

January 31, 1946

MEMORANDUM FOR THE COURT

Re: Nos. 61 Misc. and 672 – Yamashita v. Styer

In order to accommodate my opinion to the views of some of my brethren, I am making the following changes:

Page 13, last paragraph, 6th line, between the words “persons” and “Petitioner” insert the following:

“The Articles recognized but one kind of military commission, not two. But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not apply. Being of this latter class, petitioner cannot claim the benefits of the Articles, which are applicable only to the members of the other class.”

Page 15, last paragraph, 3rd line, after the word “authority”, insert the following:

“For reasons already stated we hold that the commission’s rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied.”

Omit all that follows in the text on pages 15, 16, 17 and 18, down to the heading at the bottom of page 18 “Effect of failure to give notice”, etc. etc.

H. F. S.

Nos. 93, Misc., and 818.

General Homma

Mr. Justice RUTLEDGE, dissenting.

I dissent upon the grounds stated in the dissenting opinions in General Yamashita's case, all of which are exemplified in these petitions, and for additional reasons presented by them.

For the first time the Court, by its denial of the petitions with the effect of sustaining the commission's jurisdiction, permits trial for a capital offense under a binding procedure which allows forced confessions to be received in evidence; ¹ makes proof in prior trials of groups for mass offenses "prima facie evidence that the accused is likewise guilty of that offense"; ² and requires that the findings and judgment in such a mass trial "be given full faith and credit" in any subsequent trial of an individual person charged as a member of the group. ³

Moreover the time allowed for preparation of the defense was cut from the three weeks given to Yamashita to fifteen days between arraignment and the beginning of trial. Motions at arraignment for 30 days to prepare defense before the trial began and on the opening day of trial for a ten-day continuance, the latter supported by counsel's affidavit of insufficient time, were denied.⁴

⁴ The following is a bare chronological statement concerning the constitution of the commission and subsequent events: On December 5, 1945, the regulations governing the trial were issued; December 6, the order to General Styer to appoint the commission followed; on December 12 petitioner was transferred from Japan to Manila; December 15 counsel for the defense was appointed; December 17 the charge was served on petitioner, substantially identical with that in the Yamashita case, containing 47 specifications of the same general type there involved; December 19 the commission convened, counsel were sworn, petitioner was arraigned, pleaded not guilty and entered a motion for thirty days time to prepare defense before trial. The motion was denied. On December __ a supplemental charge and specifications were filed. On January 3, 1946, the commission reconvened. The prosecution then filed a bill of particulars to two of the specifications. Petitioner's plea to the jurisdiction, motion to dismiss, motions for bills of particulars relating to certain items in the specifications, and for further particulars concerning other items were denied. The commission also then denied the motion of counsel for the defense to postpone the trial for ten days. This motion was supported by affidavit of counsel, dated January 2, 1945, which set forth that he and his associates began work on preparing the defense on December 16; that "each of the 48 specifications requires a detailed investigation and that eighteen days have proved insufficient time to accomplish even a small portion of this investigation"; that two members of the defense staff who had left for Tokyo on December 25 to interview witnesses and secure other evidence had not returned; that two of three investigators originally assigned to the defense were ill and in the hospital, one from December 21, the other from December 24, and that only one additional investigator had been assigned to the defense, though others had been promised; that on January 2 the defense had received from the prosecution 11 "typical cases" on which proof was to be offered under specification 4 and 9 "representative instances" under specification 47, which the defense had had no opportunity to investigate. The affidavit concluded with the statement that a minimum period of ten days was required before counsel could be prepared to proceed with the trial.

The trial began in the afternoon of January 3. On January 16 petitions for writs of habeas corpus and prohibition were filed in the Supreme Court of the Philippine Islands. They were denied January 23 without argument. The petitions and motions constituting this application were filed in this Court February 7, 1946.

Other serious questions, affecting the validity and fairness of the commission's constitution are presented which were not raised in the Yamashita petitions.

I think the petitions should be set for hearing and determined on the merits.