St. John's Law Review

Volume 41
Number 1 *Volume 41, July 1966, Number 1*

Article 9

April 2013

Military Law--Mandamus--Judicial Review of Court-Martial Conviction Proper in Action to Compel Secretary of Defense to Change Petitioner's Dishonorable Discharge (Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965)

St. John's Law Review

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

entitled to be present at a pretrial hearing, he has the constitutional right to the assistance of counsel in the cross-examination of accusing witnesses.[29] When considered in conjunction with *Pointer,* the practical effect of *Anderson* is to make it virtually impossible for a defendant to be the victim of an unfair pretrial hearing since his presence, both personally and as represented by counsel, is now guaranteed. In this way, an accused's rights cannot be prejudiced.

Although it may be possible that a defendant's rights may be adequately protected in his absence, as Blackstone[30] observed, and as implied in *Anderson,* the *semblance* of justice is essential to a fair hearing. The traditions ingrained in our concept of a fair and impartial trial mandate that an accused be personally present, and that complete justice cannot be effected in his absence.

MILITARY LAW — MANDAMUS — JUDICIAL REVIEW OF COURT-MARTIAL CONVICTION PROPER IN ACTION TO COMPEL SECRETARY OF DEFENSE TO CHANGE PETITIONER'S DISHONORABLE DISCHARGE. — After having been convicted of assault by a general court-martial in 1947, appellant was given a dishonorable discharge from the Navy. During the military trial, when appellant's codefendant gave unexpected testimony which implicated appellant, the common counsel for both parties asserted that he could no longer effectively represent both men. Counsel's request for withdrawal was denied and he was ordered to proceed with the defense. Eighteen years later, in an action in the nature of mandamus,[1] appellant sought to compel the Secretary of Defense to change the record of his dismissal and to issue him an honorable discharge. The Court of Appeals for the First Circuit *held* that because appellant was denied effective counsel during the court-martial, the Secretary of Defense

---

[29] See Note, 11 CATHOLIC LAW. 244 (1965).

[30] 4 BLACKSTONE, COMMENTARIES *282-83.

[1] Appellant brought this action under 28 U.S.C. § 1361 (1964), which gives the district courts "original jurisdiction of any action in the nature of mandamus to compel an officer . . . of the United States . . . to perform a duty owed to the plaintiff." Enacted at the same time, 28 U.S.C. § 1391(e) (1964) permits the laying of venue, under the facts of this case in the district of plaintiff's residence, and renders the defendant amenable to service of process by certified mail beyond the territorial limits of the district in which the action is brought. Prior to these provisions, an action in mandamus could be brought only in the District of Columbia. *E.g.,* Knickerbocker Ice Co. v. Sprague, 4 F. Supp. 499 (S.D.N.Y. 1933). For a complete analysis of the use of the mandatory injunction as a method of avoiding the former jurisdictional limitations on mandamus, see Note, 38 COLUM. L. REV. 903 (1938).

had the duty to change appellant's dishonorable discharge. *Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965).

The eighth section of Article I of the United States Constitution provides, in part, that Congress shall have the power "to make Rules for the Government and Regulation of land and naval Forces." Pursuant to this power, Congress has enacted statutes, and established courts-martial to pass upon any alleged violation of military law.[2] Moreover, Congress has accorded a certain degree of finality to the decisions of military tribunals.[3] Although a civilian court has no *direct* appellate power over court-martial proceedings,[4] the determinations of military tribunals are open to collateral attack by habeas corpus. This latter form of review has historically been limited to a determination as to "whether the military court had jurisdiction of the person and the subject-matter, and whether . . . it had exceeded its powers in the sentence pronounced."[5]

Until 1946, the finality accorded court-martial determinations was somewhat tempered by the power of Congress to change, by private bill, the type of discharge ordered by a military court.[6] Prior to that time, many private bills came before Congress requesting that it legislate "corrections" upon military records.[7] Burdened by the quantity of these applications, Congress enacted Sections 131 and 207 of the Legislative Reorganization Act of 1946[8] which conferred authority upon the military departments to make record changes. Section 131 of the act provided that "no private bill . . . directing . . . the correction of a military . . . record, shall be received or considered in [Congress],"[9] while section 207 allowed the secretaries of the appropriate military departments, acting through boards of civilian officers or employees, "to correct any military . . . record where in their judgment such action is necessary to correct an error or to remove an injustice."[10]

Following the passage of this act, Attorney General Clark was requested to rule as to whether the secretary of a military depart-

---

[2] Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1964); see Carter v. Roberts, 177 U.S. 496, 497-98 (1900).

[3] See 10 U.S.C. § 876 (1964); Carter v. McClaughry, 183 U.S. 365, 401 (1902); Carter v. Roberts, *supra* note 2, at 498.

[4] See *In re* Yamashita, 327 U.S. 1, 8 (1946); Carter v. Roberts, *supra* note 2, at 498; Williams v. Heritage, 323 F.2d 731 (5th Cir. 1963).

[5] Carter v. Roberts, *supra* note 2, at 498.

[6] See Redd, *The Board for Correction of Naval Records*, 19 JAG. J. 9 (1964); 40 OPS. ATT'Y GEN. 504 (1947).

[7] See Redd, *supra* note 6. These statutes made many changes including provision for the alteration of a retirement date and the vacatur of a dishonorable discharge. 40 OPS. ATT'Y GEN. 504, 505-06 (1947).

[8] 60 Stat. 812-52 (1946).

[9] Legislative Reorganization Act of 1946, ch. 753, § 131, 60 Stat. 831 (1946).

[10] Legislative Reorganization Act of 1946, ch. 753, § 207, 10 U.S.C. § 1552(a) (1964).

ment was empowered to change records resulting from court-martial proceedings.[11] The Attorney General concluded that section 207, when read in conjunction with section 131,[12] necessarily permitted a secretary to change the type of discharge given by a court-martial.[13] He noted, however, that "the language of section 207 cannot be construed as permitting the reopening of the proceedings, findings, and judgments of court-martial so as to disturb the conclusiveness of such judgments, which has been long recognized by the courts." [14] In other words, the correction of record and issuance of a new discharge was regarded as an act of clemency or mitigation. The nature of the relief afforded remained the same as was previously provided by congressional act.[15]

As a result of a secretary's power to correct records, a more difficult problem arose, viz., the extent to which his exercise of this power would be subject to judicial review. In general, the judiciary has been reluctant to question any administrative military determination.[16] It has been frequently stated that the courts are without jurisdiction to review such rulings since Congress placed the administration of the armed forces solely within the discretion of the executive branch.[17]

> [J]udges are not given the task of running the army. . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.[18]

Except where the Constitution requires judicial review, it is within the power of Congress to grant or withhold this power. When Congress is silent and the Constitution does not require it, the question of review depends upon the entire setting of the particular statute and the scheme of regulation which is adopted.[19]

---

[11] 40 OPS. ATT'Y GEN. 504 (1947).
[12] 40 OPS. ATT'Y GEN. 505 (1947).
[13] 40 OPS. ATT'Y GEN. 509 (1947).
[14] 40 OPS. ATT'Y GEN. 508 (1947).
[15] *Ibid.*
[16] *E.g.*, Orloff v. Willoughby, 345 U.S. 83, 93-95 (1953); United States *ex rel.* French v. Weeks, 259 U.S. 326, 335-36 (1922). See also *In re* Yamashita, *supra* note 4, where the Court stated that as far as courts-martial are concerned, the judiciary has *no power* to review directly, but it has judicial power "to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."
[17] *E.g.*, United States *ex rel.* French v. Weeks, *supra* note 16; Reaves v. Ainsworth, 219 U.S. 296, 306 (1911); see also U.S. CONST. art. I, § 8, art. II, § 2.
[18] Orloff v. Willoughby, *supra* note 16, at 93-94.
[19] See Estep v. United States, 327 U.S. 114, 120-23 (1946), where the Court held that such a provision making draft board determinations final, does not, however, preclude judicial inquiry as to whether the draft board's

Thus, Congress may expressly or impliedly require that military action be treated as final by the courts. In this regard, the legislative history of section 207 sheds little light upon the reviewability of correction board determinations. When the section was enacted in 1946, Congress gave no indication of the intended scope of further review.[20] In 1951, Congress added a finality clause to section 207 stating that: "a correction under this section is final and conclusive on all *officers* of the United States." [21] This amendment was apparently passed to overrule the Comptroller General's refusal [22] to recognize the power of the secretaries to make full financial settlements attendant upon the alteration of a record.[23] When the bill to amend section 207 was introduced in the House, it provided that settlement within its purview "shall be final and conclusive on all officers of the Government, *including review by the courts of the United States. . . .*"[24] Sub-committee concern [25] over the phrase "including review by the courts" spurred its deletion "so that *under appropriate circumstances* the courts . . . might review these matters."[26] Thus, the availability of judicial review depends upon undefined "appropriate circumstances."

While neither the legislative history [27] nor the decisions [28] relating to section 207 clearly define the scope of review which will be given to a decision rendered by a secretary, *Harmon v. Brucker* [29] established that such rulings are not immune from all judicial inquiry. The petitioner in *Harmon* was dismissed from the Army with less than an honorable discharge (for activities committed prior to his induction), and thereafter sued the Secretary of the Army demanding that he be issued an honorable discharge. The Government contended that the courts were powerless to review this action because: (1) it was within the secretary's discretion to determine

decision had any basis in fact. See also Gentila v. Pace, 193 F.2d 924 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 943 (1952).

[20] See Ashe v. McNamara, 355 F.2d 277, 280-81 (1st Cir. 1965).

[21] 10 U.S.C. § 1552(a) (1964). (Emphasis added.)

[22] 27 Decs. Comp. Gen. 665 (1948).

[23] Ashe v. McNamara, 355 F.2d 277, 281 (1st Cir. 1965).

[24] See H.R. Rep. No. 449, 82d Cong., 1st Sess. 6 (1951). (Emphasis added.)

[25] See *Hearings Before a Subcommittee of the House Committee on Armed Services on H.R.* 1181, 82 Cong., 1st Sess. 369, 377, 391-93, 398 (1951).

[26] *Id.* at 450. (Emphasis added.) See H.R. Rep. No. 449, 82 Cong., 1st Sess. 3 (1951).

[27] *Compare* Friedman v. United States, 310 F.2d 381, 404 (Ct. Cl. 1962) (appendix), *with* Jones, *Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges,* 57 Colum. L. Rev. 917, 967-71 (1957).

[28] See Betts v. United States, 172 F. Supp. 450 (Ct. Cl. 1959); Eicks v. United States, 172 F. Supp. 445 (Ct. Cl. 1959); Friedman v. United States, 158 F. Supp. 364 (Ct. Cl. 1958).

[29] 355 U.S. 579 (1958).

the type of discharge which would be issued to petitioner; and (2) the secretary's decisions were, by statute, unreviewable.[30] In rejecting these contentions, the Supreme Court determined that the secretary exceeded his authority by issuing the discharge for pre-induction activities. The Court held that: "judicial relief is available to one who has been injured by the act of a government official which is in excess of his express or implied powers."[31] Thus, the Court impliedly construed the finality clause of section 207 so as to provide for *some* judicial review.

In the instant case, Judge Hastie, speaking for the Court, examined section 207 and concluded: first, that the secretaries, acting through correction boards, were empowered to change discharges pursuant to courts-martial; and secondly, that the finality clause was designed solely to preclude review by Government officers, and was not intended to foreclose proper judicial review.[32] In addition, the Court cited precedent authorizing examination of administrative action covered by a finality clause where the action challenged is "violative of [a] constitutional right . . . illegal or without basis in fact."[33]

In reviewing the record of appellant's court-martial, the Court stated that forcing defense counsel to represent two men, whose testimony was contradictory, was a procedure so fundamentally unfair that if appellant were still imprisoned, he would have been released on a writ of habeas corpus.[34] It was, therefore, apparent to the Court that appellant's constitutional rights had been violated. Mandamus, however, will issue only where there is a clear legal right, *and* an equally plain legal duty.[35] The Court found that under section 207, changing the discharge *was not* a matter of discretion since the sentence had been unconstitutionally imposed, and thus, there was a plain legal duty to change the record.[36]

It is significant that the Court, in the instant case, based its decision upon the initial determination that a writ of habeas corpus would have been issued had appellant been incarcerated.[37] His-

---

[30] *Id.* at 581.
[31] *Id.* at 581-82.
[32] Ashe v. McNamara, *supra* note 23, at 280-81.
[33] *Id.* at 281.
[34] *Id.* at 279-80.
[35] See Coombs v. Edwards, 280 N.Y. 361, 21 N.E.2d 353 (1939); 55 C.J.S. *Mandamus* § 1 (1948).
[36] Ashe v. McNamara, *supra* note 23, at 282.
[37] While habeas corpus is the most common method of civil inquiry, other available procedures include: an action for a declaratory judgment (Jackson v. McElroy, 163 F. Supp. 257 (D.D.C. 1958). *But see* Goldstein v. Johnson, 184 F.2d. 342 (D.C. Cir. 1950)); a suit for back pay (Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947)); an action for wrongful imprisonment (McLean v. United States, 73 F. Supp. 775 (W.D.S.C. 1947)). For an excellent discussion of collateral review, see Bishop, *Civilian Judges and*

torically, the single issue presented in such a proceeding was whether the military court had jurisdiction over the person and the subject matter.[38] It is interesting to note, however, that the scope of review available on a petition for habeas corpus has been significantly expanded in *civilian* criminal trials. The Supreme Court has ruled that a violation of due process may cause the trial court to "lose" jurisdiction.[39] In light of this consideration, the Supreme Court, in *Burns v. Wilson*,[40] recognized that deprivation of constitutional rights might also render void the jurisdiction of a court-martial. In *Burns*, the Court said: "The constitutional guarantee of due process . . . protect[s] soldiers—as well as civilians—from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness. . . ."[41] The Court stated, however, that as long as the military had *fully* and *fairly* reviewed, and had not manifestly refused to consider the petitioner's position, the civil courts were precluded from re-evaluating the military determination.[42] The Supreme Court thus expanded military habeas corpus to encompass constitutional guarantees, but at the same time seemingly restricted its practical application.[43]

Surprisingly, the Court in the instant case did not mention the limitation inherent in the *Burns* decision—that fair military review precludes civil court inquiry. This omission might lead one to conjecture that the Court assumed that where a defect is patent on the record there is no necessity for further investigation as to whether the military's review of the conviction was fairly conducted.

Since the guidelines established by *Burns* are well settled,[44] it is unlikely that the Court's failure to mention them constitutes their rejection. Therefore, it may be surmised that the impact of

---

Military Justice: Collateral Review of Court-Martial Convictions, 61 Colum. L. Rev. 40 (1961).

[38] See Dynes v. Hoover, 61 U.S. (20 How.) 65, 81 (1857).

[39] Johnson v. Zerbst, 304 U.S. 458, 468 (1938). Thus, in civilian trials, the writ of habeas corpus was expanded to allow relief: for lack of counsel (Johnson v. Zerbst, *supra*); for admission of coerced confessions (Leyra v. Denno, 347 U.S. 556 (1954)); and for suppression of evidence (United States *ex rel.* Almeida v. Baldi, 195 F.2d 815 (3d Cir. 1952), *cert. denied*, 345 U.S. 904 (1953)).

[40] 346 U.S. 137 (1953).

[41] *Id.* at 142.

[42] *Id.* at 142-44.

[43] Prior to Application of Stapley, 246 F. Supp. 316 (D. Utah 1965), wherein petitioner successfully alleged unfairness in court-martial procedure due to inadequate counsel at a special court-martial, there were apparently no reported cases in which a petitioner-soldier obtained his liberty by a writ of habeas corpus. See Bishop, *supra* note 37, at 60-61, which offers a possible explanation for this situation.

[44] See, *e.g.*, Thomas v. Davis, 249 F.2d 232, 233-34 (10th Cir. 1957); Easley v. Hunter, 209 F.2d 483, 487 (10th Cir. 1953).

the instant case is limited to cases where there has not been full and fair military review.

In practical effect, *Ashe v. McNamara* may provide an avenue for judicial relief to ex-servicemen who would otherwise be without a remedy.[45] Moreover, it seems that the secretaries of the various military departments are now compelled to change the records of applicants who were denied their constitutional rights.

Apparently, the instant case presents the first time that a court has, under section 207, ordered a secretary to change a court-martial discharge. In doing so, the Court found that the finality provision of the section did not preclude any "otherwise proper judicial review." The Court justified the instant review on the authority of Supreme Court decisions which held reviewable allegedly final administrative actions when these actions were in excess of authority given, were in violation of a constitutional right, or were without basis in fact. In that a court-martial which has no jurisdiction over the defendant is a nullity, and provides no basis or justification for a dishonorable discharge, it appears that the instant Court's review of the secretary's decision is well founded.

---

[45] It should be noted, however, that relief under § 207 may be precluded by the statute of limitations which provides: "No correction may be made . . . unless the claimant . . . files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a [correction] board . . . may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice." 65 Stat. 655-56 (1951), 10 U.S.C. § 1552(b) (1964).