DRAKE LAW REVIEW

VOLUME 21 JUNE 1972 NUMBER 3

Published four times a year, with the fourth issue
entitled the Drake Insurance Law Annual,
by law students of Drake University

Member, National Conference of Law Reviews

Notes

HABEAS CORPUS RELIEF FOR THE MILITARY PRISONER: THE DOUBLE STANDARD

I. INTRODUCTION

The development of military law in the United States as a system of jurisprudence has been divorced from the civilian judiciary. The substantive and procedural law of courts-martial have a different historical derivation than the civilian criminal law.[1] In fact, direct appellate review of a court-martial conviction to the United States Supreme Court is not available to the military prisoner.[2] Though military tribunals are courts of limited jurisdiction, their adjudications cannot be directly reviewed by any federal civil court; their decisions must be collaterally attacked. The United States Supreme Court first entertained collateral attack in several forms before permitting habeas corpus to test the validity of a court-martial's judgment.[3] However, matters cognizable for review on a petition for a writ of habeas corpus are not as broad for a military prisoner as for a state prisoner.

Nevertheless, the most common form of collateral attack is habeas corpus. The purpose of this Note is to survey the nature of relief afforded the man in uniform through habeas corpus. The constitutional rights afforded a serviceman that may serve as a basis for issuing the writ or affording the additional remedies the serviceman may pursue are also explored.

II. THE SCOPE OF REVIEW

A. *Pre-Burns: Jurisdiction*

The history of civilian court review of final adjudications by courts-martial is a history of contradictions based on confusion and doubt. The confusion results from the dichotomous approach taken by the Supreme Court. In military habeas corpus, the scope of matters open for review have been held to be more narrow than in civil habeas corpus.[4]

---

[1] Sherman, *The Civilization of Military Law*, 22 ME. L. REV. 3 (1970) [hereinafter cited as Sherman].

[2] *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1863).

[3] As early as 1806 in Wise v. Withers, 7 U.S. (3 Cran.) 331 (1806), the Supreme Court, in an action in trespass against one who collected a military fine erroneously imposed by a military court, held that since the court-martial acted without its jurisdiction, the court and the officers were trespassers. *See also Ex parte* Reed, 100 U.S. 13 (1879) (first to allow habeas corpus); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857) (assault, battery, and false imprisonment); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827) (replevin); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820) (trespass).

[4] Burns v. Wilson, 346 U.S. 137, 139 (1953).

In 1857, the Supreme Court adopted a jurisdictional test in holding that the sole inquiry upon reviewing a conviction of a military petitioner was limited to determining whether the military court had proper jurisdiction.[5] If the court-martial had jurisdiction over the person and the offense, and if the sentence imposed was within the scope of the court's lawful powers, its proceedings could not be attacked collaterally. This strict jurisdictional test was upheld by the Court until 1953.[6]

The early decisions were based upon the court's interpretation of article I, section 8, clause 14 of the United States Constitution which grants Congress the power "to make Rules for the Government and Regulation of the land and naval Forces." By the traditional interpretation the military courts are considered to have been created by Congress as an entity separate from those courts created under the power derived from article III.[7] In 1857, the Court expressly stated that the military courts are not part of the federal judiciary under article III but are agencies of the executive under articles I and II.[8] The separation of powers concept emanating from this interpretation may explain the Court's hesitancy in exerting supervisory control or expanded review over military courts.

From 1857 until 1938, the scope of review remained unchanged.[9] In 1938, the traditional concepts of jurisdiction as a limitation on review were altered for federal prisoners when the Court entertained a new ground for habeas corpus in *Johnson v. Zerbst*.[10] The Supreme Court held that where a federal prisoner's right to counsel is denied, jurisdiction, although present at the outset of the trial, "may be lost 'in the course of the proceedings' " so that the "court no longer has jurisdiction to proceed."[11] Unfortunately, the Supreme Court did not extend *Johnson v. Zerbst* to military petitioners though it has extended it to state petitioners.[12] Since many lower federal courts had extended *Johnson v. Zerbst* to military prisoners,[13] the Supreme Court attempted to clarify the muddied waters of military habeas corpus by rendering its decision in *Hiatt v. Brown*.[14] In *Hiatt*, the Court upheld the traditional approach of jurisdiction in military habeas corpus when the Court pronounced:

> We think the Court [of appeals] was in error in extending its review, for the purpose of determining compliance with the due process clause,

---

[5] Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

[6] Mr. Justice Vinson in his plurality opinion in Burns v. Wilson, 346 U.S. 137 (1953), though not rejecting the strict jurisdictional test, formulated the "full and fair consideration" test.

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

[8] Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

[9] *See* 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); *Ex parte* Reed, 100 U.S. 13 (1879).

[10] 304 U.S. 458 (1938).

[11] *Id.* at 468.

[12] *Cf.* House v. Mayo, 324 U.S. 42 (1945).

[13] *E.g.*, Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947).

[14] 339 U.S. 103 (1950).

> 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."[15]

B. *Burns: Full and Fair Consideration*

Lower federal courts avoided, whenever possible, this narrow interpretation in *Hiatt v. Brown* and the often harsh results from its application.[16] Therefore, the Supreme Court once again muddied the water in military habeas corpus by rendering its decision in *Burns v. Wilson*.[17] *Burns*, after nineteen years "still stands as the principal lighthouse in these trackless waters, however low its candlepower."[18] The precedential value of this decision was diminished by the fact that four separate opinions were filed, none supported by the majority of the Court.[19]

Burns and another soldier were convicted of rape and murder by a general court-martial. On habeas, Burns alleged that he had been illegally detained, that his confession had been coerced, that he had been denied effective assistance of counsel, that favorable evidence had been suppressed and perjured testimony used, and that his trial had been conducted in an atmosphere of "terror, hysteria and vengeance."[20] The Supreme Court affirmed the lower court's dismissal of the petition on the ground that petitioner's contentions had been given "full and fair consideration" by the military authorities. Mr. Chief Justice Vinson, in writing the plurality opinion, cast doubts on the Court's traditional adherence to the jurisdictional test; however, he equally cast doubts on the court's receptiveness to reviewing due process arguments or any matter outside the jurisdictional confines. In voting to affirm, the plurality stated:

> Had the military courts manifestly refused to consider those claims [of petitioner], the District Court was empowered to review them *de novo*. For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians—from the crude injustices of a trial so conducted that it becomes

---

[15] *Id.* at 110-11.

[16] Burns v. Lovett, 202 F.2d 335 (D.C. Cir. 1952); Kuykendall v. Hunter, 187 F.2d 545 (10th Cir. 1951).

[17] 346 U.S. 137 (1953).

[18] Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 51 (1961).

[19] "[T]he lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases" United States v. Pink, 315 U.S. 203, 216 (1942). Mr. Justice Vinson joined by Justices Reed, Burton and Clark, wrote the plurality opinion. Mr. Justice Jackson concurred without opinion. Mr. Justice Minton concurred in a separate opinion adhering to the strict traditional test in *Hiatt*. Justice Frankfurter abstained and Justices Douglas and Black dissented.

[20] *See* Burns v. Lovett, 202 F.2d 335, 346 (D.C. Cir. 1952), *aff'd sub nom.* Burns v. Wilson, 346 U.S. 137 (1953).

> bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military as well as the civil courts.[21]

However, the Court limited such broadening language by further stating, "But in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases."[22]

Although the lower federal courts' interpretations of *Burns* do not lend themselves to any comfortable degree of taxonomy, four general approaches have been taken: (1) due process is extended to soldiers to insulate them from the "crude injustices" of courts-martial;[23] (2) full review is granted if the military authorities did not give "full and fair consideration" to petitioner's allegations;[24] (3) full review is granted if the military "manifestly refused" to hear petitioner's allegations;[25] (4) review is not expanded; instead, the traditional narrow scope of review is upheld.[26] The disparity in the decisions is due to the subjectivity in the key terms used in the plurality opinion: "fully and fairly," "manifest refusal" and "crude injustices."

An increasing number of circuits have abandoned the traditional tests and have rendered decisions on the merits.[27] Most notable in this category is *Kauffman v. Secretary of the Air Force*,[28] which extended its review to the merits of petitioner's constitutional allegations. After determining that a military prisoner need not be in custody to meet the jurisdictional requirement for collateral review of a military judgment in a civilian court, the court discussed the scope of review: "We think it is the better view that the principal opinion in *Burns* did not apply a standard of review different from that currently imposed in habeas corpus review of state convictions."[29]

The court took an express definitional stand on the "full and fair" phrase in *Burns* in stating:

> [T]he test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards . . . . The wholesale exclusion of constitutional errors from civilian review and the perfunctory review of servicemen's remaining claims urged by the government are limitations with no rational relation to the military circumstances which may qualify constitutional requirements. The benefits of col-

---

21 Burns v. Wilson, 346 U.S. 137, 142-43 (1953).
22 *Id.* at 139.
23 Richards v. Cox, 184 F. Supp. 107 (D. Kan. 1960).
24 Dixon v. United States, 237 F.2d 509 (10th Cir. 1956); Sweet v. Taylor, 178 F. Supp. 456 (D. Kan. 1959).
25 Burns v. Taylor, 274 F.2d 141 (10th Cir. 1959).
26 White v. Humphrey, 212 F.2d 503 (3d Cir. 1954).
27 Allen v. VanCantfort, 436 F.2d 625 (1st Cir. 1971); Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969); Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965); Kasey v. Goodwyn, 291 F.2d 174 (4th Cir. 1961); Rushing v. Wilkinson, 272 F.2d 633 (5th Cir. 1959); Augenblick v. United States, 377 F.2d 586 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969).
28 415 F.2d 991 (D.C. Cir. 1969).
29 *Id.* at 997.

> lateral review of military judgments are lost if civilian courts apply a vague and watered-down standard of full and fair consideration . . . .[30]

However, the same scope of inquiry for military and state habeas corpus petitioners is not enjoyed in every circuit. The same federal district court that hears state habeas corpus petitions must struggle, when considering a military prisoner's habeas corpus petition, not only with "jurisdiction," but also with the yet confusing concept of "full and fair consideration."[31] The precise issues cognizable in a military habeas corpus still remain in the abyss of the Court's mind. With such a great disparity among the circuits, the matters open for review in a military habeas corpus proceeding are, unquestionably, justiciable.

Since *Burns* lacked a majority opinion and in view of the changed composition of the Court, a new decision in this area may be expected. If the Court does align the scope of review with that afforded a state prisoner, the fundamental question then arises as to just what are the constitutional rights enjoyed by the serviceman that would form a foundation for issuing the Great Writ.

III. Constitutional Rights Afforded

A. *Framer's Intention*

The applicability of the Bill of Rights to military trials lies at the root of the question of the scope of review of the military courts by the civil courts. As yet it is not clearly settled to what extent the Bill of Rights apply to military trials.[32] The ambiguity perhaps was initialed by the dictum of Mr. Chief Justice Chase when he stated, "that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment."[33] It may not have been the intent of the framers of the Constitution to apply the Bill of Rights to the military, but rather to leave that task to Congress.[34] However, the controversy is rendered primarily academic since most of the explicit guarantees of the Bill of Rights are statutory through the Uniform Code of Military Justice. Today, the person in uniform enjoys the effective assistance of counsel of his own choice,[35] and the prohibition against compulsory self-incrimination,[36] double jeopardy,[37] and cruel and inhuman punishment.[38] He must also be apprised of the charges against him[39] and

---

30 *Id.*

31 Katz & Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 Ohio St. L.J. 193, 212 (1966).

32 Reid v. Covert, 354 U.S. 1, 37 (1957).

33 *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 138 (1866) (concurring opinion).

34 Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I & II*, 72 Harv. L. Rev. 1, 266 (1958) [hereinafter cited as Wiener]. *Contra*, Henderson, *Courts-Martial and the Constitution: the Original Understanding*, 71 Harv. L. Rev. 293 (1957) [hereinafter cited as Henderson].

35 10 U.S.C. § 838(b) (1970).

36 10 U.S.C. § 831 (1970).

37 10 U.S.C. § 844 (1970).

38 10 U.S.C. § 855 (1970).

39 10 U.S.C. § 830 (1970).

has the benefit of compulsory process for witnesses.[40]

The second, third, seventh, ninth, and tenth amendments shall not be discussed in this Note since they have no relevance to a ground upon which a military prisoner may base his allegation that a constitutional right was denied by a court-martial proceeding. The remaining amendments shall be discussed in their numerical order.

B. *First Amendment*

The first amendment guarantee against the establishment of a religion is permissively dealt with in the military. "An officer in the Chaplin Corps may conduct public worship according to the manner and forms of the church of which he is a member."[41] Both the Army and Navy articles encourage religious devotions.[42] Congress did not, in providing for chaplins and recommending attendance at divine services, establish a state church. Congress, perhaps assuming the first amendment applicable to the land and naval forces, enacted only nonsecular legislation.[43] Freedom of speech guaranteed in the first amendment has been thought by some authorities not to ever have been intended by the founders to apply to persons in the land and naval forces.[44] However, the Court of Military Appeals has stated that freedom of speech does apply to the soldier.[45] The standards applied by that court to determine if this guarantee has been denied are the same as the Supreme Court applies to a civilian.[46] However, the extent of freedom of speech extended to a soldier is not as broad as that extended to his civilian brethren.[47] This appears to be true in light of the abrogation of the right to use "contemptuous words" against the President, Vice-President, Congress, the Secretary of Defense or the Governor or legislature of any state in which he is stationed.[48]

The right to petition for redress of grievances is statutorily extended by Congress to the serviceman.[49]

C. *Fourth Amendment*

The fourth amendment privilege against unreasonable searches and seizures was implemented in the military by executive order.[50] The judicial gloss

---

40 10 U.S.C. § 846 (1970).
41 10 U.S.C. § 6031 (1970).
42 Wiener, *supra* note 34, at 267.
43 *Id.*
44 *Id.* at 270; Sabel, *Civil Safeguard Before Courts-Martial*, 25 MINN. L. REV. 323 (1941); W. Winthrop, MILITARY LAW AND PRECEDENTS (2d ed. 1920). *Contra*, Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181 (1962); Henderson, *supra* note 34; Antieau, *Courts-Martial and the Constitution*, 33 MARQ. L. REV. 25 (1949).
45 United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960) (dictum); United States v. Wysong, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958) (dictum).
46 United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).
47 Brown, *Must the Soldier be a Silent Member of our Society*, 43 MIL. L. REV. 71 (1969).
48 10 U.S.C. § 888 (1970).
49 10 U.S.C. § 938 (1970).
50 Exec. Order No. 10,214, 3 C.F.R. 408 (1951).

of this privilege, *i.e.*, the exclusionary rule, was applied in a court-martial long before *Mapp v. Ohio*[51] made the federal exclusionary rule applicable to the states. The power to authorize the search of military persons or property is exercised by the commanding officer. The commander must have probable cause to issue a warrant. The standards established by the Court of Military Appeals in some respects exceed the requirement of civilian courts.[52]

D. *Fifth Amendment*

In *Wade v. Hunter*,[53] the Supreme Court incorporated the protection against double jeopardy in that bundle of the Bill of Rights applicable to military trials. This fifth amendment guarantee has been subsequently made applicable by Congress.[54] In *Wade*, the Supreme Court held that where a case is discontinued because particular facts demand such, a trial before a second court-martial does not violate the fifth amendment bar against double jeopardy.

In the area of self-incrimination, article 31 of the Uniform Code of Military Justice (hereinafter cited as UCMJ)[55] requires that a person accused or suspected of an offense must be warned before interrogation as to the nature of the accusation against him, that he does not have to make a statement, and that a statement he makes may be used against him in the event of a court-martial.[56] Again, this right was afforded the man in uniform long before the Supreme Court decided *Miranda v. Arizona*.[57] However, article 31 does not require, as the *Miranda* warning does, that the accused be informed of his right to counsel, to have counsel appointed if he cannot afford to hire one, and to have counsel present during his interrogation. Only ten months after *Miranda*, the Court of Military Appeals held the Miranda requirements applicable to military law.[58] Generally, in alleging noncompliance with article 31, the scope of possible error is greater than under the civilian rule since article 31 is considered broader in its application.[59]

---

[51] 367 U.S. 643 (1961).

[52] United States v. Price, 17 U.S.C.M.A. 566, 38 C.M.R. 364 (1968); United States v. Britt, 17 U.S.C.M.A. 617, 38 C.M.R. 415 (1968). *See generally* Quinn, *Some Comparisons between Courts-Martial and Civilian Practice*, 15 U.C.L.A. L. REV. 1240, 1253-58 (1968).

[53] 336 U.S. 684 (1949).

[54] 10 U.S.C. § 844 (1970).

[55] 10 U.S.C. § 831 (1970). In order to obtain the cross-reference citation in title 10 of the United States Code for each article of the UCMJ, simply add 800 to the number of the article.

[56] 10 U.S.C. § 831 (1970).

[57] 384 U.S. 436 (1966).

[58] United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). However, at least one federal court has held them inapplicable. *See* Allen v. VanCantfort, 436 F.2d 625 (1st Cir. 1971).

[59] Sherman, *supra* note 1, at 69. For example, incriminating statements have been excluded in military courts where the accused was clearly not in custody. United States v. Wilson, 2 U.S.C.M.A. 248, 8 C.M.R. 48 (1953). Also the military exclusionary rule excludes voice identifications, handwriting exemplars, and blood samples as incriminating statements. *See* United States v. Newborn, 17 U.S.C.M.A. 431, 38 C.M.R. 229 (1968); United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967); United States v. Musguire, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958). The civilian rule is contrary.

"[W]hat is due process of law must be determined by the circumstances. To those in the military or naval services of the United States the military law is due process."[60] In *Burns*, the Court held that due process of law for military personnel is what Congress provides for them. Actually, there is little difference in procedural due process today between military and civilian courts.[61] In 1950 with the enactment of the UCMJ, military due process far excelled that afforded a civilian. However, the Warren court in the 1950's and 60's brought civilian due process in line with the military and in some areas instituted more demanding due process requirements.[62] It must also be noted that the right to indictment by a grand jury for a capital or otherwise infamous crime is expressly excluded to those in the land and naval forces.[63]

E. *Sixth Amendment*

Since all court-martial proceedings are criminal in nature, the sixth amendment guarantee that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial" should include prosecutions in court-martial. In fact, the UCMJ requires that whenever a person "is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or dismiss the charges and release him."[64] A serviceman, it has been noted, receives a speedier trial than an accused in a civilian court.[65] The Court of Military Appeals will grant a reversal when a trial is delayed without good reason for an even shorter time than is required in the civilian courts.[66] The more stringent rule appears justifiable since bail pending trial is not afforded to the serviceman.[67] It should also be noted that the Court of Military Appeals has also upheld the right to a public court-martial.[68] However, "[t]he right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial . . . ."[69]

The provision of the sixth amendment providing the accused the right "to be informed of the nature and cause of the accusation" is made mandatory upon the military through article 10.[70] However, the privilege of being "confronted with the witnesses against him" has not been incorporated into those sixth

---

See Gilbert v. United States, 388 U.S. 263 (1967) (handwriting exemplar taken before indictment and before appointment of counsel held admissible); Schmerber v. California, 384 U.S. 757 (1966) (blood sample drawn over accused's objection held admissible).

60 Reaves v. Ainsworth, 219 U.S. 296, 304 (1911).

61 Symposium, 11 U.S.A.F. JAG L. REV. 175 (1969).

62 Sherman, *supra* note 1, at 64.

63 U.S. CONST. amend. V.

64 10 U.S.C. § 810 (1970); UNIFORM CODE OF MILITARY JUSTICE art. 10.

65 Sherman, *supra* note 1, at 72.

66 *See* United States v. Boehm, 17 U.S.C.M.A. 530, 38 C.M.R. 328 (1968). A recent federal case has also adopted the more stringent speedy trial rule followed in the military. Jones v. United States, 402 F.2d 639 (D.C. Cir. 1968).

67 Wiener, *supra* note 34, at 286.

68 United States v. Brown, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956).

69 Whelchel v. McDonald, 340 U.S. 122, 127 (1950).

70 10 U.S.C. § 810 (1970); UNIFORM CODE OF MILITARY JUSTICE art. 10.

amendment rights enjoyed by our soldiers. The guarantee of confrontation certainly appears abrogated in light of article 49 which provides for the admission of depositions in noncapital cases.[71] The Court of Military Appeals has tempered this practice by requiring the presence of defense counsel at the time the deposition is taken.[72] In capital offenses, only the defense may resort to depositions.[73]

The sixth amendment guarantee of the right "to have compulsory process for obtaining witnesses in his favor" is provided the man in uniform through article 46.[74] Courts-martial may issue process "to compel witnesses to appear and testify . . . similar to that which courts of the United States having criminal jurisdiction may lawfully issue . . . ."[75] A military subpoena may reach a witness anywhere within the jurisdiction of the United States. The sixth amendment guarantee appears diluted when it is noted that the power to issue a subpoena under the UCMJ is given the prosecuting trial counsel,[76] rather than to an unbiased clerk of court as is the practice in most civilian jurisdictions.

The right to counsel has been statutorily guaranteed by Congress in the UCMJ.[77] The military indigent was granted the assistance of counsel twelve years before *Gideon v. Wainwright*[78] made counsel available to the state civilian indigent. However, the UCMJ goes even further and provides for a qualified military lawyer to be appointed whenever the accused has not selected counsel of his own choosing whether or not the accused is indigent.

F. *Eighth Amendment*

The right to bail is unknown in the military.[79] However, the eighth amendment protection from cruel and inhuman treatment may not be adjudged by any court-martial.[80] In retrospect, the only express constitutional rights afforded civilians but still not afforded those in uniform are: (1) indictment by grand jury;[81] (2) trial by jury;[82] (3) the right to confrontation;[83] (4) and the right to bail.[84]

G. *Future Rights to be Afforded*

Notwithstanding the express exception in the fifth amendment of the right

---

71 10 U.S.C. § 849 (1970); UNIFORM CODE OF MILITARY JUSTICE art. 49.
72 United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).
73 10 U.S.C. § 849(e) (1970).
74 10 U.S.C. § 846 (1970).
75 *Id.*
76 MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 115 (rev. ed. 1969).
77 10 U.S.C. § 838(b) (1970).
78 372 U.S. 336 (1963).
79 Wiener, *supra* note 34, at 285.
80 10 U.S.C. § 855 (1970).
81 U.S. CONST. amend. V; United States v. Burney, 6 U.S.C.M.A. 776, 796, 21 C.M.R. 98, 118 (1956).
82 United States v. Burney, 6 U.S.C.M.A. 776, 796, 21 C.M.R. 98, 118 (1956).
83 United States v. Sutton, 3 U.S.C.M.A. 220, 11 C.M.R. 220 (1953).
84 Wiener, *supra* note 34, at 284.

to indictment by a grand jury, many of those who were once thought to be amenable to the jurisdiction of a court-martial have been afforded this privilege through recent Supreme Court decisions. For example, the civilian work forces accompanying the armed forces overseas are now afforded the fifth amendment right to an indictment and the sixth amendment right to trial by jury because they are no longer subject to trial by court-martial.[85] Dependents[86] accompanying the armed forces overseas as well as servicemen[87] committing non-service connected acts also enjoy these fundamental rights today.

Certainly the right to confrontation is adaptable to the military and the court-martial system. If not afforded by Congress, the Court of Military Appeals should readily recognize this right.[88]

It has been observed that the right to bail is inappropriate to the military accused since he is subject to control by his superiors at all times and really has little freedom of movement.[89] However, there appears to be no justifiable reason for denying bail to the serviceman. Nevertheless, its virtual non-existence in military law and practice stands as a hurdle in the track for its extension to those in uniform today. Notwithstanding this historical precedent, the initial groundwork may have been laid when a civilian employee was tried by a court-martial and granted bail.[90]

Perhaps today, the greatest advancements in granting constitutional guarantees to those in the land and naval forces has been through the United States Supreme Court rather than Congress. Through striking down the military encroachment upon civilian court jurisdiction, the Court has afforded the entire Bill of Rights to many today who were denied its privileges yesterday.

IV. Court-Martial Jurisdiction

A. *Statutory*

The jurisdiction of courts-martial is statutory. Courts-martial derive their jurisdiction from Acts of Congress which created them pursuant to the power granted by the Constitution to "make Rules for the Government and Regulation of the land and naval Forces."[91] Court-martial jurisdiction is not dependent on a state of war or hostilities.[92] Once a military tribunal acquires jurisdiction, that jurisdiction continues until the termination of the trial and the imposition

---

85 McElroy v. Guagliardo, 361 U.S. 281 (1960).
86 Reid v. Covert, 354 U.S. 1 (1957).
87 O'Callahan v. Parker, 395 U.S. 258 (1969).
88 Extension of this privilege appears probable when weighted against the Court of Military Appeal's statement in 1960; "it is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).
89 Henderson, *supra* note 34, at 316.
90 McElroy v. Guagliardo, 361 U.S. 281 (1960).
91 U.S. Const. art. I, § 8.
92 Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

of the sentence; it cannot lose its jurisdiction because hostilities have ceased.[93] The Supreme Court has taken a narrow view of the scope of court-martial jurisdiction.[94] Not until 1863 was the power to try soldiers for the capital crimes of murder and rape legislatively granted to courts-martial.[95] In determining the scope of the constitutional power of Congress in authorizing trial by court-martial, the Supreme Court has stated that it "presents another instance calling for limitation to '*the least possible power adequate to the end proposed.*' "[96]

B. *Limitations on Court-Martial Jurisdiction*

1. *Status Test*

Every encroachment upon the jurisdiction of a civil court by a military tribunal represents a denial of the right to trial by jury. In protection of this right, the Supreme Court has recently placed restrictions upon court-martial jurisdiction. In the first line of cases limiting court-martial jurisdiction, the Supreme Court developed the "status" test in an effort to define the confines of military jurisdiction. In the celebrated case of *Toth v. Quarles*,[97] the Supreme Court held that a discharged serviceman, who had allegedly committed an offense while in the armed forces, was not, after his discharge, amenable to the jurisdiction of a court-martial. Justice Black stated that "Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades."[98]

Only two years later, the Supreme Court held that article 2(11) of the UCMJ, which provided for the trial by court-martial of "all persons . . . accompanying the armed forces without the continental limits of the United States," cannot be constitutionally applied in capital cases to the trial of civilian dependents accompanying members of the armed forces overseas in time of peace.[99] Mr. Justice Black, again writing the opinion for the majority, recognized the "status" test but failed to set any concrete guidelines for its application:

> Even if it were possible, we need not attempt here to precisely define the boundary between "civilians" and members of the "land and naval Forces". We recognize that there might be circumstances where a person could be "in" the armed services for the purposes of Clause 14 even though he had not formally been inducted into the military

---

93 Lee v. Madigan, 358 U.S. 228, 231 (1959).

94 "Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." Toth v. Quarles, 350 U.S. 11, 22 (1955).

95 Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435 (1960).

96 Toth v. Quarles, 350 U.S. 11, 23 (1955).

97 *Id.*

98 *Id.* at 22.

99 Reid v. Covert, 354 U.S. 1 (1957).

> or did not wear a uniform. But the wives, children and other dependents of servicemen cannot be placed in that category . . . . We have no difficulty in saying that such persons do not lose their civilian status and their right to a civilian trial because the Government helps them live as members of a soldier's family.[100]

In *Reid v. Covert*, court-martial jurisdiction was limited in the "Nation's tradition of keeping military power subservient to civilian authority"; a concept "firmly embodied in the Constitution."[101] Once more relying upon petitioner's status, the Court extended *Reid* to protect dependents committing non-capital offenses.[102] In another case the Court held that civilian employees of the armed forces overseas are not subject to court-martial jurisdiction.[103] However, "status" of the accused is not the sole determinant in resolving the jurisdiction of a court-martial. In 1969, the Court stated that "status" was "merely the beginning of the inquiry" and yet another test remained.[104]

2. *Service Connected Act Test*

"Status" is necessary for jurisdiction, but it does not follow from the ascertainment of "status" that the inquiry is complete, regardless of the nature, time, and place of the offense.[105] In *O'Callahan v. Parker*,[106] the Supreme Court formulated the "service connected act" test as an addition to, rather than in lieu of, the "status" test. To be a non-service connected act, an offense must have been committed when the following are present:[107]

(1) The serviceman's proper absence from the base.
(2) The crime's commission away from the base.
(3) Its commission at a place not under military control.
(4) Its commission within our territorial limits and not in an occupied zone of a foreign country.
(5) Its commission in peacetime and its being unrelated to authority stemming from the war power.
(6) The absence of any connection between the defendant's military duties and the crime.
(7) The victim's not being engaged in the performance of any duty relating to the military.
(8) The presence and availability of a civilian court in which the case can be prosecuted.
(9) The absence of any flouting of military authority.
(10) The absence of any threat to a military post.

---

100 *Id.* at 22-23.
101 *Id.* at 40.
102 Kinsella v. Singleton, 361 U.S. 234 (1960).
103 Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. Guagliardo, 361 U.S. 281 (1960). *See generally* Bishop, *Court-Martial Jurisdiction over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317 (1964).
104 O'Callahan v. Parker, 395 U.S. 258, 267 (1969).
105 *Id.* at 267.
106 *Id.*
107 Relford v. Commandant, 401 U.S. 355, 365 (1971).

(11) The absence of any violation of military property.
(12) The offense's being among those traditionally prosecuted in civilian courts.

One criticism voiced over the "service connected" test is the Court's silence as to its retroactive application. Last term, the Court granted certiorari to hear a case involving the question of retroactivity,[108] but decided the case on other grounds never reaching the question of retrospective application.[109] The Court withheld its opinion on that question until a decision on that precise issue would be dispositive of the case.

Having explored the matters within the scope of review upon a military habeas corpus petition and the constitutional deprivations that may form a basis for issuing the writ, the question now arises as to what are the jurisdictional requirements for seeking the Great Writ. Of course, this begs the question of what other remedies the militarily incarcerated individual may seek if he is unable to meet the jurisdictional requirements for habeas corpus. At the base of these queries lies the foundation of collaterally attacking a court-martial conviction.

VI. Collaterally Attacking The Court-Martial Conviction

A. *Habeas Corpus*

Since a military habeas corpus petition is brought into federal court under the same statute as a state habeas corpus petition,[110] the court-martialed petitioner faces the same obstacles to relief as the state petitioner, *i.e.*, custody, waiver, and exhaustion of available remedies. Case law is nearly unanimous in requiring actual physical confinement before habeas will lie.[111] However, in light of the recent loosening of custody requirements for state prisoners[112] and the complete abolition of the requirement for military prisoners by the United States Court of Appeals for the District of Columbia,[113] the custodial requirement may be a waning concept.

Waiver seldom appeared in military habeas corpus opinions when the sole subject of inquiry was the jurisdiction of the court-martial. Since *Burns*, the lower federal courts, in considering constitutional claims, have held that a claim is barred on habeas corpus if it was available but not asserted in the military court system.[114] This strict waiver rule appears to have more basis in

---

108 Relford v. Commandant, 397 U.S. 934 (1970).
109 Relford v. Commandant, 401 U.S. 355 (1971).
110 28 U.S.C. § 2241 (1970).
111 Wales v. Whitney, 114 U.S. 564 (1885); Kanewske v. Nitze, 383 F.2d 388 (9th Cir. 1967); Goldstein v. Johnson, 184 F.2d 342 (D.C. Cir. 1950); Murray v. Wedemeyer, 179 F.2d 963 (9th Cir. 1950). *Contra*, Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969).
112 Carafas v. LaVallee, 391 U.S. 234 (1968); Peyton v. Rowe, 391 U.S. 54 (1968); Jones v. Cunningham, 371 U.S. 236 (1963).
113 Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969).
114 Suttles v. Davis, 215 F.2d 760 (10th Cir. 1954); LeBallister v. Warden, 247 F. Supp. 349 (D. Kan. 1965); Bokoros v. Kearney, 144 F. Supp. 221 (E.D. Tex. 1956).

the "full and fair consideration" test of *Burns* than in principles of waiver.[115]

In 1950, the Supreme Court affirmatively answered the question of applicability of the doctrine of exhaustion of remedies to military habeas corpus.[116] All direct review within the military must be exhausted in vain before habeas corpus will lie in a federal court,[117] since the futility exception to the exhaustion requirement is not recognized.[118] Three areas within the military to be exhausted are direct review, Court of Military Appeal's postconviction remedies, and administrative remedies.

The steps in exhausting direct review of a military conviction depend upon the rank of the accused, the lawful sentence that may be imposed, and the type of court-martial in which the accused was convicted.[119] For example, where one is accused and convicted of murder with a premeditated design to kill, the proper forum would be a general court-martial. After the general court-martial decision, the convening authority refers the record to his staff judge advocate who, in turn, submits an opinion to him.[120] If the convening authority approves both the findings of guilt and the sentence of the court-martial,[121] he forwards the entire record to the appropriate Judge Advocate General.[122] The Judge Advocate General then refers the record to the Court of Military Review for every case in which the sentence affects a general or flag officer or extends to death or dismissal of a commissioned officer.[123] "In considering the record, it [Court of Military Review] may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact . . . ."[124] If the Court of Military Review affirms the sentence, review by the Court of Military Appeals is automatic.[125] At this juncture, the accused has exhausted all available direct review. However, two areas unique to the military remain before complete exhaustion is accomplished.

In 1966, the United States Court of Military Appeals [USCMA], by way of dicta, suggested that when appropriate it would issue postconviction relief.[126] In 1968, the court first granted such extraordinary relief.[127] When the USCMA has not passed upon a question of law presented by a petitioner's claim and the claim arises in a case which the USCMA can ultimately review, exhaustion of postconviction remedies is a prerequisite of appeal to the federal court system.[128] However, postconviction review should not be mandatory to

---

115 *Developments in the Law—Federal Habeas Corpus,* 83 HARV. L. REV. 1038, 1231 (1970).
116 Gusik v. Schilder, 340 U.S. 128 (1950).
117 Noyd v. Bond, 395 U.S. 683 (1969).
118 Gusik v. Schilder, 340 U.S. 128, 133 (1950).
119 10 U.S.C. §§ 859-72, 874-76 (1970).
120 10 U.S.C. § 861 (1970).
121 10 U.S.C. § 864 (1970).
122 10 U.S.C. § 865 (1970).
123 10 U.S.C. § 866 (1970).
124 10 U.S.C. § 866(c) (1970).
125 10 U.S.C. § 867(4)(b) (1970).
126 United States v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).
127 Jones v. Ignatius, 18 U.S.C.M.A. 7, 39 C.M.R. 7 (1968).
128 Noyd v. Bond, 395 U.S. 683 (1969).

fulfill the exhaustion requirement where the court has previously and adversely decided the question of law that a petitioner's claim presents. This is similar to the state postconviction rule which recognizes the futility in requiring repeated attempts to convince a court that its holding on a particular issue is erroneous.[129]

Administrative relief presents another problem to the exhaustion requirement. Since 1946, the appropriate secretary of a military department "may correct any military record of that department when he considers it necessary to correct an error or remove an injustice."[130] Exhaustion of administrative relief has been held inapplicable to military habeas corpus.[131] However, the paucity of habeas corpus decisions where exhaustion of administrative relief was in issue leaves the question undecided. In light of this limited area of relief, exhaustion would unduly delay the accused's relief to habeas corpus in the federal courts and should not be required.

B. *Back-Pay Suit*

Habeas corpus is not the only method of collateral review of military convictions; a suit for back-pay may be filed in the Court of Claims seeking review of petitioner's court-martial conviction.[132] Back-pay suits are filed pursuant to 28 U.S.C. § 1491, which grants the Court of Claims "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress . . . ." Since custody is not a required prerequisite to filing a back-pay claim,[133] the Court of Claims presents a form of relief to the soldier who is discharged from the service and unable to avail himself of habeas corpus. However, exhaustion appears to be required before jurisdiction to hear the claim will be granted.[134] The problem of waiver is handled the same as on a petition for habeas corpus.[135] The scope of matters open for review by the Court of Claims has been, historically, greater than on habeas corpus.[136] The Court of Claims has adopted the same standard of review as that taken by the Supreme Court on state habeas corpus.[137] Therefore, an action for back-pay in the Court of Claims presents greater chances for relief to more applicants than habeas corpus.

C. *Additional Relief*

The military convict whose grievances cannot be assuaged by habeas corpus nor by an action for back-pay may also seek relief by filing an action for a

---

129 Brown v. Allen, 344 U.S. 443 (1953).
130 10 U.S.C. § 1552 (1970).
131 Healy v. Beatty, 300 F. Supp. 843 (S.D. Ga. 1969).
132 *E.g.*, Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947).
133 United States v. Augenblick, 393 U.S. 348 (1969); Runkle v. United States, 122 U.S. 543 (1887); Shaw v. United States, 357 F.2d 949 (Ct. Cl. 1966).
134 United States v. Augenblick, 393 U.S. 348 (1969).
135 *Cf.* Shaw v. United States, 357 F.2d 949 (Ct. Cl. 1966).
136 Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947).
137 *Id.*

declaratory judgment, testing the validity of his conviction.[138] He may also file an action for wrongful imprisonment.[139] Even a petition for a writ of mandamus is available to the man in uniform.[140] At least one United States circuit court has entertained a suit for a mandatory injunction where the petitioner alleged the unconstitutionality of the statute denying him the right of review by the Court of Military Appeals.[141] However, habeas corpus is the fundamental avenue taken in collaterally attacking a court-martial conviction today. Due to the paucity of decisions rendered in the area of the additional reliefs to habeas corpus, petitioners are unenlightened in traveling the untraveled. Consequently, habeas corpus is the sole lighthouse in that tempestuous storm of extending the guarantees of the Bill of Rights to our fighting men.

VII. Conclusion

The history of reform of American military justice has followed a cyclic pattern. After every war there are loud and often justified condemnations about military justice which traditionally has been labeled a "rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks."[142] This is usually followed by a tremendous pother in Congress, accompanied by a renovation of the current Articles of War, only to be culminated in profound public apathy until the next war.[143] If our Nation were to be placed in that cycle today, it, undoubtedly, would be recorded in the initial stages of the cycle.

Public awareness of the military has been augmented by the fact that every resident male of the United States is a potential member of the peacetime armed forces. Service in the military may occupy a minimum of 4 per cent of the adult life of the average American male reaching draft age, while reserve obligations may extend over 10 per cent.[144] Certainly today with our large standing army and with the potential of more courts-martial than ever, the guarantee of a fair trial must be protected by the right to review.

There is something irrational in what Mr. Justice Frankfurter described as "the principle 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."[145] If there

---

138 Jackson v. McElroy, 163 F. Supp. 257 (D.D.C. 1958).
139 Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857); McLean v. United States, 73 F. Supp. 775 (W.D.S.C. 1947).
140 Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968); Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965).
141 Gallagher v. Quinn, 363 F.2d 301 (D.C. Cir. 1966).
142 Reid v. Covert, 354 U.S. 1, 35-36 (1957).
143 Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 Colum. L. Rev. 40, 57-58 (1961).
144 Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181 (1962).
145 Burns v. Wilson, 346 U.S. 844, 851 (1953) (separate opinion).

ever was a time for considering the military as a "separate community" that time is long past. The citizen certainly should not be stripped of his constitutional rights merely because he dons a uniform.

WILLIAM R. STILES