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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 SOUTHERN DIVISION

11 CHRONITE 2-5 CHARLES E. HATTO,

12 Plaintiff
13 Petitioner,

NO. 4020

NO. 4031

14 VS.

15 MICHAEL LARSO, Secretary of Defense,
16 SENATOR HENRY, Secretary of the Army,
17 HONORABLE CHIEF OF STAFF LARSON,
18 Commanding General of 6th United States
19 Army, MAJOR GENERAL WILLARD HANSON,
20 Commanding General, United States Army
21 Training Center, Fort Lewis, Washington,
22 THE UNITED STATES ARMY, and THE UNITED
23 STATES OF AMERICA,

24 Defendants
25 Respondents.

ORDER

26 On January 15, 1970 plaintiff-petitioner Hatto filed two
27 actions against the defendants, 4020 a complaint for damages under
28 the Tucker Act with a complaint for declaratory judgment and action
29 for restraining order and 4031, a petition for writ of habeas corpus.
30 To each of these actions the defendants have filed a motion for
31 judgment of dismissal pursuant to Rules 12(b) and 56, Federal Rules
32 of Civil Procedure. Both parties agreed that the actions are based
upon the same contention and subject to the same legal authorities
and the court so considered these actions.

These matters then were before the court on the 20th day
of January, 1970 where after hearing oral arguments of Stephen R.
Chenour for the plaintiff-petitioner, and J. S. Chenour, Assistant

1 United States Attorney for the Western District of Washington for the
2 defendants-respondents, and considering the pleadings, affidavits and
3 memoranda of all parties and otherwise being fully advised did give an
4 oral decision, a transcript of which by this reference is incorporated
5 herein.

6 The Court does find that the action of plaintiff-prosecution
7 in both instances, the Tucker Act - Declaratory Judgment action in
8 Case #4030, and the petition for habeas corpus in Case #4001, are
9 based upon the same proposition, namely that because his period of
10 enlistment would normally have terminated on January 12, 1970, had
11 criminal proceedings against Hutto not been initiated prior to that
12 date, that notwithstanding the initiation of the pending criminal
13 proceedings the enlistment expired on that date and the military lost
14 jurisdiction to prosecute these criminal proceedings against him.

15 The Court does find that in his contract of enlistment
16 Hutto specifically swore an oath to "obey the orders of the President
17 of the United States and the orders of the officers appointed over me,
18 according to regulations and the Uniform Code of Military Justice."
19 The Uniform Code of Military Justice is an enactment of the Congress
20 of the United States and is in no manner an executive order or Presi-
21 dential proclamation and Article 3(a) of that Code (10 U.S.C. 803(a))
22 provides that a person charged with committing while in a military
23 status an offense punishable by confinement for more than five years
24 and for which he cannot be tried in any of the courts of the United
25 States, shall not be relieved from responsibility to trial by court-
26 martial by reason of termination of that status. This article was
27 not violated by the decision of the Supreme Court in Ex parte Quirin,
28 (1955) 317 U.S. 11, as to persons not yet discharged when charged by
29 offenses punishable by confinement for five years or more. All of the
30 charges against Hutto provide maximum penalties of confinement in
31 excess of five years.
32

1 The Court finds that as to Hutto, the investigation and
2 proceedings with view to trial by court-martial were initiated several
3 weeks prior to January 12, 1970, the date of the expiration of the
4 enlistment and prior to that date charges had been preferred against
5 Hutto. The authorities cited by Hutto, particularly Wilkinson v.
6 Perkins, 395 U.S. 253, 23 L.Ed.(2d) 201, 89 S.Ct. 1693 (1969) and
7 Smith v. Charles, 350 U.S. 11 (1955) are not applicable here but rather
8 the cases of Parson v. Ortiz, 291 F.Supp. 95 (1968) and Richman v.
9 Parson, 245 F.(2d) 317 (10th Cir., 1957) are the applicable authorities
10 determinative of these two cases. In the Wilkinson case the offense
11 involved was committed while the defendant was on leave and it was
12 totally unrelated to any military activity. Smith dealt with a
13 former serviceman who had been honorably discharged from the military
14 service five months prior to initiation of the court-martial proceedings.
15 These facts and authorities are inapplicable to the present cases in
16 which timely charges were initiated against Hutto who was legally in
17 active service when the alleged offenses were committed and who was
18 legally in the military service when the investigation and proceedings
19 with view to Court-martial were initiated. These are substantially
20 the same facts as in the Richman and Parson cases and the principles
21 stated therein are applicable to the present cases.

22 Therefore, it is the finding of this Court that there is no
23 merit to the basic contention of Hutto in either of these actions,
24 #4000 and #4001, and each and both actions should be dismissed except
25 only as to the application for a restraining order in #4000.

26 There is no showing on the record that Hutto or his counsel
27 have presented his contentions with respect to his removal to the
28 military authorities. These contentions must first be presented to
29 the military authorities for determination by a fact finding if
30 necessary upon the facts and contentions raised in that hearing.
31 Action #4000 will continue viable to the extent that it pertains to
32

1 the request for a restraining order, providing that Petitioner expeditiously
2 presents his contentions to the military authorities in which event
3 such contentions shall be expeditiously heard, considered and
4 determined by the military authorities. If and when such proceedings
5 are initiated and concluded, further consideration of the application
6 for a restraining order may be sought in this court. Therefore,

7 IT IS HEREBY ORDERED that with the exception of the appli-
8 cation for a restraining order in Cause #4030, all other contentions
9 in Causes #4030 and #4031 are dismissed.

10 In the circumstances forthwith entry of this order is
11 indicated with the proviso that objections or proposed amendments
12 shall be served and filed not later than 12:00 noon Monday, February
13 2, 1970.

14 Plaintiff-Petitioner's objections and exceptions to each
15 and every ruling hereinabove entered are hereby noted.

16 DATED this 26th day of January, 1970.

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18 /s/ G. N. [illegible]
19 United States District Judge

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21 Presented by

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23
24 /s/ J. E. [illegible]
25 Assistant United States Attorney