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THE NEED FOR CLARIFICATION IN MILITARY HABEAS CORPUS

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A few months after Washington's inauguration, our army numbered a mere 672 of the 840 authorized by Congress. Today, in dramatic contrast, the situation is this: Our armed forces number two and a half million; every resident male is a potential member of the peacetime armed forces; such service may occupy a minimum of four per cent of the adult life of the average American male reaching draft age; reserve obligations extend over ten per cent of such a person's life; and veterans are numbered in excess of twenty-two and a half million. When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.[1]

INTRODUCTION

During the last twenty-five years the law of federal habeas corpus has undergone rapid and significant development. This development has been undergirded by the basic assumption that finality in criminal justice is to be valued less highly than the interest in assuring that no person is imprisoned or deprived of his life in violation of the Constitution. To that end the Supreme Court has steadily chipped away at the obstacles to adjudication of constitutional claims in federal habeas corpus proceedings. From *Johnson v. Zerbst*[2] in 1938, to *Fay v. Noia*[3] in 1963, it has been established not only that federal habeas corpus courts have the power to consider constitutional trial defects, but that the limiting devices on this power, such as the exhaustion requirement, the waiver doctrine, and the "adequate

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1 Warren, "The Bill of Rights and the Military," 37 N.Y.U.L. Rev. 181, 187-88 (1962).

2 304 U.S. 458 (1938).

3 372 U.S. 391 (1963).

state ground" concept, have been substantially circumscribed. However, this obvious concern for the constitutional rights of state and federal civilian prisoners serves only to magnify the neglect and vacilation generally shown toward the court-martial prisoner by the federal courts. Although the federal district judge need have few, if any, qualms about inquiring into the constitutional defects of a state or federal conviction, if the petitioner is unfortunate enough to have been convicted by a court-martial, that same judge is confronted with and often confused by legal concepts that have been discarded years before with respect to civilian prisoners. It is true that the court-martial prisoner has a statutory right to request habeas corpus relief.[4] However, the governing standards laid down by the Supreme Court over twelve years ago in *Burns v. Wilson*[5] are at best confusing; at worst, they represent an abdication of the federal courts' ultimate authority to determine and define the Constitution and the extent of its application to all citizens, civilian and military alike.

A major purpose of this article is to demonstrate that the area of military habeas corpus is in critical need of Supreme Court guidance and clarification. More specifically, however, it will concentrate on one fundamental issue: whether the federal district courts should have the power to make their own determination of the constitutional due process issues raised by a person convicted by a court-martial. Deliberately avoided in this article is any direct con-

[4] 28 U.S.C. § 2241 (1964) provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice, thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; . . . .

Moreover, collateral attack by habeas corpus on a military judgment has long been within the power of the federal courts. See Gusik v. Shilder, 340 U.S. 128, 133 (1950), and cases cited therein.

[5] 346 U.S. 137 (1953).

sideration of the principles of exhaustion, waiver, or a possible military equivalent of "adequate state grounds."[6] Such doctrines are essentially limiting devices on the issuance of the writ of habeas corpus and, accordingly, appear both to raise as well as cloud the more basic question: Do the federal district courts have the power to adjudicate due process issues with respect to courts-martial in the first place?

In a recent case, *In re Stapley*,[7] one federal judge made an admirable attempt to close the habeas corpus gap between civilian and military prisoners; however, the significance of this decision as precedent has been weakened because the government has not appealed allowing a fresh high court decision in this area.[8] On July 29, 1965, Stapley, a private first class in the United States Army, was arraigned and tried before a special court-martial for violation of various articles of the Uniform Code of Military Justice. Not only breaches of military orders and discipline were involved but also repeated acts of alleged fraud in the issuance of personal checks.[9] When the charges were made, Stapley, who was financially unable to retain a civilian attorney, requested the appointment of a military lawyer as defense counsel. This request was not granted. Appointed instead were a captain and a second lieutenant, neither of whom had formal legal training or particular knowledge of the law.[10] On the advice of his appointed counsel Stapley pleaded guilty to all charges, including one later dismissed because of legal insufficiency. The court-martial accepted Stapley's guilty plea and sentenced him to serve three months confinement at hard labor and reduction to the lowest enlisted grade with a substantial forfeiture of pay. Pursuant to a pretrial agreement and in return for Stapley's guilty plea, the convening authority later

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[6] For a case consideration of these problems, see, *e.g.*, Gusik v. Shilder, 340 U.S. 128 (1950); Williams v. Heritage, 323 F.2d 731 (5th Cir. 1963); Gorko v. Commanding Officer, Second Air Force, 314 F.2d 858 (10th Cir. 1963); Crigler v. United States Army, 285 F.2d 260 (10th Cir. 1961). See also Snedeker, "Habeas Corpus and Court-Martial Prisoners," 6 Vand. L. Rev. 288, 293 (1953).

[7] 246 F. Supp. 316 (D. Utah 1965). *But see* LeBallister v. Warden, 247 F. Supp. 349 (D. Kan. 1965).

[8] The Army views the principles enunciated in *In re Stapley* to be applicable only to the facts of that case. See 65-30 Judge Advocate Legal Service 6 (DA PAM 27-65-30).

[9] Stapley was charged with absence without leave, willful disobedience, provoking speech and gestures, uttering worthless checks, and action prejudicial to good order and discipline. See Uniform Code of Military Justice, arts. 86, 90, 117, 123a, 134, 10 U.S.C. §§ 886, 890, 917, 923a, 934 (1964).

[10] A military defendant has a statutory right to qualified counsel provided by the government in a special court-martial only if the counsel for the government is similarly qualified. See Uniform Code of Military Justice art. 27, 10 U.S.C. § 827 (1964).

reduced the sentence to confinement at hard labor for two months, reduction to the lowest enlisted grade, and a comparable reduction in the forfeiture of pay.[11]

Stapley then filed a petition for a writ of habeas corpus in the local federal district court. The court determined that it possessed the requisite power to decide on habeas corpus, the due process issue raised by the petition.[12] It also held that the sixth amendment to the Constitution applies to proceedings before special courts-martial. This means that qualified counsel must be appointed to assist the accused, at least where the charges are substantial, involve moral turpitude, or may result in a substantial deprivation of liberty.[13] The court further held that Stapley had not been afforded adequate counsel and accordingly ordered his release from confinement.[14]

Military and Civilian Habeas Corpus: The Early Concept of Jurisdiction

Prior to World War II, federal courts consistently limited their habeas corpus review of court-martial convictions to questions of jurisdiction. In *Ex parte Reed*,[15] the first military habeas corpus case to reach the Supreme Court, the following limitations were stated:

> The [military] court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis, *and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest and the highest, under like circumstances.*[16]

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[11] A special court-martial may not set greater punishment than confinement for six months and forfeiture of two-thirds pay per month for six months. A bad conduct discharge may not be adjudged unless a complete record of trial is maintained. Uniform Code of Military Justice art. 19, 10 U.S.C. § 819 (1964). Any sentence to confinement results in automatic reduction of enlisted defendants to the lowest enlisted grade. Uniform Code of Military Justice art. 58a, 10 U.S.C. § 858a (1964). The convening authority has broad powers to suspend, remit, or completely revoke the findings of the court-martial. See Uniform Code of Military Justice art. 64, 10 U.S.C. § 864 (1964).

[12] *In re* Stapley, 246 F. Supp. 316, 320 (D. Utah 1965).

[13] *Ibid.*

[14] For a consideration of the application of the sixth amendment to the military, see United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); Note, "Right to Counsel in Special Court-Martial," 50 Minn. L. Rev. 147 (1965).

[15] 100 U.S. 13 (1879).

[16] *Id.* at 23. (Emphasis added.) Of course, it must be pointed out that prior to *Ex parte Reed*, in non-habeas corpus cases, the Supreme Court viewed its jurisdiction over

Subsequent Supreme Court decisions during this period emphasized that the scope of inquiry for federal courts was limited to whether the court-martial was properly constituted, whether it had jurisdiction over the person and the offense charged, and whether the sentence was authorized by law.[17]

This is not to say, however, that the Supreme Court, within its defined concept of jurisdiction, completely refused to consider constitutional due process arguments raised by military prisoners on habeas corpus. In *Johnson v. Sayre*,[18] for example, the Court considered, albeit briefly and adversely to the petitioner, the question of the possible application of the eighth amendment to the sentence adjudged by a court-martial:

> The suggestion, in the opinion below, that the prison at Boston is shown in evidence to be one of narrow cells and limited appliances for comfort, and such as would seem to render confinement in it for a long term a punishment which the law regards as cruel and unusual, and forbidden by the Eighth Article of Amendment to the Constitution is unsupported by anything in the record. The remarks of the Secretary of the Navy . . . cited by the learned judge, as to the condition of the prisons at the command of the department at that time, have no tendency to show what is the present condition of any of those prisons.[19]

Moreover, in *Carter v. McClaughry*,[20] the Court, although affirming the concept of limited review on habeas corpus, went to great lengths to show that the petitioner had not been subjected to double jeopardy within the concept of the fifth amendment. Accordingly, there is some support for the proposition that, even in military habeas corpus cases, the Supreme Court was not totally unwilling to consider due process arguments within the context of whether the court-martial possessed the requisite jurisdiction over the person and the offense and whether the sentence was authorized by law.

During this period, similar language limiting the federal courts to questions of jurisdiction pervades most of the Supreme Court opinions considering habeas corpus attack on civilian criminal convictions.[21]

courts-martial to be narrowly limited. See *Ex parte* Vallamdigham, 68 U.S. (1 Wall.) 243 (1863); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

[17] *E.g.*, Collins v. McDonald, 258 U.S. 416 (1922); McClaughry v. Deming, 186 U.S. 49 (1902); Carter v. McClaughry, 183 U.S. 365 (1902); Johnson v. Sayre, 158 U.S. 109 (1895); *In re* Grimley, 137 U.S. 147 (1890).

[18] 158 U.S. 109 (1895).

[19] *Id.* at 116.

[20] 183 U.S. 365 (1902).

[21] See, *e.g.*, *In re* Gregory, 219 U.S. 210 (1911); Harlan v. McGourin, 218 U.S. 442 (1910); *In re* Moran, 203 U.S. 96 (1906); Dimmick v. Tompkins, 194 U.S. 540 (1904); Storti v. Massachusetts, 183 U.S. 138 (1901).

In *In re Gregory*,[22] for example, a habeas corpus proceeding reviewing a District of Columbia police court conviction, Mr. Justice Hughes, speaking for the Court, stated clearly:

> The only question before us is whether the police Court had jurisdiction. A *habeas corpus* proceeding cannot be made to perform the function of a writ of error and we are not concerned with the question whether the information was sufficient or whether the acts set forth in the agreed statement constituted a crime, that is to say, whether the court properly applied the law, if it be found that the court had jurisdiction to try the issues and to render the judgment.[23]

However, during this period the impact of this "black-letter" law was alleviated somewhat by a limited expansion of the concept of jurisdiction. In 1889, for example, the Supreme Court allowed a petitioner in habeas corpus to attack the jurisdiction of a federal court on grounds of double jeopardy.[24] However, most of the later deviations from the narrow jurisdictional concept occurred in cases involving allegations of state denial of due process. In *Frank v. Mangrum*[25] the Court considered but rejected on habeas corpus an allegation of a mob-dominated Georgia trial. But the Court indicated that if the allegation had been proved, habeas corpus relief on the basis of a violation of the fourteenth amendment may have been available. On the other hand in *Moore v. Dempsey*,[26] a habeas corpus attack on an Arkansas murder conviction, the Supreme Court ordered the federal district judge to hold a hearing to determine whether alleged mob domination of the trial was sufficient to render the trial "void" because of a denial of due process. It should be noted that in *Moore* the Court was probably influenced by the fact that the petitioners were Negroes facing execution and that their allegations, if true, evidenced a brutal and shocking disregard of their constitutional rights.[27] Later, in *Knewel v. Egan*,[28] the Court returned, albeit somewhat equivocally, to more traditional "jurisdiction language" in considering the habeas corpus petition of a South Dakota prisoner:

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22 219 U.S. 210 (1911).

23 *Id.* at 213.

24 Hans Nielsen, 131 U.S. 176 (1889); *But cf. Ex parte* Bigelow, 113 U.S. 328, 330 (1885).

25 237 U.S. 309 (1915). For a discussion of the implications of the *Frank* case, see Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L. Rev. 441, 486-93 (1963).

26 261 U.S. 86 (1923).

27 *Id.* at 87-90.

28 268 U.S. 442 (1925).

> A person convicted of crime by a judgment of a state court . . . may proceed by writ of *habeas corpus* on constitutional grounds summarily to determine whether he is restrained of his liberty by judgment of a court acting without jurisdiction. . . . But . . . he may not use it as a substitute for a writ of error.
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> [T]he ultimate question presented is whether the procedure established by the statutes of South Dakota . . . is a denial of a constitutional right. With respect to that question, we hold . . . that the judgment of state courts in criminal cases will not be reviewed on habeas corpus merely because some right under the Constitution of the United States is alleged to have been denied to the person convicted.[29]

The traditional concepts of jurisdiction were not seriously strained, however, at least with respect to federal convictions, until 1938, when the Court broke into substantially new habeas corpus ground in *Johnson v. Zerbst*.[30] The federal district court in that case had noted that the petitioner had been deprived of his right to counsel guaranteed by the sixth amendment, but refused to grant habeas corpus relief because it was "not sufficient . . . to make the trial void."[31] The Supreme Court reversed and held that jurisdiction, although present at the beginning of the trial, "may be lost in the course of the proceedings due to failure to complete the court . . . by providing counsel for an accused." It further ruled that if there had been a violation of the sixth amendment, it "stands as a jurisdictional bar to a valid conviction and sentence."[32] Four years later, in *Waley v. Johnston*,[33] the Court further extended the scope of habeas corpus by simply deciding that jurisdiction alone was no longer the sole consideration. The Court concluded that the writ of habeas corpus "extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights."[34] By 1944, *Zerbst* and *Waley* were implicitly extended to state convictions in *House v. Mayo*,[35] where a prisoner sought habeas corpus relief alleging that he was forced to plead to a burglary information without the requested aid of counsel.

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29 *Id.* at 445-47. *But see* Mooney v. Holohan, 294 U.S. 103 (1935).

30 304 U.S. 458 (1938).

31 Bridwell v. Aderhold, 13 F. Supp. 253, 256 (N.D. Ga. 1935).

32 Johnson v. Zerbst, 304 U.S. 458, 468 (1938).

33 316 U.S. 101 (1942).

34 *Id.* at 104-05.

35 324 U.S. 42 (1945). See Hart, "The Supreme Court 1958 Term," 73 Harv. L. Rev. 84, 105 (1959).

THE TEMPORARY EXPANSION OF MILITARY HABEAS CORPUS

Considering the history of similar limitations applicable to habeas corpus relief in both military and civilian convictions,[36] many district court and court of appeals judges apparently considered it logical to extend the protection afforded by the Supreme Court's decision in *Johnson v. Zerbst*[37] to court-martial convictions. The extension of the doctrine of the *Johnson* case to state convictions in all likelihood reinforced this premise.[38] During the 1940's, the courts of appeals in six circuits ruled that federal courts considering habeas corpus petitions filed by military personnel convicted by courts-martial should determine whether the petitioners' rights to fair trial and due process were violated by the military tribunals.[39] In each circuit the court either traced the expansion of collateral attack and extended it to military personnel or assumed that expansion and then determined whether there was a constitutional violation.

In the second circuit, Judge Swan assumed that when a denial of due process of law by a court-martial exists, the civil courts may discharge a military prisoner from custody.[40] Similarly, the Third Circuit concluded that "it is open for a civil court in a habeas corpus proceeding to consider whether the circumstances of a court-martial proceeding and the manner in which it was conducted ran afoul of the basic standard of fairness which is involved in the constitutional concept of due process of law and if it so finds, to declare that the relator has been deprived of his liberty in violation of the fifth amendment and to discharge him from custody."[41] The Tenth Circuit held that "a civil court has jurisdiction in a proceeding in habeas corpus to determine whether the sentence of the court-martial was wanting in due process."[42] Moreover, the Court of Appeals for the Eighth Circuit, in reversing the denial of the writ in *Schita v. King*,[43] referred to the "trend of modern decisions" and ordered the district court to hear

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36 See text accompanying notes 15-30 *supra*.

37 304 U.S. 458 (1938).

38 See *supra* note 35.

39 Montalvo v. Hiatt, 174 F.2d 645 (5th Cir.), *cert. denied*, 338 U.S. 874 (1949); Smith v. Hiatt, 170 F.2d 61 (3d Cir. 1948), *rev'd*, Humphrey v. Smith, 336 U.S. 695 (1949); Benjamin v. Hunter, 169 F.2d 512 (10th Cir. 1948); Wrublewski v. McInerney, 166 F.2d 243 (9th Cir. 1948); United States *ex rel.* Weintraub v. Swenson, 165 F.2d 756 (2d Cir. 1948); United States *ex rel.* Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944); Schita v. King, 133 F.2d 283 (8th Cir. 1943).

40 United States *ex rel.* Weintraub v. Swenson, 165 F.2d 756 (2d Cir. 1948).

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

42 Benjamin v. Hunter, 169 F.2d 512, 513-14 (10th Cir. 1948).

43 133 F.2d 283 (8th Cir. 1943).

petitioner's allegations that he had been denied a fair trial.[44] The court probably intended to extend collateral attack of courts-martial beyond the federal court standard when it admonished that "the judgment did not carry with it the presumptions of legality and validity which protect the judgment of a civil court of general jurisdiction against collateral attack."[45] Upon a second appeal of *Schita*, this time affirming the denial of the writ, the court reiterated that a claim of denial of due process by courts-martial justified the interference of a federal civil court in habeas corpus proceedings.[46]

It must be emphasized that during this period the courts of appeals limited scrutinization of military tribunals on constitutional grounds to "exceptional cases," in accord with the federal standard.[47] While making their own determinations of the due process questions presented in each case, the courts found the military procedure consonant with due process and failed to order the discharge of any military prisoner because of a denial of due process. The Supreme Court avoided the question of due process and military tribunals by denying certiorari in all cases where the petitioners were not discharged but where the courts of appeals decisions were, nonetheless, based upon due process grounds. In only one case during this decade did the Supreme Court make its presence felt on this issue, and that case involved what was apparently the only order by a court of appeals discharging a military prisoner because of a denial of due process during the military proceedings.[48] A ruling that a pretrial investigation, which was neither thorough nor impartial, was a violation of due process was reversed by the Supreme Court in *Humphrey v. Smith*.[49] The lower court's statements concerning due process were not refuted nor discussed by the Supreme Court, which limited its decision to the nature of the pretrial investigation. Finding the pretrial investigation not mandatory under the Articles of War, Mr. Justice Black held the investigation not to be a jurisdictional matter. Whether the Court intended the

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[44] Among other allegations, the petitioner, Schita, convicted by a general court-martial in 1919, charged that representation by military counsel was not of his own choosing, that witnesses testified in his absence, that witnesses testifying against him were not under oath, that the petitioner and his witnesses were intimidated, and that his civilian counsel was unprepared. The district court had ruled that these allegations were insufficient to show a lack of jurisdiction in the court-martial. *Id.* at 284.

[45] *Id.* at 287.

[46] Schita v. Cox, 139 F.2d 971 (8th Cir.), *cert. denied*, 322 U.S. 761, *rehearing denied*, 323 U.S. 810 (1944).

[47] United States *ex rel.* Innes v. Hiatt, *supra* note 41.

[48] Smith v. Hiatt, 170 F.2d 61 (3d Cir. 1948).

[49] 336 U.S. 695 (1949).

term "jurisdiction" to be construed in the narrow, technical sense or in the broader due process connotation remains unclear from the decision. Although *Humphrey v. Smith*[50] provided an excellent vehicle for the Court to rule upon the nature and extent of collateral attack of court-martial convictions, the Court, instead, chose to construe a narrow point.[51]

One year later, in 1950, the Supreme Court intervened.[52]

THE SOURCE OF THE CONFUSION

In the 1950 Supreme Court case, *Hiatt v. Brown*,[53] it was considered error for a federal court to determine whether an individual subject to military jurisdiction was accorded a fair trial and due process of law. The Court did not consider the applicability of *Johnson v. Zerbst*,[54] but adopted a narrow rule denying servicemen the right to attack through habeas corpus a failing of due process in court-martial convictions. The intent of the Court was made very clear by Mr. Justice Clark:

> The Court of Appeals also concluded that certain errors committed by the military tribunal and reviewing authorities had deprived respondent of due process. We think the court was in error in extending its review, for the purpose of determining compliance with the due process clause to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation, and the competence of the law member and defense counsel. It is well settled that "by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial. . . . The single inquiry, the test, is jurisdiction."[55]

Among other irregularities in the court-martial, the court of appeals in *Hiatt* found that "counsel appointed to defend the accused was incompetent, gave no preparation to the case, and submitted only a token defense."[56] But the Supreme Court denied such "supervisory" power to the federal courts. Mr. Justice Clark could well have quoted from

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[50] *Ibid.*

[51] The same year that the Court decided *Humphrey v. Smith*, it specifically avoided deciding to what extent a court-martial overruling of a plea of former jeopardy is subject to collateral attack in habeas corpus proceedings. Wade v. Hunter, 336 U.S. 684, 688 n.4 (1949).

[52] Hiatt v. Brown, 339 U.S. 103, *rehearing denied*, 339 U.S. 939 (1950).

[53] *Ibid.*

[54] 304 U.S. 458 (1938).

[55] Hiatt v. Brown, *supra* note 52, at 110-11. (Citations omitted.)

[56] Hiatt v. Brown, 175 F.2d 273, 277 (5th Cir. 1949).

the district court decision which was overruled by *Johnson v. Zerbst* that the findings were not sufficient "to make the trial void and justify its annulment in a habeas corpus proceeding, but that they constituted trial errors or irregularities which could only be corrected on appeal."[57]

Despite the clear import of the Supreme Court's unequivocal language, the Tenth Circuit in *Kuykendall v. Hunter*[58] ignored *Hiatt* and applied due process considerations in a habeas corpus attack upon a court-martial. In *Kuykendall*, the petitioner alleged that he was denied due process and a fair trial by the joinder of four specifications of rape. The court, while finding no violation of due process, did review the petitioner's claims beyond the narrow confines of technical jurisdiction and observed that "due process of law must be observed in military trials the same as trials in civil courts."[59]

The strict approach to habeas corpus petitions arising out of court-martial convictions was modified by the Supreme Court in *Burns v. Wilson*.[60] There the two petitioners alleged a denial of due process, charging (1) that they had been illegally detained; (2) that coerced confessions had been extorted from them; (3) that they had been denied counsel of their choice and denied effective representation; (4) that the military had supressed evidence favorable to petitioners, had procured perjured testimony against the petitioners, and had interfered with the preparation of petitioners' defense; and (5) that the trials were conducted in an atmosphere conducive to mob violence.[61] The district court dismissed the applications without hearing evidence and without reviewing the petitioners' allegations. Taking a strict approach, the district court determined that once a civil court was satisfied that the military had jurisdiction over the petitioners at the time of trial and over the crimes with which the petitioners were charged, it was powerless to inquire into the regularity of the military proceedings.[62] The court of appeals affirmed the judgment, but it expanded the scope of review in reviewing the transcripts of the proceedings before the military tribunals. The court explained

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57 Bridwell v. Aderhold, *supra* note 30, at 256.

58 187 F.2d 545 (10th Cir. 1951).

59 *Id.* at 546.

60 346 U.S. 137 (1953), 52 Mich. L. Rev. 602 (1954), 27 So. Cal. L. Rev. 333 (1954), 5 Syracuse L. Rev. 116 (1953), 27 Temple L.Q. 342 (1954), 22 U. Cinc. L. Rev. 501 (1953). See also Rossman, "Review of Recent Supreme Court Decisions," 39 A.B.A.J. 909 (1953); "The Supreme Court, 1952 Term," 67 Harv. L. Rev. 91, 160 (1953).

61 Burns v. Wilson, 346 U.S. 137, 138 (1953).

62 Dennis v. Lovett, 104 F. Supp. 310 (D.D.C. 1952).

its deviation from *Hiatt v. Brown*,[63] stating that when the Supreme Court used the expression "acted within its lawful powers," it implied a scope of review not limited to technical jurisdiction. Judge Prettyman noted that:

> (1) An accused before a court-martial is entitled to a fair trial within due process of law concepts. (2) The responsibility for insuring such fairness and for determining debatable points is upon the military authorities, and their determinations are not reviewable by the courts, except (3) that, 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 to render judgment, the courts will review upon petition for *habeas corpus*. To support issuance of a writ of *habeas corpus* the circumstances shown by the papers before the court must so seriously affect the fundamental fairness of the trial and the validity of the appellate and later determinations as to deprive the military authorities of jurisdiction, *i.e.*, of power to act.[64]

On certiorari, the Supreme Court affirmed the denial of the writ but split on the question of what constitutes an appropriate standard for review.[65] The Court accepted neither of the lower courts' interpretations of the scope of review of military proceedings. That no approach was acceptable to a majority of the Court lessens the value of *Burns* as precedent. However, at least seven members of the Court were in favor of a broader scope of review than the one allowed by *Hiatt v. Brown*.[66] The Court's failure was in resolving how much broader the scope of review should be.

Chief Justice Vinson, speaking for three other members of the Court, reiterated that the federal courts' habeas corpus review of due process aspects of military tribunals is limited, when the military tribunal has dealt "fully and fairly" with the petitioner's allegations.[67] In the view of the Chief Justice, "it is not the duty of the civil courts to . . . reexamine and reweigh each item of evidence. . . ."[68] If the military had refused to consider the allegations made by the petitioners, then the Vinson opinion would authorize the district court to review them de novo.

In effect, though it establishes due process protection for the military, the Vinson opinion would have the federal courts abdicate their essential obligation: interpreting the appropriate constitutional

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63 *Supra* note 52.

64 Burns v. Lovett, 202 F.2d 335, 342 (D.C. Cir. 1952).

65 Burns v. Wilson, 346 U.S. 137 (1953).

66 *Supra* note 52.

67 Burns v. Wilson, 346 U.S. 137, 144 (1953).

68 346 U.S. at 144.

provision and ruling on its applicability to an instant case. The opinion failed to explain how the federal district courts were to determine if the military tribunals accorded "fair consideration" to the allegations. If the federal district court examines the former proceedings only to determine whether the military considered the claims, as did the Chief Justice in *Burns*, certainly the civil court is not ascertaining whether the military accorded a "fair consideration" to those claims. Conversely, if the civil court examines the court-martial proceedings and military review to ascertain whether a petitioner's claims were given "fair consideration," in accordance with the standard postulated by the Chief Justice, the court then exceeds the scope of review authorized by the Vinson opinion by making its own determination of the correctness of the military's rulings on the constitutional questions.[69]

It is obvious that Mr. Justice Frankfurter was more perplexed by this problem than any other member of the Court. Realizing that "the right to invoke habeas corpus to secure freedom is not to be confined by any *a priori* or technical notions of 'jurisdiction,' "[70] he initially advocated that the case be set for reargument so that the Court would have ample time to consider all the ramifications of the problem. Later, dissenting from the Court's refusal to grant a rehearing in *Burns*, he clarified and expanded his position on the matter by contending that the Court had never considered whether the doctrine of *Johnson v. Zerbst*[71] should be extended to military personnel. He determined that there was no reason that it should not.[72] Mr. Justice Frankfurter traced the development of habeas corpus in both the military and civilian jurisprudence. He labeled "demonstrably incorrect" the argument that the review of the military upon an application for habeas corpus had been traditionally narrower than the review of civilian convictions.[73]

Mr. Justice Douglas, joined by Mr. Justice Black, dissenting, seemingly advocated the application of the Vinson standard in that he agreed that if the military tribunal applied the standards of due process no service could be performed by the civilian courts rehashing the same facts. It is obvious, however, that Douglas would modify the Vinson standard by permitting the federal courts to consider the

[69] No confusion was generated by the separate concurring opinion of Mr. Justice Minton, who sanctioned review only on the traditional narrow lines of jurisdiction. 346 U.S. at 146. Mr. Justice Jackson concurred in silence, joining neither opinion.

[70] 346 U.S. at 148.

[71] 304 U.S. 458 (1938).

[72] Burns v. Wilson, *supra* note 65, *rehearing denied*, 346 U.S. 844 (1953).

[73] *Id.* at 844.

transcripts and records to determine whether the rules of due process have been applied. Thus the federal court would be making its own determination of the constitutional question because "the rules which . . . [the military] apply are constitutional rules which . . . [the civilian courts not the military tribunals] formulate."[74]

The net effect of *Burns* is confusion,[75] confusion which the Supreme Court has not cleared up yet. Although *Burns* indicates that the narrow standard formulated by the Court in *Hiatt* is no longer appropriate, the extent of the new, wider scope of review remains uncertain. Lower federal courts are without guidance from the Supreme Court and must formulate their own standards. The result has been a lack of uniformity and increasing uncertainty.

The Various Interpretations of Burns

The standards and approaches adopted by the lower federal courts have run the gamut of possibilities. Different approaches have been sanctioned within the same circuits. It is possible that, lacking the guidance of the Supreme Court, the courts have adopted the approach which most easily helps them to dispose of the case before them. Decisions are often clouded with semantical jargon. Cases have been cited as adopting varying and conflicting approaches. All the courts have relied upon *Burns* as the cornerstone for the approach in each case, but the approaches vary substantially.

Clearly the most satisfying approach to the courts, and possibly the only clear one, has been in cases where the court could avoid determining the proper scope of review. In these few cases, the courts, wary of the uncertainty, have reviewed the facts and allegations and determined that, regardless of the applicable scope of review, the petitioners' allegations would be insufficient.[76] In *Bisson v. Howard*,[77] the Court of Appeals for the Fifth Circuit, after outlining the confusion in the area,[78] asserted that the allegations would not be

[74] Burns v. Wilson, 346 U.S. 137, 154 (1953).

[75] See Warren, "The Bill of Rights and the Military," 37 N.Y.U.L. Rev. 181 (1962).

[76] *E.g.*, Burns v. Harris, 340 F.2d 383 (8th Cir. 1965); Kasey v. Goodwyn, 291 F.2d 174 (4th Cir. 1961), *cert. denied*, 368 U.S. 959 (1962); Rushing v. Wilkinson, 272 F.2d 633 (5th Cir. 1959), *cert. denied*, 364 U.S. 914 (1960); Bisson v. Howard, 224 F.2d 586 (5th Cir.), *cert. denied*, 350 U.S. 916 (1955).

[77] *Supra* note 76.

[78] In *Bisson v. Howard* the court said:

> [I]t is not clear whether the Supreme Court has now set down the rule that the military courts may with finality determine all constitutionality questions of the sort here discussed, provided they undertake to decide such issues and give full and fair consideration to their resolution. As stated, it is not necessary for us to

sufficient even if the court were reviewing the proceedings under the standards set forth in *Johnson v. Zerbst.*[79] Similarly, in *Kasey v. Goodwyn,*[80] where the Government had advocated adoption of the narrow approach advocated in *Burns* and the petitioner contended for the correctness of Mr. Justice Frankfurter's position, the court avoided the whole question of the scope of review.[81]

A second equivocating and less satisfactory approach attempts to satisfy the contradictory rationales of *Hiatt* and *Burns.* This attempt is illustrated by *Wilson v. Wilkinson,*[82] in which the petitioner alleged that he was inadequately represented by military counsel. Relying upon Mr. Justice Clark's statement that the court of appeals in *Hiatt* had erred in extending its review to the question of adequacy of counsel, the court in *Wilkinson* ruled that it was not a matter open for consideration in habeas corpus. Apparently inhibited by the theoretical liberalization of the area by *Burns,* the court also stated that the record did not sustain the petitioner's contention that counsel was inadequate. This secondary consideration was curtly handled by the statement: "Counsel was an attorney duly certified by the Judge Advocate General as qualified under the requirements of Article 27(b) of the Uniform Code of Military Justice and the trial record shows petitioner had a fair trial, ably represented by counsel."[83] Remaining unanswered, of course, was the question of what the court would have done if it had found from the record that petitioner's counsel was, indeed, incompetent.

The third and fourth patterns have been no more satisfactory. It has not been resolved whether the federal district court merely should satisfy itself that the military considered the due process questions raised by a petitioner, or whether the court should make an independent determination of the due process questions. On its face, the latter approach would seem to contradict the view of Chief Justice Vinson in *Burns v. Wilson.*[84] But that theory is, of course, erroneously

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decide whether the determination by the military board of review that no prejudicial error voiding the trial resulted from the failure to appoint separate counsel would be binding on a district court. We only point again to the discussion of a somewhat similar subject in Burns v. Wilson, supra. The language there is probably broad enough to justify such a conclusion.

224 F.2d at 590.

[79] 304 U.S. 458 (1938).

[80] 291 F.2d 174 (4th Cir. 1961), *cert. denied,* 368 U.S. 959 (1962).

[81] *Id.* at 178.

[82] 129 F. Supp. 324 (M.D. Pa. 1955).

[83] *Id.* at 326.

[84] 346 U.S. 137 (1953).

predicated on the assumption that once the due process issue has been raised and disposed of by a military tribunal, it has been accorded a full and fair determination.

Within the third pattern is the great majority of cases decided since *Burns*. These courts have refused to inquire into the merits of the due process contentions raised by military prisoners. Applying the narrow interpretation of *Burns*, the courts have been satisfied that their function is exhausted once it is determined that the military tribunals have given fair consideration to the due process contentions.[85] Fair consideration in these cases has not meant that the military's decision has been in accord with the determinations of constitutional courts or consonant with the prevalent theory of fair trial, but simply that the military tribunal has considered the contention.[86] Moreover, the courts have failed to make their own determinations in areas where the most elementary concepts of due process

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[85] *E.g.*, Palomera v. Taylor, 344 F.2d 937 (10th Cir. 1965); Reed v. Franke, 297 F.2d 17 (4th Cir. 1961); Crigler v. United States Army, 285 F.2d 260 (10th Cir. 1961); McKinney v. Warden, 273 F.2d 643 (10th Cir. 1959), *cert. denied*, 363 U.S. 816 (1960); Bennet v. Davis, 267 F.2d 15 (10th Cir. 1959); Thomas v. Davis 249 F.2d 232 (10th Cir. 1957), *cert. denied*, 355 U.S. 927 (1958); Dickenson v. Davis, 245 F.2d 317 (10th Cir. 1957), *cert. denied*, 355 U.S. 918 (1958); Mitchell v. Swope, 224 F.2d 365 (9th Cir. 1955); Bourchier v. Van Metre, 223 F.2d 646 (D.C. Cir. 1955); Suttles v. Davis, 215 F.2d 760 (10th Cir.), *cert. denied*, 348 U.S. 903 (1954); Easley v. Hunter, 209 F.2d 483 (10th Cir. 1953); Dennis v. Taylor, 150 F. Supp. 597 (M.D. Pa. 1957); Bokoros v. Kearney, 144 F. Supp. 221 (E.D. Tex. 1956).

[86] In Easley v. Hunter, 209 F.2d 483 (10th Cir. 1953), the court said at 487:

> In other words as we understand the *Burns* decision, it 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.

In Sunday v. Madigan, 301 F.2d 871 (9th Cir. 1962), the court said at 873:

> But once it has been concluded by the civil courts that the military had jurisdiction and dealt fully and fairly with all such claims, it is not open to such courts to grant the writ simply to re-evaluate the evidence.

In Mitchell v. Swope, 224 F.2d 365 (9th Cir. 1955), at 367:

> It is sufficient to say that this claim was fully and carefully examined by the Board of Review which found not only that proceeding to trial at that time was required by military necessity but that in view of the fact that defense counsel had had four days for preparation, the denial of the motion for continuance was within the sound judicial discretion of the court and that there was no showing of an abuse of that discretion.

And finally, after a finding that the military tribunal had considered the petitioner's allegations, the court in Gordon v. Willingham, 188 F. Supp. 2 (M.D. Pa. 1960), said at 4:

> Under these circumstances this Court is without jurisdiction to further inquire into the matters asserted by petitioners as grounds for the relief sought.

are involved: adequacy of counsel;[87] coerced confessions;[88] confrontation of witnesses;[89] bias on the part of the court-martial; command control, and inflammatory and distorted publicity;[90] prejudicial comments by the trial counsel;[91] and the denial of adequate time to prepare a defense.[92]

The argument that the court-martial which allegedly deprived a defendant of constitutional rights could not have accorded a full and fair hearing on the matter was rejected out of hand in *Easley v. Hunter*.[93] Although it is acknowledged that the Supreme Court in *Burns* stated that the constitutional guarantee of due process is meaningful enough to protect soldiers as well as civilians,[94] the due process protection granted by the civil courts under this concept of "fair consideration" is at best negligible and, in all probability, nonexistent.

In the fourth pattern, the courts have gone beyond the strict limitations imposed by *Burns* to make their own determinations of the due process questions. There has been an apparent hesitancy on the part of these courts to do this, and the decisions have generally been couched in the language of the narrow approach to collateral attack. Possibly other cases illustrating the narrow approach might have had different results had the courts felt that a due process violation did occur. Finding no lack of due process, the courts were free to confine their language to endorse only a narrow approach.

The confusion is best shown by a 1960 district court decision.[95] The court initially determined that the military courts had considered all of the petitioners' contentions. Consequently, using the language of *Burns*, it stated that the civil court had no authority "to re-examine the evidence."[96] Ordered to reconsider by the court of appeals, the judge made it clear that he had not treated the case in the cavalier manner which the language of his original opinion perhaps indicated. It was emphasized that the court had considered the transcript and that the problem was one of semantics. The judge stated that, "Perhaps

87 McKinney v. Warden, 273 F.2d 643 (10th Cir. 1959), *cert. denied*, 363 U.S. 816 (1960); Bennet v. Davis, 267 F.2d 15 (10th Cir. 1959).

88 Suttles v. Davis, 215 F.2d 760 (10th Cir.), *cert. denied*, 348 U.S. 903 (1954).

89 Easley v. Hunter, 209 F.2d 483 (10th Cir. 1953).

90 Gordon v. Willingham, 188 F. Supp. 2 (M.D. Pa. 1960).

91 Thomas v. Davis, 249 F.2d 232 (10th Cir. 1957).

92 Mitchell v. Swope, 224 F.2d 365 (9th Cir. 1955).

93 *Supra* note 89.

94 Burns v. Wilson, 346 U.S. 137, 142 (1953).

95 Chandler v. Markley, 191 F. Supp. 706 (S.D. Ind. 1960).

96 *Id.* at 707.

the court in its entry should have said 'weigh the evidence' instead of 're-examine the evidence.' "[97]

If there is occurring a trend towards the broadening of the scope of collateral review of a military trial to equal that available for a civilian trial,[98] that trend has been evidenced only in dictum. The strongest statement for a broad review of military decisions, made by Chief Judge Huxman in *Sweet v. Taylor*,[99] concludes that:

> [I]f a careful examination of the record compels a conclusion that there is no evidence to sustain the judgment or that in fact petitioner was not represented by an attorney, or that it must be said that basic constitutional rights were violated, it would seem that a civil court would have jurisdiction to grant relief because under such circumstances it cannot be said that the reviewing military authorities fairly considered these questions.[100]

The following year, Judge Huxman expanded on this thesis in *Richards v. Cox*,[101] when he found that the error complained of by the petitioner did "not constitute such a lack of due process as to give this court jurisdiction." Unfortunately, in *Richards* the judge, adding confusion to the area which he previously had begun to clarify, reverted to the language of the narrow interpretation:

> The philosophy of the Burns case is that where grave questions have been presented and fairly considered by the military court-martial tribunals, the law courts are without jurisdiction to review and consider the same questions.[102]

Nevertheless, the court did review and consider the same questions.

A controversy developed in the eighth circuit, when the court of appeals ordered a reluctant district court judge to hold a hearing to determine whether a court-martial had disposed of the petitioner's contentions fully and fairly.[103] The district court, on remand, exhaustively reviewed the law in the area to show that its interpretation of the narrow review was justified, but it went to pains to illustrate that it was complying with the appellate court's directive by reviewing the facts of the case and that petitioner had not been deprived of his constitutional rights.[104] The district court, however, had the oppor-

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97 *Ibid.*

98 At least one court believes this to be the case. Rushing v. Wilkinson, 272 F.2d 633, 641 (5th Cir. 1959).

99 178 F. Supp. 456 (D. Kan. 1959).

100 *Id.* at 458.

101 184 F. Supp. 107 (D. Kan. 1960).

102 *Id.* at 108.

103 Swisher v. United States, 326 F.2d 97 (8th Cir. 1964).

104 Swisher v. United States, 237 F. Supp. 921 (W.D. Mo. 1965).

tunity to reaffirm its belief in the narrow standard of review when the same petitioner several months later submitted his eighth petition for review.[105]

Prior to the most recent case, *In re Stapley*,[106] no military prisoner had been discharged by a federal court on purely due process grounds. Not only did the *Stapley* court break with the traditional standards, but by its result the court also invited reappraisal of the whole area. The court unequivocally extended the protection of habeas corpus to due process grounds when it made its own determination of the constitutional question raised by the petitioner. Moreover, the court cut through the haze generated by *Burns* (and the twelve subsequent years of confusion) when it said:

> That notwithstanding the limited scope of such jurisdiction, the vindication of constitutional rights through such inquiry and rulings in proper cases transcends ordinary limitations and affords federal courts both the jurisdiction and the duty to inquire and rule upon the legality of detainment of any person entitled to constitutional protection whether in or out of military service.[107]

Prior to *In re Stapley*, the lower federal courts, even when applying the broad standard of "full and fair consideration" (and then finding no violation of due process), were equivocal enough to cast doubt upon their willingness to grant the writ when faced with a clear due process violation.[108]

The Need for Reevaluation

It is now hardly debatable that federal district courts have broad power via habeas corpus to make their own determination on allegations by civilians of due process violations during their trial proceedings.[109] This power exists whether it has been achieved within the

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[105] Swisher v. United States, 239 F. Supp. 182 (W.D. Mo. 1965).

[106] 246 F. Supp. 316 (D. Utah 1965).

[107] *Id.* at 320. It should be pointed out that Stapley did not exhaust his military remedies before petitioning for the writ, a fact that the district court did not consider fatal to relief in this case. *Ibid.* This problem is not directly considered in this article. See text accompanying *supra* note 6.

[108] See Burns v. Harris, 340 F.2d 383 (8th Cir. 1965); Swisher v. United States, *supra* note 103; Gorko v. Commanding Officer, Second Air Force, 314 F.2d 858 (10th Cir. 1963); Fisher v. Ruffner, 277 F.2d 756 (5th Cir. 1960); White v. Humphrey, 212 F.2d 503 (3d Cir.), *cert. denied*, 348 U.S. 900 (1954); Richards v. Cox, *supra* note 101; Sweet v. Taylor, *supra* note 99; United States *ex rel.* Atkinson v. Kish, 176 F. Supp. 820 (M.D. Pa. 1959).

[109] See, *e.g.*, Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Brown v. Allen, 344 U.S. 443 (1953); Note, "Federal Habeas Corpus for State Prisoners: The Isolation Principle," 39 N.Y.U.L. Rev. 78, 79 (1964).

concept of jurisdiction[110] or simply because jurisdiction has proved unworkable.[111] Yet, the same federal district courts, when considering a military prisoner's habeas corpus petition, must still struggle not only with "jurisdiction," but in addition with the limiting, yet confusing, concept of "fair consideration." It thus seems even more appropriate now than it did to Mr. Justice Frankfurter twelve years ago in *Burns* to question the result 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."[112]

Proponents of a limited scope of habeas corpus review for military prisoners possibly find comfort in Chief Justice Vinson's assertion in *Burns* that "in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases."[113] History does indeed indicate that the federal courts have generally been hesitant to allow collateral attack on military judgments on grounds other than lack of jurisdiction in the traditional sense.[114] Whether this hesitancy, however, was any less strongly felt with respect to civilian convictions is, on the other hand, highly questionable. During the first four decades of this century the strict interpretation of jurisdiction was to a degree softened in a few cases, usually involving state convictions. However, it is difficult to view these deviations as part of a trend since in other cases the Supreme Court was perfectly content to rely on the traditional concepts of jurisdiction.[115] Moreover, the Supreme Court in a very few instances actually considered due process attacks on courts-martial.[116] At least the pre-1938 cases involving federal convictions were consistent in their reliance on a strict interpretation of jurisdiction.[117] *Johnson v. Zerbst*[118] really represented the "pathbreaking case" by expanding jurisdiction to include due process defects in trial proceedings.[119] Thereafter the scope of review rapidly expanded for civilian prisoners, yet the Supreme Court chose not to apply *Johnson v. Zerbst* to military habeas corpus.

110 *Cf.* Longsdorf, "Habeas Corpus: A Protean Writ and Remedy," 8 F.R.D. 179, 189 (1949).

111 See Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L. Rev. 441, 470-71 (1963).

112 Burns v. Wilson, 346 U.S. 844, 851 (1953).

113 Burns v. Wilson, 346 U.S. 137, 139 (1953).

114 See text accompanying *supra* notes 15-18.

115 See text accompanying *supra* notes 24-28.

116 See text accompanying *supra* notes 18-20.

117 See Burns v. Wilson, 346 U.S. 844, 845-46 (1953).

118 304 U.S. 458 (1938).

119 Hart, "The Supreme Court 1958 Term," 73 Harv. L. Rev. 84, 104 (1959).

The plurality opinion in *Burns* intimated that a limited scope of review in military habeas corpus was intended by Congress when the Uniform Code of Military Justice was enacted in 1950.[120] Article 76 of the Code provides that the decisions of military tribunals should be "final" and "conclusive" and, accordingly, "binding" on the courts.[121] This provision, in the view of at least four members of the *Burns* court, means that when the military courts had dealt "fully and fairly" with a petitioner's claims, the federal habeas corpus court could not grant the writ simply to "reevaluate the evidence."[122] But the congressional language of article 76 indicates that such an interpretation may be inaccurate. According to the Armed Services Committees of both the House and the Senate:

> This article is derived from AW50(h) and is modified to conform to terminology used in this code. *Subject only to a petition for a writ of habeas corpus in Federal Court, it provides for the finality of court-martial proceedings and judgments.*[123]

In the opinion of Mr. Justice Frankfurter, Congress probably did not intend the "finality" provision to have any effect upon the federal courts' power in military habeas corpus cases.[124] This view is strengthened by the language of the Court in *Gusik v. Shilder*,[125] that the finality provision of the almost identical predecessor to article 76 did no more than "describe the terminal point for proceedings within the court-martial system."[126]

To argue for an expansion of federal district court power in military habeas corpus does not in any way discount the fact that the military courts have made substantial progress in the protection of the constitutional rights of servicemen.[127] In this context it should be noted that the Uniform Code of Military Justice provides for a fairly complete initial and appellate review of courts-martial.[128] There is, in

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120 Burns v. Wilson, *supra* note 65, at 142.

121 Uniform Code of Military Justice art. 76, 10 U.S.C. § 876 (1964).

122 Burns v. Wilson, 346 U.S. 137, 142 (1953).

123 H.R. Rep. No. 491, 81st Cong., 1st Sess. 35 (1949); S. Rep. No. 486, 81st Cong., 1st Sess. 32 (1949). (Emphasis added.)

124 Burns v. Wilson, 346 U.S. 844, 850 (1953). Apparently Chief Judge Quinn of the Court of Military Appeals also is of the opinion that Congress did not intend to restrict military habeas corpus to the narrow jurisdictional concept. See Quinn, "The United States Court of Military Appeals and Military Due Process," 35 St. John's L. Rev. 225, 228 n.9 (1961).

125 340 U.S. 128 (1950).

126 *Id.* at 132.

127 See Warren, *supra* note 75, at 189.

128 In short, depending on its type and the sentence adjudged, a court-martial conviction will be reviewed by one or more of the following agencies: the convening authority

addition, a limited form of military collateral review in special cases.[129] The Uniform Code not only recognizes in statutory form many rights guaranteed to civilians through constitutional provisions, but the Court of Military Appeals has also expanded the statutory protections by its own application of constitutional principles to court-martial proceedings.[130] Moreover, there is some indication that the above advances have reduced substantially the number of applications for habeas corpus by military prisoners.[131]

This progress during the past decade, however, should not be used to rationalize the limitations of the scope of review in military habeas corpus. The recognition by the Court of Military Appeals that servicemen have constitutional protections simply raises the further problem of the extent to which such protection should be applied in the military setting. That court's decision in *United States v. Culp*[132] is particularly valuable in illustrating this problem. In *Culp*, a Marine private had been charged with larceny and tried by special court-martial. On the advice of court-appointed defense counsel, who was not a lawyer, the accused pleaded guilty and was sentenced to a bad conduct discharge, confinement at hard labor for four months, a substantial

of the court-martial or his superior in command, the Office of the Judge Advocate General, Boards of Review, the Court of Military Appeals, and the President and the Secretaries of the military departments. See Uniform Code of Military Justice arts. 59-76, 10 U.S.C. §§ 859-76 (1964). Final review of most court-martial convictions will generally take place at one of the first three of the above-mentioned agencies. The Court of Military Appeals automatically reviews only death sentences, convictions involving general or flag officers, and those cases certified to it by the Judge Advocate General. See Uniform Code of Military Justice art. 67, 10 U.S.C. § 867 (1964). The latter court may, however, in its discretion accept other appeals on petition from the accused, assuming the petition is filed by the accused within thirty days from the time he is notified of the decision of the Board of Review. See Uniform Code of Military Justice art. 67(b)(3), 10 U.S.C. § 867(b)(3) (1964).

129 If the sentence as approved by the convening authority is death, dismissal (in the cases of officers), dishonorable discharge, bad conduct discharge, or confinement for one year or more, the accused may, under article 73 of the Uniform Code, petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court, and must do so, if at all, within a year of the approval of the sentence by the convening authority. See Uniform Code of Military Justice art. 73, 10 U.S.C. § 873 (1964).

130 Wiener, "Courts-Martial and the Bill of Rights: The Original Practice II," 72 Harv. L. Rev. 266, 294 (1958). See, *e.g.*, United States v. Brown, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959) (fourth amendment); United States v. Kemp, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962) (fifth amendment); United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963) (sixth amendment); United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960) (sixth amendment).

131 Warren, *supra* note 75, at 188.

132 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

forfeiture of pay, and reduction to the lowest enlisted grade. The Board of Review set the conviction aside using as one basis for their decision the conclusion that the sixth amendment requires qualified counsel in special courts-martial.[133] The Court of Military Appeals reversed the Board despite the fact that two of the three members of the court agreed that the sixth amendment was applicable to courts-martial.[134] These two decided that the sixth amendment had not been violated because in their opinion the non-lawyer officers satisfied the right to counsel requirement with respect to special courts-martial. Yet, under the almost identical circumstances of *In re Stapley*,[135] the federal district court ruled that the sixth amendment required the appointment of qualified counsel in the special court-martial under consideration in that case. In fact, the court was fully aware of the decision in *Culp*, since the latter case is cited in the *Stapley* decision.[136] Although both of the above courts recognized, in principle at least, the applicability of a particular constitutional protection, it would be difficult indeed explaining that fact to Private Culp. Of course, neither interpretation of the sixth amendment is necessarily correct. The conclusion must be, however, that on constitutional problems, constitutional courts rather than the statutory courts should provide the conclusive interpretation. Unless the Supreme Court rejects the notion that "fair consideration" of the constitutional issues is sufficient, it in effect abdicates at least part of its authority to be the final arbitor of constitutional due process questions. It has clearly refused to allow this result with respect to the state courts.

Expansion of the scope of federal court consideration in military habeas corpus would not necessarily portend the incorporation of civilian due process into the military law.[137] Fourteenth amendment guarantees applicable to civilians could rather be modified to allow due consideration for the peculiarities and unique requirements of the military establishment. Battlefield conditions, for example, might justify a more flexible concept of due process than would be normal in the average civilian criminal court. What is now termed "military due process" by the Court of Military Appeals may well be found acceptable by the federal courts in habeas corpus.[138] The essential principle

133 United States v. Culp, 14 U.S.C.M.A. 199, 201, 33 C.M.R. 411, 413 (1963).

134 United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963). See also United States v. Cutting, 14 U.S.C.M.A. 347, 34 C.M.R. 127 (1964).

135 246 F. Supp. 316, 322 (D. Utah 1965).

136 *Id.* at 322 n.1.

137 Wiener, *supra* note 130, at 303.

138 *But see In re* Stapley, 246 F. Supp. 316, 321 (D. Utah 1965). For an excellent discussion of "military due process," see Quinn, *supra* note 124.

to be stressed is simply that constitutional courts should ultimately interpret the Constitution for all citizens, notwithstanding the possibility that the interpretation may of necessity be more fluid in some cases than in others.

Nor would an expansion of the scope necessarily lead to different results in most habeas corpus cases taken to review court-martial proceedings. It should be noted that the Court of Claims, which considers only monetary claims rather than petitions for release from confinement, has never been inhibited by the limitations of *Burns*. Even though dealing in what might be termed an area of lesser importance and significance, the Court of Claims has not adopted a free wheeling approach but, after making its own determination of the due process questions, has generally found the contested military procedure consonant with the protections guaranteed by the Constitution.[139]

Perhaps, it is said, an expanded scope of military habeas corpus may adversely affect and jeopardize the "good order and discipline" of the military. This assertion is questionable on several grounds. In the first place, the Army has publicly recognized that the advances made under the Uniform Code of Military Justice are reflected in the "highest state of discipline and good order" ever achieved by the Army.[140] It may very well be that to increase the serviceman's procedural rights in the manner we suggest will actually improve morale, and hence, discipline. Secondly, it should be emphasized that only three of the military habeas corpus cases arising in the last decade involved offenses which were of a peculiarly military nature.[141] Moreover, only two of the military petitioners have been incarcerated in stockades or similar facilities.[142] The remainder were imprisoned in federal reformatories, penitentiaries, and disciplinary barracks. Therefore it is reasonable to conclude that most prisoners who would nor-

139 In 1947, before the Supreme Court's decision in *Burns*, the Court of Claims held that the standard set forth in *Johnson v. Zerbst* is applicable to habeas corpus review of courts-martial. Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947). In the subsequent cases, the court has continued to make its own determinations of the due process questions raised in this form of collateral attack of courts-martial. See Narum v. United States, 155 Ct. Cl. 903, 287 F.2d 897 (1960), *cert. denied*, 368 U.S. 848 (1961); Begalke v. United States, 151 Ct. Cl. 707, 286 F.2d 606, *cert. denied*, 364 U.S. 865 (1960); Griffiths v. United States, 147 Ct. Cl. 660, 172 F. Supp. 691, *cert. denied*, 361 U.S. 865 (1959); Krivoski v. United States, 136 Ct. Cl. 813, 145 F. Supp. 239, *cert. denied*, 352 U.S. 954 (1956).

140 1960 U.S. Court of Military Appeals Ann. Rep. 4.

141 Dickensen v. Davis, 245 F.2d 317 (10th Cir. 1957) (unlawful communication with the enemy); Richards v. Cox, 184 F. Supp. 107 (D. Kan. 1960) (assault with a carbine); Fisher v. Ruffner, 277 F.2d 756 (5th Cir. 1960) (desertion).

142 Gorko v. Commanding Officer, Second Air Force, 314 F.2d 858 (10th Cir. 1963); *In re* Stapley, 246 F. Supp. 316 (D. Utah 1965).

mally use habeas corpus, even under an expanded scope of the writ, are not in a position where allowing the writ would have any serious effect on the normal routine of military life. It seems implausible that two prisoners occupying adjoining cells in a federal penal institution, and who were convicted of a similar offense, should not be afforded the same consideration on a petition for the writ solely because one was convicted by a court-martial and the other by a federal court. Certainly, habeas corpus review should not entail the examination of every procedural and evidentiary ruling made by military courts, but ultimately the federal courts should be able to make their own determination of alleged due process defects in court-martial proceedings.

It is argued that military law has always been "separate and apart" from the federal law.[143] The same statement might also be made about state law. But that has not deterred the federal courts from protecting individuals convicted by state courts in violation of the due process requirements of the fourteenth amendment. Moreover, the military establishment itself is now not so clearly separated from the rest of the American community, for, as Chief Judge Quinn of the Court of Military Appeals has so aptly emphasized, "the points of contact between the civilian community and the Armed Forces are today so numerous and intimate that it can be truly said that military life is an immediate and integral part of American life."[144] To be sure, military law should be "separate" in the sense that it must impose certain standards of conduct not ordinarily acceptable in civilian life if it is to accomplish the military mission. However, the concept of "separateness" should not be used as a legal crutch to uphold limitations on a serviceman's procedural rights where military necessity does not dictate such limitations.

CONCLUSION

On the basis of the foregoing, federal district courts in military habeas corpus cases should possess and exercise the power to make their own determinations on allegations of court-martial due process violations. To grant a serviceman parity with his civilian counterpart in a constitutional court on questions of the scope of review in habeas corpus hardly seems unreasonable. This emphatically would not give the federal courts the prerogative to interfere in questions of purely military law. The federal courts could very well conclude that the current concept of "military due process" meets the requirements of con-

143 Burns v. Wilson, 346 U.S. 137, 140 (1953). See Aycock & Wurfel, Military Law Under the Uniform Code of Military Justice 378 (1955).

144 Quinn, *supra* note 124, at 254.

stitutional due process. Moreover, federal habeas corpus courts can and probably should apply the various limiting devices (such as the exhaustion requirement, the waiver theory, or a possible military equivalent of "adequate state grounds") at least to the extent they are applied to state proceedings under the principles enunciated in *Fay v. Noia*.[145] Finally, as the quality of military justice improves, the number of petitions for the writ by military prisoners, even under a broader scope of review, should continue to decrease. But the important thing is that the federal courts, as constitutional courts, should retain the ultimate authority to determine constitutional law. This would be true even though the need for that authority might diminish as the military courts extend more constitutional protections to servicemen.

In any event, the case law in the twelve years since *Burns* is at best confusing. Since *Burns* does not have a majority opinion its value as precedent is definitely questionable. At the very least, therefore, some clarification is obviously needed to provide the lower federal courts with a meaningful military habeas corpus standard.

[145] 372 U.S. 391 (1963).