



J. Howard McGrath, The Solicitor General

February 7, 1946

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Criminal Division

TLC:EB:lr

Masaharu Homma vs. Lt. General Wilhelm D. Styer, et al

You have requested my opinion as to whether or not the above case is controlled by the decision of the United States Supreme Court in General Tomoyuki Yamashita vs. Lt. General Wilhelm D. Styer, et al, decided February 4, 1946.

out chief
In one important respect the trial of General Homma differs from that of General Yamashita. The Court which tried Yamashita was established by General MacArthur acting under the authority of the ~~COMSEC~~ General Staff of the United States Army and Navy. It was the traditional military commission of the United States Army. The Commission which is trying Homma has been set up under the authority of the Allied Forces and is referred to by the Army as a "political court". This would appear to mean that our Supreme Court might have a more limited jurisdiction in this case than it did in the case of Yamashita.

Petitioner contends that because the Court was established as an allied court General MacArthur was without authority to delegate to Lt. General Styer the duty of appointing the Commission by whom petitioner is being tried. This contention appears to be frivolous. We do not have before us the series of orders establishing the Commission. Presumably they correspond to those issued in the case of Yamashita and the decision of the United States Supreme Court in the Yamashita case that the military commission was lawfully created would appear to control in the Homma case.

Petitioner further alleges (1) that the Commission was without authority to try petitioner for violations of the law of war because it was convened after the cessation of hostilities between the United States and Japan; (2) the charge preferred fails to state a violation of the laws of war; and (3) the rules of evidence and procedure governing the trial and the various rulings of the Commission made in the course of the trial violate the constitution and laws of the United States and of the Philippines. These same points were raised in the Yamashita case and were decided adversely to the petitioner. The particular irregularities of procedure which are urged are: (1) that the charge is so vague and uninformative, that it is impossible

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for petitioner adequately to prepare his defense (2) that he was forced to trial without the opportunity for adequate preparation of a defense, (3) that the rules of procedure and evidence and the Commission's orders, which are substantially the same as those in the Yamashita case, violate the due process requirements of the United States Constitution and Articles 25 and 38 of the Articles of War. All these points were considered at length in both the majority and minority opinions in the Yamashita case and the contention of the minority that they involved such violation of the constitution and laws of the United States as to deprive the Commission of jurisdiction was rejected by the majority of the Court.

The petitioner raises a novel point which was not considered in the Yamashita case. He alleges that General MacArthur was incompetent to appoint the military commission which is trying General Homma because he has a personal interest adverse to that of the accused and because of his position and relationship to the members of his command who are participating in the trial of the petitioner and who will ultimately review the judgment of the Commission. Petitioner bases this claim upon Article 8 of the Articles of War and Paragraph 8 of the Manual for Courts-Martial, United States Army, 1928 (corrected April 20, 1943) and Paragraph 53, Technical Manual 29-255, Military Justice Procedure. This Article and the instructions issued under it provide in part that when any officer is himself the accuser he may not appoint the court-martial which tries the accused. The accuser is defined to include "any officer who because of his personal feeling or interest in charges preferred by another adopts them as his own or undertakes to have them tried." Petitioner contends that where a person within this definition is also the superior officer the right of review of military procedure is for all practical purposes eliminated.

In the Yamashita case the courts specifically decided that Articles 25 and 38 of the Articles of War do not apply to the trial of an enemy combatant by a military commission for violations of the law of war. The Articles considered in the Yamashita case contain specific mention of military commissions. It would seem even more certain that Article 8 which contains no such reference does not apply to such a situation and the orders issued under it would be equally inapplicable.

Even if it were conceded that for practical purposes petitioner's right of appeal becomes an empty one in this particular

situation, ^{It} should be noted that it has been decided that the right of review of a conviction by an appellate court is not included in the guarantee of due process. Haywood vs. United States 268 F. 795, cert. denied 256 U.S. 589.

Petitioner makes one more point. He contends that since the decision in the Yamashita case was based in part upon the theory that the Supreme Court of the Commonwealth of the Philippines is without jurisdiction to issue a writ of habeas corpus or of prohibition to an officer in the United States Army, the Supreme Court of the United States should grant a writ of certiorari in order to determine this point. The Philippine Court in the Yamashita case based its decision on two grounds, (a) that the Court had no jurisdiction over the United States Army (b) that the military commission was validly constituted. In view of the second ground of the decision it becomes unnecessary to review the question of the Philippine Court's jurisdiction over the United States Army.

In view of all these considerations, I believe that the Honma case is fully controlled by the Yamashita case.

