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Habeas Corpus and the Military: The Crippled Attack on Court-Martials

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HABEAS CORPUS AND THE MILITARY: THE CRIPPLED ATTACK ON COURT-MARTIALS

> 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 civilian courts almost inevitably is drawn into question.[1]

At the time of this writing the Viet Nam war is no longer a potent political issue. The mass public protests against the war have lost the energy that caused them to dominate headlines in the late sixties. Much debate about the war centered on its constitutionality,[2] but the Supreme Court was insulated from deciding this politically intense issue.[3] That a great many lives have been affected by the constitutionally unchallenged war is obvious. Even as American involvement is phased down, it is equally obvious that a great many lives are yet to be affected by the war and the military establishment in general. For those still serving in the military and for those yet to serve, other constitutional issues of great importance persist: the rights to be afforded the servicemen, how these rights are to be protected, and what tribunal will have the ultimate word in defining and upholding these rights.

The American public, an aggregate of citizen-consumers of American law, has traditionally looked to the Supreme Court as the ultimate exegete and protector of rights derived from the Constitution. Under now familiar principles, it is axiomatic that our constitutional rights are what the Supreme Court interprets these rights to be. With the

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[1] Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187-88 (1962) [hereinafter cited as Warren].

[2] *See, e.g.*, S. REP. NO. 797, 90th Cong., 1st Sess. (1967). *See also* G. GUNTHER & N. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW 599-610 (8th ed. 1970); Velvel, *The War in Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 KAN. L. REV. 449 (1968).

[3] The constitutionality of the war has not been a "justiciable" issue. *See* Velvel v. Nixon, 396 U.S. 1042 (1970); McArthur v. Clifford, 393 U.S. 1002 (1968); Hart v. United States, 391 U.S. 956 (1968); Mora v. McNamara, 389 U.S. 934 (1967).

Court's recognition that servicemen do not lose their constitutional rights just because they have donned uniforms,[4] it is natural to assume that the Court is continuing to define and protect the soldiers' rights. Such is not the case.

At least superficially, the reasons for this phenomenon are simple. Congress is partly responsible; it has refused to provide for direct review of military courts by civilian courts.[5] Thus, servicemen who claim that military courts have convicted them in violation of their constitutional rights must resort to collateral attack. Habeas corpus, the "great writ of liberty," is the recognized means for vindicating constitutional rights in a collateral proceeding;[6] yet the Supreme Court, and the lower federal courts which operate under its guidance, have almost closed the door. More precisely, the courts have narrowly restricted the review of constitutional due process claims raised by servicemen in habeas litigation. As a result, military due process is not subject to Supreme Court standards, and servicemen are denied the full protection of their constitutional rights.[7] By focusing in more

[4] Burns v. Wilson, 346 U.S. 137, 142 (1953). The Court of Military Appeals has said that "[t]he impact of *Burns* is an unequivocal holding by the Supreme Court that the protections of the Constitution are available to servicemen . . ." United States v. Tempia, 16 U.S.M.C.A. 629, 37 C.M.R. 249, 254 (1967). *See also* Warren, *supra* note 1, at 188.

[5] The "finality clause," UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 876 (1970) is usually cited as authority. *See, e.g.*, Burns v. Wilson, 346 U.S. 137, 142 (1953).

In a pre-Civil War case, Dynes v. Hoover, 61 U.S. (20 How.) 65, 82-83 (1858), the Court first enunciated the doctrine that civil courts could not directly review military court decisions. This decision rested on the fact that military courts were established under Congress' power "[t]o make Rules for the Government and Regulation of the land and naval forces . . ." U.S. CONST. art I, § 8. The fact that military judges do not have life tenure has traditionally been a clear indication that military courts are "legislative courts" and not "constitutional courts" under article III. A curious situation arose in 1963 when the House of Representatives passed a bill, H.R. No. 3179, 88th Cong., 1st Sess. (1963), which would have given judges on the Court of Military Appeals life tenure. Whether life tenure judges would have made military decisions directly reviewable by article III courts was never decided—the bill failed in the Senate.

For a recent decision holding that United States Courts of Appeals have no jurisdiction to review decisions of the United States Court of Military Appeals, *see* Davies v. Clifford, 393 F.2d 496, 497 (1st Cir. 1968). *See generally*, Ghent, *Military Appellate Processes*, 10 AM. CRIM. L. REV. 125 (1971).

[6] Other forms of collateral relief are available to servicemen challenging convictions. Mandamus is available under 28 U.S.C. § 136 (1970) to correct military records. *See, e.g.*, Carter v. Seamans, 411 F.2d 767 (5th Cir. 1969); Lima v. Secretary of the United States Army, 314 F. Supp. 337 (E.D. Pa. 1970). Also, servicemen may sue for back pay in the Court of Claims (to establish their case they would have to show they were wrongly convicted), *see e.g.*, Shaw v. United States, 357 F.2d 949 (Ct. Cl. 1966). Perhaps because the law of these alternative means of collateral relief is uncertain, habeas corpus is the relief predominately sought, *see* Burris & Jones, *Civilian Courts and Courts-Martial-The Civilian Attorney's Perspective*, 10 AM. CRIM. L. REV. 139, 153-56 (1971) [hereinafter cited as Burris & Jones].

depth on the presently restricted scope of habeas corpus review of court-martials, this comment will attempt to trace the history, doctrines, and decisions that have shaped the law in this area. In the process, it is hoped that the need to broaden the scope of military habeas review will become apparent.

The writ of habeas corpus has its origins in the common law. The common law courts used the writ to expand and protect their power at the expense of other judicial bodies.[8] If other than common law courts imprisoned a citizen, the writ challenged the legal power of the sentencing tribunal to impose the confinement.[9] In a strict sense, the use of the writ was limited to questions of competency; if a common law court determined that a citizen had been confined by a tribunal which lacked jurisdiction over the person or the subject matter, or lacked the power to impose the sentence, the court issued the writ and release from confinement resulted.[10]

As part of the common law, the writ was considered to be the heritage of every Englishman.[11] The Founding Fathers recognized the writ by mentioning it in the Constitution.[12] By implication, the Supreme Court could have treated its power to issue the writ as a matter of constitutional authorization;[13] however, an early opinion of the Court indicated that jurisdiction to issue the writ required statutory authorization.[14] Congress granted this authorization in the Judiciary Act of 1789,[15] and the Court subsequently held that the purposes for which the writ could be used were controlled by the common law.[16] Thus, federal habeas courts followed the English tradition of reviewing only jurisdictional issues.

Curiously, Congress did not give federal courts the power to use

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[7] For example, the bare promise that servicemen have a right to counsel, *see* 10 U.S.C. § 838 (1970), does not give servicemen their constitutional right to counsel, U.S. CONST. amend. VI, because the Supreme Court "gloss" is not the required standard (problems of incorporation encountered under the fourteenth amendment are not, or should not, be present vis-à-vis military law).

[8] Note, *Developments—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1040-45 (1970) [hereinafter cited as *Developments—Federal Habeas Corpus*].

[9] *Id.*

[10] *Id.*

[11] Snedeker, *Habeas Corpus and Court-Martial Prisoners*, 6 VAND. L. REV. 288 (1953) [hereinafter cited as Snedeker].

[12] U.S. CONST. art. I, § 9 states: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."

[13] *See* Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 493, 508 (1951) in which the author states that the Founding Fathers simply assumed the existence of the writ.

[14] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807).

[15] 1 Stat. 81 (1789).

[16] *Ex parte* Watkins, 28 U.S. (3 Pet.) 370 (1830).

the writ to release state prisoners.[17] Conversely, a majority of state courts following the common law employed the writ to release prisoners held in federal custody.[18] Federal judges objected to state interference,[19] and in 1858 the Supreme Court ruled that no state judge or court had the right to interfere with federal prisoners.[20] Shortly thereafter, Congress gave federal courts jurisdiction to entertain habeas petitions from state prisoners.[21] At this juncture, the common law principles of the writ were particularly adaptable to the problems of federalism encountered when federal habeas courts received state prisoners' petitions. Under the constitutional scheme, principles of comity precluded federal judges from reviewing issues of state law. Moreover, state courts shared the responsibility for enforcing the Constitution and federal law. By limiting the scope of state habeas review to issues of jurisdiction, a great deal of conflict was avoided.[22]

Ex parte Reed[23] was the first court-martial case to reach the Supreme Court by review of habeas corpus. In previous decisions regarding military law, the Court had established that Congress was acting within its powers to create military courts,[24] that civil courts had no power to directly interfere with court-martial decisions,[25] and that the Court could not review military decisions by certiorari.[26] *Reed* firmly established that court-martial convictions were subject to habeas review; since it was a case of first impression, the Court defined the scope of issues cognizable. Not surprisingly, habeas review was limited to jurisdictional issues.[27] Since habeas petitions from state prisoners and federal prisoners were similarly limited to review of jurisdictional issues, there was an unusual harmony in the law.

The stability in the area of habeas review was short-lived, however, as the Court soon embarked on a long line of decisions that broadened

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17 Federal courts could issue the writ for prisoners held "in custody under or by colour of the authority of the United States." Act of Sept. 24, 1789, ch. 20, § 14.

18 Snedeker, *supra* note 11, at 289.

19 *Id.* at 289-90.

20 Abelman v. Booth, 62 U.S. (21 How.) 506 (1858).

21 14 Stat. 385 (1867), *as amended* 28 U.S.C. § 2241 (1970).

22 *See, e.g., Ex parte* Royall 117 U.S. 254 (1886).

23 100 U.S. 13 (1879).

24 Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858). See note 5 *supra*, and accompaning text.

25 *Id.*

26 *Ex parte* Vallandingham, 68 U.S. (1 Wall.) 243 (1864).

27 The Court stated that courts-martial "are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals." *Ex parte* Reed, 100 U.S. 13, 23 (1879). Civilian courts could inquire whether the court-martial had jurisdiction over the person and the subject matter and had the power to impose the sentence. *Developments—Federal Habeas Corpus, supra* note 8, at 1209.

the concept of jurisdiction as it defined the issues reviewable in civil habeas review.[28] In succession, the Court affirmed writs issued on claims of double jeopardy,[29] unconstitutional statutes,[30] lack of grand jury indictment,[31] fundamental unfairness in a mob-dominated trial,[32] and denial of counsel.[33] In all of these cases, the Court clung to the jurisdiction rubric,[34] an approach which tended to obscure the circular syllogism being used—no jurisdiction, no due process; no due process, no jurisdiction. The Court finally abandoned the confusing jurisdiction rationale in *Waley v. Johnson*[35] which held that federal habeas courts could issue the writ in cases where "the conviction has been obtained in disregard of the constitutional rights of the accused."[36]

The landmark case of *Brown v. Allen*[37] was the final major expansion in the scope of federal habeas review.[38] The Court held that all constitutional claims were subject to de novo review in habeas courts and state determinations of constitutional claims could be relitigated. This decision rested primarily on the belief that a collateral federal court, not preoccupied with finding guilt or innocence, was the best institutional setting for vindicating constitutional rights.[39] Thus, while

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28 An a priori explanation of the rationale and methodology used by the Court may illuminate the decisions. As a basic premise, confinement by a tribunal which lacks competency to impose the confinement is a deprivation of liberty without due process of law; therefore, the tribunal's sentence is void. The next logical progression is to reason that other errors depriving a defendant of liberty without due process also make a conviction void. Confusion arises when voidness is equated with lack of jurisdiction, which the Court, quite confusingly, chose to do. A guess can be made as to why the Court took this approach. After the adoption of the fourteenth amendment, the Court moved quite slowly in developing the concept of due process as it applied to the states, *see e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). Without having to break new ground in the due process area, the judicial conscience could be eased by resorting to the familiar habeas corpus means to void blatantly unfair state convictions. The only limitation on the use of habeas corpus was the jurisdictional standard of review, so perhaps the Court felt justified in corrupting the meaning of jurisdiction.

29 *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

30 *Ex parte* Siebold, 100 U.S. 371 (1879).

31 *Ex parte* Wilson, 114 U.S. 417 (1885).

32 Moore v. Dempsey, 261 U.S. 86 (1923). *But see* Frank v. Mangrum, 237 U.S. 304 (1915).

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

34 See note 28, *supra*, and accompanying text.

35 316 U.S. 101 (1942).

36 *Id.* at 104-05.

37 344 U.S. 443 (1953).

38 While *Brown* held that federal courts could relitigate state constitutional decisions, it had the anamolous effect of barring federal review if state courts had reached no decision on constitutional challenges. The anamoly was the result of the Court's interpretation of the exhaustion requirement in 28 U.S.C. § 2254 (1970). A later case, Fay v. Noia, 372 U.S. 391 (1963), held that federal habeas rulings were possible even if petitioners had not raised constitutional challenges in state courts. Thus, in the strictest sense, *Brown* was not the final step in the expansion of habeas review.

39 *See Developments—Federal Habeas Corpus, supra* note 8, at 1056-62.

once limited to determining if a civil court had competency, habeas courts could review constitutional issues on the merits, and Supreme Court standards were applied and enforced.

Compared to the progressive evolution of civil habeas corpus, the Supreme Court's development of military habeas corpus has been intransigent. By World War II, expansion of the scope of review in civil cases suggested that military prisoners might press constitutional claims in federal habeas courts. The unprecedented size of military forces during the war naturally resulted in a dramatic increase in the number of courts-martial.[40] Encouraged by the habeas developments in civil cases, military prisoners took to the federal courts by "squads and platoons."[41] Habeas petitions were favorably received by federal judges,[42] and the courts of appeals in six circuits ruled that habeas courts should expand the scope of review to determine if military prisoners' rights to fair trial and due process of law were violated.[43] Civilian precedents were invoked and military convictions were vulnerable if violations of constitutional rights were alleged.[44]

The propriety of the expanded scope of military habeas review was squarely reached by the Supreme Court in *Hiatt v. Brown*.[45] The Fifth Circuit had affirmed a district court's issuance of the writ on grounds that the petitioner's court-martial was improperly constituted and that certain errors deprived him of due process of law under the fifth amendment.[46] The Supreme Court reversed, stating:

> 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 proposition of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain the respondent's conviction, the adequacy of the pretrial investigation, and the competency of the law member and defense counsel '. . . The single inquiry, the test, is jurisdiction. . . .' The correction of any errors it [the court-martial] may have committed is for the military authorities which are alone authorized to review its decision.[47]

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[40] Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 45 (1961) [hereinafter cited as Bishop].

[41] *Id.*

[42] *Id.*

[43] See Katz & Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 O.S.L.J. 193, 200 n.39 (1966) [hereinafter cited as Katz & Nelson] for representative cases from the six circuits.

[44] Note, *Servicemen in Civilian Courts*, 76 YALE L.J. 380, 383-84 (1967).

[45] 339 U.S. 103 (1950).

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

[47] Hiatt v. Brown, 339 U.S. 103, 110-11 (1950).

The Court made no reference to the landmark civil decisions; instead, it reached back to *In re Grimley*[48] for precedent. Except for the somewhat ambiguous reference to the due process clause,[49] *Hiatt* was a reversion to the *Ex parte Reed* standard of review.[50]

Hiatt was immediately followed by *Whelchel v. McDonald*[51] in which the Court intimated in dictum, without distinguishing *Hiatt*, that a denial of the opportunity to present a defense of insanity might raise a jurisdictional question.[52] Exactly why the Court relapsed into the use of the jurisdiction rubric is unclear, but the due process implication was unmistakable.[53]

Three years later, the Supreme Court decided *Burns v. Wilson*[54] which still stands as the leading case in defining the scope of habeas review of courts-martial. The petitioners in *Burns* alleged that their convictions had been obtained after several constitutional errors: admission into evidence of coerced confessions, lack of effective counsel, suppression of favorable evidence, perjured testimony, and trial in an atmosphere of vengeance. Following *Hiatt*, the lower courts had denied the petition. Four opinions were written in *Burns*, and while the dismissal of the petition was affirmed, none of the opinions attracted a majority.

Justices Reed, Clark, and Burton joined in the opinion of Chief Justice Vinson. This opinion stated that the scope of habeas review of the military had always been narrower than the scope of review in civil cases, that Congress had just adopted the Uniform Code of Military Justice, that the new code provided a system of review the decisions of which were to be final and binding on all courts, that the rights of servicemen were conditioned to demands of discipline and

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[48] 137 U.S. 147 (1890).

[49] It is interesting that the Court reviewed the merits of the allegation that the court-martial was convened in violation of the governing statutes (the Court cited 62 Stat. 628-29 regarding the composition of courts-martial). Examination of an early case, McClaughry v. Deming, 186 U.S. 49 (1902), reveals that the Court voided a conviction, using the jurisdiction concept (*see* note 28 *supra*, and accompanying text), by reasoning that a court-martial convened in violation of the Articles of War created a jurisdictional defect. Thus, it would seem that due process issues would be raised by statutory violations. Coupled with the curious negative pregnant in the *Hiatt* text mentioning the due process clause, it appeared that at least some due process issues might be subject to review on the merits.

[50] See note 27 *supra*, and accompanying text.

[51] 340 U.S. 122 (1950).

[52] *Id.* at 124.

[53] See note 28 *supra*, and accompanying text.

[54] Burns v. Wilson, 346 U.S. 137 (1953), Vinson opinion at 137-46 (Burton, Clark & Reed, JJ., concurring), Minton opinion at 146-48 (separate opinion), Frankfurter opinion at 148-50 (dissenting), Douglas opinion at 150-55 (dissenting, Black, J., concurring) (Jackson, J., affirming without opinion). With the exception of direct quotations, further citations to the *Burns* text will be omitted.

duty, and that civil courts were not the proper forums to balance the needs of the military. Having made these arguments, the Chief Justice enunciated guidelines for habeas review as follows:

> [W]hen 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. . . .
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> Had the military courts manifestly refused to consider those claims, the district court was empowered to review them de novo. . . .
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> . . . .
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> These records make it plain that the military courts have heard the petitioner out on every significant allegation which they urge. Accordingly, it is not the duty of the civil courts simply to repeat that process. . . . It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims. . . .[55]

Justice Jackson concurred in the result without opinion, and Justice Minton concurred in a separate opinion in which he echoed the principles of *Hiatt* and *In re Grimley.*

Justice Frankfurter dissented and labeled incorrect the argument that military habeas review had traditionally been narrower than civil habeas review. Also, he could not agree that the scope of inquiry should be limited to questions of jurisdiction or to ascertaining whether the military had considered constitutional challenges.

Justice Douglas also dissented, Justice Black concurring, on the grounds that habeas courts should make separate determinations of constitutional questions based on the standards of due process formulated by the Court. Thus, he advocated having the scope of military habeas review parallel civil habeas review.

At best, *Burns* has provided a fragile framework for the lower courts faced with petitions from military prisoners.[56] Although *Burns* indicated that the narrow standard announced in *Hiatt* was no longer appropriate, the new scope of review was, and has been, uncertain. Forced to struggle with four differing opinions, the lower courts have generally taken the plurality opinion as the opinion of the Court.[57] The Vinson opinion failed, however, to elaborate on the meaning of

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[55] 346 U.S. 137, 142-44 (1953).

[56] Professor Bishop observed that *Burns* "still stands as the principle lighthouse in these tackless waters, however low its candlepower." Bishop, *supra* note 40, at 51.

[57] One writer has suggested that *Burns* has no precedental value because of its failure to gain a majority of support. Wiener, *Courts-Martial and the Bill of Rights: The Original Practice,* 72 HARV. L. REV. 266, 297 (1958).

"full and fair consideration," and subsequent interpretations by the lower courts have been clearly inconsistent.

The lower court opinions following *Burns* do not lend themselves to facile taxonomy.[58] The predominant interpretation, no doubt influenced by the "manifestly refused" language in *Burns*, has been that habeas courts must only determine if the military courts have given petitioners' constitutional claims complete and impartial consideration.[59] If this has been done, habeas courts must refuse to decide the correctness of the military decisions. The Tenth Circuit, which reviews petitions from prisoners at the United States Disciplinary Barracks and the Federal Penitentiary at Leavenworth, Kansas,[60] has stated: "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. . . ."[61] Also representative of this interpretation is the recent holding in *King v. Moseley*[62] to the effect that:

> [T]he Court enunciated the rule that the limited function of the civil courts in reviewing a military conviction on a petition for a writ of habeas corpus, in addition to the jurisdictional issue under the prior rule, is to determine whether the military gave fair consideration to each of the petitioner's constitutional claims. . . .
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> . . . .
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> The appellant asserts that the military courts and boards reached the wrong result. But again . . . this is not for us to evaluate.[63]

The net effect of this interpretation is that *Burns* only minutely expanded the scope of review. If a petitioner fails to raise a due process objection during the military proceedings, it cannot be said that the military courts "manifestly refused" to consider his claim.

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[58] For various attempts at analyzing the lower courts opinions since *Burns*, *see* Bishop, *supra* note 40, at 60-70; Burris & Jones, *supra* note 6, at 145-49; Katz & Nelson, *supra* note 43, at 206-11; Comment, 1971 U. ILL. L.F. 124, 125, 127-29.

[59] *See, e.g.*, Parisi v. Davidson, 435 F.2d 299 (9th Cir. 1970), *rev'd on other grounds*, 405 U.S. 34 (1972); Thompson v. Parker, 399 F.2d 744 (3d Cir. 1968); Palomera v. Taylor, 344 F.2d 937 (10th Cir. 1965); Williams v. Heritage, 323 F.2d 731 (5th Cir. 1963); Sunday v. Madigan, 301 F.2d 871 (9th Cir. 1962); Reed v. Franke, 297 F.2d 17 (4th Cir. 1961); Crigler v. United States Army, 285 F.2d 260 (10th Cir. 1961).

[60] Because of the exhaustion requirement (see note 38 *supra*, and accompanying text), most convicted servicemen are in prison by the time habeas proceedings are commenced. Since habeas petitioners are required to seek relief in district courts for the jurisdiction in which they are confined, the Tenth Circuit Court of Appeals has appellate jurisdiction over a large portion of military cases.

[61] Easley v. Hunter, 209 F.2d 483, 487 (10th Cir. 1953).

[62] 430 F.2d 732 (10th Cir. 1970).

[63] *Id.* at 734-35.

Furthermore, manifest refusal to hear an objection is unlikely. It has been observed by one critic that a habeas court following *Burns* may simply and summarily dismiss a petition on the grounds that the military did not refuse to hear the allegation, or it may, with equal ease and on the same authority, stress the requirement that the consideration was full and fair.[64]

A second approach to interpreting *Burns* can be roughly categorized as placing a more qualitative emphasis on the meaning of fair consideration. Instead of making perfunctory kowtows to military decisions because the records indicate that constitutional claims were considered, some courts have timidly decided to "briefly" review the claims on the merits to see if the decisions were fair.[65] Fairness in these cases has not been required to conform with Supreme Court standards. In cases where the alleged constitutional violations have been so unfair as to "shock the conscience," some courts have felt compelled to a review the claims on the merits.[66] In somewhat confusing opinions, other courts have also tried to distinguish between issues of fact and issues of law, the implication being that legal issues may require qualitative review.[67] The only real consistency running through all of these cases is the monotonous regularity with which petitions are denied.

Only two cases have been reported in which bona fide attempts have been made to broaden the scope of military review to equal that of civil review. Granting the petition in *Application of Stapley*,[68] a Utah district court said in dictum:

> [T]he vindication of constitutional rights through such inquiry and rulings [habeas proceedings] 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.[69]

In a second case, *Kauffman v. Secretary of the Air Force*,[70] the District of Columbia Circuit Court of Appeals unequivocably faced the issue of the proper scope of habeas review of court-martial con-

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[64] Bishop, *supra* note 40, at 59.

[65] *See, e.g.*, Allen v. Van Cantfort, 436 F.2d 625 (1st Cir. 1971); Harris v. Ciccone, 417 F.2d 479 (8th Cir. 1969); Heilman v. United States, 406 F.2d 1011 (7th Cir. 1969).

[66] *See, e.g.*, Swisher v. United States, 354 F.2d 472 (8th Cir. 1966); Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965).

[67] *See, e.g.*, Gibbs v. Blackwell, 354 F.2d 469 (5th Cir. 1965); Fischer v. Ruffner, 277 F.2d 756 (5th Cir. 1960).

[68] 246 F.Supp. 316 (D. Utah 1965).

[69] *Id.* at 320.

[70] 415 F.2d 991 (D.C. Cir. 1969). *See* Comment, 19 AM. U.L. REV. 84 (1970).

victions. Recalling Justice Frankfurter's distraught observation in *Burns* that convictions by civil courts which lacked due process were open to habeas attack while identically defective convictions by military courts were invulnerable, the court refused to accept the government's argument to confine the scope of review to whether the military had jurisdiction and whether the military courts had considered petitioner's constitutional claims. The court did not interpret *Burns* as applying standards of review for military convictions that differed from review of civil convictions. The Circuit Court held:

> [T]he test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule. . . . The wholesale exclusion of constitutional errors from civilian review and the perfunctory review of servicemen's remaining claim's . . . are limitations with no rational relation to the military circumstances which may qualify constitutional requirements. The benefits of collateral review . . . are lost if civilian courts apply a vague and watered-down standard of full and fair consideration. . . .[71]

The *Kauffman* court obviously found it difficult to rationalize a dichotomous approach to habeas review of military convictions and civil convictions. That other courts have not found a similar difficulty is most likely due to uncritical acceptance of the arguments made in the plurality opinion in *Burns*. The "full and fair consideration" test is not, however, a rigid mandate for narrow review. It is a conceptual guideline that should be interpreted according to the times and atmosphere in which it must operate. Since the *Burns* arguments have apparently controlled the meaning of "full and fair consideration," those arguments will be examined for their validity and present persuasiveness. This is particularly appropriate since the Supreme Court has said that "habeas corpus is not a static, narrow, formalistic remedy."[72]

As Justice Frankfurter pointed out in his dissent in *Burns*, the statement that habeas review of the military has always been more restricted than habeas review of civil courts is simply not accurate. Until the Court decided *Hiatt*, the range of issues cognizable in military habeas proceedings were paralleled by those in civil habeas proceedings. During the nineteenth century, there was no dichotomy because both civil and military review were equally restricted to jurisdictional issues. As the Court gradually expanded the concept of jurisdiction in civil cases, a paucity of decisions regarding military review left the area rather undeveloped until the World War II flood

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[71] Kauffman v. Secretary of the Air Force, 415 F.2d 991, 997 (1969).
[72] Jones v. Cunningham, 371 U.S. 236, 243 (1963).

of cases. As previously pointed out, lower federal courts simply assumed the expansion in habeas review applied to military cases. No dichotomy really existed until *Hiatt*, and as a "tradition," the dichotomy observed the veneration of a three year existence.

The plurality opinion of *Burns* also noted that Congress had just passed the Uniform Code of Military Justice[73] [hereinafter cited as UCMJ] in which a substantial number of Bill of Rights guarantees were secured for the servicemen.[74] This reference was obviously made to point out that the military was Congress' responsibility, and that Congress had just exercised its judgement.[75] If the reference to the UCMJ was simply a tactful nod to Congress, then it was of little importance; but taken in its textual setting, the reference clearly carried the meaning that Congress, through the new code, was guaranteeing constitutional due process to servicemen.[76] If servicemen's rights were exclusively left to congressional and executive judgment, then the Court could not exercise any supervisory function over those rights; but the opinion also stated that "the constitutional guarantee of due process is meaningful enough . . . to protect soldiers as well as civilians. . . ."[77] The fact that Congress adopts legislation does not reduce the duty of constitutional courts to define and protect constitutional rights; yet the import of *Burns* is that abdication to Article I military court judgements on constitutional issues is proper. This is particularly distressing since the Court has recently stated that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[78]

The plurality argument that "[t]he rights of men in the armed forces must perforce be conditioned to meet overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck"[79] is not persuasive for a number of reasons. Central to military discipline is rigid command control. Broad discretion is given to enforce discipline and

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[73] Act of May 5, 1950, ch. 169, 64 Stat. 107 [codified at 10 U.S.C. §§ 801-940 (1970)].

[74] *See generally* Moyer, *Procedural Rights of the Military Accused*, 51 MIL. L. REV. 1 (1971).

[75] For recent history of congressional administration of military law see Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25, 25-27 (1971).

[76] *See* note 7 *supra*, and accompanying text. The problem with the *Burns* decision is brought more clearly into focus when it is realized that the military courts determine their own "gloss"—Congress does not develop military law on a case by case basis.

[77] 346 U.S. 137, 142-44 (1953). *See also* note 4 *supra*, and accompanying text.

[78] O'Callahan v. Parker, 395 U.S. 258, 265 (1969).

[79] 346 U.S. 137, 140 (1953).

the arbitrariness of command power is limited only by the integrity and fairness of conscience.[80] It is difficult to reconcile discretionary, and potentially arbitrary, power to discipline with procedural justice. Constitutional due process rights, guarantees of protection from arbitrariness and unfairness in criminal litigation, are undermined by the premise that discipline is a proper goal in courts-martial. Soldiers' rights in a judicial forum should not be conditioned by the need to discipline.

The argument that civil judges cannot appreciate the needs of the military in determining constitutional issues is untenable. It is as easy to say that military courts cannot appreciate the demands of constitutional rights as it is to say that civil courts cannot appreciate the demands of discipline and duty. Obviously some balance must be struck, but leaving that determination to the exclusive judgment of the military is not a satisfactory approach. If habeas courts can weigh special state interests in hearing petitions from state convictions, so should they be able to weigh military interests on petitions from military convictions.[81] The approach taken in *Kauffman*[82] is much more satisfactory than the apparent *Burns* approach. Furthermore, the policy underlying the decision in *Brown v. Allen* applies with equal force to opening habeas review of military convictions.[83] The institutional setting of courts-martial makes it likely that constitutional rights might be overlooked or ignored. The mere possibility of constitutional violations requires that an impartial forum adjudicating only constitutional claims be provided.

The finality clause of the UCMJ referred to in *Burns* was not meant to preclude all civil review of the military.[84] The legislative history of that clause explicitly states that Congress did not intend to exempt habeas corpus review.[85] The fact that Congress has not provided for direct review should require that the issues cognizable on collateral review be broad enough to allow full determinations of fundamental constitutional claims. Furthermore, a recent addition to the UCMJ directing military courts to apply principles of law recognized in

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[80] *See, The Dilemma of Military Discipline and Procedural Justice,* 17 A.B.A. STUD. LAW J. 12 (1972) [hereinafter cited as *The Dilemma of Military Discipline and Procedural Justice*].

[81] *See, e.g.,* Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

[82] The military must carry the burden of showing why military needs require modifications of Supreme Court standards. *See* text at note 71 *supra.*

[83] *See* text at note 39 *supra.*

[84] *See* note 5 *supra,* and accompanying text.

[85] H.R. REP. No. 491, 81st Cong., 1st Sess. 35 (1949).

criminal cases tried in federal district courts,[86] implies a need for broadened habeas review—particularly if constitutional violations are claimed.

While examination of *Burns* and its effect on the lower courts does not present an exhaustive survey of reasons for broadening the scope of military habeas review, it should at least be clear that servicemen are being denied an effective means of vindicating their constitutional rights. The Supreme Court, however, has refused to reconsider or clarify the "ful and fair consideration" standard in spite of the general confusion in the lower courts and the tenuous arguments made in *Burns*. Nevertheless, the Court recently handed down an opinion dealing with military law that clearly showed the Court's concern for servicemen's rights. In *O'Callahan v. Parker*,[87] the Court made a flanking attack on military jurisdiction by holding that servicemen could only be tried for "service-connected crimes in military courts. The clear intention of the Court was to protect servicemen's due process rights by having soldiers tried in civil courts for crimes having no relation to the military's mission. Thus, the scope of issues cognizable in habeas courts now includes whether a soldier's conviction is based on a service-connected crime. If the courts find that the military has jurisdiction, however, *Burns* controls and "full and fair consideration" is still the standard of review for constitutional claims.

No doubt *O'Callahan* was a response to the rapidly accelerating public criticism of military justice. Young soldiers are themselves questioning, criticizing, and protesting against regulations, policies, and orders of the military.[88] Congress has focused critical attention on the system of military justice and voiced concern for the soldiers who claim the constitutional rights of citizenship.[89] In response, two bills have been introduced in Congress that would grant Supreme Court review of military courts by writ of certiorari.[90] If passed, the Court would find it difficult to avoid issues regarding servicemen's constitutional rights. In the meantime servicemen must hope that "full and fair consideration" acquires a substantive meaning. It should not stand as a stumbling block or barrier to constitutional rights.

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[86] 10 U.S.C. § 836 (1970).

[87] 395 U.S. 258 (1969). *See also* Relford v. Commandant, 401 U.S. 355 (1971).

[88] *The Dilemma of Military Discipline and Procedural Justice, supra* note 80, at 12.

[89] *See* Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM. L. REV. 9 (1971).

[90] S. 1127, 92d Cong., 1st Sess. § 844 (1971) (sponsored by Senator Birch Bayh); H.R. 579, 92d Cong., 1st Sess. § 844 (1971) (sponsored by Congressman Charles Bennett).