concept of due process of law. "To those in the military. . . service of the United States the military law is due process."[3] This is not to say, however, that those subject to military discipline are deprived of all procedural safeguards. On the contrary, the system of military justice that has been developed is capable of preserving the rights of the accused and of affording him a fair trial. And "the due process clause guarantees to [members of the armed forces] that this military procedure will be applied to them in a fundamentally fair way."[4] As summarized by the Vanderbilt Advisory Committee on Military Justice, this procedure includes a preliminary investigation to determine whether a formal charge should be laid; the formulation of the charge in precise terms in case a prosecution is needed; the appointment of a general court by the commander of the division, consisting of at least five officers of whom one must be a law member with the qualifications of an experienced lawyer, all sworn to give a fair and impartial trial to the accused; the appointment of counsel for the prosecution

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1. Report of War Department Advisory Committee on Military Justice (1946) 5.

2. Mr. Justice Frankfurter in Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940).

3. Reaves v. Ainsworth, 219 U.S. 296, 304 (1911).

4. United States *ex rel.* Innes v. Hiatt, 141 F. 2d 664, 666 (C.C.A. 3d 1944).

and the defense; an automatic review of the judgment of the court by the appointing authority, after receiving the advice of his staff judge advocate, who may set aside a verdict of guilty or reduce a sentence but may not increase it; and finally an additional automatic review in the more important cases in the Judge Advocate General's Department.[5] "It cannot be doubted," concludes the Committee, "that such a system is capable of speedy action and the safeguarding of rights of the accused."[6]

At the same time, it is clear that there are instances where the above procedure is not followed as closely as it should be. In such cases, what redress does the accused have? Is he limited to the internal review provided for within the Department of the Army or does he have a further right to resort to the ordinary courts?

As a starting point, it is settled that "courts martial form no part of the judicial system of the United States,"[7] and hence are not subject to the appellate jurisdiction of the civil courts. "With the sentences of courts martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs. . ., civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts."[8]

Implicit in this is the requirement that the military tribunal has acted within its jurisdiction. The question of *vires* is one which is always open in the civil courts. "If a court martial has no *jurisdiction over the subject matter of the charge* it has been convened to try, or shall inflict a punishment *forbidden by the law,* though its sentence shall be approved by the officers having a revisory power of it, *civil courts* may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction and give him redress."[9]

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5. Report, 3.
6. *Ibid.*
7. Kurtz v. Moffitt, 115 U.S. 487, 500 (1885). See In re Yamashita, 327 U.S. 1, 8 (1946).
8. Dynes v. Hoover, 20 How. 65, 82 (U.S. 1857).
9. *Ibid.* See Lieber, *The Supreme Court on the Military Status,* 31 AM. L. REV. 342 (1897). The most recent example in the Supreme Court is United States *ex rel.* Hirshberg v. Cooke, 69 Sup. Ct. 530 (1949), where the decision of a naval court-martial was set aside for want of jurisdiction.

In this respect, courts-martial are treated as inferior tribunals, subject to the controlling jurisdiction of the civil courts, which is derived from the power of the Court of King's Bench in England. "Such tribunal is not an autocrat free to act as it pleases, but is an inferior tribunal subject to the jurisdiction which the Court of King's Bench for centuries, and the High Court since the Judicature Acts, has exercised over such tribunals."[10] This theory of judicial control is well expressed by Erskine in an early case. "The court-martial which pronounced sentence on the prisoner is a Court of Inferior and limited jurisdiction; and if it appear upon the face of their proceedings that they have exceeded their authority, this Court, though not a Court of Error for the purpose, have [sic] power on a return to a habeas corpus to interfere on behalf of the subject aggrieved."[11]

Looked at in this way, judicial control over the decisions of courts-martial bears a close relation to court control of the acts of public officers. The theory upon which control is based is that military tribunals, like other bodies composed of public officers, have marked out for them by law a certain area of "jurisdiction." Within the boundaries of this area they can act freely according to their own discretion, and the civil courts will respect their action as final. But if they overstep those bounds, then the courts will intervene. Viewed in this light, the law of judicial control of courts-martial becomes simply a branch of the law of *ultra vires*.[12]

The *vires* within which the system of military justice must operate is marked out by the Articles of War, enacted by the Congress in the exercise of its constitutional power "to make rules for the government and regulation of the land and naval forces."[13] It is in them that is to be found the law governing courts-martial, and it is from them that the latter derive their authority.

Generally speaking, where an inferior tribunal is acting under powers conferred by statute, it must follow the provisions of the enabling Act, else its action is invalid. The jurisdiction of courts-martial is derived from the Acts of Congress embodying the Articles of War. "A court martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is

10. Rex v. Board of Education [1910] 2 K.B. 165, 179.
11. Rex v. Suddis, 1 East 306, 312, 102 Eng. Rep. 119, 121 (1801).
12. Paraphrasing DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 41 (1927).
13. Carter v. Roberts, 177 U.S. 496, 497 (1900).

without jurisdiction."[14] The authority of the civil courts to intervene in cases where the provisions of the enabling legislation are not followed is, under our polity, inherent in the judicial power. When Congress passes an Act empowering military tribunals to exercise judicial functions, the power of those tribunals is circumscribed by the authority granted. "The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."[15]

That the civil courts can intervene in cases where the provisions of the Articles of War are not complied with is shown by *McClaughry v. Deming*.[16] Petitioner there, a volunteer officer, asserted that he had been tried by a court-martial composed wholly of officers of the Regular Army, in violation of the seventy-seventh Article of War. That Article provided that "Officers of the Regular Army shall not be competent to sit on courts-martial, to try officers or soldiers of other forces . . ." After finding that the Volunteer Army of 1899, of which petitioner was an officer at the time of his trial, came within the term "other forces" in Article 77, the Court went on to assert that the failure to comply with the provisions of that Article was a jurisdictional defect. The Government had argued that Article 77 related "entirely to the competency of members of a court-martial, not at all to its jurisdiction."[17] To this proposition, the Court could not agree. "What jurisdiction can a court-martial have which is composed of officers incompetent to sit on such court, of officers who are placed there in direct and plain violation of the act of Congress?"[18] Or, as stated by Circuit Judge Sanborn, in the court below, "In the army of the United States courts-martial derive their power —their jurisdiction—from the acts of Congress. Neither the silence, the consent, nor the agreement of the parties can confer it if it is not granted by the statutes. This court-martial derived no power or jurisdiction from the acts of the Congress of the United States, because it was constituted in direct violation of, and not in accordance with, them. It was therefore entirely without jurisdiction to try the petitioner, and its judgment against him was absolutely void."[19]

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14. McClaughry v. Deming, 186 U.S. 49, 62 (1902).
15. Stark v. Wickard, 321 U.S. 288, 310 (1944).
16. 186 U.S. 49 (1902).
17. *Id.* at 54.
18. *Id.* at 63.
19. Deming v. McClaughry, 113 Fed. 639, 652 (C.C.A. 8th 1902).

With the *Deming* case is to be contrasted *Swaim v. United States,*[20] where a majority of the court-martial was composed of colonels, officers inferior in rank to the appellant, whose rank was that of brigadier-general, although the seventy-ninth Article of War provided that "officers shall be tried only of [sic] general courts-martial; and no officer shall, when it can be avoided, be tried by officers inferior to him in rank."[21] Here, said the Court, the action of the court-martial could not be attacked for lack of jurisdiction. The language of Article 79 implied a discretion in the appointing authority as to whether the convening of a court of members inferior in rank to the accused was "avoidable." "In the present case, several considerations might have determined the selection of the members of the court, such as the health of the officers within convenient distance, or the injury to the public interests by detaching officers from their stations. . . . The sentence cannot be collaterally attacked by going into an inquiry whether the trial by officers inferior in rank to the accused was or was not avoidable."[22]

A similar result is reached with regard to the provision in the eighth Article of War that "The authority appointing a general court-martial shall detail as one of the members thereof a law member, who shall be a member of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service. . . ." Clearly, under this, the provision for the appointment of a law member is mandatory and a court in which the convening order did not designate a law member is not legally constituted.[23] The question of the "availability" of a member of the Judge Advocate General's Department is, however, quite a different matter.

In a recent case,[24] petitioner urged that the court-martial was improperly constituted in that the officer designated as the law member was not a member of the Judge Advocate General's Department "although a member of such department was available for the purpose." Petitioner's argument on this point was based upon the fact that the trial judge advocate and the officer who was appointed as defense counsel for another defendant were

20. 165 U.S. 553 (1897).
21. This is now Article of War 16.
22. 165 U.S. at 560. See TILLOTSON, THE ARTICLES OF WAR ANNOTATED 34 (3d ed. 1944).
23. DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL, 1912-1940 (1942) 175.
24. Henry v. Hodges, 76 F. Supp. 968 (S.D.N.Y. 1948).

both members of the Judge Advocate General's Department. Hence, he claimed, at least two members of that department were "available" within the meaning of the eighth Article of War. This argument was rejected by both the district court and the Court of Appeals for the Second Circuit.[25] The language of Article 8 vests a discretion in the appointing officer as to whether or not the Judge Advocate General's Department officer is available as a law member. "The whole question," asserted Judge Learned Hand, "is especially one of discretion; and, if it is ever reviewable, certainly the record at bar is without evidence which would justify a review. The commanding officer who convenes the court must decide what membership will be least to the 'injury of the service,' and what officers are 'available.' 'Available' means more than presently 'accessible'; it demands a balance between the conflicting demands upon the service, and it must be determined on the spot."[26]

The *Swaim* and *Henry* cases do not detract from the general proposition that the civil courts can inquire into the question of whether the provisions of the Articles of War have been followed in a court-martial proceeding. Unless the language of the particular Article implies a discretion in the military authorities with regard to the procedure to be followed, the statutory provisions must be strictly complied with. Otherwise, the act of the military tribunal is *ultra vires* and can be attacked in the ordinary courts.

The problem of whether a military tribunal which has failed to comply with a particular Article of War is thereby deprived of jurisdiction is dealt with in several recent decisions involving the effect of the seventieth Article of War.[27] The pertinent portion of that Article reads as follows:

"No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be

25. Henry v. Hodges, 171 F. 2d 401 (C.C.A. 2d 1948). *Cf.* Durant v. Hiatt, 81 Supp. 948 (N.D. GA. 1948)

26. *Id.* at 403. *But see* Brown v. Hiatt, 81 F. Supp. 647 (N.D. GA. 1948). A.W. 8 has recently been amended so as to provide that the law member of a court-martial shall be a J.A.G. officer. Selective Service Act of 1948, Tit. II, § 206, Pub. L. No. 759, 80th Cong., 2d Sess. Compare DeWar v. Hunter, 170 F. 2d 993, 996 (C.C.A. 10th 1948), on the provision of A.W. 70 [now A.W. 46(b)] giving to the accused, at the preliminary investigation, full opportunity to cross-examine witnesses against him "if they are available."

27. Under Title II of the Selective Service Act of 1948, this is now A.W. 46(b).

made in the interest of justice and discipline . . . At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation they shall be accompanied by a statement of the substance of the testimony taken on both sides."

The Judge Advocate General has held that where the record showed affirmatively that no investigation of the charges had been made prior to the trial, the court-martial was without jurisdiction. "The provisions of A. W. 70 with reference to investigating charges are mandatory and there must be a substantial compliance therewith before charges can legally be referred for trial. A court-martial is without jurisdiction to try an accused upon charges to it for trial without having been first investigated in substantial compliance with the provisions of A. W. 70 and, in such a case, the court-martial proceedings are void *ab initio*."[28]

Later J. A. G. holdings have, however, implied that non-compliance with Article 70 is not jurisdictional. "Although these [earlier] cases have not been expressly overruled, opinions on analogous points indicate that the first three paragraphs of Article of War 70 have come to be regarded as directory only in all respects and that failure to comply therewith is not fatal error."[29] The present view of the Judge Advocate General is that expressed in a recent decision: "The pre-trial investigation directed by Article of War 70 . . . is not, in any sense, jurisdictional. It is an administrative procedure prescribed by Congress for the purpose of informing the appointing and referring authority as to the facts of an alleged offense against the Articles of War committed by a member of his command to the end that he may determine the proper course of disciplinary action. It is directory and not mandatory in its operation and confers upon an accused no rights the deprivation of which affects the jurisdiction of the court to which charges against him are referred for trial."[30]

"It is with this observation as to the nature of the requirements of 'A. W. 70,' that we cannot agree," asserted District Judge Ryan in *Henry v.*

28. DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL, 1912-1940, 292.

29. Floyd, 17 J.A.G. Board of Review 149. The substance of this opinion is quoted in Henry v. Hodges, 76 F. Supp. at 972.

30. Ruckman, 72 J.A.G. Board of Review 267.

Hodges.[31] In that case, one Captain Myers had been designated to investigate an alleged misappropriation of silver plate by Military Government Officers in Waldmünchen, Germany. After interviewing numerous witnesses, he submitted a report in which he concluded that "silver plate was illegally cut and taken by several MG Officers" and that "Capt. Henry [the petitioner for habeas corpus] appears to be the main figure in the affair." After this report had been made, the commanding officer of the Third Military Government Regiment prepared the charges upon which petitioner was tried; and then appointed Captain Myers as the investigating officer pursuant to the provisions of Article of War 70 to conduct the required pre-trial investigation.

On the habeas corpus proceeding, petitioner contended that he did not receive the benefit of the "thorough and impartial investigation" required by A. W. 70. With this, the district court agreed. "Can it be fairly said that one who assumes the duties of an investigator is not disqualified by reason of the fact that he has previously expressed in a written report his opinion as to the guilt of the accused, when such report has been made the basis of the very charge he is investigating?"[32] The answer to this question, said Judge Ryan, "is obvious. It is manifestly impossible for him to conduct the thorough and impartial investigation contemplated and directed by Act of Congress."[33] Since the investigating officer was not impartial, the court goes on, the court-martial was without jurisdiction. "The requirement that there be a thorough and impartial pre-trial investigation is specifically ordained by Act of Congress. The failure to accord an accused this right appears to be jurisdictional rather than procedural."[34]

That failure to afford the "thorough and impartial investigation" called for by Article of War 70 will defeat the jurisdiction of the court-martial appears to follow from the language of that Article.[34a] "No charge will be re-

31. 76 F. Supp. 968, 971 (S.D. N.Y. 1948).
32. *Id.* at 974.
33. *Ibid.* Compare Becker v. Webster, 171 F. 2d 762, 764 (C.C.A. 2d 1949), and the dissenting opinion of Frank, J., at p. 768.
34. *Id.* at 971. Compare Jackson v. Gough, 170 F. 2d (C.C.A. 5th 1948); Benjamin v. Hunter, 169 F. 2d 512, 514 (C.C.A. 10th 1948); Anthony v. Hunter, 71 F. Supp. 823 (D. Kan. 1947); Note, 15 U. of CHI. L. REV. 763 (1948); Note, 57 YALE L. J. 483 (1948). But compare the observations of Murrah, Circuit Judge, concurring in DeWar v. Hunter, 170 F. 2d 993, 997 (C.C.A. 10th 1948).
34a. Article 32 (d) of the proposed Uniform Code of Military Justice now pending in Congress (S. 857; H.R. 2498) provides that failure to follow the requirements for pre-trial investigation "shall not constitute jurisdictional error."

ferred" to the court-martial until after the required investigation shall have been made. There is no conferring of discretion such as was involved in the *Swaim* case, discussed above. Here, the case comes within the normal principle governing judicial control of the decisions of inferior tribunals: Unless the statutory provisions are followed, the decision is *ultra vires* and cannot stand.

The argument the other way loses sight of the role of the courts in holding tribunals in the Executive branch to the jurisdiction conferred upon them by the legislature. If the Vanderbilt Committee on Military Justice was correct in its assertion that the system of military justice provided for by Congress in the Articles of War "was not followed as closely as it should have been and that the system not infrequently broke down, . . ."[35] then certainly the best safeguard against such breakdowns would seem to be the assertion of judicial control to ensure conformity to the statutory procedure. With regard to A.W. 70, the Committee recommended that "The provision of Article of War 70, that no charge will be referred to a general court-martial for trial until after a thorough, impartial investigation thereof shall be made, should be enforced."[36] What surer way is there of securing such enforcement than through the intervention of the civil courts where Article 70 is not followed? The mere possibility of such intervention will, indeed, be enough in most cases to ensure compliance.

Judge Ryan's holding that compliance with Article 70 is a condition precedent to the jurisdiction of the court–martial is thus sound, even though one may disagree with his conclusion that, on the facts in *Henry v. Hodges,* an "impartial" investigation was not afforded.

The mere fact that the investigation officer has come to a tentative conclusion with regard to the guilt of the accused should not of itself require a finding that the investigation was not "impartial" as required by A.W. 70. There must be evidence of a continuing bias, of a closed mind which would prevent the investigating officer from considering the accused's side of the controversy. There was no such evidence in this case. As stated by Judge Learned Hand, on appeal in *Henry v. Hodges,* "Rightly or wrongly, judges are credited pro tanto with enough detachment to be able to re-examine impartially what they have done; at

35. Report, 3.
36. *Id.* at 13. Compare DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL 1912-1940, 293.

least when, as here, the final disposition will in the end be determined by others. There is not a syllable to support the conclusion that in this case Captain Myers was unwilling to reconsider the conclusions to which he had come before."[37]

If this case had involved a law court or an administrative agency, it seems clear that there was not enough evidence of bias for disqualification to have resulted. With respect to a judge, prejudgment of a case alone is not enough to disqualify. Under the relevant federal statute,[38] a *personal* bias is necessary. "It is clear that the prejudgment of a case does not necessarily demonstrate the existence of any personal bias or prejudice either for or against any party to a suit."[39] As recently stated by Judge Yankwich, in a case where it was alleged that he had come to a tentative conclusion against defendants, the bias required to disqualify "is not the possession of definite views on the law or even a 'pre-judgment' of the controversy, but a personal attitude of enmity directed against the suitor making the application."[40]

A like result is reached where prejudgment is alleged on the part of an administrative agency. Thus, in a case arising under the Longshoremen's and Harbor Workers' Compensation Act,[41] the insurer claimed that the Deputy Commissioner who made the award was biased. This was based on his statement in a letter that so far as he was concerned there was no need of a hearing in the case which he then knew as well as he should at the conclusion of the hearing, and the further statement that there was no way to protect the right of the claimant "except to go into a hearing and fully develop the record, in such shape that it will stand an appeal to the courts if the carrier takes an appeal." This alone, said Judge Augustus Hand, was not enough to show that the insurer had been denied a fair hearing. "However tactless or undesirable such remarks may have been, they fell short of a statement that nothing that might be shown at such a hearing would change his mind."[42]

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37. 171 F. 2d 401, 402 (C.C.A. 2d 1948) .
38. 36 STAT. 1090 (1911), 28 U.S.C.A. § 25 (1940).
39. Note, 33 GEO. L. J. 311, 313 (1945).
40. Cole v. Loew's, 76 F. Supp. 872, 876 (S.D. Cal. 1948); Eisler v. United States, 170 F. 2d 273 (App. D. C. 1948); see Price v. Johnston, 125 F. 2d 806, 811 (C.C.A. 9th 1942); Henry v. Speer, 201 Fed. 869, 872 (C.C.A. 5th 1913).
41. 44 STAT. 1424 (1927), 33 U.S.C.A. § 901 (1940).
42. Lumber Mut. Casualty Ins. Co. v. Locke, 60 F. 2d 35, 38 (C.C.A. 2d 1932).

Similarly, in *Federal Trade Commission v. Cement Institute*,[43] where a charge of bias on the part of the F.T.C. was based upon reports of the Commission which "make it clear that long before the filing of this complaint the members of the Commission at that time, or at least some of them, were of the opinion" that the practice charged in this case was an unfair method of competition, the Court held that belief did not disqualify the Commission. "The fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices."[44]

If a judge or an administrative agency may not be disqualified for bias on the ground of having prejudged the issue prior to the hearing, the same should be true of the investigating officer appointed under Article of War 70. In a case like *Henry v. Hodges*, A.W. 70 was thus substantially complied with. The court-martial there had jurisdiction, even if we assume that the failure to follow that Article would have been a jurisdictional defect.

For a civil court to intervene because the investigation prior to the court-martial was not "impartial" as required by Article 70, more would have to be shown than was the case in *Henry v. Hodges*. A decision in the Third Circuit[45] illustrates this. There, too, as in the *Henry* case, the investigating officer, one Lieutenant Todd, had been in charge of the original inquiry which resulted in petitioner's being held. But the court found more than the mere "prejudgment" involved in the *Henry* case. His original inquiry appeared to have so closed Todd's mind that he considered an examination into the full facts unnecessary at the investigation held pursuant to Article 70. Thus, there was a failure on his part to examine a vital witness. In addition, the court was strongly influenced by the fact that Todd participated in the court-martial as assistant trial judge advocate. It may well be that these factors add up to "partiality" so as to violate A.W. 70, even if prejudgment alone would not.

It should be noted that in *Smith v. Hiatt*, the case just discussed, the civil court was not limited to the military record in determining

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43. 333 U. S. 683 (1948).
44. *Id.* at 701. See Note, 41 COL. L. REV. 1384 (1941). For an interesting English analogy, see Franklin v. Minister of Town and Country Planning [1947] 1 All E.R. 296, 398, reversed on another point [1948] A.C. 87.
45. Smith v. Hiatt, 170 F. 2d (C.C.A. 3d 1948).

whether the "thorough and impartial" investigation required by Article 70 had been held. If failure to comply with the requirements of that Article is a jurisdictional defect, this would appear to be the proper approach. The question of "impartiality" is one to be determined by the civil court upon its own independent judgment, and, in determining it, the court is not limited to the military record. This is true even though procedure by habeas corpus does not normally permit a reconsideration of issues of fact. Where the fact is one upon which the military jurisdiction depends, the civil court should determine for itself whether the jurisdictional fact existed.[46] This result is not changed by the recent amendment of the Articles of War which expressly provides that the proceedings, findings, and sentences of courts-martial shall be "final and conclusive."[47] Such a provision for "finality" does not bar judicial inquiry into jurisdictional questions.[48]

If this issue is one upon which the military power to act depends, the civil court should not be limited by the circumstance that the issue is one of fact. "It is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure—such a tribunal would be autocratic, not limited —and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact; a Court with jurisdiction confined to the city of London cannot extend such jurisdiction by finding as a fact that Piccadilly Circus is in the ward of Chepe."[49]

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46. See Givens v. Zerbst, 255 U.S. 11, 19-20 (1921).

47. Article of War 50h (Title II, Selective Service Act of 1948; act June 24, 1948, Pub. L. 759, 80th Cong.), which became effective February 1, 1949, provides as follows:

"h. Finality of court-martial judgments.—The appellate review of records of trial provided by this article, the conflicting action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53."

48. See United States *ex rel.* Trinler v. Carusi, 166 F. 2d 457, 461 (C.C.A. 3d 1948). Compare Aycock-Lindsey Corp. v. United States, 171 F. 2d 518 (C.C.A. 5th 1948).

49. Rex v. Shoreditch Assessment Committee, [1910] 2 K.B. 859, 880.

Judicial control based upon the law of *ultra vires* thus allows inquiry by the courts into the jurisdictional facts upon which the military tribunal's power to act depended. Some courts, indeed, seem to go even further in examining the military record. Thus, in a case in the Third Circuit,[50] the inquiry into the record of the court-martial was broadened to include an examination of the question of whether the accused had been denied due process. "We think," asserted Judge Maris, "that this basic guarantee of fairness afforded by the due process clause of the fifth amendment applies to a defendant in criminal proceedings in a federal military court as well as in a federal civil court. An individual does not cease to be a person within the protection of the fifth amendment of the Constitution because he has joined the nation's armed forces and has taken the oath to support that Constitution with his life, if need be."[51] The court here implies that the broadening of the scope of habeas corpus in the federal courts in recent years to test the validity of a conviction for crime by a civil court where the denial of due process is alleged[52] applies as well to convictions by courts-martial. Under this view, there is a wide review of the record below to ascertain whether there was any fundamental unfairness in the trial. Where this approach is taken, due process is treated as a jurisdictional item. It is for the civil court to see that the "procedures of the military law were . . . applied to [the accused] in a fundamentally fair way."[53]

It may be that these cases go too far in treating due process as a jurisdictional requirement. Certainly this is true if by due process is meant the procedure guaranteed to defendants in civil courts. That it means something less in cases where the proceedings of courts-martial are concerned is recognized in the *Innes* case. As to those in the armed forces, the opinion there admits, "due process of law means the application of the procedure of the military law. Many of the procedural safeguards which have always been observed for the benefit of defendants in the civil courts are not granted by the military law."[54] At the same time, it is for the civil courts to see that the procedure prescribed by military law is applied to members of the military forces "in a fundamentally fair way."[55]

50. United States *ex rel.* Innes v. Hiatt, 141 F. 2d 664 (C.C.A. 3d 1944).
51. *Id.* at 666.
52. *Id.* at 665-66.
53. Hicks v. Hiatt, 64 F. Supp. 238, 250 (M.D. Pa. 1946).
54. 141 F. 2d 666.
55. *Ibid.*

This appears to be but another way of stating the principle that the courts can intervene when the procedural provisions of the Articles of War have not been substantially complied with. If "to those in the military . . . service of the United States the military law is due process, . . ."[56] then judicial control to ensure due process is, in effect, judicial control to ensure conformity to the procedure prescribed by the Articles of War. The result is, therefore, the same whether we adopt the due process approach of Judge Maris in the *Innes* case or whether we follow the more traditional view which treats the law of court control of courts-martial as a branch of the law of *ultra vires*. In either case, the civil courts can set aside the decisions of courts-martial when the provisions of the Articles of War have not been substantially complied with.[57]

56. Reaves v. Ainsworth, 219 U.S. 296, 304 (1911).

57. Article 76 of the proposed Uniform Code of Military Justice now pend-pending in Congress (S. 857; H.R. 2498) contains provisions substantially identical with those of present Article of War 50 (h). See note 47, *supra*. Article 67 of the proposed Uniform Code provides for review of certain court-martial cases by a Judicial Council composed of three civilians appointed by the President, with the compensation and allowances of judges of a United States Court of Appeals. If it should be determined that this body is a United States court established under Article III of the Constitution, presumably its decisions would be subject to collateral attack only in cases where judgments of a United States Court of Appeals would be subject to such an attack. Considering the language of the proposed enactment, it is improbable that the contemplated Judicial Council would be held to be a true court. As to previous similar proposals see Fratcher, *Appellate Review in American Military Law*, 14 Mo. L. Rev. 15, 43, 59, note 158 (January 1949).