Federal Habeas Corpus

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The First Circuit has taken the best approach to the problem by requiring that a section 2255 motion must be heard by a judge other than the one who presided at trial. Grounded on the court's supervisory power, not the due process clause, that rule recognizes the difficulty of disqualifying a judge, as well as the potential for abuse when a judge is called on to reverse his own decision.

VI. EXTRAJUDICIAL DETENTIONS

A. Review of Courts-Martial

This section concerns the right of persons convicted by courts-martial to turn to federal civilian courts, through habeas corpus, to attack their confinements. The most critical issue in the field is the range of issues cognizable by the civilian court. This section suggests that the present range of issues cognizable is unnecessarily narrow and should be broadened so that military wanted the trial judge to preside. Indeed the advantages of section 2255 can all be achieved if the case is heard in the sentencing district, regardless of which judge hears it. According to the Senate committee report the purpose of the bill was to make the proceeding a part of the criminal action so the court could resentence the applicant, or grant him a new trial. (A judge presiding over a habeas corpus action does not have these powers.) In addition, Congress did not want the cases heard in the district of confinement because that tended to concentrate the burden on a few districts, and made it difficult for witnesses and records to be produced. S. REP. No. 1526, 80th Cong., 2d Sess. 2-3 (1948). Considering the danger of abuse that exists when a judge is called upon to review his own decisions, it seems ill-advised to "supplement legislative history that contains no such suggestion, and which demonstrates concern with quite a different matter." Halliday v. United States, 380 F.2d 270, 273 (1st Cir. 1967).

The First Circuit's rule does not bar the trial judge from deciding whether a section 2255 application warrants a hearing. This decision is to be made according to the "files and records of the case," 28 U.S.C. § 2255 (1964), which plainly does not include the judge's personal recollections of the case. The First Circuit also recognized that problems may arise if the district court has only one judge, and stated that in such a case the sentencing judge could preside at the hearing. The problem is not of much significance, however, since there are only seven such districts in the United States.

It would be difficult to formulate a constitutional rule requiring the disqualification of a district judge solely because he presided at trial. Cf. Ungar v. Sarafite, 376 U.S. 575, 584 (1964) ("We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions.").

Beyond the scope of this section are the problems of review and control of the extraordinary organs, such as military commissions, established under military government and martial law, as well as problems of international character, such as habeas corpus review of international military tribunals or the obstacles aliens face in obtaining review of military convictions.
court detentions are treated in the same manner as state court detentions. The section then turns briefly to a discussion of the applicability of such habeas doctrines as custody, waiver, and exhaustion to the court-martialed prisoner.

1. Historical Overview. — The problems of habeas corpus review of a court-martial conviction first reached the Supreme Court in 1879 in *Ex parte Reed.* There the Court laid down narrow limits on the issues cognizable: civilian courts, it was said, could inquire whether the court-martial had jurisdiction over the person and subject matter and had the power to impose the sentence. Habeas was not to serve as appellate review; "mere error or irregularity" was not sufficient to impeach the court-martial judgment. These limits, identical to those imposed in previous collateral attacks on military judicial decisions, were at least as narrow as those placed on habeas review of civilian convictions at the time. These early cases reflect the original con-
ception of the writ as a guardian against the unauthorized use of adjudicatory power. The paramount policy was to restrict the military to its "appropriate sphere" in accordance with this nation's historic fear of "the corrosive effect upon liberty of exaggerated military power."

At the start of the twentieth century the range of issues cognizable expanded, evidently in response to a feeling that habeas should serve not only to restrict the military courts to their proper sphere but also to protect those properly within the reach of courts-martial from a misuse of power. To the traditional issues of personal and subject matter jurisdiction and legality of sentence were added the questions whether the court-martial jurisdiction over person in a suit for damages against the executor of the sentence):

[Wise] proves only that a court martial was considered as one of those inferior courts of limited jurisdiction, whose judgments may be questioned collaterally. They are not placed on the same high ground with the judgments of a court of record. [That case]... is no authority for inquiring into the judgments of a court of general criminal jurisdiction. ...

The Court in McClaughry v. Deming, 186 U.S. 49, 63, 68-69 (1902) (dictum) explained that one consequence of the inferiority of courts-martial was that, unlike civilian convictions, all jurisdictional facts necessary to sustain the court-martial judgment in the face of collateral attack must appear of record; they could not be inferred argumentatively, and no presumptions existed in favor of the court-martial's jurisdiction. This rule theoretically allowed the petitioner to assail every fact necessary to jurisdiction and to introduce proof thereon, while the military could do no more than present the record. This rule had little practical effect, however, and was discarded in Givens v. Zerbst, 255 U.S. 11, 19-20 (1921). See also Fratcher, Review by the Civil Courts of Judgments of Federal Military Tribunals, 10 Ohio St. L.J. 271, 298-300 (1949).

A similar, contemporary expansion of federal habeas corpus was occurring with respect to review of state convictions; see pp. 1045-62 supra.


Similarly, subject matter jurisdiction has contracted. Although always limited to crimes, recently jurisdiction was severely narrowed to "service connected" crimes. O'Callahan v. Parker, 395 U.S. 258 (1969), noted in The Supreme Court, 1968 Term, 83 Harv. L. Rev. 7, 212 (1969).
violated the statutes governing its proceedings or basic notions of fairness. Inquiry into these two questions was had by stretching the concept of jurisdiction, which was still said to be the only issue cognizable. The leading case on statutory violations is *McCloughry v. Deming*, where an officer of the Volunteer Army was tried by a court-martial composed wholly of officers of the Regular Army—a clear violation of Article of War 77 of 1874. The Court reasoned that since the court-martial is a creation of statute, any act by it beyond or inconsistent with its governing statutes is void; or, in the terminology of the day, the court-martial lacked jurisdiction over the person and subject matter since it was illegally constituted.

*Deming* could have led to quite considerable civilian review. Its rationale was not limited to statutes governing the convening of courts-martial, but could be used to require conformity to statutes and regulations governing all stages of the proceedings. The current statutory and regulatory framework is detailed, and enforcing conformity by habeas would permit close supervision by civilian courts. Further, since the statutes and regulations reiterate many constitutional rights, the *Deming* approach would allow civilian courts to protect these rights without necessitating direct review of constitutional issues. Accordingly, some courts and commentators have lauded *Deming* as a way to ensure basic fairness in courts-martial without completely abandoning the concept of jurisdictional habeas corpus. On the other hand, *Deming*'s formalistic approach raises conceptual difficul-

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11 186 U.S. 49 (1902).
12 186 U.S. at 69.
15 E.g., UCMJ art. 44 (former jeopardy); MCM (1969) ¶ 152 (illegal search), ¶ 150(b) (self-incrimination), ¶ 140(a)(2) (Miranda warnings), ¶ 149(b) (right to cross-examine). See UCMJ art. 36 (the rules prescribed by the President "shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be . . . inconsistent with" the UCMJ).
17 E.g., Schwartz, *Habeas Corpus and Court-Martial Deviations from the Articles of War*, 14 Mo. L. Rev. 147 (1949).
ties. In a plain sense, not every statutory provision or regulation can rise to a jurisdictional level.\(^1\) Thus Deming calls for a determination of which parts of the directive framework are "jurisdictional," but the courts were unable to articulate any viable, definite standards.\(^2\) Another difficulty with the Deming approach is that, in theory, it might lead to a habeas court's enforcing a statutory command but not a constitutional provision.\(^3\) For example, a relatively insignificant violation of a statute, which had previously been declared jurisdictional in an appealing case, would void a court-martial, while essential constitutional rights not spelled out in the statutes or regulations could be wilfully ignored.

\(^{1}\) The very detail of the directive framework which creates Deming's potential for expansion makes it impossible for the civilian court to require precise conformance. For example, it would be unthinkable that a habeas court, under the guise of divestiture of jurisdiction, could void a court-martial for violation of the regulation which allows the accused to wear his decorations at trial, MCM (1969) § 60.

\(^{2}\) There was a general tendency to classify as jurisdictional those statutes dealing with the manner of convening the court-martial. E.g., United States v. Smith, 197 U.S. 386, 392 (1905) (dictum) (convening officer must be authorized by statute or by President to appoint court-martial); McClaughray v. Deming, 186 U.S. 49 (1902); McDaniel v. Hiatt, 78 F. Supp. 573 (M.D. Pa. 1948) (dictum) (minimum number of court-martial members fixed by statute must be met). Some statutes which went to the basic fairness of trial were also classified as jurisdictional. E.g., Juhl v. United States, 383 F.2d 1009, 1023 (Ct. Cl. 1967), rev'd sub nom. United States v. Augenblick, 393 F.2d 1009, 1023 (2d Cir. 1969). In that case the lower court in a suit for damages allowed collateral attack on the grounds that the conviction was based on accomplice testimony in violation of executive regulation, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951), § 153(a), Exec. Order No. 10,214, 16 Fed. Reg. 1385-86 (1951) [hereinafter cited as MCM (1951)]. The Supreme Court reversed, stating that the rule was not of constitutional stature but providing no further explanation. See p. 1228 & notes 70 & 115 infra.

On the other hand, courts have classified as directory, rather than jurisdictional, those statutes which are primarily procedural. E.g., McMicking v. Shields, 238 U.S. 99 (1915) (failure to follow executive regulation requiring that the accused be granted two days to prepare defense); United States ex rel. Innes v. Hiatt, 141 F.2d 664, 667 (3d Cir. 1944) (violation of statute by court conferring with the trial judge-advocate in absence of accused). Statutes that were discretionary received similar treatment. E.g., Hiatt v. Brown, 339 U.S. 103, 107-10 (1950) (appointment of a qualified law member was required if one was "available for the purpose"; since discretion was allowed a role by terms of the statute, there could be no successful attack, at least in the absence of gross abuse of discretion); Swaim v. United States, 165 U.S. 553, 559-60 (1897) (officer shall not be tried by those inferior in rank "when it can be avoided"); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827) (13 members of court-martial required where possible "without manifest injury to the service").

\(^{3}\) The statement in text clearly assumes that the constitutional rights of servicemen are to be protected. Whatever doubt there once may have been about the point seems to have been settled by Burns v. Wilson, 346 U.S. 137, 142-43 (1953). See also note 83 infra.
The *Deming* approach was eventually cast aside by the lower federal courts in favor of a more straightforward decision to review constitutional claims on habeas corpus. In the 1940's, at least five circuit courts, following the expansion of habeas for civilians in *Johnson v. Zerbst*, ruled constitutional claims cognizable, although all decided adversely to the petitioner on the merits. The Third Circuit said:

We think that this basic guarantee of fairness afforded by the due process clause of the fifth amendment applies to a defendant in criminal proceedings in a federal military court as well as in a federal civil court. An individual does not cease to be a person within the protection of the fifth amendment of the Constitution because he has joined the nation's armed forces and has taken the oath to support that Constitution with his life, if need be.

The propriety of this expanded approach squarely reached

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22 Early cases that considered constitutional claims did so carefully within the traditional language of divestiture of jurisdiction and all decided adversely to the petitioner. E.g., McMicking v. Shields, 238 U.S. 99, 106 (1915) (due process); Carter v. McLaughry, 183 U.S. 365, 387-96, 401 (1902) (double jeopardy); Johnson v. Sayre, 158 U.S. 109, 116 (1895) (cruel and unusual punishment).

23 304 U.S. 458 (1938).

24 Montalvo v. Hiatt, 174 F.2d 645 (5th Cir.) (per curiam), cert. denied, 338 U.S. 874 (1949); Benjamin v. Hunter, 169 F.2d 512 (10th Cir. 1948); United States *ex rel.* Weintraub v. Swenson, 165 F.2d 756 (2d Cir. 1948) (semble); United States *ex rel.* Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944); Schita v. King, 133 F.2d 283 (8th Cir. 1943) (remanded for new hearing; on remand, held, no due process violation, *aff'd sub nom.* Schita v. Cox, 239 F.2d 971, cert. denied, 322 U.S. 761 (1944)).

Other circuit courts looked into constitutional claims adversely to the petitioner without feeling called upon to decide the applicability of *Zerbst* to courts-martial. E.g., Hironimus v. Durant, 168 F.2d 288 (4th Cir.), *cert. denied*, 335 U.S. 818 (1948); Wrublewski v. McKinley, 166 F.2d 243 (9th Cir. 1948); Waite v. Overlade, 164 F.2d 722 (7th Cir.), *cert. denied*, 334 U.S. 812 (1948). District courts in yet other circuits felt free to look into due process claims along *Zerbst* lines. E.g., Boone v. Nelson, 72 F. Supp. 807 (D. Me. 1947).

Furthermore, in 1947 the Court of Claims, in a suit for lost pay, allowed the first successful collateral attack of a court-martial judgment on grounds of violations of constitutional rights; in overruling the defendant's demurrer, the court found that denial of fifth amendment due process and sixth amendment right to counsel divested jurisdiction. Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947). The government, choosing not to appeal, stipulated judgment. 108 Ct. Cl. 754 (1947). *Shapiro* has been approved consistently by the Court of Claims, which has also somewhat slighted the importance of Burns v. Wilson, 346 U.S. 137 (1953). See, e.g., Augenblick v. United States, 377 F.2d 586, 591-93 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969); Shaw v. United States, 357 F.2d 949, 953-54 (Ct. Cl. 1966); cases cited in Katz & Nelson, *supra* note 5, at 216 n. 139. *But cf.* Begalke v. United States, 286 F.2d 606, 608 (Ct. Cl. 1960). *See also note 70 infra.*

25 United States *ex rel.* Innes v. Hiatt, 141 F.2d 664, 666 (3d Cir. 1944).

26 Although this issue was present in two cases in 1949, the Supreme Court avoided deciding it. Humphrey v. Smith, 336 U.S. 695, 697 (1949), *rev'd* Smith
the Supreme Court in 1950. The Fifth Circuit in Hiatt v. Brown had affirmed a district court's release order on two grounds: that the court-martial was constituted in violation of the statute and that the record showed prejudicial errors depriving the petitioner of due process. The Supreme Court reversed the former ground and then ruled that the lower "court was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters" as the alleged errors. Correction of these errors, said the Court, was committed solely to the military authorities. "The single inquiry, the test, is jurisdiction." Jurisdictional inquiry was defined to include determining whether there was jurisdiction of the person accused and the offense charged and whether the court-martial "acted within its lawful powers.

For several reasons the Court's decision in Hiatt v. Brown did not induce federal courts to refrain from reviewing alleged court-martial denials of constitutional rights. First, the Supreme Court's failure to explain why contemporary advances made in civilian habeas should not be extended to the court-martialed prisoner encouraged lower courts to seek ways to avoid the obstacle to review that Hiatt seemed to present. Second, the

v. Hiatt, 170 F.2d 61 (3d Cir. 1948) (reversed on the ground that the violated statute in question was directory, not jurisdictional; the due process argument was dispensed with by observing the absence of a "finding that there was unfairness in the court-martial trial itself"); Wade v. Hunter, 336 U.S. 684 (1949), aff'd 169 F.2d 973 (10th Cir. 1948) (affirmed on the basis of invalidity of a double jeopardy claim; no consideration of the propriety of examining the constitutional claim).

27 175 F.2d 273 (1949).
29 The circuit court interpreted Article of War 8 of 1920, ch. 227, subch. II, § 1, 41 Stat. 788, as requiring the presence of a law member from the Judge Advocate General's Department unless such officer was in fact unavailable. The court held that the record showed such an officer to be available and that failure to appoint him law member was in disregard of this requirement. 175 F.2d at 276.
30 The circuit court cited the following errors: the court-martial and the reviewing authorities misconceived the applicable law; the law member and defense counsel were grossly incompetent; there was no pretrial investigation; the evidence as to certain elements of the crime was insufficient. 175 F.2d at 277.
31 Hiatt v. Brown, 339 U.S. 103, 107-10 (1950); see note 20 supra.
32 Id. at 110.
33 Id. at 111, quoting from In re Grimley, 137 U.S. 147, 150 (1890).
34 339 U.S. at 111.
35 E.g., Burns v. Lovett, 202 F.2d 335 (D.C. Cir. 1952), aff'd sub nom. Burns v. Wilson, 346 U.S. 137 (1953); Kuykendall v. Hunter, 187 F.2d 545, 546 (10th Cir. 1951) (dictum) ("Due process of law must be observed in military trials the same as trials in civil courts"); the court does not cite Hiatt v. Brown). See Snedeker, Habeas Corpus and Court-Martial Prisoners, 6 Vand. L. Rev. 288, 297 & n.90, 298 (1953).
Court's opinion contains two ambiguities which provided the means for avoiding the obstacle.\textsuperscript{36} One is that the Court's mention of the due process clause (quoted above) can be read to mean that although a due process claim is generally a valid inquiry, the alleged errors in this case did not amount to a denial of due process. The other is the use of the "lawful powers" terminology, which could be interpreted as an authorization to reach many issues of fundamental fairness, as long as the habeas court stayed within the rubric of "jurisdiction." \textsuperscript{37}

In \textit{Burns v. Wilson},\textsuperscript{38} the Court attempted to clarify the \textit{Hiatt} opinion. The court-martialed petitioners alleged on habeas a denial of due process.\textsuperscript{39} The district court\textsuperscript{40} dismissed the petitions on the ground that it had no authority to look into such an allegation. The circuit court\textsuperscript{41} affirmed, while ruling that the expanding scope of review in civilian cases dictated that \textit{Hiatt} not be read to bar all review of constitutional issues. That court stated that habeas would lie only "in the exceptional case when a denial of a constitutional right is so flagrant as to affect the 'jurisdiction' (i.e., the basic power) of the tribunal." \textsuperscript{42} After a lengthy consideration of the allegations on their merits, the circuit court held that the test was not met.

The Supreme Court affirmed, but was unable to come to any agreement as to what issues were cognizable. At least seven Justices\textsuperscript{43} appeared to reject the old view, expressed in Mr. Justice Minton's concurring opinion,\textsuperscript{44} that civilian courts on habeas could only review the formal jurisdiction of the military court.\textsuperscript{45} Chief Justice Vinson's plurality opinion announced that a civilian

\begin{itemize}
\item \textsuperscript{37} The Supreme Court added to the confusion later in the year when it declared, without citing \textit{Hiatt}, that denial of the opportunity to raise the issue of insanity goes to the question of jurisdiction. \textit{Whelchel v. McDonald}, 340 U.S. 122, 124 (1950) (dictum).
\item \textsuperscript{38} 346 U.S. 137, rehearing denied, 346 U.S. 844 (1953).
\item \textsuperscript{39} The petitioners had been sentenced to death for rape and murder. They alleged that they had been illegally detained, their confessions coerced, their right to counsel denied, evidence suppressed, perjured testimony procured, and that the trial atmosphere had been conducive to mob violence. The dispute on these claims was chiefly centered on issues of fact, not on the applicable legal standards.
\item \textsuperscript{40} \textit{Burns v. Lovett}, 104 F. Supp. 312 (D.D.C. 1952); \textit{Dennis v. Lovett}, 104 F. Supp. 310 (D.D.C. 1952).
\item \textsuperscript{41} \textit{Burns v. Lovett}, 202 F.2d 335 (D.C. Cir. 1952).
\item \textsuperscript{42} \textit{Id.} at 342.
\item \textsuperscript{43} Mr. Justice Jackson concurred in the result, without opinion. 346 U.S. at 146.
\item \textsuperscript{44} 346 U.S. 137, 146.
\item \textsuperscript{45} Lower courts now consider this concept as finally laid to rest. \textit{E.g.}, \textit{Gibbs v. Blackwell}, 354 F.2d 469, 471 (5th Cir. 1965).
\end{itemize}
habeas court could inquire only into those constitutional claims with which the military had not dealt "fully and fairly" in a "fair consideration." Applying the rule to the case, he found that the military had heard petitioners out on every significant allegation, then had scrutinized the trial record, and in lengthy opinions had concluded that petitioners had failed to establish their allegations. Mr. Justice Douglas dissented, arguing that, as in review of state convictions, any denial of due process entitled the petitioners to habeas relief. He would have had the habeas court determine at least whether the military court had employed the proper legal standard, even if bowing to the military court's findings of fact.

2. The Range of Issues Cognizable. — (a) Constitutional Issues. — Since Burns, the Supreme Court has remained virtually silent on the range of issues cognizable when a federal habeas court entertains a petition from a court-martialed prisoner. Consequently, the lower courts have had to struggle on their own with the "fair consideration" test, at least with respect to constitutional issues. The fair consideration test poses few unusual problems when applied to questions of fact. Under now familiar principles, if the military court has held a hearing at which the defendant had an opportunity to develop the facts, if the procedures surrounding that hearing were conducive to a full development, and if the findings are stated or can easily

46 346 U.S. at 142.
47 Id. at 144.
48 Id. at 150.
50 Mr. Justice Frankfurter wrote a separate opinion, 346 U.S. at 148, which was reiterated and expanded upon denial of rehearing, 346 U.S. at 844. He argued that inadequate exploration of the issues and the inconclusive determination called for a better focused reargument and more careful deliberation.
51 The Court said it was following Burns in Fowler v. Wilkinson, 353 U.S. 583 (1957), where it refused to review the severity of a military sentence which was within the statutory maximum. The case did little to clarify Burns since even a state prisoner under Brown v. Allen, 344 U.S. 443 (1953), probably could not attack such a sentence. See p. 1070 infra. The reliance on Fowler in Williams v. Heritage, 323 F.2d 731, 732 (5th Cir. 1963), cert. denied, 377 U.S. 945 (1964), as indicating a return to the pre-Burns view of the scope of military habeas, is then unwarranted.

The other mentions of Burns have been equally unilluminating. See United States v. Augenblick, 393 U.S. 348, 350 n.3, 351 (1969); Morse v. Boswell, 393 U.S. 804, 809 (1968) (Douglas, J., dissenting to mem. denial of application for stay), cert. denied, 393 U.S. 1052 (1969); Reid v. Covert, 354 U.S. 1, 37 n.68, 56 (1957).
52 Treatment of jurisdictional and other legal issues on habeas is discussed at pp. 1227-29 infra.
53 See pp. 1113-40 supra.
be reconstructed, the military can be said to have fairly considered the issue.\textsuperscript{54} Professor Bator has noted in a similar context the fruitlessness of a search for the "ultimate truth" of the historical sequence of events.\textsuperscript{55} These principles are nearly as applicable to fair military court findings of fact as to fair state court findings. Military findings, particularly those not reviewed by a military appeals court, might warrant less deference than state findings, however, because of the special role of the court-martial in meting out discipline.\textsuperscript{56} But the federal habeas courts seem to defer, in general, very readily to military findings of fact.\textsuperscript{57}

The courts have had a harder time in applying the fair consideration test to issues of law. Taken at its face, the test requires a federal habeas court to refrain from reviewing a constitutional decision of a military court that diverges from the usual constitutional standard and is unjustified by any unique military interest, if only the military court has used fair and adequate procedures in coming to its decision. But if the "rightness" of the military decision is to be an indicium of the "fairness" of the consideration, then there is no logical way to prevent the fair consideration test from turning into a review de novo. Faced with such difficulties,\textsuperscript{58} the courts have tried various solutions.\textsuperscript{59} Some courts, admitting confusion, manage to avoid the issue by finding no constitutional violation, whatever the proper standard of review.\textsuperscript{60} Other courts have reviewed issues of constitutional law de novo, either by virtually ignoring \textit{Burns} and ruling that such claims are cognizable,\textsuperscript{61} or, more cautiously, by

\textsuperscript{54} \textit{Burns} itself demonstrated this principle in its treatment of the factual issues presented. \textit{See} pp. 1225-26 infra.


\textsuperscript{56} \textit{Cf.} p. 1224 infra. On the other hand, where unraveling the fact situation requires significant experience with the realities of military life, deference to facts found by a fair procedure would be appropriate.

\textsuperscript{57} \textit{See}, e.g., \textit{Kasey v. Goodwyn}, 291 F.2d 174 (4th Cir. 1961), \textit{cert. denied}, 368 U.S. 959 (1962); Mitchell v. Swope, 224 F.2d 365 (9th Cir. 1955) (per curiam).

\textsuperscript{58} The existence of such difficulties may argue that \textit{Burns} was intended to apply only to issues of fact. \textit{See} pp. 1225-26 infra.

\textsuperscript{59} \textit{See generally} Katz & Nelson, \textit{supra} note 5, at 206-11.


Perhaps the most striking example of this approach, and the only time that the decision resulted in the release of the petitioner from confinement, was \textit{In re Stapley}, 246 F. Supp. 316 (D. Utah 1965). The government, however, chose not to appeal.
ruling that a determination of the fairness of consideration involves inquiry into the rightness of the decision. The majority of courts, however, have taken a narrow view of their power to review on habeas corpus a decision of a court-martial, and apply, in effect, a simple test: did the military consider the allegation? If so, the military determination is conclusive:

[T]he Burns decision . . . does no more than hold that a military court must consider questions relating to the guarantees afforded an accused by the Constitution and when this is done, the civil courts will not review its action.

These courts, in other words, refuse to consider de novo any issue on which the military has made a decision.

The deference granted to military courts under the prevalent interpretation of Burns is far greater than the deference to state courts under Brown v. Allen. When considering a habeas petition from a state prisoner, the federal court can inquire de novo into questions of constitutional law and can repeat the process of applying the law to the facts, no matter how fully the state court has considered the issue and no matter how adequate the state procedures. If the state inadequately considered issues of fact, the federal habeas court can redetermine them. But Burns has been read to prohibit inquiry into law or fact if the military has decided the issue. This result is a strange one, for there are several reasons the state courts would seem to deserve more, not less, deference than military courts from the federal judiciary. First, since the military is a federal creation, the federal courts when reviewing a court-martial conviction need not feel restrained by notions of comity based on federalism. Second, state courts are part of the scheme established by the Constitution to provide for interpretation of constitutional standards; thus their decisions on constitutional issues, having once survived the scrutiny of direct review, should be entitled to greater durability than the
decision of military courts entirely outside this constitutional scheme.\(^{67}\) Third, state convictions can be reviewed in the Supreme Court for constitutional infirmities,\(^{68}\) while military convictions have never been subject to direct review by civilian courts.\(^{69}\) Since habeas corpus is the only important means of civilian review,\(^{70}\) a narrow range of issues cognizable would be

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\(^{67}\) Mr. Justice Frankfurter in his separate opinion upon denial of rehearing in Burns v. Wilson, 346 U.S. 844, 851 (1953), noted the anomaly that "a conviction by a constitutional court which lacked due process is open to attack by habeas corpus while an identically defective conviction when rendered by an ad hoc military tribunal is invulnerable."


\(^{69}\) See Dynes v. Hoover, 61 U.S. (20 How.) 65, 82 (1858).


Other collateral remedies, which do not require custody, may be available, but their validity is questionable and their scope of review is tied to that allowed on habeas. The most important is a suit for damages which result from the invalid court-martial sentence. See notes 4 & 24 supra. The suit is now against the United States in the Court of Claims, 28 U.S.C. § 1491 (1964), or, presumably, in the district courts if the amount in controversy does not exceed $10,000, id. § 1346(a)(2). Dicta in a recent Supreme Court case, United States v. Augenblick, 393 U.S. 348, 350-51 (1969), indicate this remedy may be improper because of the finality provisions of UCMJ article 76. Even if available, the remedy is coterminous with habeas, see, e.g., Augenblick v. United States, 377 F.2d 586, 592-93 (Ct. Cl. 1967), rev'd on other grounds, 393 U.S. 348 (1969); Begalke v. United States, 286 F.2d 606, 608 (Ct. Cl. 1960).

Despite prior cases mentioned above, a declaratory judgment, 28 U.S.C. §§ 2201-02 (1964), may be available today to attack a court-martial conviction, see Gallagher v. Quinn, 363 F.2d 301, 303-04 (D.C. Cir.), cert. denied, 385 U.S. 881 (1966) (declaratory relief available to challenge the constitutionality of a UCMJ provision; relief denied on merits); Jackson v. Wilson, 147 F. Supp. 296 (D.D.C. 1957) (declaratory relief available to vacate court-martial judgment without jurisdiction; relief denied on merits). But this relief might be barred by the finality provision of the UCMJ, see United States v. Augenblick, 393 U.S. 348, 351 (1969) (dictum); Davies v. McNamara, 275 F. Supp. 278, 279 (D.N.H. 1967), aff'd sub nom. Davies v. Clifford, 393 F.2d 496 (1st Cir. 1968). Even if available, the remedy is surely limited to the issues which can be raised on habeas corpus. Goldstein v. Johnson, 184 F.2d 342, 343 (D.C. Cir.), cert. denied, 340 U.S. 879 (1955). A third possible collateral remedy is review by mandamus of a refusal by the secretary of a military department to grant administrative relief. Problems with this device are discussed at p. 1237 infra.
more telling in insulating constitutional abuse from correction than a comparable restriction of habeas review of state convictions. Finally, the practical necessity of supervising the application of the Constitution in state criminal systems may be less than in the military system. Relatively speaking, "[a] civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while the military trial is marked by the age-old manifest destiny of retributive justice." 71

What, then, is the justification for treating military judgments on federal constitutional questions with more respect than state judgments? No statute or constitutional provision compels the federal courts to make the range of issues narrower when a military detention is attacked than when a civilian custody is challenged. 72 The same federal statute grants the district courts power to issue habeas to military and civilian prisoners, 73 and there has never been any special treatment statutorily given to military prisoners. 74 The range of issues cognizable on military habeas, as the Burns Court recognized, is a matter of policy, not of power. 75

Chief Justice Vinson offered several arguments in his opinion to justify a narrow range of issues cognizable for military habeas corpus. First, he argued that "in military habeas corpus . . . the scope of matters open for review . . . has always been more narrow than in civil cases." 76 Only Hiatt v. Brown, 77 decided three years earlier, was cited. Yet the original range of inquiry fixed by the Supreme Court in Ex Parte Reed was at least as broad as that applied to civilian cases of that time. 78 Subsequently, there was a gradual expansion of this range roughly comparable to the expansion of civilian habeas corpus. 79 The revolutionary expansion of civilian habeas corpus after Johnson v. Zerbst 80 was also paralleled in military habeas until the Court

74 The finality provision of UCMJ art. 76 (and formerly Article of War 50(h) of 1948, ch. 625, 62 Stat. 637–38) does not apply to habeas corpus. See p. 1222 infra.
75 Burns v. Wilson, 346 U.S. 137, 139 (1953) (Vinson, C.J., plurality opinion). See In re Yamashita, 327 U.S. 1, 30 (1946) (Murphy, J., dissenting) ("The ultimate nature and scope of the writ of habeas corpus are within the discretion of the judiciary unless validly circumscribed by Congress.").
76 346 U.S. at 139.
78 See pp. 1209–10 supra.
79 Katz & Nelson, supra note 5, at 197–98.
80 304 U.S. 458 (1938).
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reacted in Hiatt. Thus it was only in 1950 — the year in which Vinson's historical survey began and ended — that the range of issues cognizable on civilian habeas corpus became significantly broader than the range on military habeas. Second, the Chief Justice pointed out that the need for habeas was not pressing because Congress was doing a good job of enforcing fairness in the military courts. But the very premise of the Burns and other decisions is that a serviceman is constitutionally protected, just as a civilian, against unlawful or arbitrary government action. Congressional action does not reduce the obligation of the courts to define and protect those rights. The statutes that protect servicemen could, of course, be altered at any time. Nor does the third point made in the opinion justify a narrow range

81 See pp. 1213–14 supra.
83 346 U.S. at 142–43:
For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect 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 rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts.
It may be that the original intent of the framers was not to apply the Bill of Rights per se to the military, but rather to leave to Congress the task of safeguarding the soldiers' rights to that extent which is consonant with the demands of discipline and duty. Wiener, Courts-Martial and the Bill of Rights: The Original Practice (Pts. 1–2), 72 Harv. L. Rev. 1, 266 (1958). Contra, Henderson, Courts-Martial and the Constitution: The Original Understanding, 71 Harv. L. Rev. 293 (1957); Burns v. Wilson, 346 U.S. 137, 152–53 (1953) (Douglas, J., dissenting). However, considerations of original intent have been rendered largely academic by the recent, express application of the Constitution to servicemen. This has been accomplished either by a direct application of the constitutional amendments or by an application of the substance of these rights through fifth amendment due process. See Wiener, supra, at 294–304. The first course has been followed by the United States Court of Military Appeals. United States v. Jacoby, 11 U.S.C.M.A. 428, 430–31, 29 C.M.R. 244, 246–47 (1960) (dictum) (Bill of Rights applicable to servicemen unless expressly or by necessary implication unavailable); see United States v. Culp, 14 U.S.C.M.A. 199, 219–17, 219, 33 C.M.R. 411, 428–29, 431 (1963) (Quinn, C.J., and Ferguson, J., concurring opinions) (right to counsel). The latter course was adopted by the Supreme Court in Burns. The district court deciding In re Stapley, 246 F. Supp. 316 (D. Utah 1965), utilized both, applying fifth amendment due process and sixth amendment right to counsel in an overlapping manner; see note 61 supra.
85 Reid v. Covert, 354 U.S. 1, 37 & n.67 (1957) (Black, J., plurality opinion).
86 346 U.S. at 142:
of issues cognizable on military habeas: the finality provision of UCMJ article 76 was simply not intended by Congress to apply to habeas. A fourth argument was that "[m]ilitary law, like state law, is a jurisprudence which exists separate and apart," as shown by the fact that the "Court has played no role in its development." While military courts and the law they administer have enjoyed a long development largely independent of the civilian judiciary in England and America, the Chief Justice ignored the fact that the rules governing a court-martial's proceedings are required by statute to conform as nearly as practicable to those principles of law and rules of evidence recognized by the federal courts. Furthermore, Chief Justice Vinson slighted the moral pressures, indirect but very real, created by the Supreme Court's pronouncements; judges of the military courts apparently feel bound by the Court's rulings where military necessities permit, and cite the Court continually. Also, as has been shown, the federal courts in the past have often stepped in by habeas to prevent the military courts from exceeding their appropriate jurisdiction, to force conformity with their governing statutes, or even occasionally to correct radical departures from fundamental fairness. In short, the Chief Justice's view of history was oversimplified. Additionally, and more fundamentally, the historical separateness of military law is irrelevant where constitutional law is the issue.

We have held before that [the statutory finality provision] does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner. Gusik v. Schilder, 340 U.S. 128 (1950). But these provisions do mean that when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence.

This finality provision, formerly Article of War 50(h) of 1948, ch. 625, 62 Stat. 637-38, states that decisions of courts-martial are "final and conclusive" and "binding upon all departments, courts, agencies, and officers of the United States."


466 U.S. at 140.

UCMJ art. 36.

The main argument on which Burns rested was the special need of the military "to meet certain overriding demands of discipline and duty" in order to accomplish its task of defending the nation. The argument is that this need for discipline requires that Congress, through the military courts, be allowed to decide how to deal with servicemen that violate military law. If accurate, this argument could provide a reason for a narrow range of issues cognizable upon habeas corpus. But the argument is unpersuasive.

It is true that an expanding military habeas might require the military to expend its resources on repeated trials and to forego the manpower needed at the trial or habeas hearing, thus impeding the military's functions. Further, the prestige of the military might be sullied if civilian courts often used habeas corpus to correct errors made in military courts. But arguments of this sort have been rejected when made by the states in objecting to federal habeas. The interest in vindicating constitutional rights simply overrides such arguments. Furthermore, the primary effect on discipline of any expansion of the "escape route" that habeas represents will be on the military prison population. Quite clearly, the military has no special need of that sort of discipline which produces a fighting unit for men it is holding in prison. The primary effect is limited to prisoners because habeas is not of immediate concern to soldiers outside the stockade. For this mass of servicemen, the ordinary, day-to-day enforcement of discipline does not depend on the court-martial, but on extra duty, withholding of passes, and non-judicial punishment, normally considered beyond the reach of habeas. As to morale, the psychological disruption incident to expanding habeas to the full review enjoyed by civilian prisoners can be expected to be minimal since the advances in court-martial fairness already made by Congress and the USCMA have greatly reduced the magnitude of change necessary to this expansion. In fact, if any appreciable effect on morale is felt, it might be a positive one stemming from the added protection of constitutional rights that is afforded by habeas, just as confidence in the system of military
law supposedly grew following implementation of the Uniform Code of Military Justice.99

The special needs argument, then, must be aimed not at limiting the range of issues cognizable on habeas but rather at establishing the military's need to determine for itself the substantive constitutional rights servicemen have. Such arguments center on the need for certainty of punishment, especially when extreme circumstances necessitate disregard for civilian notions of individual rights, and on the peculiar nature of the military environment, which requires the expertise of military judges for a proper balance of military needs against constitutional rights. That is, the special needs argument here reduces to an assertion about which set of courts is to make the final judgment on constitutional questions. The fair consideration test of Burns permits the military to create its own version of constitutional law, without any review to ensure a valid military justification for the difference. Giving the military courts this power is likely to undermine the basic premise that servicemen are protected by the Constitution against government activity violative of their constitutional rights.100

The same sorts of considerations that justify federal habeas review of the constitutional validity of a state conviction101 apply with even greater force to review of military convictions. The court-martial is an ad hoc tribunal and is subject to the risks of command influence since military judges lack the constitutional guarantee of life tenure and protected salary. It is not "an independent instrument of justice but . . . to a significant degree a specialized part of the overall mechanism by which military discipline is preserved."102 The momentum of the court-martial's interest in guilt or innocence and its institutional ineptitude in "dealing with the nice subtleties of constitutional law,"103 both argue that a second proceeding is necessary to ensure that the defendant's constitutional rights are respected. That second proceeding should be in an article III court, not in a military appeals court. Even more than a state court, the military tribunal has dual allegiances: its institutional role must make it highly responsive to arguments based on the special needs of the military.104 The federal habeas court in a proceeding which looks only at constitutional questions, not guilt or innocence, will be institutionally more hospitable to the serviceman's rights.

99 1960 ANNUAL REPORT OF THE USCMA 4-5.
100 See note 83 supra.
101 See pp. 1056-62 supra.
103 Id.
Moreover, the habeas court need not apply the full panoply of constitutional provisions as they apply to civilians. The court can take real military needs into consideration when determining the scope of a serviceman's constitutional rights if necessary to avoid a foreseeable adverse effect on the military's mission. To this end, the habeas court can consider the opinions of the military courts, and rules of exhaustion can ensure that the habeas court will have before it the military's statement of its interests.\textsuperscript{105} The degree of deference given these opinions can be expected to vary according to the authoritativeness of the source within the military judicial hierarchy and according to the persuasiveness of the argument. Particularly careful consideration of the military opinion can be given by the habeas court on those mixed issues of fact and law which call for military expertise. For example, the military's determination of the meaning of illegal search in the military environment should receive more weight than its interpretation of the right to counsel before courts-martial.

These arguments lead to the conclusion that there is no persuasive reason for a narrower range of issues cognizable when a military prisoner petitions for habeas than when a state prisoner petitions. The proper rule would seem to be that the federal habeas court can decide whether the military court used the proper constitutional standard and whether that standard was correctly applied to the facts.\textsuperscript{106} The habeas court should normally defer to the findings of fact of the military court, provided they were arrived at after a "fair consideration."\textsuperscript{107} In short, the \textit{Burns} rule as interpreted by a majority of courts should be rejected, and the rules of habeas which govern habeas petitions by state prisoners should govern petitions by military prisoners.\textsuperscript{108} Special military needs can be taken into account by the civilian court in deciding the substance of the constitutional provisions which apply.

It is possible to interpret \textit{Burns} to allow this rule, although the language and spirit of the opinion do seem to support the traditional interpretation. One can read \textit{Burns} as requiring deference only to the military court's findings of fact. The case itself involved primarily disputed questions of fact: whether or not the alleged acts of coercion of confession, detention, "planted"

\textsuperscript{105} See pp. 1232–33 \textit{infra}.
\textsuperscript{106} See p. 1056 \textit{supra}.
\textsuperscript{107} See pp. 1118–21 \textit{supra}.
\textsuperscript{108} The alternative solution of providing for direct review by certiorari from the Supreme Court to the USCMA is unsatisfactory for the same reasons that habeas is a necessary complement to certiorari to the states, \textit{i.e.}, the present volume of the Court's work load. See p. 1061 \textit{supra}.
evidence, and denial of counsel actually occurred. Chief Justice Vinson was apparently thinking solely of factual issues when he ruled that the habeas court should not "re-examine and re-weigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations" and should not cater to the petitioners' desire "to make a new record, to prove de novo in the District Court precisely the case which they failed to prove in the military courts." Only one pure legal issue was posed in Burns: a contention that the rule of McNabb v. United States rendered the confession inadmissable. The Chief Justice handled the problem de novo although the military courts had evidently fully and fairly considered the issue. Thus, as a few courts have hesitatingly indicated, Burns can be read to allow full consideration of legal issues by the habeas court, with deference only to the military's findings of fact.

In the face of considerable lower court precedent for a broader interpretation of Burns, however, this view is unlikely to prevail, and only a re-examination of Burns by the Supreme Court is likely to settle the issue.

109 See note 39 supra.
110 346 U.S. at 144.
111 Id. at 146.
112 318 U.S. 332 (1943).
113 346 U.S. at 145 n.12. Relegating this issue to a footnote in Burns is perhaps further indication that treatment of issues of constitutional law was tangential to the Chief Justice's reasoning.
114 E.g., Kennedy v. Commandant, 377 F.2d 339, 342 (10th Cir. 1967) (The court considered de novo the legal issue of right to counsel in a given fact situation, after observing that if "the constitutional issue [had] involve[d] a factual determination, our inquiry [would be] limited to whether the military court gave full and fair consideration to the constitutional questions presented."); Gibbs v. Blackwell, 354 F.2d 469, 471-72 (5th Cir. 1965) (semble). But see Smith v. McNamara, 395 F.2d 896, 900 (10th Cir. 1968), cert. denied, 394 U.S. 934 (1969), where the same judge who decided Kennedy held in a mandamus proceeding that a non-factual issue of constitutional law was not cognizable since the military heard it "fully and fairly"; Kennedy was cited as support.

E.g., Shaw v. United States, 357 F.2d 949, 954 (Cl. Ct. 1966) (Had the issue turned on evaluation of particular facts, the court would not have reassessed them, once the military had done so with care, but "such abstinence is not to be practiced when the servicemen presents pure issues of constitutional law . . . . That type of unmixed legal question this court has always decided for itself"); Augenblick v. United States, 377 F.2d 586, 593 (Cl. Ct. 1967), rev'd on other grounds, 393 U.S. 348 (1969).

115 The Supreme Court bypassed an opportunity to clarify the whole area of collateral attack on military judgments when it decided United States v. Augenblick, 393 U.S. 348 (1969), reversing on the merits two Court of Claims cases without passing on the validity of the Deming approach to collateral attack used in one case (Juhl v. United States, 383 F.2d 1009 (1967), see note 20 supra & pp. 1227-28 infra) or a straight-forward constitutional inquiry similar to the one
(b) Questions of Nonconstitutional Law.— The statute that grants habeas jurisdiction to the federal courts with respect to both state prisoners and military prisoners provides that the petitioner is to be released if held “in violation of the Constitution or laws” of the United States.\(^{116}\) State prisoners rarely have such claims,\(^{117}\) but since all military law is federal law, every legal issue faced by the court-martial would seem open to review on habeas under the statute.

It is clear that the question of jurisdiction of the person and the subject matter—a question of law—is open to review de novo on habeas corpus.\(^ {118}\) But it is not clear whether other questions of law are cognizable. Under the approach of McClaughrv v. Deming\(^ {110}\) statutory violations can be raised on habeas under the rubric of jurisdiction, since any act by the court-martial beyond or inconsistent with its governing statutes can be said to be void. Deming, however, was decided long before Burns v. Wilson. Today Deming seems an outmoded approach. It arose to enable courts to reach questions bearing on fundamental fairness which were then not otherwise reviewable. Since that time a complex military appeals system has arisen to provide initial review.\(^ {120}\) Moreover, the Constitution has been held to apply directly to servicemen,\(^ {121}\) and Burns permits some review of constitutional


\(^{117}\) See pp. 1070–72 supra.


\(^{120}\) At the time of Deming the only review was confirmation by a superior officer or, in important cases, by the President. Rev. Stat. tit. XIV, ch. 5, § 1342, arts. 104–10 (1874). The appeal system currently used is described in note 168 infra.

\(^{121}\) See note 83 supra.
Consequently, the *raison d'être* of Deming has disappeared. The opinion of the Supreme Court in *United States v. Augenblick* suggests that if the Deming approach relied on by the lower court retains any validity at all, it is limited to violations of law that take on constitutional stature. For legal issues of a nonconstitutional and nonjurisdictional nature the lower courts must look to Burns.

Since Burns has been interpreted by most to mean that a federal habeas court can not review a constitutional decision of a military court if that court has considered the matter fully and fairly, it would seem to follow that where the military court has interpreted a provision of military law in a full and fair proceeding, the habeas court cannot review the decision. On the other hand, where the military courts have not considered the issue, and the petitioner has not waived his claim, the federal courts on habeas conceivably could consider the issue de novo. The Supreme Court in *Jackson v. Taylor*, without mentioning the problem, considered an issue in the interpretation of the Uniform Code of Military Justice which the USCMA had not faced. Yet even the power to review when the military has not considered the claim may be in doubt, for several recent cases use broad language indicating that only jurisdictional and constitutional issues are ever cognizable.

In short, while the state of the law is somewhat unclear, it seems that there is a general tendency to limit civilian review of legal issues (other than jurisdiction) even more narrowly than Burns has been read to limit review of constitutional issues. How-

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122 See pp. 1215–16 *supra.*

123 393 U.S. 348 (1969). The case involved review of collateral attacks by way of suits for damages in the Court of Claims; such review has been traditionally comparable to habeas. See note 70 *supra.*

124 The exact holding of the case is unclear because the Court failed to consider explicitly the lower court's arguments based on the Deming approach. See Note, *supra* note 72, at 1272; note 115 *supra.*

125 Juhl v. United States, 383 F.2d 1009 (Ct. Cl. 1967).

126 In this case, the improper use of accomplice testimony in violation of MCM (1951) § 153(a), was ruled not to be of constitutional stature.

127 See pp. 1230–32 *infra.*


129 Id. at 571–72. The issue was the power of the Board of Review to modify a court-martial sentence under UCMJ art. 66(c). In Fischer v. Ruffner, 277 F.2d 756, 758 (5th Cir. 1960), *Jackson* was distinguished by considering this issue to be one of jurisdiction.

130 Wigand v. Taylor, 285 F.2d 594 (10th Cir. 1960) (denying review of an alleged violation of a procedural regulation, MCM (1951) § 30(f)); Fischer v. Ruffner, 277 F.2d 756 (5th Cir. 1960) (question of law involving the statute of limitations ruled not cognizable on habeas); Bourchier v. Van Metre, 223 F.2d 646 (D.C. Cir. 1955) (*semble*) (only constitutional and jurisdictional issues are cognizable).
ever, the kind of objection raised above — that Burns permits the development by the military of its own constitutional law — does not apply with the same force to issues of military law as it does to constitutional questions. The appeals system in the military can usually ensure that the court-martial did not violate its governing statutes and can provide for uniform application of military law. While military courts may be institutionally inadequate to make unreviewable judgments of a person's constitutional rights, other issues of law are of a lower stature and within the competence of the military court, which deals with such issues each day. An analogy may be drawn from review of state convictions on habeas. Matters of state law will not be heard by the federal court; they are exclusively for the state judicial system. Just as the federal courts will not become involved in issues of state law because of the sovereignty of the state, matters of military law as a regular course could be left to the system Congress created to enforce the Uniform Code of Military Justice.

The state of the law on the cognizability of nonconstitutional legal issues which have been decided by the military is thus acceptable. However, in the case where the military has not heard the claim, a tendency to bar all issues of military law on habeas is more disquieting. On such a petition, the habeas court should apply a strict exhaustion doctrine; but if there is no possibility of airing the claim in the military and if the claim has not been waived, the federal court should provide relief by exercising its reserve power to review matters arising under the laws of the United States.

3. Traditional Habeas Doctrines and Review of Court-Martial Decisions. — Since habeas corpus petitions from prisoners under the sentence of a court-martial are brought into federal court under the same statutory provisions as petitions from state prisoners, the court-martialed prisoner faces the same obstacles to relief as the state prisoner. Custody is one example. Present case law requires that the court-martialed prisoner be in actual physical confinement before habeas will lie. This is the tradi-

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131 See p. 1224 supra.
132 See id.
133 See pp. 1070-72 supra.
134 See pp. 1232-34 infra.
136 Other obstacles include prematurity, exhaustion of remedies, and waiver.
137 See, e.g., Wales v. Whitney, 114 U.S. 564, 570-75 (1885) (order to remain in District of Columbia is not sufficient confinement); Kanewskie v. Nitze, 383 F.2d 388 (5th Cir. 1967) (per curiam) (bad-conduct discharge does not satisfy custody requirement); Goldstein v. Johnson, 184 F.2d 342, 343 (D.C. Cir.) (per curiam), cert. denied, 340 U.S. 879 (1950) (dishonorable discharge does not satisfy custody requirement); Murray v. Wedemeyer, 179 F.2d 903 (9th Cir.) (per
tional rule. As the custody requirement loosens for state and federal prisoners, the strict requirement for court-martialed prisoners can be expected to ease, because the same purposes are served by the custody rule in both situations. Likewise, as the Great Writ begins to provide civilian prisoners with remedies beyond simple release from custody, the present rule that physical release is the only remedy available to a court-martialed prisoner should be modified.

In two areas, however, the courts face problems in applying the usual habeas doctrines. The first is waiver, where a combination of the language in Burns v. Wilson and a lack of authoritative application of Fay v. Noia has created the problem. Exhaustion of remedies is the second area; there the proliferation of intra-military procedures makes application of the well-understood rules somewhat complicated.

(a) Waiver. — During the period that the habeas court could inquire only into jurisdiction when petitioned by a court-martialed prisoner, the waiver issue was rarely litigated. Now that constitutional claims are cognizable, however, the courts are regularly faced with the waiver question.

Burns v. Wilson, the first case in which the Supreme Court recognized a constitutional claim from a court-martialed prisoner...
on habeas, provides no guidance on waiver, for all the claims there had been asserted before the military courts. Nor has the Court provided guidance since *Burns*\(^\text{140}\). Lower court decisions have not been uniform, but the prevailing view of waiver is a strict one: a claim is said to be barred on habeas corpus if it was available but not asserted in the military court system.\(^\text{150}\) This rule has been based not so much on principles of waiver as on the "fair consideration" test of *Burns*. The Tenth Circuit in *Suttles v. Davis*\(^\text{151}\) put it this way:

The civil courts may review only claims of infringement of constitutional rights which the military courts refused to give fair consideration. . . . Obviously, it cannot be said that they have refused to fairly consider claims not asserted.

But this semantic ploy is inconclusive,\(^\text{152}\) for it may just as easily be said that where the military had not been presented the claim it did not give it the fair consideration demanded by *Burns* as a bar to habeas review. The waiver question is best answered by assessing the purposes served by the waiver rule.

Just as in review of state criminal detentions, a waiver rule for court-martialed prisoners should reflect the policy of encouraging defendants to make full use of the other procedures available to them before recourse to habeas corpus. This policy in turn reflects interests in permitting the state or military judicial system to correct its own mistakes, to find a non-constitutional ground on which to base the decision, and to protect the integrity of its courts by not having claims which might have led to a


\(^{152}\) Without the *Suttles* doctrine, however, *Burns* (as usually interpreted) could lead to the following difficulty. Suppose two soldiers in separate proceedings raise claims of coerced confession. In the first, the court-martial, after full argument and consideration, decides that the proper legal standard is that the confession is admissible if trustworthy. In the second, the claim is not raised. Each prisoner seeks federal habeas. The first, under *Burns*, would presumably get no review of the issue, since the military had fully considered it. The second presumably would get full review. Then, unless the second habeas court were bound by the first court-martial's determination, it would be free to apply a different legal standard to the second petitioner. The *Suttles* strict waiver rule avoids such an anomalous result.
different result brought up only on collateral attack. These reasons lead to use of the *Fay v. Noia* 163 "deliberate by-pass" rule in the military as well as the state area. The simplistic test of *Suttles v. Davis*, which would bar claims even when the failure to assert them was due to a "grisly choice," should be rejected.

(b) Exhaustion. — The Supreme Court did not squarely face the question of exhaustion as prerequisite to military habeas corpus until the vastly increased flow of post-World War II petitions 165 and the temporary expansion of the range of issues cognizable in the 1940's 156 posed the problem sharply. In *Gusik v. Schilder* 157 the Court ruled that a habeas petitioner must have first availed himself of the then new statutory provision for petition for a new trial 158 before seeking federal habeas corpus. The Court expressly applied by analogy the rules of exhaustion, both statutory 150 and decisional, 160 applicable to state prisoners.

The exhaustion rule serves similar purposes in both areas. 101 First, resort to military postconviction remedies might render habeas corpus unnecessary, thus avoiding needless interjudicial friction. Second, the doctrine allows military courts to pass on constitutional questions as well as factual questions first. The federal habeas court will then have the military's view of its needs when it considers the questions presented.

Since the purposes of the exhaustion requirement are similar for both the state and the military prisoner, it seems clear that the *Fay v. Noia* 162 rule that relief is not barred when an unexhausted remedy is no longer available should apply to review of courts-martial, even though there has been no authoritative application of that rule up to this time. 103 Barring relief when the

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154 Some earlier cases relied on considerations peculiar to the exhaustion doctrine without expressly formulating it. E.g., *Wales v. Whitney*, 114 U.S. 564, 575 (1885).


156 See pp. 1213–15 supra.


158 Article of War 53 of 1948, ch. 625, 62 Stat. 639, as amended, UCMJ art. 73, 10 U.S.C. § 873 (Supp. IV, 1969). Presently this article offers the court-martialed serviceman the possibility of petitioning the Judge Advocate General for a new trial, on the grounds of newly discovered evidence or fraud on the court, within two years of the approval of the court-martial sentence by the convening authority.


101 See pp. 1093–1103 supra.


160 Sherman, supra note 155, at 501; see, e.g., *Bokoros v. Kearney*, 144 F. Supp. 221, 228–29 (E.D. Tex. 1956) (alternative holding) (failure to apply for new trial
remedy is no longer available is a per se waiver rule, serving none of the purposes of exhaustion. If the object is to encourage use of the military court system, a proper waiver rule will suffice.\textsuperscript{164} It also seems clear that, since exhaustion is a matter of comity and not one of power,\textsuperscript{165} a flexible treatment of the exhaustion requirement is appropriate. Indeed, \textit{Gusik} itself recognized the futility exception to the exhaustion requirement.\textsuperscript{166} Where there is little to be gained by exhaustion and the petitioner may have to subject himself to additional penalties in order to pursue his military remedy, exhaustion ought not be required.\textsuperscript{167}

Present case law establishes the general rule that all direct review\textsuperscript{168} within the military system must be exhausted before federal habeas will lie.\textsuperscript{169} This rule poses no analytical problem, for it is the same rule used in review of state and federal detentions.\textsuperscript{170} Difficulties arise, however, in two areas unique to the military.

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within the one year limit without good cause bars habeas corpus). However, the court in Williams v. Heritage, 323 F.2d 731, 732 (5th Cir. 1963), \textit{cert. denied}, 377 U.S. 945 (1964), in a brief and confusing opinion, did state that \textit{Pay v. Noia} should apply to a military prisoner.

\textsuperscript{164} See pp. 1230-32 \textit{supra}.


\textsuperscript{166} 340 U.S. at 132-33.

\textsuperscript{167} There has been a recent, analogous liberalization in the treatment given exhaustion in habeas cases involving military administrative decisions. \textit{E.g.}, \textit{Hammond v. Lenfest}, 398 F.2d 705, 712-14 (2d Cir. 1968); Sherman, \textit{supra} note 155, at 538-40.

\textsuperscript{168} UCMJ arts. 59-72, 74-76, 10 U.S.C. §§ 859-72, 874-76 (1964), as amended, (Supp. IV, 1969). The chain of review is subject to complex permutations which depend on the rank of accused, the severity of sentence, and the type of court-martial. As one example of the thoroughness of direct review, a death sentence is reviewed by the staff judge advocate (art. 61), the convening authority (art. 60), a Court of Military Review (art. 66), the USCMA (art. 67), and the President (art. 71(a)).

\textsuperscript{169} Noyd v. Bond, 395 U.S. 683, 693 (1969) (dictum); Gorko v. Commanding Officer, 314 F.2d 858, 860 (10th Cir. 1963); Osborne v. Swope, 226 F.2d 908, 909 (9th Cir. 1955). MCM (1951) § 214(b) provided that "\{p\}rior to the exhaustion of the remedies of appellate review and petition for new trial . . . resort to habeas corpus . . . is inappropriate and premature." This provision, along with the rest of the chapter on habeas corpus, was deleted from MCM (1969).

However, in Noyd v. Bond, \textit{supra}, at 696 n.8, the Court said that exhaustion is not required when a prisoner challenges the personal jurisdiction of the military. The Court's theory was that the expertise of military courts [does not extend] to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion of military remedies when the petitioners raised substantial arguments denying the right of the military to try them at all.

\textsuperscript{170} See pp. 1093-1103 \textit{supra}.
\end{flushleft}
United States Court of Military Appeals' Postconviction Remedies.—Postconviction relief issuing from the USCMA did not exist at all until 1966. Extraordinary relief was first actually granted in Jones v. Ignatius less than two years ago. In that case the sentence of a special court-martial was commuted by the convening authority from six months confinement and a bad conduct discharge to eleven months confinement. The latter sentence was in excess of the statutory maximum. After direct review was exhausted, Jones petitioned the USCMA for habeas corpus or appropriate relief. The latter was granted: the action of the convening authority was set aside and the case remanded.

The existence of military postconviction relief raises some important questions. First, must the relief be sought whenever available? The answer can be found by analogy to federal review of state detentions. State postconviction remedies ordinarily need not be utilized if the highest state court to which the issue can rise on habeas has already passed adversely on the claim; this rule evolved because it seems pointless to require repeated attempts to convince that court that its view of the federal question is improper. The same rule should apply where the USCMA has already considered the petitioner's claim. Second, must military postconviction relief ordinarily be sought if the USCMA has not passed on the issue? By analogy to review of state court detentions, the answer would appear to be affirmative. Noyd v. Bond seems to require the same answer. There the Supreme Court ruled that the habeas petitioner who sought

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173 UCMJ art. 64.

174 UCMJ art. 19.

175 UCMJ art. 65(c); the sentence as commuted was not severe enough to allow review under articles 66 or 67.

176 Most recently, in United States v. Bevilacqua, 18 U.S.C.M.A. 10, 11-12, 39 C.M.R. 10, 11-12 (1968) (petition for coram nobis denied on the merits), the USCMA stated that it stood ready to accord extraordinary relief to an accused who has palpably been denied constitutional rights in any court-martial; . . . an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary.

177 See pp. 1096-97 supra.

178 See pp. 1093-1103 supra.

release in the civilian courts pending his military appeal should first seek the writ from the USCMA, which had not yet considered his claim.

It would be inappropriate, however, to require exhaustion of military postconviction relief in all cases in which the USCMA had not once passed on the claim. *Noyd* was a case which was ultimately subject to direct review by the USCMA. In requiring exhaustion there, the Supreme Court noted that the writ to be granted by the USCMA was "necessary or appropriate in aid of [its jurisdiction]." 180 The Court pointed out that "a different question would, of course, arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes." 181 The implication is clear: the USCMA arguably has no power to expand its jurisdiction by issuing extraordinary writs in cases over which it has no eventual review power. 182 *United States v. Bevilacqua*, 183 where the sentence was not severe enough to warrant direct review by the USCMA, would be such a case. A similar situation would be presented where the time for appeal had run, even though the case was originally reviewable. 184 By the reasoning in *Noyd* another similar problem would arise in a case in which only a review of findings of fact is required. Since the USCMA is restricted to reviewing matters of law, 185 arguably relief predicated on fact review is not "in aid of [its] jurisdiction." Exhaustion should not be required until it is clear, either from congressional or Supreme Court action, that the USCMA is lawfully empowered to grant the requested relief in the situation.186 Moreover, doubts injected by *Noyd* as to the extent of

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181 395 U.S. at 695 n.7.
182 Those sentences which the USCMA can review without referral by JAG are ones affecting a general or flag officer, or extending to dismissal of a commissioned officer, cadet or midshipman, or extending to death, dishonorable discharge, bad-conduct discharge, or confinement for one year or more. UCMJ arts. 66(b), 67(b).
183 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968); see note 176 supra.
185 UCMJ art. 67(d). However, the USCMA has construed its jurisdiction broadly to reach matters of mixed law and fact, mislabeled questions of fact, findings of fact unsupported by substantial evidence, and findings of fact when fundamental rights are involved. Note, supra note 72, at 1264.
186 There are some other, less substantial arguments against the validity of the USCMA's power to grant postconviction relief which have not yet been decided by the Supreme Court. These include the effect of the finality provision of UCMJ art. 76, which is discussed in United States v. Frischholz, 16 U.S.C.M.A. 150, 151, 36 C.M.R. 306, 307 (1966); and the possibly superseding effect of a complete code such as the UCMJ on the inherent power to grant extraordinary relief—an analogous argument based on new criminal codes has succeeded in some
USCMA's powers, coupled with the paucity of intramilitary post-conviction relief cases, leave today's petitioner unenlightened as to the types of claims for which the USCMA will venture to give any relief at all. It would be unfair to impose the delay exhaustion entails when the availability and the legality of relief is so doubtful. The appropriate analogies in review of state convictions are those cases in which the state post-conviction remedy is a procedural morass or in which seeking the remedy is futile because of prior state decisions. In those sorts of cases, exhaustion is properly not required.

In sum, exhaustion of the military postconviction remedy should presently be required only when the claim has not yet been passed on by the USCMA and arises in a case which the USCMA can ultimately review — for this is the only situation in which it can now be said with assurance that the petitioner can get lawful relief if he is entitled to it. For two reasons, the USCMA probably will often be voluntarily petitioned for relief before federal habeas is sought. First, the range of issues cognizable on military postconviction relief purportedly includes examination of all constitutional rights and may include examination of evidentiary facts relevant to guilt, an issue not cognizable on habeas. Second, the USCMA has neither imposed a custody requirement nor limited the type of relief available. Thus the USCMA should receive sufficient petitions for the further development and clarification of its remedies, and the federal courts should not often have to face the exhaustion problem.

(ii) Administrative Relief. — Since 1946 there has been an administrative remedy whereby the secretary of a military de-
partment, acting through a board of correction, can "correct any military record of that department when he considers it necessary to correct an error or remove an injustice."194 This power has been considered to extend to court-martial judgments195 despite the finality provisions of UCMJ article 76 and its predecessors.196 The original intention was that this relief should function as an act of clemency comparable to, and in lieu of, a private act of Congress; it does not affect the validity or conclusiveness of the court-martial.197

A recent case, Ashe v. McNamara,198 suggested a new potential of this administrative remedy for providing civilian court review on constitutional issues. The court there held that the secretary had violated a plain duty in failing to change a serviceman's discharge from dishonorable to honorable when the court-martial which had sentenced the discharge failed to meet due process standards. Relief in the nature of mandamus199 was found appropriate. By thus subjecting the administrative remedy to civilian judicial review, the court seemed to promise a potent complement to habeas and, in view of the court's disregard for the military's consideration of the issue, an approach unhampered by the restrictions of Burns. However, a later case200 has taken the logical step of equating the two forms of collateral attack by applying the "fully and fairly" test201 to this new remedy. Up to now, so few courts have entertained such suits that the availability and limitation of judicial review of the administrative action remain unixed.202

When both remedies—habeas and administrative relief plus judicial review—are available, the applicability of exhaustion

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196 41 Op. Att'y Gen. 49 (1949); Ashe v. McNamara, 355 F.2d 277, 280 (1st Cir. 1965).
198 355 F.2d 277 (1st Cir. 1965). This case was cited with apparent approval in United States v. Augenblick, 393 U.S. 348, 351 (1969).
201 See pp. 1215-16 supra.
202 One possible serious limitation is suggested by the fact that no case supports the availability of the administrative remedy to effect one's freedom from jail; most cases involve discharges, reinstatements, changes in recorded rank and the like. Although a court-martial prison sentence seems almost as much a "military record" as does a court-martial sentence of dishonorable discharge, a narrow construction of "record" could mean that habeas and this administrative remedy are seldom alternative remedies posing an exhaustion problem.
comes into question. Exhaustion of the administrative remedy should not be required. It would be unfair to inflict on a prisoner the double delay of a further military remedy and the subsequent judicial review if he has already unsuccessfully pursued the full direct review — which may, incidentally, include confirmation by the secretary of the military department — and perhaps has also pursued the UCMJ article 73 petition for a new trial as well as any postconviction relief offered by the USCMA. Requiring exhaustion would be ill-advised in light of the original intent behind the extraordinary administrative remedy. Funneling all constitutional claims to the secretary before they are heard by a habeas court would convert his function from one similar to a governor's pardon in special cases to one where the secretary and his advisors would have to act as an additional military court in almost every constitutional case.

B. Administrative Restraints

Historically, habeas corpus has been a far more effective remedy for executive restraints than for confinements under the sentence of a court. While habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention. The rationale of this distinction has lost none of its force in the modern context even though the federal habeas jurisdiction for criminal prisoners has been significantly expanded: habeas corpus provides the first judicial scrutiny of detention by administrative agencies, whose quasi-judicial decisions affect constitutional and statutory

209 See UCMJ arts. 71(b), 74.
204 See p. 1232 & note 158 supra.
205 Not only is exhaustion of this new remedy undesirable, it may be unfeasible. The Fifth Circuit recently held that mandamus cannot properly issue if another adequate remedy is available. Carter v. Seamans, 411 F.2d 767, 773 (1969) (serviceman's alternate remedy was action in Court of Claims).
206 See p. 1045 supra.
207 See p. 1240 infra.
208 See pp. 1045-62 supra.
209 See, e.g., Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (resident alien sought habeas corpus to challenge administrative exclusion from United States upon his return from voyage on an American ship); The Japanese Immigrant Case, 189 U.S. 86 (1903) (alien determined by immigration authorities to be illegally within United States sought habeas corpus to obtain review of order of exclusion).
210 See, e.g., Ng Fung Ho v. White, 259 U.S. 276 (1922) (resident subject to administrative order of deportation has constitutional right to de novo judicial determination of claim of American citizenship — question goes to jurisdiction of agency).