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Constitutional Law--Courts-Martial--Jurisdiction Over Ex-Servicemen

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sufficient for relief under 28 U.S.C. § 2255 (1952). This rule stands without exception. However, stronger allegations might, in a proper case, bring § 2255 into play. Thus, *Jones v. Huff*, 152 F.2d 14 (D. C. Cir. 1945), allowed a hearing under § 2255. There numerous obvious errors had been committed by the defendant's counsel, e. g., he had failed to object to admission in evidence of an involuntary confession, to call witnesses who would have established the defendant's innocence, to offer a relevant defense and to take steps to obtain an examination of handwritings in a forgery case. See *Adams v. United States*, 222 F.2d 45 (D. C. Cir. 1955) where the defendant's criticism of his attorney was made at the time of sentencing in the presence of the court, but the petition was denied, since the trial court had had an opportunity to decide the issue at that time.

The courts lay down two general reasons for this strict standard. One is that they do not want to open a "Pandora's box of accusations" for every person convicted of a crime and sentenced. *United States v. Malfetti*, 125 F. Supp. 27, 30 (D.N.J. 1954). "If the test to be applied depended upon the skill with which a defendant was represented, there would never be any finality to a trial." *Miller v. Hudspeth*, 176 F.2d 111 (10th Cir. 1949). The other and closely related reason, is that the courts do not think they should use "hindsight", or "second guessing", in determining if trial strategy had been good or bad. *Hillman v. State*, *supra* at 188, dissenting opinion.

In the principal case the court indicated that the defendant's allegations of trickery should have been asserted in the trial court and by appeal. But it would seem that the defendant would not be able to present a case reversible under due process, whether on appeal or by habeas corpus, or under § 2255, since the substantive test for denial of due process does not appear to have been met. The defendant still would be denied the relief he sought. It is little consolation to the defendant to advise him that his mistake was only procedural, when it was substantive as well.

G. T. L.

CONSTITUTIONAL LAW -- COURTS-MARTIAL -- JURISDICTION OVER EX-SERVICEMEN. — Five months after being honorably discharged from the Air Force, a former serviceman was arrested by military authorities on a charge of murder committed while serving as an airman in Korea. He was taken to Korea to stand trial under au-

thority of art. 3(a) of the Uniform Code of Military Justice which authorizes courts-martial after separation from the services of former servicemen for certain crimes committed during service and for which accused cannot be tried in a federal court. Upon petition for habeas corpus the district court released the prisoner without passing on the validity of art. 3(a). The court of appeals reversed the decision of the lower court upholding the constitutionality of this section of the Uniform Code of Military Justice. The Supreme Court granted certiorari. *Held*, that Congress has no power to subject a discharged serviceman to trial by courts-martial for offenses committed while in the service, thus depriving him of the constitutional safeguards protecting persons accused of crime in a federal court. Judgment reversed. Three Justices dissented on the ground that the constitutional provision empowering Congress to regulate the armed forces when read with the necessary and proper clause in art. I, § 8, cl. 18, was sufficiently broad to sustain this provision of the Uniform Code of Military Justice. *United States v. Quarles*, 76 Sup. Ct. 1 (1955).

The Federal Constitution provides that Congress shall have the power to raise and support armies and maintain a navy; to make rules for the government and regulation of these forces, and to make all laws necessary and proper for carrying these foregoing powers into execution. U. S. CONST. art. I, § 8. Upon this section is based the system of military law known today as the Uniform Code of Military Justice. 64 STAT. 107 (1950), 50 U.S.C. § 551 (1952). Certain sections of this code set forth the framework for the courts-martial jurisdiction of all of the armed forces. It is one aspect of this jurisdiction which presents the question set forth in the principal case. Article 3(a) of the Uniform Code authorizes courts-martial of former servicemen for certain crimes committed prior to their discharge provided that the federal courts do not have jurisdiction. 64 STAT. 109 (1950), 50 U.S.C. § 553 (1953). The Supreme Court, in the instant case, refused to recognize the contention that military jurisdiction could be extended to civilians who had severed all relationships with the military and declared art. 3(a) unconstitutional. In order to appreciate the effect of this ruling it is important to have a general understanding of the facts and circumstances which led Congress to extend the authority of military tribunals to this point.

The necessity for some type of legislation to cover the ex-serviceman for serious crimes committed while in the armed forces

can best be exemplified by the famous case arising out of the last war involving the murder of an American army major by two of his men while serving behind the German lines in Italy. The crime was not discovered until the persons involved had been returned to the United States and honorably discharged. Even if their guilt were unquestionable, these men could not be extradited to Italy for trial since the treaty between the United States and that country had been abrogated by the war. *In re Lo Dolce*, 106 F. Supp. 455 (W.D.N.Y. 1952). Since they were not subject to courts-martial under the military law in effect at that time, and there was no statute extending the jurisdiction of the federal courts to this situation, these men were permitted to go unpunished. In view of this and other serious crimes over which no court had jurisdiction, it was obvious that some legislation was in order, the only question being whether to extend the authority of the military or of the federal courts. Congress chose the former but not without some doubt as to its validity.

Article ninety-four of the Articles of War, which governed the army prior to 1950, provided that courts-martial jurisdiction would extend to those discharged servicemen who committed certain enumerated frauds against the government while in the service. 41 STAT. 804 (1920), 10 U.S.C. § 1599 (1949). A Supreme Court decision, prior to the passage of the Uniform Code of Military Justice held that jurisdiction over offenses committed while in the service was terminated on discharge, except for certain cases of fraud. *Hershberg v. Cook*, 336 U.S. 210 (1949). Although the *Hershberg* case did not decide the validity of art. 94, the constitutionality of this section had been questioned in the lower federal courts on several occasions. As the dissent pointed out, it was upheld in one such test. *Kronberg v. Hale*, 180 F.2d 128 (9th Cir. 1950). However, in a district court case it was declared invalid. *Flannery v. Commanding General*, 69 F. Supp. 661 (S.D.N.Y. 1946). Thus when Congress was faced with the question of including a provision similar to but broader than art. 94, as part of the Uniform Code of Military Justice there was some uncertainty as to its constitutionality. The principal case provides the answer.

It has been held that the power of Congress in the government of the land and naval forces and of the militia is not at all affected by the fifth or any other amendment. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Also the right to trial by jury guaranteed by

the sixth amendment was held not to apply to trials by courts-martial or military commissions. *Whelchel v. McDonald*, 341 U.S. 122 (1950). Therefore the majority of the Court in the instant case takes the view that any expansion of courts-martial jurisdiction over former servicemen after separation from the services necessarily encroaches on the jurisdiction of the federal courts set up under the Constitution where persons are surrounded with more constitutional guarantees than in the military. Throughout the opinion it is apparent that the Court is expressing an attitude indicating a restraint on the military which has prevailed throughout the development of American law and government. In 1875 it was held that the exercise of military power where the rights of citizens are concerned shall never be pushed beyond what the exigency requires. *Raymond v. Thomas*, 91 U.S. (1 Otto) 712 (1875). It is evident that the majority felt art. 3(a) of the Uniform Code went beyond this point.

The argument is presented that the present decision will have an adverse effect upon the discipline of the armed forces since it is now possible for crimes to go unpunished which are not discovered while the perpetrator is within military jurisdiction. However, as the majority points out, this argument appears insignificant when weighed against any possibility of infringement of important constitutional guarantees.

The fact that there is an alternate solution left to Congress which would adequately cover the situation is an additional factor upholding the desirability of this decision. At present the federal courts do not have jurisdiction over crimes committed by citizens abroad. However, the Supreme Court in the principal case expressed the view that there is no valid argument that ex-servicemen must be tried by courts-martial or not at all since there is sufficient authority to permit the extension of federal court jurisdiction to cover this situation. Although the sixth amendment states that trial shall be in the state and district where the crime was committed, it has been held to apply only to federal offenses committed in a state. *Cook v. United States*, 138 U.S. 157 (1891). The Constitution provides that if a crime is not committed within any state, the trial shall be at such place or places as Congress may by law have directed. U. S. CONST. art. III, § 2. The Supreme Court has held that a nation may impose obligations with respect to the conduct of its citizens outside its territorial limits. *United States v. Blackmer*, 284 U.S. 421 (1932); *United States v. Bowman*, 260 U.S. 94 (1922).

Although it is apparent that past and present offenders who have escaped military jurisdiction will continue to go unpunished due to the constitutional provision forbidding ex post facto legislation, there is no reason for the possibility of future crimes without punishment if Congress takes prompt and appropriate action to correct this present deficiency in the law.

T. E. P.

CORPORATIONS—ULTRA VIRES AS AN AFFIRMATIVE PLEA.—*P* corporation was comprised of three stockholders, *A*, *B*, and *C*. *A* was the president and owned 31 shares of stock. *B* was the secretary and owned 28 shares of stock. *C* was the treasurer and owned 1 share of stock. *A* and *B* were husband and wife and *C* was *A*'s stepson and *B*'s son. *P* insured *A*'s life for \$25,000.00 and named *P* as the beneficiary of the policy. *D* was the insurer. Later, *A* and *B* had marital difficulties and entered into a separation agreement whereby assignment of \$15,000.00 of the insurance policy was made to *B* as protection in the event that other terms of the separation agreement were not fulfilled. At the time of this assignment, *P*'s assets were much less than its liabilities. *A*, *B*, and *C* discussed the assignment and consented thereto. Still later, *A* and *B* divorced and *A* remarried. After *A*'s death, *D* paid \$15,000.00 to *B* although *P* notified *D* that *P* would seek all proceeds of the policy. *P* now sues *D*. Held, that *P*'s assignment was ultra vires, as *P* contended, and was thus void and of no effect and, also, that *P* was not estopped to urge ultra vires. *P* recovered all proceeds of the policy. *Crossland-Cullen Co. v. Philadelphia Life Ins. Co.*, 133 F. Supp. 473 (W.D.D.C. 1955).

Involved here is a completely executed gratuitous partial assignment of a chose in action. Being an ultra vires act, it affected only parties to the transaction, creditors of the corporation, the state of North Carolina, and stockholders of the corporation. All shareholders ratified the act and neither the creditors, nor the state, nor third parties to the act are involved in this suit.

"The theory that a corporation can do no acts beyond its authority, discarded by a majority of the courts in this country, is responsible for most of the decisions that ultra vires contracts are absolutely void. On the other hand, most of the courts hold that ultra vires acts are the acts of the corporation and are not void, and classify rights and liabilities according to whether the contract is (1) wholly executory, (2) wholly executed, or (3) executed