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A problem frequently encountered today in general law practice involves an individual who, after having been released from one of the armed services with a discharge in some degree less than the normal honorable discharge, seeks the aid of a lawyer in changing the discharge. The effects of an unfavorable discharge are beyond the scope of this article. It is sufficient to note, however, that a discharge in any degree less than honorable carries a mark of social stigma and, more seriously, often acts as a bar to employment and educational opportunities.[1]

The purpose of this article is to discuss both the judicial and administrative remedies available for seeking relief of a less than honorable discharge. The discussion will cover both punitive discharges (those awarded by courts-martial)[2] and administrative discharges (those awarded by administrative boards),[3] and its scope will be limited to

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1. *See* Sofranoff v. United States, 165 Ct. Cl. 470 (1964); Bland v. Connally, 293 F.2d 852, 858 (D.C. Cir. 1961); Dougherty and Lynch, *The Administrative Discharge: Military Justice*, 33 GEO. WASH. L. REV. 498 (1964); Brown, *The Results of the Punitive Discharge*, 1961 JAG J. 13; Note, 69 YALE L.J. 474, 490 (1960).

2. There are two types of punitive discharges; a dishonorable discharge and a bad conduct discharge. 10 U.S.C. § 856; MANUAL FOR COURTS-MARTIAL, 1969, para. 127(c) Table of Maximum Punishments, Section A. A bad conduct discharge can be awarded by either a special or a general court-martial, but a dishonorable discharge can be awarded only by a general court-martial. 10 U.S.C. § 818, 819; MANUAL FOR COURTS-MARTIAL, 1969, para. 127(c) Table of Maximum Punishments, Section A. Dishonorable or bad conduct discharges are given to enlisted men only. Punitive removal of an officer can only be accomplished by a dismissal awarded "by sentence of a general court-martial," "in commutation of a sentence of a general court-martial," or "in time of war by order of the President." 10 U.S.C. § 1161. In all cases in which a punitive discharge or dismissal is awarded (and approved by the convening authority) there is an automatic review by a Court of Military Review. 10 U.S.C. § 866. Thereafter, if the case involves a flag or general officer or the death penalty, it is automatically reviewed by the U.S. Court of Military Appeals. 10 U.S.C. § 867. Otherwise, a case involving a punitive discharge or a dismissal must be certified to the Court of Military Appeals by the Judge Advocate General of the service involved, or be granted a review by the Court on petition by the accused for "good cause shown." 10 U.S.C. § 867.

3. Administrative discharges are awarded pursuant to regulations prescribed by the Department of Defense and the Secretaries of the services involved, on authority of the

remedies available after the discharge has been finalized. No attempt will be made to discuss the practice before military courts-martial or military appellate courts where the serviceman is represented by military lawyers.

The choice of remedy will depend upon the nature of the discharge, the relief desired, and whether the serviceman is confined pursuant to sentence of court-martial.

If the serviceman has been awarded a punitive discharge by a court-martial, it is possible that the discharge proceeding itself may be attacked by a petition to the Judge Advocate General of the service involved. The initial determination must be made whether there exist grounds sufficient to warrant the expectation that such relief will be granted. Title 10 U.S.C. § 873 provides in part:

> At any time within two years after approval by the convening authority of a court-martial sentence the accused may petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court.[4]

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following statutes: Officer separations, 10 U.S.C. § 3781 (Army), 10 U.S.C. § 5864 (Navy), 10 U.S.C. § 8791 (Air Force), and 14 U.S.C. § 321 (Coast Guard). Enlisted separations, R.S. 161, 5 U.S.C. § 301, 10 U.S.C. §§ 3811-20, 6291-98, 8811-20. The Secretary of Defense has issued a directive implementing these statutes. 32 C.F.R. 41.

The types of administrative discharges with which the lawyer will most likely be concerned are the general discharge (separation under honorable conditions) 32 C.F.R. 41.3(m); and the undesirable discharge (separation under conditions other than honorable) 32 C.F.R. 41.3(n). A general discharge may be issued on the grounds of unsuitability and is usually given for physical or medical reasons. 32 C.F.R. 41.6(g). An undesirable discharge is usually awarded for unfitness for one of the following reasons:

1. Frequent involvement of a discreditable nature with civil or military authorities.
2. Sexual perversion, including, but not limited to (I) lewd and lascivious acts, (II) homosexual acts, (III) sodomy, (IV) indecent exposure, (V) indecent acts with or assault upon a child, (VI) other indecent acts or offenses.
3. Drug addiction, habitation, or the unauthorized use or possession of narcotics, hypnotics, sedatives, tranquilizers, stimulants, hallucinogens, and other similar known harmful or habit forming drugs and/or chemicals.
4. An established pattern for shirking.
5. An established pattern showing dishonorable failure to pay just debts.
6. An established pattern showing dishonorable failure to contribute adequate support to dependents or failure to comply with orders, decrees, or judgments of a civil court concerning support of dependents.
7. Unsanitary habits. 32 C.F.R. 41.6(i).

The services have issued procedural regulations implementing the foregoing directive. *See* ARMY REGULATION No. 635-212 (July 14, 1966); AIR FORCE MANUAL No. 39-12 (September 1, 1966); BUREAU OF NAVAL PERSONNEL MANUAL C-10302 to C-10314, change 13.

A serviceman cannot be issued an undesirable discharge unless he has been afforded certain procedural safeguards, such as a hearing before a board of officers and representation by counsel. 32 C.F.R. 41.7. These same procedural requirements apply to the issuing of a general or honorable discharge for unsuitability where the serviceman has eight or more years of active military service. 32 C.F.R. 41.7.

4. In the Coast Guard the petition is made to the General Counsel of the Department of Transportation. 10 U.S.C. § 801.

The Manual for Courts-Martial, 1969, provides that a new trial will not be granted unless the petitioner can "affirmatively establish that an injustice has resulted from the findings or the sentence and that a new trial would probably produce a substantially more favorable result for the accused."[5] The evidence must have been discovered since the trial and the accused must establish that he exercised due diligence to discover it at the time of trial. He must also show that, if the evidence were to be considered by the court-martial, it would produce a substantially more favorable result. If fraud upon the court is offered as a reason for the new trial, it must be shown that the fraud had a "substantial contributing effect" to the findings or sentence.[6]

If, when the serviceman contacts the attorney, he is confined pursuant to the sentence of a court-martial, the verdict and sentence may also be attacked by means of an application for writ of habeas corpus to a Federal District Court. The application must be made in the district where the custodian of petitioner is located or, if the serviceman is confined outside the United States, in the district where the person having authority over that custodian (such as the Secretary of the Navy) is located.[7]

Military post conviction remedies should be exhausted before filing an application for a writ of habeas corpus, and failure to do so will result in the court's declining to hear the merits of the appeal.[8] As hereafter indicated, the law in this area is unsettled. While the scope of review in habeas corpus proceedings of a court-martial verdict by a federal district court is limited, it has been expanding slowly over the past twenty years.

Traditionally, a civil court's power to review a court-martial conviction by an application for a writ of habeas corpus was limited to a determination of "whether the military court had jurisdiction of

5. MANUAL FOR COURTS-MARTIAL, 1969, para. 109(d).

6. *Id.* Examples of fraud which may warrant a new trial are perjury, willful concealment by the prosecution of exculpatory evidence, and willful concealment of a material ground for challenge by the military judge, a court member, or the convening authority.

7. *Compare* Day v. Wilson, 247 F.2d 60 (D.C. Cir. 1957) *with* Duncan v. Maine, 195 F. Supp. 199 (D.C. Maine 1961) and U.S. *ex rel.* Quinn v. Hunter, 162 F.2d 644 (7th Cir. 1947). *See* Burns v. Wilson, 346 U.S. 137 (1953), *petition for rehearing denied*, 346 U.S. 844 (1953).

8. Noyd v. Bond, — U.S. —, No. 830, O.T. 1968, June 16, 1969; Gusick v. Schilder, 340 U.S. 128 (1950); Branford v. United States, 356 F.2d 877 (7th Cir. 1966); United States v. Parker, 390 F.2d 360 (3d Cir. 1968). When military jurisdiction is attacked however, it appears that complete exhaustion of military remedies is unnecessary. Noyd v. Bond, *supra; See* Toth v. Quarles, 350 U.S. 11 (1955); Reid v. Covert, 354 U.S. 1 (1957); Guagliardo v. McElroy, 259 F.2d 927 (D.C. Cir. 1958), *aff'd*, 361 U.S. 281 (1960).

the person and subject matter, and whether, though having jurisdiction, it had exceeded its powers in the sentence produced."[9] Once the civil court made this determination, the review was completed. Correction of any other errors was left to military authorities who were deemed "alone authorized to review . . . [the court-martial] decision."[10]

A departure by the Supreme Court from this strict view occurred in *Burns v. Wilson*.[11] There petitioners, who had been convicted of murder and sentenced to death by an Air Force Court-Martial, sought a writ of habeas corpus in the Federal District Court by contending their conviction had been obtained without due process of law. After the District Court and Court of Appeals had denied issuance of the writ, the Supreme Court granted certiorari. Chief Justice Vinson, in an opinion joined by Justices Reed, Burton, and Clark, upheld the lower court's ruling, but in so doing departed from the traditional scope of court-martial review. The court said:

> The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings—of the fair determinations of the military tribunals after all military remedies have been exhausted. Congress has provided that these determinations are "final" and "binding" upon all courts. We have held before that this does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner . . . . [But] *when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence.*
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> [I]t is not the duty of the civil courts . . . to re-examine and re-weigh each item of evidence of the occurence of events which

9. Carter v. Roberts, 177 U.S. 496, 498 (1900); *accord*, Swain v. United States, 165 U.S. 553 (1897); Collins v. McDonald, 258 U.S. 416 (1922); *In re* Grimley, 137 U.S. 147 (1890).

10. Hiatt v. Brown, 339 U.S. 103 (1950). This case is an example of how strictly the rule was applied, notwithstanding the existence of patent error. The Supreme Court dismissed the application even though the Court of Appeals found that the accused was convicted on an inconsistent theory, on evidence not measuring up to malice, premeditation, or deliberation for a murder conviction, that the law member appointed was grossly incompetent, that there was no pre-trial investigation, that counsel for accused was incompetent and submitted only a token defense, and appellate review by the army reviewing authorities revealed a total misconception of the applicable law. 175 F.2d 273, 277 (6th Cir. 1949).

11. 346 U.S. 137, *rehearing denied*, 346 U.S. 844.

> tend to prove or disprove one of the allegations in the applications for habeas corpus. *It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims.* (Emphasis added.)[12]

Justice Minton concurred only in the result, and expressed his feeling that review should be limited to the traditional inquiry whether the military court had technical jurisdiction.[13]

Justice Frankfurter neither concurred nor dissented, but said that the inquiry concerning a military sentence by habeas corpus was broader than the technical jurisdictional review, and that additional argument should be heard before determining what the exact scope should be.[14] Upon denial of rehearing[15] Justice Frankfurter filed a separate opinion in which he stated that lower courts should not be left with the "inconclusive determination which our disposition of the case . . . implies."[16]

The divergence of the "majority opinions" in *Burns* left the area unclear for some time;[17] recently, however, some lower federal courts have definitely held that the traditional technical jurisdiction review is dead.[18] They now examine, albeit cautiously, courts-martial proceedings to determine whether the "military court dealt fully and fairly with an allegation raised in the application."[19]

The courts have varied, however, in the extent to which they will carry this examination. In *Kennedy v. Commandant*[20] it was held that " 'in military habeas corpus the civil courts have jurisdiction to de-

12. *Id.* at 142, 144.
13. *Id.* at 146.
14. *Id.* at 149.
15. 346 U.S. 844 (1953).
16. Justice Frankfurter wanted the case set down for further argument to consider whether the doctrine of Johnson v. Zerbst, 304 U.S. 458 (1938) should apply. In *Johnson* the court held that procedural errors in a criminal trial which did not amount to strict questions of jurisdiction could be attacked by means of habeas corpus to determine if they amounted to a denial of constitutional right. If such a denial was found the court was deemed to have lost jurisdiction, and the conviction was invalid. The Court of Claims applied this doctrine to invalidate a military conviction in Shapiro v. United States, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947). Justice Frankfurter decried the fact that neither side in *Burns* offered *Shapiro* for the court's consideration. 346 U.S. 847.
17. *See* Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 CAL. L. REV. 40 (1961).
18. "Burns v. Wilson . . . if it accomplished nothing else, conclusively rejected the concept advocated by Justice Minton that habeas corpus review should be limited to the questions of formal jurisdiction." Gibbs v. Blackwell, 354 F.2d 469, 471 (5th Cir. 1965). Other federal courts have also held that the basic inquiry upon application for writ of habeas corpus extends beyond the inquiry of technical jurisdiction. *See* Day v. Wilson, 247 F.2d 60 (D.C. Cir. 1957); Rushing v. Wilkinson, 272 F.2d 633 (5th Cir. 1959), *cert. denied*, 364 U.S. 914 (1965); De Coster v. Madigen, 223 F.2d 906 (7th Cir. 1955).
19. Burns v. Wilson, *supra*, n. 10, at 142.
20. 377 F.2d 339 (10th Cir. 1967).

termine whether the accused was denied any basic right guaranteed to him by the constitution.' "[21] The question in *Kennedy* concerned the adequacy of petitioner's defense counsel before the special court-martial that convicted him. The court noted that it could not make a factual determination of whether the petitioner's counsel was inadequate because "where the constitutional issue involves a factual determination . . . [the] inquiry is limited to whether the military court gave full and fair consideration to the constitutional issues presented."[22] It held that it was free, however, to determine the purely legal point whether the sixth amendment required certified legal counsel at special courts-martial.[23]

Where it appears that the military courts have not litigated a constitutional question, a trial de novo has been ordered in the District Court. In both *Gibbs v. Blackwell*[24] (involving denial of effective counsel), and *Swisher v. United States*[25] (involving insanity at the time of trial), the Court remanded to the district court with instructions to hold a full hearing on the questions not decided by the military.

Naturally if the serviceman is not being confined, the writ of habeas corpus remedy is unavailable. In *Gallagher v. Quinn*[26] an ex-serviceman, no longer in confinement, filed a complaint for a mandatory injunction and general relief in Federal District Court to compel the Court of Military Appeals to review his case. The District Court dismissed the petition on the ground it could not review the case because the traditional habeas corpus avenue was closed. The Court of Appeals recognized the requirement of constitutional due process in military trials, noted that the right to due process would be lost if one deprived of it could not obtain redress because he was not in confinement, and said:

> The Supreme Court is the final arbiter of due process under the constitution. The Supreme Court has not been granted jurisdiction to review either on direct appeal or by certiorari a decision of the Court of Military Appeals. The consequence is that

21. *Id.* at 342.
22. *Id.*
23. *Id. But see* Application of Stapley, 246 F. Supp. 316 (D.C. Utah 1965), where a district court made a factual determination that the accused's counsel was so inadequate in the performance of his duties that the accused was denied the effective assistance of counsel.
24. 254 F.2d 469 (5th Cir. 1965).
25. 326 F.2d 97 (8th Cir. 1964).
26. 363 F.2d 301 (D.C. Cir. 1966).

> unless jurisdiction lies in the District Court in such a case as this, with appellate jurisdiction in this court and then in the Supreme Court, the constitutional validity of the Act of Congress cannot be decided except by a military tribunal. The 'separate and apart' military law jurisprudence, referred to in those terms in *Burns v. Wilson* . . . would appear not to be separated so far from possible Supreme Court scrutiny.[27]

The court then treated complainant's prayer for general relief as a request for declaratory judgment and proceded to consider the constitutional questions. Other courts have followed *Gallagher* and recognized that a serviceman can seek review by a federal district court on a constitutional question notwithstanding he is not confined.[28]

In cases involving petitions for declaratory judgment, such as *Gallagher,* the scope of review is identical to that accorded an application for a writ of habeas corpus.[29] Thus, it appears that the federal courts will examine claims that servicemen were denied constitutional rights in trials by courts-martial, but will grant relief only in those cases where there is a clear violation of rights. Until the rule in *Burns* is clarified the district courts will be reluctant to significantly extend the scope of the "full and fair consideration" test.[30]

In lieu of a *Gallagher* type action in Federal District Court, a petition to one of the two administrative boards, the Discharge Review Board and the Board for Correction of Military Records, established by Congress in each of the armed services should be considered. Relief may be sought before these boards for errors not amounting to constitutional violations.[31]

In each service the Discharge Review Board has the power, "subject to the review by the Secretary concerned, to change a discharge or dismissal, or issue a new discharge, to reflect its findings."[32] Review of a dismissal or discharge by a general court-martial is, however, specifically

27. *Id.* at 304.

28. Kaufman v. Secretary of the Air Force, *et al.*, 269 F. Supp. 639 (D.D.C. 1967); Robson v. United States, 279 F. Supp. 631 (E.D. Pa. 1968); *but cf.* Davies v. Clifford, 393 F.2d 496 (1st Cir. 1968).

29. Kaufman v. Secretary of the Air Force, *supra.*

30. The Supreme Court granted certiorari in two cases decided by the Court of Claims, Augenblict v. United States, Ct. Cl. No. 357-64, 377 F.2d 586 (1967); Juhl v. United States, Ct. Cl. No. 353-65, 383 F.2d 1009 (1967), on the issue of the scope of review of courts-martial verdicts by civilian courts; however, the Supreme Court ruled without reaching the question. 393 U.S. 348 (1969).

31. Decisions of the Discharge Review Boards and the Boards for Correction of Military Records are unpublished. The above stated information is based upon the author's observations while serving as appellate defense counsel in the Office of the Judge Advocate General of the Navy, Washington, D.C.

32. 10 U.S.C. 1553(b).

exempted from this board.[33] The board may review any administrative discharge, and any bad conduct discharge awarded by a special court-martial, and may substitute a discharge of higher quality. It will automatically grant any applicant a hearing, with counsel provided by the serviceman, but it lacks subpoena power and cannot award back pay.[34]

If relief is denied here the serviceman may petition the Board for the Correction of Military Records of the particular service branch involved. Pursuant to Title 10 U.S.C. § 1552:

> The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice.

This request must be filed within three years of discovery of the error or injustice. A board, however, "may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice."[35]

The Correction Board has broader powers than the Discharge Review Board—extending to changing the nature of a discharge, reinstating a serviceman to active duty, and awarding back pay, among others.[36] Unlike the Discharge Review Board, a hearing is not granted in all cases when requested, and the Board for Correction of Military Records may render a decision based only upon the petitioner's written application and his service record.[37]

Military correction boards cannot disturb the finality of court-martial judgments.[38] Despite this fact, however, the Judge Advocates-General of the various services have held that where an injustice is found in the proceedings the correction board may, as a matter of *clemency*, effect a change in the sentence as entered in the serviceman's records. The Judge Advocate-General of the Army stated the position in this fashion:

> In consonance with . . . [the] opinions of the Attorney General, this office has expressed the opinion that the Army Board for the

33. 10 U.S.C. 1553(a).
34. *See* Everett, *Military Administrative Discharges—The Pendulum Swings*, 1966 DUKE LAW JOURNAL 41, 60.
35. 10 U.S.C. 1552(b).
36. *See* Everett, *supra* n.34, at 63.
37. *E.g.* 32 C.F.R. 723 3(e).
38. 40 OPS. ATTY. GEN. 504.

> Correction of Military Records, or the comparable boards in the other military departments, not being established as appellate tribunals in the court-martial system, may not determine that the proceedings, findings, or sentence of a court-martial are erroneous, nor recommend that they be declared null and void. If, however, the Board determines that an injustice has been effected by the imposition of a particular sentence, the Board may legally recommend that military records, other than the records pertaining directly to the court-martial trial and appellate proceedings, be corrected to effect a change in the results of a sentence, as distinguished from the sentence itself. This is not considered a reopening of or a collateral attack upon the judgment of the court-martial, but rather is considered in the nature of an act of clemency, comparable to a successful appeal to the Congress for relief by private legislation.[39]

Thus, the correction board changes the *results* of a court-martial sentence rather than the sentence itself. For example, the board may correct the record to show that an administrative discharge (honorable or less than honorable) was issued rather than a punitive discharge, or that all or part of the confinement or forfeitures of pay had been remitted, or that the serviceman was not reduced in grade.[40]

If a petitioner is merely seeking a change in his discharge he must first exhaust his remedies before the discharge review board.[41] Selecting which of these two boards to petition involves some choice of tactics. One writer in the field has described it in the following manner:

> In a discharge case you may decide to apply first to the Discharge Review Board and then later to the Correction Board; in this way you are getting two chances to present your client's case. However, I would suspect that if a hearing already has taken place before a Discharge Review Board, a Correction Board would be less likely to grant a hearing than if no prior hearing had occurred. Thus, you may choose to work your client's application for relief in such a way—by requesting back pay or other monetary relief—that it will fall outside the jurisdiction of a Discharge Board. Then it will be possible to go directly to the

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39. OP JAGA 1956/5599, July 9, 1956. Accord, OP JAGN 1954/231, August 5, 1954, 4 Dig. Op. Records 16.7; OP JAGAF 1952/5, 1 Dig. Op. Records 16.7.

40. Op. JAGA 1956/2452, March 2, 1956; *see* Willians, *The Army Board for Correction of Military Records*, 6 MIL. L. REVIEW 41 (1959).

41. *E.g.* 32 C.F.R. 723 3(c); Redd, "*The Board for the Correction of Naval Records*," 19 JAG JOURNAL 9, 10 (1964).

Correction Board without pausing for proceedings before the Discharge Review Board.[42]

It should be noted that the statute provides that the Secretary of the service involved, acting through the board, may correct any military record. Thus, the Secretary may legally act contrary to the findings and conclusions of the board. For example, Navy regulations provide "the record of proceedings of the board will be forwarded to the Secretary of the Navy who will direct such action in each case as he determines to be appropriate. . . ."[43] However, decisions of the Secretary are subject to judicial review to determine whether he has acted within his authority.[44] Thus, the Secretary may not arbitrarily overrule a correction board where the board's findings are justified by the record.[45] The courts have reversed the decision of the Secretary where: he refused to follow the recommendation of the board to credit an officer's unused leave to his term of enlistment;[46] where he refused to accept the board's recommendation that a serviceman's record be corrected to indicate he retired from a physical disability;[47] and where the Secretary considered matters outside the serviceman's military record, contrary to Army Regulations, to award the serviceman a less than Honorable Discharge.[48]

In 1965 the U.S. Court of Appeals for the First Circuit, in deciding *Ashe v. McNamara*,[49] expanded the scope of judicial review of the decisions of the Administrative Boards. Ashe had been dishonorably discharged from the Navy in 1948 by a general court-martial. The Board for the Correction of Naval Records had denied his application to change his discharge to one under honorable conditions, and the Secretary of the Navy had approved the board's decision. Ashe then petitioned the Federal District Court for the District of Massachusetts to compel the Secretary of Defense to take favorable action on his petition. Ashe alleged lack of effective assistance of counsel as a violation of the sixth amendment of the Constitution because his counsel had been forced to represent both Ashe and another de-

42. Everett, *supra* n.34, at 65.
43. 32 C.F.R. 723.7; *see* Redd, *supra* n.41, at 25.
44. Harmon v. Brucker, 355 U.S. 579 (1958); Bland v. Connally, 293 F.2d 853 (D.C. Cir. 1961).
45. Nelson v. Miller, 373 F.2d 474 (3d Cir. 1967) and cases cited therein at fn. 15.
46. Eicks v. United States, 172 F. Supp. 445, 145 Ct. Cl. 552 (1959).
47. Proper v. United States, 154 F. Supp. 317, 139 Ct. Cl. 511 (1957).
48. Harmon v. Brucker, 355 U.S. 579 (1958).
49. 355 F.2d 277 (1st Cir. 1965).

fendant who had a conflicting defense. The district court granted summary judgment for the Secretary. On appeal the court of appeals held that Ashe was in fact denied effective assistance of counsel, and found that his trial was so unfair that if Ashe had applied for a writ of habeas corpus while incarcerated a district court would have been obliged to grant the writ.[50] The court also held that the finality provision in the statute creating the Correction Board[51] did not preclude judicial review of any board action changing or declining to change the nature of a discharge.

It should be noted that the Court granted the relief on what amounted to a constitutional error. It is doubtful whether a court would issue a mandamus in an *Ashe* situation where the error was procedural or evidentiary, and did not amount to a denial of a constitutional right.[52]

One additional remedy deserves mention which might, in some limited circumstances, prove useful in obtaining relief for the serviceman. In *United States v. Frischoltz*,[53] *United States v. Callahan*,[54] and *United States v. Bevilacqua and Braun*,[55] the Court of Military Appeals held that it possessed the power under the All Writs Act[56] to entertain the common law writ of Error Coram Nobis. Coram Nobis is an extraordinary writ used to collaterally attack a judgment when no other remedy is available.[57] The court pointed out that the writ has had a limited application:

> Coram Nobis is not a substitute for an appeal. It is extraordinary relief predicated upon 'exceptional circumstances' not apparent to the court in its original consideration of the case . . . . It may not be used to seek a reevaluation of the evidence or a reconsideration of alleged errors.[58]

To justify the issuance of the writ, the errors alleged must affect the "validity and regularity of the judgment."[59] Relief will be granted

50. *Id.* at 280.
51. ". . . a correction under this section is final and conclusive on all officers of the United States." 10 U.S.C. § 1552.
52. *See* Smith v. McNamara, 395 F.2d 896, 900 (10th Cir. 1968).
53. 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).
54. 16 U.S.C.M.A. 568, 37 C.M.R. 188 (1967).
55. 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968).
56. 28 U.S.C. 165 (1964). The Supreme Court expressly approved the Fritscholtz decision on this point in Noyd v. Bond, *supra*, n. 1.
57. *See* Freedman, *The Writ of Error Coram Nobis*, 3 TEMP. L.Q. 365 (1929); 18 AM. JUR. 2d 445; 5 Orfield, *Criminal Procedure Under the Federal Rules*, sec. 33:101 *et seq.*
58. United States v. Frischoltz, 16 U.S.C.M.A. 150, 153, 36 C.M.R. 306 (1966).
59. United States v. Morgan, 346 U.S. 502, 507 (1954). H. STEPHENS, PRINCIPLES OF PLEADING 143 (3d Amer. ed. 1901).

under this remedy ". . . only under circumstances compelling such action to achieve justice."[60]

Coram Nobis might be a proper vehicle to bring before the Court of Military Appeals newly discovered evidence or information regarding fraud upon the court which cannot be used as a basis for seeking a new trial because two years have elapsed since the court-martial.[61]

If the petition to the administrative boards proves unsuccessful, a suit in the Court of Claims should be considered. This court is divorced from the military establishment and has heard many cases dealing with the imposition of discharges. Title 28 U.S.C. § 1491 provides in part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:
> (1) Founded upon the Constitution; or
> (2) Founded upon any Act of Congress; or
> (3) Founded upon any regulation of an executive department.

Under this provision a serviceman can claim back pay, alleging that his discharge was awarded either in violation of his constitutional rights or in violation of federal regulations, and thus have the discharge adjudicated in the Court of Claims. The theory of the suit is that the plaintiff sues for pay he contends he is entitled to because his discharge was a nullity.[62] The court must then, in determining whether he is entitled to back pay,[63] decide the validity of the discharge. If it decides the serviceman was invalidly discharged from the armed service he regains his status as a serviceman until a valid discharge takes place, or until the date his term of enlistment would have expired. The award made includes a right to pay and allowances for the period, less appropriate setoffs.[64]

When considering suits involving punitive discharges, the Court of Claims has consistently held that a "denial of significant constitutional rights . . . render[s] the military conviction invalid, and . . . permit[s] . . . [the] court to award back pay."[65]

60. United States v. Morgan, *supra n.* 59 at 511.
61. *See* 10 U.S.C. 873.
62. *See* Meador, *Judicial Determinations of Military Status*, 72 YALE L.J. 1293, 1300 (1963).
63. Like all federal courts, the Court of Claims has the power to decide all issues which are necessary to the case before it. Osborn v. Bank of U.S., 22 U.S. (9 Wheat) 738 (1824).
64. Shaw v. United States, 174 Ct. Cl. 899, 920; 357 F.2d 949 (1966).
65. Shaw v. United States, *supra* note 64, cases cited therein at fn. 4.
A suggested area for attack is the bad conduct discharge awarded pursuant to MANUAL

Although the Court of Claims has stated that it will apply the "full and fair hearing" test of *Burns*,[66] it has also held that it is free to draw its own conclusions from facts already found by the military courts.[67] Thus, in *Shaw v. United States*, the Court of Claims held that, on the basis of the Navy's own findings, the serviceman could not "constitutionally" be held to have embezzled funds entrusted to his care.[68] And, in *Shapiro v. United States*,[69] plaintiff was awarded back pay where the court found that his constitutional right of due process and his right to counsel were clearly violated. The court held that while the court-martial had had jurisdiction at the beginning of the trial, because of the denial of the accused's constitutional rights jurisdiction was lost, and the verdict rendered by it was void.

The court-martial error advanced as the basis for the back pay claim must involve a deprivation of a constitutional right; otherwise the Court of Claims is powerless to make any award. In two 1967 cases, the Court of Claims awarded back pay to servicemen, only to have the judgments reversed by the Supreme Court on the grounds that no deprivation of a constitutional right was shown. In *Augenblick v. United States*[70] the Court of Claims determined that rulings by the law officer at the court-martial and certain portions of the decision of the Board of Review violated the Jencks Act regarding the production of government documents. The court reasoned that the denial amounted (in the particular circumstances of the case) to a denial of due process. In *Juhl v. United States*,[71] the court found plaintiff's conviction, based upon the introduction of self-contradictory accomplice testimony, in violation of the evidentiary provisions of the Manual for Courts-Martial, 1951. The court held that the accomplice testimony rule in the manual was not a mere rule of evidence, but rather a direction by the President, which, if

FOR COURTS-MARTIAL, 1969, para. 127(c) *Table of Maximum Punishments*, Section B. This provision authorizes a special or general court-martial to impose a bad conduct discharge if the serviceman has a record of two or more prior convictions by courts-martial, notwithstanding that the offense for which he is being tried does not authorize a discharge. Quite often one or both of these prior convictions resulted from a summary court-martial, a one-man court where the accused is not provided counsel. 10 U.S.C. § 816. Thus, the discharge may be attacked on the grounds that it was awarded because of prior convictions which resulted from proceedings in which the accused was not represented by counsel.

66. Begalke v. United States, 148 Ct. Cl. 401, 286 F.2d 606 (1960).
67. Shaw v. United States, *supra* note 65.
68. *Id.* at 905.
69. 107 Ct. Cl. 650, 69 F. Supp. 205 (1947).
70. Ct. Cl. No. 357-64, 377 F.2d 586 (1967).
71. Ct. Cl. No. 353-65, 383 F.2d 1009 (1967).

violated, went to the basic fairness of the conviction. A violation of this rule, the court reasoned, amounted to a violation of a fundamental right of due process. The Supreme Court reversed the judgments in both cases on the grounds that the Court of Claims had "elevated to a constitutional level" errors which were not deprivations of constitutional rights.[72]

A suit for back pay may also be filed in Federal District Court in lieu of the Court of Claims.[73] Monetary recovery here, however, is limited to $10,000. It seems that this forum is used less than the Court of Claims for back pay suits, even though the suit may be conveniently filed in the district where the plaintiff resides.[74] One possible reason for this preference is that the Court of Claims has been a proven ground for successful suits of this type. Another reason may be that attorneys engaged in practice in this area feel that local judges may be very unfamiliar with military discharge problems.[75]

If the serviceman receives a money judgment in the Court of Claims, the discharge is unaffected, and he must take further action to have it declared invalid. Two alternatives are available. He may petition the Board for the Correction of Military Records to correct his record on the basis of the Court of Claims judgment to reflect an honorable or general discharge, or he may sue for relief in Federal District Court. In the latter case the government would most likely be estopped from asserting the validity of the discharge.[76]

If the serviceman has been awarded an administrative[77] discharge, many of the same remedies for seeking relief of punitive discharges are available. The first step should be a petition to the applicable administrative board (depending upon the relief desired) discussed earlier. The foregoing discussion of the administrative boards and the judicial relief thereof regarding punitive discharges applies to administrative discharges as well. Care should be taken to examine the procedural regulations pursuant to which the serviceman was discharged.

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72. United States v. Augenblict, 393 U.S. 348, 356 (1969).
73. 28 U.S.C. § 1346(a)(2). *See generally* H.R. REP. NO. 1604, 88th Cong., 2d Sess., 2 (1967).
74. 28 U.S.C. § 1391(e).
75. Joint Hearings before the SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS of the Senate Committee on the Judiciary and a SPECIAL SUBCOMMITTEE OF THE SENATE COMMITTEE ON ARMED FORCES, on Bills to Improve the Administration of Justice in the Armed Services, 89th Cong., 2d Sess., Appendix A, 832 (1966).
76. *See* Everett, *Military Administrative Discharges—The Pendulum Swings*, 1966 DUKE L.J. 41, 68.
77. *See supra* n.3.

Quite often the prescribed procedure is not followed and the discharge may be declared void on this ground.[78]

If no relief is obtained from the administrative boards, a back pay suit in the Court of Claims should be considered.[79] Where the claim for back pay is based upon an administrative rather than a punitive discharge, the Court of Claims has a broader scope of review.[80] It is also free to determine whether the military service followed its own regulations in processing the discharge.[81] Administrative discharges have been declared invalid for failure to give notice as required by service regulations,[82] for failure to inform servicemen of a material fact relating to procedure which might have influenced him to contest the undesirable discharge,[83] and for using an administrative discharge as punishment.[84] The Court of Claims will also award a claim for back pay where it determines the administrative discharge proceedings were violative of fundamental notions of due process of law.[85]

SUMMARY

The following steps are suggested for an attorney who is representing an individual who is seeking to change his less than honorable discharge.

Punitive Discharges

If a man is still confined, determine if there exist grounds upon which a petition for new trial can be based. If there are none, consider filing an application for a writ of habeas corpus in Federal District Court. The law regarding the scope of review of courts-martial verdicts in District Court is still somewhat unclear, but an error amounting to a denial of a constitutional right is necessary for relief. If the serviceman is not confined, a suit for declaratory judgment in Federal District Court or a petition to one of the administrative boards in the service involved should be the next step. It should be remembered, however, that in the suit for declaratory judgment the

78. *See* Everett, *supra* note 66 at 75.
79. An alternative suit is possible in Federal District Court. *See* notes 73, 74 *supra*.
80. Harmel, *Military Pay Cases before the Court of Claims*, 55 GEO. L.J. 529, 531 (1966).
81. *See* Vitarelli v. Seaton, 359 U.S. 535 (1959).
82. Cole v. United States, 171 Ct. Cl. 178 (1965).
83. Middleton v. United States, 170 Ct. Cl. 36 (1965).
84. Sofranoff v. United States, 165 Ct. Cl. 470 (1964).
85. Clackum v. United States, 148 Ct. Cl. 404, 296 F.2d 226 (1960).

courts apply the same scope of review of courts-martial verdicts as in habeas corpus cases. The administrative boards will grant relief for errors not amounting to a denial of a constitutional right.

If relief is denied by the administrative boards, the next step is the Court of Claims, where the validity of the discharge is determined in the serviceman's suit for back pay. An award here will not affect the discharge, and further court or administrative action will be necessary to change the nature of the discharge. A final but limited remedy is a petition for writ of Coram Nobis to the Court of Military Appeals. Although this is an extraordinary writ, it may prove successful in some limited circumstances.

Administrative Discharges

The first step is to petition the appropriate administrative board in the service involved. If relief is denied here, the next step should be the Court of Claims. Care should be taken to examine the service regulations pursuant to which the serviceman was discharged. Quite often the regulations are not followed and the serviceman is denied certain rights during the administrative procedure which will void the discharge.

The subject of serviceman's rights is under continual study by Congress and the armed services. The area is subject to constant change and the attorney handling such a case should be aware that new legislation and revised service regulations may afford his client additional remedies that did not exist at the time of the imposition of the discharge.