Notes and Comments

Servicemen in Civilian Courts

An off-duty Army lieutenant, opposed to the war in Vietnam, marches for peace with a sign demanding "End Johnson's Fascist Aggression." Court-martialed, he is convicted of "using contemptuous words against the President" and sentenced to confinement and dismissal from the service.

But for his military status, the young officer would clearly be protected by the First Amendment. With his entry into the armed forces, however, the lieutenant's constitutional rights vanished into limbo. Neither history nor authoritative judicial statement defines the status of the serviceman under the Constitution. Arguments can still be made for blanket exclusion from the Bill of Rights or for virtually complete protection. Symptomatically, the district courts for Utah and Kansas reached opposite conclusions recently concerning the serviceman's Sixth Amendment right to counsel.1

Civilian courts cannot agree even on their jurisdiction to determine whether servicemen have constitutional rights. Because federal courts have never had appellate jurisdiction over military tribunals,2 the serviceman can present constitutional claims to Article III courts3 only in collateral attacks.4 And there is no agreement on the scope of col-

1. Compare Application of Stapley, 246 F. Supp. 316, 320 (D. Utah 1965) ("[T]he Sixth Amendment . . . applies to . . . the military service, as far as concerns the right to the assistance of counsel") with LeBallister v. Warden, 247 F. Supp. 349, 352 (D. Kan. 1965) ("An accused before a military court is not entitled as a matter of right under the Sixth Amendment to representation by legally trained counsel.").

2. In re Vidal, 179 U.S. 126 (1900); Ex parte Vallandigham, 68 U.S. (1 Wall.) 243 (1864); Shaw v. United States, 209 F.2d 811 (D.C. Cir. 1954).

3. Military courts are legislative courts created by Congress under U.S. Const. art. I, § 8; their jurisdiction is independent of article III judicial power. In re Vidal, 179 U.S. 125, 127 (1900); Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857).

4. The most common form of collateral attack on court-martial convictions is by petition for habeas corpus, but other modes of attack are possible. Actions against court-martial members or those carrying out its orders for damages caused by illegal proceedings were once popular, but have fallen from use. See, e.g., Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857); Wise v. Withers, 7 U.S. (3 Cranch) 330 (1806). Suits for back pay are today the usual remedy when the serviceman is not presently confined and habeas corpus is hence unavailable. See, e.g., Shaw v. United States, 357 F.2d 949 (Ct. Cl. 1966). When habeas corpus is unavailable the serviceman or former serviceman may also bring an action of mandamus to compel the proper administrative authorities to make appropriate corrections in his military records. See Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965).
Servicemen lateral review. The district courts for Utah and Kansas, for example, were fully as out of phase in defining the scope of review as in construing the Sixth Amendment. The Utah court thought it had jurisdiction to “vindicat[e] constitutional rights.” The Kansas court held that court-martial convictions “may be reviewed only when void because of absolute want of power, and are not merely voidable because of the defective exercise of power possessed.”

Preoccupied with jurisdictional qualms, the federal courts cannot but fail to resolve the underlying constitutional issues. This note will attempt to prune the procedural thicket in order to place the substantive problems of constitutional rights in perspective. The effort must begin with an examination of the historical relationship between courts-martial and the Constitution.

The sole reference to the military in the Bill of Rights is found in the Fifth Amendment, where cases arising in the land or naval forces are excepted from the requirement of indictment by grand jury. The legislative history of the first ten amendments suggests a similar exclusion of the military from the petit jury guarantee of the Sixth Amendment but can otherwise be interpreted to extend to servicemen the protection of the Bill of Rights. Scant attention was paid to the military in the framing of the first ten amendments, however, and the traditional isolation of the military law from civilian standards in the

7. The Fifth Amendment reads, in relevant part,

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger ....

8. Briefly, the argument proceeds from the fact that the grand and petit jury requirements were initially paired in a separate amendment in which the clause excluding the land or naval forces could be read to apply to both. Because of changes made in the Senate, the guarantees were eventually placed separately in the Fifth and Sixth Amendments, with the land-and-naval-forces clause accompanying only the grand jury provision, for no discernible reason. It can therefore be argued that the military were included in the remaining provisions of the Bill of Rights, since they were not specifically excluded as they initially were in the grand and petit jury requirements. See Henderson, Courts-Martial and the Constitution: The Original Understanding, 71 Harv. L. Rev. 299, 303-16 (1957).

9. Henderson's argument rests essentially on the fact that the Framers never dealt with the military in composing the non-jury provisions of the Bill of Rights, which leads to a possible interpretation rather than a positive argument that the military were included. The problem of determining the intent of the Framers is understated when Henderson observes, “T]hose who framed and ratified the Constitution and its first ten amendments did not leave as much evidence of their thoughts concerning military justice as we might wish ....” Henderson, supra note 8, at 297. The soundest conclusion to be drawn from such ringing silence is simply that the Framers had weightier problems to consider in drafting the Bill of Rights than the protection of the handful of men (see note 72 infra) who then constituted the “land and naval forces.”
eighteenth century\textsuperscript{10} undercuts the conclusion that the authors of the Bill of Rights expected to effect any change whatever in court-martial practice.

Whatever the intention of the Framers, if any,\textsuperscript{11} the evolution of the military law in the nineteenth century was unaffected by the Bill of Rights. Constitutional issues were rarely advanced in military trials, and when raised were rudely squelched.\textsuperscript{12} Nor did civilian courts apply constitutional standards to courts-martial. The Supreme Court refused to pass upon claims of the grossest injustices when military convictions were collaterally attacked,\textsuperscript{13} and in doing so occasionally stated or suggested that courts-martial were outside some or all of the Bill of Rights.\textsuperscript{14}

The Court's dicta, however, must be understood in light of the narrow nineteenth century scope of collateral review. In both civilian and military cases\textsuperscript{15} review was limited to the jurisdictional issues of whether the sentencing court was properly constituted,\textsuperscript{16} had juris-

10. Although treatises of the period sometimes referred to the civilian law as a source for rules to be followed when the military code was silent, see, e.g., STEPHEN Adye, A TREATISE ON COURTS MARTIAL 66 (3d ed. 1785), the military law was characteristically treated as a distinct field of jurisprudence. See generally Adye, supra; 2 McARTHUR, PRINCIPLES AND PRACTICE OF NAVAL AND MILITARY COURTS MARTIAL (4th ed. 1813); Tytler, AN ESSAY ON MILITARY LAW (1800).

11. See note 9 supra.

12. See generally Wiener, Courts-Martial and the Bill of Rights: The Original Practice (pts. 1, 2), 72 HARV. L. REV. 1, 266 (1958). Colonel Wiener sets out to refute the Henderson thesis, see notes 8-9 supra, by showing that court-martial practice was not controlled by the Bill of Rights in the nineteenth century. He succeeds, with massive documentation.

13. See, e.g., Keyes v. United States, 109 U.S. 336 (1883). The commander of Lieutenant Keyes' regiment had functioned as "prosecutor, witness and judge" at his court-martial. Justice Blatchford, for a unanimous Court, concluded in a two-page opinion that since the court-martial had had jurisdiction of the case, the conviction could not be upset "whatever irregularities or errors . . . occurred." Id. at 340.

14. The strongest dictum appeared in Ex parte Milligan, 71 U.S. (4 Wall.) 138 (1866) (concurring opinion of Chase, C.J.): "[T]he power of Congress, in the government of the land and naval forces . . ., is not at all affected by the fifth or any other amendment." The case involved a conviction by military commission rather than by a court-martial; for the distinction, see 1 Moore, FEDERAL PRACTICE ¶ 0.5[1] (2d ed. 1964). In Ex parte Mason, 105 U.S. 696, 700 (1882), the Court stated, "Cases arising in the land or naval forces are expressly excepted from the operation of the Fifth Amendment . . . ." See also Swaim v. United States, 165 U.S. 553 (1897) (Sixth Amendment not considered in rejecting double jeopardy claim); Carter v. McClaughry, 183 U.S. 365, 390 (1902) (accused's "status as an officer of the Army, must be borne in mind in deciding whether the [fifth] amendment, if applicable, was or was not violated by this sentence").

15. The Supreme Court usually defined the military scope of review in terms of civilian doctrine and precedent. See, e.g., Carter v. McClaughry, 183 U.S. 365, 388-90, 401 (1902); Ex parte Reed, 100 U.S. 13, 25 (1879). To the extent that a distinction was drawn between civilian and military cases, military convictions were considered more vulnerable to collateral attack because there was no presumption of jurisdiction attaching to the judgments of court-martial, which were (and are) ad hoc tribunals of limited jurisdiction. See, e.g., McClaughry v. Deming, 186 U.S. 49, 69-69 (1902); Runkle v. United States, 122 U.S. 543, 555-56 (1887); Ex parte Watkins, 28 U.S. (2 Pet.) 191, 208-09 (1829).

Servicemen

diction over the accused and over the offense, and had power to impose the sentence. Since attention was riveted on the jurisdiction of the sentencing court, the Justices never ventured upon a serious analysis of courts-martial and the Constitution.

By the time of World War II, however, the expansion in the scope of review in civilian cases suggested that military prisoners might at last press constitutional claims in the federal courts. By 1942 even the language of the jurisdictional test had been discarded, and the civilian prisoner could seek habeas corpus relief for a violation of his constitutional rights. Military prisoners soon argued that court-martial convictions could be similarly attacked. Petitions peppered the district courts and met a warm reception from federal judges incensed by the alleged injustices of wartime courts-martial. Recent civilian prece-

17. E.g., Ex parte Reed, 100 U.S. 13, 23 (1879).

A balanced reading of the sources indicates that the scope of review may have been broadened slightly between 1867 and 1915, but that if so the expansion was small and not consistently applied. Certainly the language of the jurisdictional test was never abandoned. The Supreme Court did broaden the scope of review for state prisoners in Frank v. Mangum, 237 U.S. 309 (1915), when it intimated that a hearing would have been required had the state failed to provide corrective process for the claimed denial of due process of law. Eight years later a hearing was ordered in Moore v. Dempsey, 261 U.S. 86 (1923), because the state had not provided an adequate remedy for a similar claim of a trial dominated by mob hysteria. A rationale for the expanded scope of review was advanced in Johnson v. Zerbst, 304 U.S. 458, 468 (1938), a case involving a federal prisoner: "A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court . . . by providing counsel for an accused who . . . has not intelligently waived this constitutional guaranty . . . ." 21. See Waley v. Johnston, 316 U.S. 101, 104-05 (1942).

Habeas corpus is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.

The reasoning of Waley, which involved a federal prisoner, was extended to state prisoners in House v. Mayo, 324 U.S. 42 (1945), and White v. Ragen, 324 U.S. 760 (1949).
dents were invoked, and military convictions were suddenly vulnerable if the prisoner could claim a violation of constitutional rights. But any prospect of wholesale invalidation of military convictions was scotched in 1950 when the Supreme Court firmly foreclosed examination of military rights in *Hiatt v. Brown*. The court of appeals

23. Schita v. King, 133 F.2d 283 (8th Cir. 1943), actually arose from a World War I conviction. The district court had concluded that even if true the petitioner's omnibus allegations would not justify collateral attack on his conviction. The court of appeals, citing a raft of recent Supreme Court decisions dealing with civilian prisoners, held that "in view of the trend of the modern decisions...we cannot accept that view as sound" and remanded the case for a new hearing. *Id.* at 287. In *Beets v. Hunter*, 75 F. Supp. 825 (D. Kan. 1949), rev'd on other grounds, 180 F.2d 101 (10th Cir.), cert. denied, 339 U.S. 963 (1950), Judge Biggs had "no difficulty in finding that the court which tried this man was saturated with tyranny; the compliance with the Articles of War and with military justice was an empty and farcical compliance only" and ordered the petitioner discharged. 75 F. Supp. 826. The "totality of errors" in the pre-trial investigation and court-martial of the petitioner in *Hicks v. Hiatt*, 64 F. Supp. 238 (M.D. Pa. 1946), convinced Judge Biggs that the prisoner should be discharged because "the procedures of the military law were not applied to Hicks in a fundamentally fair way." *Id.* at 250. The district court in *Anthony v. Hunter*, 71 F. Supp. 823 (D. Kan. 1947), ordered the prisoner discharged because of inadequacies in the pre-trial investigation of his case. In discussing the scope of review, the court noted, "Later cases seem to have enlarged the scope of the inquiry to be made by a district court in habeas corpus proceedings, making the remedy available to test the validity of a judgment of a state or federal court—and, a fortiori, it would seem, of a court-martial—attacked on the ground that constitutional rights of the prisoner have been violated." *Id.* at 828. The broadened scope of collateral review in civilian cases was also applied to a military habeas corpus petition in *United States ex rel. Innes v. Hiatt*, 141 F.2d 664, 665-66 (3d Cir. 1944), although the court concluded that the allegations, if true, amounted only to procedural error.

24. Defining the constitutional rights of servicemen was complicated, however, by the early Supreme Court dicta suggesting that the Bill of Rights did not apply to the military, see note 14 supra. Unless the Court's words were to be ignored or explained away, the military seemed beyond the protection of the first ten amendments. But even if "to those in the military or naval service of the United States the military law is due process," *Reaves v. Ainsworth*, 219 U.S. 296, 304 (1911); accord, *United States ex rel. Creary v. Weeks*, 259 U.S. 336, 344 (1922); *United States ex rel. French v. Weeks*, 259 U.826, 335 (1922), the serviceman might still be considered to have a constitutional right to that due process promised by the military law. It was this conception that "the due process clause guarantees [servicemen] that the military procedure will be applied to them in a fundamentally fair way," *United States ex rel. Innes v. Hiatt*, 141 F.2d 664, 666 (3d Cir. 1944), that provided the constitutional foundation for the expansion in the military scope of review among the lower courts. See also *Anthony v. Hunter*, 71 F. Supp. 823, 831 (D. Kan. 1947); *Hicks v. Hiatt*, 64 F. Supp. 238, 240-50 (M.D. Pa. 1946); but see *Kuykendall v. Hunter*, 187 F.2d 545, 546 (10th Cir. 1951); *Shapiro v. United States*, 69 F. Supp. 205, 207-08 (Ct. Cl. 1947).

25. 336 U.S. 625 (1949). The Court avoided the scope of review problem in two earlier post-World War II cases, *Humphrey v. Smith*, 336 U.S. 625 (1949); *Wade v. Hunter*, 336 U.S. 684 (1949). To the extent that the opinions deal at all with the scope of review, the Court seems to have spoken in words of studied ambiguity.
Servicemen had found the record "replete with highly prejudicial errors and irregularities" which invalidated the conviction. The Supreme Court held the lower court "was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters. . . ."

Without even a nod toward the landmark civilian decisions the Court reached all the way back to 1890 for a military precedent, *In re Grimley,* and the standard that "The single inquiry, the test, is jurisdiction."

The Court may have relented slightly from this antediluvian view later in the term when it suggested that a denial of the opportunity to tender the issue of insanity might divest a court-martial of jurisdiction. If so, the test of jurisdiction stood with its cornice barely chipped until *Burns v. Wilson.*

The petitioners in *Burns,* two Air Force men convicted of a rape-murder on Guam, claimed that they had been illegally detained while confessions were coerced from them, that they were denied the effective assistance of counsel, that evidence favorable to them had been suppressed while perjured testimony was procured by the prosecution, and that they had been tried in an "atmosphere of terror and vengeance." The district court had dismissed the petition. The court of appeals, after a full examination of the record, had held that the allegations were insufficient to require a hearing on the merits.

The Supreme Court affirmed the dismissal, but none of the four opinions filed attracted a majority of the Justices. Justice Minton alone was willing to affirm the lower courts along the narrow jurisdictional lines of *In re Grimley* and *Hiatt v. Brown.*

Chief Justice Vinson voted to affirm in an opinion joined by Justices Reed, Burton and Clark on the grounds that "when a military decision has dealt fully and fairly with an allegation raised in that application [for a writ of habeas corpus], it is not open to a federal civil court

---

27. 339 U.S. at 110.
28. 157 U.S. 147 (1890).
29. 339 U.S. at 111.
32. *Id.* at 138 (opinion of Vinson, C.J.).
to grant the writ simply to reevaluate the evidence.” Vinson went on to state, however,

Had the military courts manifestly refused to consider those claims, 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. . . .

The Chief Justice thereby recognized both that servicemen enjoy some rights arising under the Constitution and that habeas corpus was available to vindicate these rights. Unfortunately, instead of expounding these rights and delineating the broadened scope of review, the Chief Justice attempted to explain why “military habeas corpus applications cannot simply be assimilated to the law which governs” civilian petitions:

But in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases. . . .

Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.

The two dissenters saw no reason to narrow the scope of review because of military considerations, whatever effect they might have on the ultimate decision. Mr. Justice Douglas, joined by Mr. Justice Black, argued that habeas review is proper whenever the military courts fail to apply the appropriate constitutional standards.

Justice Frankfurter voted for reargument of Burns; when a rehearing was denied later in the term, he protested that “the military authorities, the bar, and the lower courts . . . ought not to be left with [an] inconclusive determination. . . .” By the time of this second opinion

36. 346 U.S. at 142.
37. Ibid.
38. Id. at 139-40.
39. Ibid.
40. Id. at 150-55 (dissenting opinion of Douglas, J.).
41. Id. at 148 (opinion of Frankfurter, J.).
Frankfurter was willing to reject flatly Vinson's statement that the scope of review in military habeas corpus was historically more narrow than in civilian cases. Choosing *Johnson v. Zerbst* as the great watershed in civilian habeas corpus, Frankfurter pointed out that until 1938 "the scope of habeas corpus in both military and civil cases was equally narrow; in both classes of cases it was limited solely to questions going to the 'jurisdiction' of the sentencing court." In view of the subsequent expansion in civilian doctrine, he asked for reargument in order that *Johnson v. Zerbst* could be "appropriately applied, as it has been by the lower courts, in the military sphere."

The lower courts have, by and large, taken Vinson's opinion as that of the Court, and have been admittedly and unashamedly confused by it. The Chief Justice's cursory analysis of the differences between civilian and military law has convinced most lower courts that military habeas corpus cannot be analogized to civilian doctrine. But with civilian precedents thus excluded and the traditional test of jurisdiction destroyed by *Burns*, the lower courts have been left to the dubious guidance of the Vinson opinion itself.

Occasionally courts have perversely clung to the "absolute want of power" test, apparently unable to extract any replacement from *Burns*. More often, the courts have tried to glean significance from the "fully and fairly" evaluated test so hastily sketched by Chief Justice Vinson. The favorite interpretation of the test has been that the...
The habeas court must satisfy itself that the military courts have given the serviceman’s claim complete and impartial consideration but need not then go on to decide the correctness of the conclusions reached. This reading drastically limits the scope of collateral review, since rarely will the serviceman be able to show that the military courts have “manifestly refused” to consider his claim.

Moreover, the petitioner’s slender hopes for review all but disappear when the federal habeas corpus court concludes that “obviously, it cannot be said that [the military courts] have refused to consider claims not asserted.” If the claim was not presented to the military tribunals, habeas corpus is barred whenever the issue might have been raised. If the issue was asserted, it will have been “fully and fairly considered” unless the military courts blatantly refused to pass upon the merits. By this double-barreled standard, the military prisoner can hope to succeed only in those rare instances when he can convince the habeas court that the issue could not have been raised in the military courts.

Most lower courts have avoided the literal impact of their own interpretations of the “fully and fairly” evaluated test. After paying lip service to a stern rule, they have edged hesitantly to the merits. But the courts’ jurisdictional uncertainties have made them reluctant to fashion new constitutional doctrine or contradict the military authorities.


51. Sutlles v. Davis, 215 F.2d 760, 763 (10th Cir.), cert. denied, 348 U.S. 903 (1954); see also Bennett v. Davis, 267 F.2d 15 (10th Cir. 1959); Thomas v. Davis, 249 F.2d 232 (10th Cir. 1957), cert. denied, 355 U.S. 927 (1958); but see Rushing v. Wilkinson, 272 F.2d 633 (5th Cir. 1959), cert. denied, 364 U.S. 914 (1960).

52. On occasion courts have justified going to the merits of claims by noting the hazy outlines of the scope of review under Burns. See Swisher v. United States, 354 F.2d 472, 475 (8th Cir. 1966); Burns v. Harris, 340 F.2d 383, 385 (8th Cir.), cert. denied, 382 U.S. 960 (1965). More frequently the lower courts have reached the asserted issues by ignoring their own statement of the scope of review. See, e.g., Bennett v. Davis, 267 F.2d 15 (10th Cir. 1959); Thomas v. Davis, 249 F.2d 232 (10th Cir. 1957), cert. denied, 355 U.S. 927 (1958); Sutlles v. Davis, 215 F.2d 760 (10th Cir.), cert. denied, 348 U.S. 903 (1954).

53. For example, in Easley v. Hunter, 209 F.2d 483 (10th Cir. 1953), the court refused to find that the use of a deposition under Article of War 25, Act of June 4, 1920, ch. 227, sub ch. II, § 1, 41 Stat. 792, denied the petitioner the right to confrontation at his court-martial. Seven years later the Court of Military Appeals (see note 63 infra and accompanying text) reversed a court-martial conviction preceded by the use of depositions under article 49 of the Uniform Code of Military Justice, 10 U.S.C. § 849 (1964), holding that the Sixth Amendment limited the use of such depositions in military trials to those taken with the accused and his counsel present. United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960). Last summer a district court was unwilling
Servicemen

This passivity of the lower courts must be placed in the context of growing concern for the status of the military under the Constitution. The Supreme Court, if it has yet to apply a specific Bill of Rights guaranteed to the serviceman, has realized that military rights can no longer be dismissed by a simple reference to history. The Vinson opinion in *Burns* indicated that servicemen are in some sense protected by the Constitution. Justices Black and Douglas went considerably farther in their dissent. In a 1956 opinion joined by Chief Justice Warren and Justices Brennan and Douglas, Justice Black stated that while “military trial does not give an accused the same protection which exists in civilian courts . . . , as yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials.” Chief Justice Warren, speaking outside the Court, has given a wide reading to *Burns* and indicated that “our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.”

The Supreme Court’s curtailment of the personal jurisdiction of courts-martial also indicates the Court’s concern over the limited constitutional rights accorded the court-martial accused. The Court has determined to “restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.” The Court ruled in 1955 that discharged servicemen could not be recalled and tried by court-martial for crimes committed on active duty. Two years later, it held that civilian dependents could not be tried by the military during peacetime for capital crimes. This limitation was extended in 1960 to non-capital peacetime offenses committed by dependents or civilian employees accompanying the armed forces overseas.

While the Supreme Court has merely shown its concern, the military courts have judiciously extended broad constitutional rights to service-

55. *Id. at 152-53* (dissenting opinion of Douglas, J.).
men. A thorough system of appellate review within the military system was created for the first time in 1950 when Congress recodified the military law and made it uniform throughout the services. Under the Uniform Code of Military Justice all court-martial proceedings in which the sentence includes a punitive discharge or confinement for one year or more are referred to a Board of Review, which may reconsider findings of law or fact. Cases in which the Board of Review has approved a death sentence go automatically to the United States Court of Military Appeals; other Board of Review cases may go to the Court of Military Appeals by order of the service Judge Advocate General or, when accepted by the court, by petition of the accused. The military high court reviews only matters of law.

While the efficacy of the military Boards of Review has been questioned, the three civilian judges of the United States Court of Military Appeals have been stern guardians of servicemen’s rights. As Professor Bishop has pointed out, “the delicate perceptions of the present Court of Military Appeals . . . have sniffed out fatal denials of due process in situations in which their presence would probably not have been noticed by most civilian judges.”

Initially, the rights protected with such care by the Court of Military Appeals were only those provided by the Uniform Code of Military Justice, since the court decided in an early case that military trials

63. The Uniform Code of Military Justice (UCMJ) was created by the Act of May 5, 1950, ch. 169, 64 Stat. 107 (now 10 U.S.C. §§ 801-940 (1964)). In recodifying the military law Congress extended to the military by statutory provision many of the explicit guarantees of the Bill of Rights. See UCMJ, arts. 31 (self-incrimination), 44 (former jeopardy), 46 (compulsory process), 55 (cruel or unusual punishment), 10 U.S.C. §§ 831, 844, 846, 855 (1964). Aside from the right to jury, see notes 7-8 supra and accompanying text, the principal differences between the Uniform Code and the Bill of Rights are in the areas of counsel, see UCMJ, arts. 27, 38, 70, 10 U.S.C. §§ 827, 838, 870 (1961); confrontation, see UCMJ, art. 49, 10 U.S.C. § 849 (1964); and bail (no provision).

64. For provisions dealing with post-conviction review of court-martial proceedings, see generally UCMJ, arts. 59-76, 10 U.S.C. §§ 859-76 (1964).

65. UCMJ, art. 66, 10 U.S.C. § 866 (1964). Cases affecting general or flag officers are also referred to a Board of Review.

66. UCMJ, art. 67 (b), 10 U.S.C. § 867(b) (1964). Cases involving general or flag officers also go automatically to the Court of Military Appeals.

67. UCMJ, art. 67(d), 10 U.S.C. § 867(d) (1964).

68. See Hearings on the Constitutional Rights of Military Personnel Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong. 2d Sess. 782, 798-94 (1962) [hereinafter cited as Hearings].

Servicemen

were beyond the ken of the Bill of Rights. The past six years, however, have seen a radical upheaval in this doctrine. The court has moved to the position 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.”

The reasons for this growing awareness that the military law must to some degree be conditioned by the Constitution can be stated simply. The military system has multiplied from a small band of volunteers at the birth of the Republic to an establishment of several million men. The professional soldier who could be said to have chosen his world and the law that went with it has been replaced, in large measure, by the draftee or reluctant volunteer. Even assuming that the Bill of Rights was drawn without regard for the military, the Supreme Court has recognized too often the futility of “a too literal quest for the advice of the Founding Fathers” where conditions and institutions have changed beyond recognition.

Moreover, the scant remaining strength of the historical argument is further weakened by the expansion of military jurisdiction since 1791. The eighteenth century courts-martial to which the Framers paid such small attention tried only military offenses. Not until 1863 were courts-martial given jurisdiction over certain “civilian” offenses com-

71. United States v. Jacoby, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960); see also United States v. Culp, 14 U.S.C.M.A. 199, 32 C.M.R. 411 (1960) (concurring opinions of Quinn, C.J., and Ferguson, J.); United States v. Sutton, 3 U.S.C.M.A. 229, 229, 11 C.M.R. 229, 229 (1955) (dissenting opinion of Quinn, C.J.); for an even stronger statement which would except only those rights excluded “in so many words,” see Hearings 181 (testimony of Quinn, C.J.). The court has not hesitated to revie the constitutionality of the statutory provisions of the Uniform Code in extending new rights to servicemen. See United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960). In Jacoby article 49, 10 U.S.C. § 849 (1964), was “interpreted” to require the presence of the accused and his counsel at the taking of a deposition to be used at trial. The holding was reached by finding that the contrary interpretation—which was the dear word- of the article, which had been consistently applied in courts-martial, and which earlier had been upheld by the court—“lends itself to conflict with the Sixth Amendment.” 11 U.S.C.M.A. at 433, 29 C.M.R. at 249.
72. A few months after Washington’s first inauguration the army consisted of 672 of the 840 men authorized by Congress. Report of Secretary of War Knox to the Congress on the Military Force in 1789, 1 Am. St. Pap. Mil. Aff. 6 (1789).
mitted during wartime. And the further extension of military jurisdiction to encompass all civilian offenses committed in peacetime was a twentieth century phenomenon not completed until 1950. The authors of the Bill of Rights may have intended to allow Congress and the military authorities to enforce military discipline as they would, but the general criminal jurisdiction of today's court-martial was beyond their contemplation.

This note does not attempt to prescribe the ultimate status of servicemen under the Constitution. The focus rather will be on the preliminary question of how this status should be determined: what agencies are best suited for the task, and what considerations should guide them. Some tentative indications of the rights which can and should be accorded servicemen will emerge as a byproduct of the analysis.

If the lower federal courts hew to their narrow interpretation of the "fully and fairly" evaluated test sketched in Burns v. Wilson, they will not play a significant role in resolving the constitutional issues. The popular interpretation of Burns, however, is neither the only nor the best analysis.

Justice Frankfurter criticized the Court in his second opinion for not applying civilian developments to the military sphere. This, together with Vinson's cursory discussion of the reasons why "the scope of matters open for review has always been more narrow than in civil cases," convinced the lower courts that whatever the new scope of review under Burns, it bore no relation to the expanding civilian standard. The conclusion was unjustified. While the Chief Justice did not cite a single civilian case in his opinion, there is good reason to believe that his reasoning was influenced by recent civilian decisions. Moreover, his opinion can be read to encompass a scope of review differing only marginally, if at all, from the then prevailing civilian doctrine.

The question in Burns was "whether the allegations of the petitions

79. See notes 50-53 supra and accompanying text.
81. Burns v. Wilson, 346 U.S. 137, 139 (1953); see notes 38-39 supra and accompanying text.
Servicemen

... require[d] a hearing on the merits."82 The answer hinged on the weight to be accorded the prior determinations of the military courts.83 The Vinson opinion held that "when a military decision has dealt fully and fairly with an allegation ..., it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence."84 Here the Chief Justice virtually echoed the earlier language of the Court in the civilian case Ex parte Hawk:85

Where the state courts have considered and adjudicated the merits of his contentions ... a federal court will not ordinarily re-examine ... the questions thus adjudicated. ... But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised ..., a federal court should entertain his petition for habeas corpus.86

The Court did not specify under what out-of-the-ordinary circumstances the federal courts should re-examine issues already "fully and fairly" adjudicated in state courts. Part of the uncertainty was removed in Brown v. Allen,87 decided only four months before Burns. In Brown the Court held that state court determinations of questions of constitutional law were reviewable in habeas corpus proceedings, while state court findings of fact would not be disturbed, except in unusual circumstances.88

Such then was the law at the time Burns was decided, if not when the case was argued.89 While the "fully and fairly" evaluated test announced by the Vinson opinion indicates some permeation of civilian doctrine into military habeas corpus, the petitioners' allegations must be examined to determine the extent to which the standard of Brown v. Allen was actually applied.

In holding that a hearing would be required only "had the military courts manifestly refused to consider those claims,"90 Vinson in effect

83. There was patently no question of court-martial jurisdiction over the petitioners or the crimes, nor of the court-martial's power to impose the death sentence.
85. 321 U.S. 114 (1944).
86. Id. at 118. (Emphasis added.)
87. 344 U.S. 443 (1953).
88. Id. at 458; see also the separate opinion of Frankfurter, J., also for the Court on this point, id. at 497-515.
89. Burns was argued four days before Brown was handed down. For conflicting views on whether Brown represented a radical upheaval in habeas corpus doctrine or merely made explicit what had gone before, compare Bator, supra note 20 at 463-64, with Reitz, supra note 20 at 1328-30, and Wright & Sofier, Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility, 75 Yale L.J. 895, 895 n.4 (1966).
The Yale Law Journal  Vol. 76: 380, 1966

gave conclusive weight to the findings of the military agencies. If the Chief Justice regarded these claims as turning on questions of fact, it is possible to conclude that Brown was applied.

Vinson seems to have so regarded them. While such allegations as the use of a coerced confession would normally be a mixed question of fact and law for re-examination by the federal habeas corpus court, the claims in Burns centered on allegations that certain events had transpired. Until these facts were established by the petitioners, no question of law could arise, and the military reviewing courts “concluded that petitioners had been accorded a complete opportunity to establish the authenticity of their allegations, and had failed.” That the Chief Justice regarded this as a determination of simple evidentiary fact is indicated by his language: “Accordingly, it is not the duty of the civil courts to . . . re-examine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations . . . .” Moreover, both the district court and the court of appeals, as well as Justices Douglas and Black in dissent, seem also to have regarded the allegations as presenting questions of fact.

The vice of the Vinson opinion was thus probably not a blanket rejection of civilian precedents but a failure to make explicit the extent to which civilian standards were applied. Although the confusion wrought in the lower courts is hardly surprising, their use of the “fully and fairly” evaluated test to bar review of questions of law as well as of findings of fact scarcely seems justified.

This analysis of Burns is supported by several recent judicial challenges to the popular interpretation of the Vinson opinion. In Application of Stapley, the Utah district court concluded that its jurisdicti-
Servicemen

tion extended to the "vindication" of petitioner's Sixth Amendment right to counsel.\textsuperscript{100} The Stapley court made no attempt to reconcile its decision with the conventional interpretation of Burns. A more refined approach was adopted by the Fifth Circuit in Gibbs v. Blackwell.\textsuperscript{104} While the case was remanded on other grounds,\textsuperscript{102} the appellate judges criticized the district court for making "little more than a technical review of jurisdiction."\textsuperscript{103} In adopting a broad reading of Burns and pointing out that the issues there were chiefly factual,\textsuperscript{104} the court stated: "In reviewing military convictions, the courts must be on guard that they do not fail to perceive the difference between reviewing questions of fact and law."\textsuperscript{105}

The Court of Claims also relied on the law-fact dichotomy last spring in a suit for back pay by a Navy officer sentenced to dismissal by a court-martial.\textsuperscript{106} The contention in Shaw was that the Navy had followed an unconstitutional interpretation of the relevant statutes in convicting the officer of embezzlement. In granting a judgment for the plaintiff,\textsuperscript{107} the court distinguished Begalhe v. United States,\textsuperscript{108} in which the "fully and fairly" evaluated test had been applied to estop examination of the plaintiff's claims, as involving chiefly factual issues.\textsuperscript{109} The court continued, in discussing its prior interpretations of Burns, "Whether or not this rule of deference to the military findings

\textsuperscript{100} Id. at 320. A majority of the Court of Military Appeals decided in United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963), that the serviceman's right to counsel arose not only under the Uniform Code but also under the Sixth Amendment. The military court, however, concluded that the untrained officer afforded the accused in a special court-martial (see UCMJ, art. 27, 10 U.S.C. § 827 (1964)) satisfied the requirements of the amendment. The Utah district court in Stapley decided that at least in the context of the specific case the Sixth Amendment required a trained lawyer as counsel. While the court limited its holding to the unpalatable facts of the case, Stapley cannot help but call into question the constitutionality of representation by untrained counsel in special courts-martial.

\textsuperscript{101} 354 F.2d 469 (5th Cir. 1965).

\textsuperscript{102} Gibbs claimed that he had spent over 20 years in prison and on parole in serving a 15-year sentence for murder, and that he had lost over seven years' time on parole because his parole was revoked when he became drunk on three occasions. The court concluded that the development of a full record was required to determine whether the "allegedly harsh application" of the federal parole statutes raised constitutional questions. Id. at 469-70.

\textsuperscript{103} Id. at 471.

\textsuperscript{104} Id. at 472.

\textsuperscript{105} Id. at 471.

\textsuperscript{106} Shaw v. United States, 357 F.2d 949 (Ct. Cl. 1966).

\textsuperscript{107} The court's judgment extended only to a recovery of salary due, however, and not to a restoration of his officer's commission or a change in the character of his dismissal. One experienced commentator claims, though, that a favorable judgment in the Court of Claims will usually enable the successful plaintiff to secure administrative correction of his discharge or dismissal. See Everett, Military Administrative Discharges—The Pendulum Swings, 1966 Duke L.J. 41, 68.

\textsuperscript{108} 286 F.2d 606 (Ct. Cl. 1960).

\textsuperscript{109} 357 F.2d at 954.
we think that such abstinence is not to be practiced where the service-
man presents pure issues of constitutional law, unentangled with appraisal of a special set of facts.”

The preceding analysis shows that Burns can be read to permit de
novo review of questions of constitutional law in military habeas
corpus proceedings, just as in civilian cases. But, however permissi-
ble, the de novo review accorded military claims must be tempered by
a realization of the unfamiliarity of civilian judges with the distinctive
purposes and problems of the military law. Several considerations
should lead federal courts to a discretionary deference to the findings
of military courts on certain constitutional issues. In the first place, the
military law represents an historical process in which the federal courts
have not played a part. Second, in gauging the “fundamental fairness”
of a court-martial procedure, a familiarity with military institutions not

111. 357 F.2d at 954. For another recent case suggesting a broad scope of review, see
Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965). Since Ashe’s imprisonment had been
completed, habeas corpus was not available and Ashe instead brought an action for
mandamus to compel the Secretary of Defense to take favorable action on his petition
to change the dishonorable character of his discharge. Having concluded that the
plaintiff had been denied his constitutional right to the effective assistance of counsel
at his 1948 court-martial, the court of appeals directed the district court to issue the
requested writ, reasoning that “a district court at the place of his [former] incarceration
would have been obligated to grant him a writ of habeas corpus...” Id. at 280.
112. The remaining constitutional and statutory arguments which would deny fed-
eral courts power to review military claims do not bear scrutiny. On the strength of
certain early Supreme Court dicta, see notes 14, 24 supra and accompanying text, It has
been argued that the constitutional grant of power to Congress “to make rules for the
government and regulation of the land and naval forces,” U.S. CONST. art. I, § 8, cl. 14,
leaves federal courts without power to review the legislative determination of military
rights, see, e.g., Thomas v. Davis, 249 F.2d 232, 235 (10th Cir. 1957), cert. denied, 355
U.S. 927 (1958); Day v. Wilson, 247 F.2d 60, 63 (D.C. Cir. 1957) (dissenting opinion of
Prettyman, J.). It has never been made clear, however, why Clause 14 of Section 8 of
Article I should be exempted from the Bill of Rights any more than the other 17 are.
Moreover, the circumstances surrounding the adoption of the Constitution hardly show
that the Framers intended to remove the military from judicial scrutiny. By far the
stronger construction of Clause 14 finds it an expression by the Framers that the rule-
making authority over the military should be vested in the legislative branch rather
than the executive. See Duke & Vogel, supra note 76, at 447-49.
It has also been argued that federal courts cannot afford habeas corpus relief to mili-
tary prisoners because article 76 of the Uniform Code, 10 U.S.C. § 876 (1964), provides
that final court-martial orders “are binding upon all departments, courts, agencies, and
officers of the United States. . . .” The Supreme Court refused to hold in Gusik v.
Schilder, 340 U.S. 129, 192 (1950), that the immediate predecessor to this finality pro-
635, deprived federal courts of jurisdiction over habeas corpus petitions from military
prisoners. A contrary interpretation would have presented interesting constitutional
questions in view of Article I, Section 9. Moreover, the Supreme Court has made such
relief available to civilians convicted by courts-martial. See notes 59-62 supra. Chief
Justice Vinson nevertheless suggested enigmatically in Burns, 346 U.S. at 142, that article
76 somehow affects the scope of review. Justice Frankfurter, however, examined the
legislative history of Article 76 and concluded that “the 'finality' provision is completely
irrelevant to any consideration concerning the proper scope of inquiry in military habeas
corpus cases.” 346 U.S. at 850.
possessed by civilian courts is an important asset. Third, the purposes of the military law include not only crime prevention, but also the creation and maintenance of the strict discipline necessary in a fighting organization. And finally, in practice the military justice must sometimes be meted out under battlefield conditions in which civilian standards cannot be observed.

An idea of the distinctive coloration constitutional problems may take on in military surroundings is best imparted by illustration. In the substantive realm the requirements of military discipline may qualify even the preferred values of free speech and association. Consider the case suggested earlier, that of the young Army lieutenant who pickets against the war in Vietnam. Article 88 of the Uniform Code provides for the punishment of "any commissioned officer who uses contemptuous words against the President. . . ." On the face of the statute, the officer has committed an offense. And were the facts altered slightly, to put the young lieutenant in uniform and on a military base, few would argue that he had not. Military discipline and the traditional subordination of the military to civilian authority both require some limitation on the free speech of officers.

The difficult twist arises from the off-duty status of the picketing officer. On the one hand, the officer in mufti does not cease to be an officer. On the other hand, the young lieutenant should have the opportunity to express his convictions as an individual rather than an officer. Which considerations should be given controlling weight must depend on the individual case. Suppose, for example, that the young officer was picketing not against the war in Vietnam, but against his base commander's policy of holding Saturday morning inspections. Here the problem would be one of military discipline. A federal court faced with such a situation, while empowered to review the issue, would be wise to accept the military tribunal's decision as to whether the impact on discipline justified the punishment of the picketing officer.

In the actual case, however, the officer was registering his dissent not against local command practices but against national policies. In this context a federal court, while considering the military tribunal's esti-

113. The example is based, with inconsequential changes, on the case of Lt. Henry H. Howe, Jr., whose conviction under articles 88 and 133 of the UCMJ, 10 U.S.C. §§ 888, 933 (1964) was affirmed by an Army Board of Review. United States v. Howe, CM 413739, Bd. of Rev., Nov. 3, 1966. The case is now on appeal to the Court of Military Appeals. 114. 10 U.S.C. § 888 (1964). The article can be traced to the 1806 Articles of War, where it was approved by President Jefferson despite its obvious resemblance to the Sedition Act of 1798. See Wiener, supra note 12, at 267-70.
mation of the impact on discipline, should make its own determination of the need to limit the officer’s right to speak on political issues while “off duty.”

Suppose now that a court-martial has convicted the young officer and the convening authority orders him confined. The lieutenant petitions a federal court for a writ of habeas corpus, alleging that he has been denied his constitutional right to bail pending appeal. On historical grounds, the federal court would have no difficulty concluding that the right to bail has never been known to the military law. Moreover, the nature of military life, with its constant limitations on the individual’s freedom of movement, may arguably make the very concept of bail inapplicable. But the early military law never provided for lengthy and drawn-out appellate review, and confinement in a disciplinary barracks can hardly be equated with the officer’s normal subjection to the commands of his superiors.

Should the federal court inquire into the constitutionality of the lieutenant’s confinement? Conditions have changed sufficiently to destroy the historical argument, and some stronger justification should be required to support the denial of bail. The military authorities may argue that the respect demanded for the officer corps would suffer if enlisted men were exposed to the offender who a court-martial has decided is unfit to be an officer.

While the civilian court should not discount the need for discipline and morale, it can ask the military whether the officer’s confinement is the only feasible safeguard. The officer could, for example, be released to a non-duty status and temporarily assigned to a station where no enlisted man need know of his “unfitness.” Unless the military command could show the impossibility of such a compromise solution, mandatory confinement should be found constitutionally impermissible.

The need for discipline, while not decisive in the context of the right to bail, may play a more prominent role in other areas. Prime

115. Colonel Wiener has suggested that this practice, widespread under the Uniform Code, may violate article 13 of the UCMJ, 10 U.S.C. § 813 (1964). Hearings 798 (testimony of F. Weiner). No federal court has passed on the merits of this theory, however, and the text will consider only the constitutional problem.

116. In the case of Lt. Howe, see note 113 supra, the application for habeas corpus was denied by the district court and the Fifth Circuit Court of Appeals. Application was then made to Mr. Justice Black, but Lt. Howe was released and the case rendered moot before action was taken on the application. Letter From Melvin Wulf, Legal Director, American Civil Liberties Union, to Yale Law Journal, March 25, 1966, on file in Yale Law Library.

117. See Wiener, supra note 12, at 284-86 and authorities cited therein.

118. See Henderson, supra note 8, at 316.
Servicemen

examples are problems of search and seizure. The Fourth Amendment's concern for privacy, if not inapplicable to the military, at least must be tailored to the distinctive characteristics of military life. Crowded and often communal living spaces cannot be reconciled with a full measure of privacy, and military discipline must include the barracks.

The Court of Military Appeals has established the standard that commanding officers may authorize evidentiary searches only on the same showing of probable cause that would justify the issuance of a warrant by a federal magistrate. Similarly, a search must be reasonably incident to a valid arrest to be justified on that basis. A problem arises, however, when evidence is seized in the course of a routine inspection. In United States v. Lange the military court concluded that the supposedly routine "shakedown inspection" had in fact been an illegal search for recently stolen property. But the military courts have yet to delineate the boundary between legitimate inspections and illegal searches, and the proper role of civilian courts in reviewing their determinations is anything but clear. Any living space inspection violates privacy. On the other hand, to allow the enlisted man—or even the junior officer—to retreat to a privileged sanctuary in his military quarters would be a radical upheaval for the services. The difficult task of balancing the conflicting goals of privacy and discipline is arguably a problem best left to tribunals with special knowledge of the military system.

While disciplinary objectives shape the substantive boundaries of the military law, the procedural rights of servicemen can hardly be affected by this factor. A coerced confession is unrelated to military


122. The three judges of the Court of Military Appeals acquire their "special knowledge of the military system" only while serving on the bench, since they are by statute appointed by the President "from civilian life." UCMJ, art. 67(a)(1), 10 U.S.C. § 867(a)(1) (1964). The judges are appointed for 15-year terms, and during the court's first 15 years only two vacancies have occurred. Since the present judges have served 15, 10 and 5 years respectively, it can fairly be said of the military high court that, as Justice Frankfurter stated in another context, "the exercise of its functions [has given] it accumulating insight not vouchsafed to courts dealing episodically with the practical problems" of military law.

123. This statement might be qualified by the proposition that the importance of discipline compels the military law to place greater emphasis on the punishment and less on the protection of the innocent than does civilian justice. Thus, the structure of civilian society is not threatened by a moderate amount of crime, and the criminal law is therefore able to place considerable emphasis on the protection of the innocent, even at some cost in deterrence. The effectiveness of the military organization, on the other hand,
discipline, as are the guarantees of the Fifth and Sixth Amendments. Wartime conditions, however, may sometimes preclude a full measure of procedural due process. Witnesses may be dead, far away or otherwise unavailable by the time of trial, particularly because a prompt trial may be impractical. If battlefield offenses are to be controlled, some procedural rights must be shaded. The requirement of a fair trial can be reconciled with the necessity of controlling crime only on the facts of each case. And the decisions of military courts, with their fuller understanding of the problems of an army in the field, deserve marked respect by civilian courts.

The institutional framework of the military law may also present problems for a civilian court. The court-martial, for example, is an instrument of the military law enshrined by time. The Court of Military Appeals is better versed than any civilian court in the intricacies of court-martial procedures, and therefore is often better qualified to place a claimed denial of procedural due process of law in the broad context of court-martial operation. But the importance of the civilian court's unfamiliarity with military procedure can be overrated. Differences of at least comparable magnitude are often present in the state law which the Supreme Court now regularly subjects to constitutional review. Moreover, military institutions may often be analogized to civilian practices to determine whether the accused was tried fairly. The court-martial, for example, functions basically as a jury in deciding questions of fact, although the court or its president also makes certain legal rulings. Where constitutional standards have been established for the selection of juries, the same or similar principles may govern the selection of court-martial members. To pose a concrete problem, while the Court of Military Appeals would unquestionably not tolerate the deliberate exclusion of Negroes from a court-martial, it has approved the deliberate inclusion of a Negro on a court-

is arguably threatened when discipline is less than absolute, and therefore the military law cannot afford to protect the innocent if discipline will thereby suffer. See United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955); Wiener, supra note 12, at 293-94. Implicit in this reasoning is the assumption that discipline will suffer if the innocent are protected. While this may be true, the converse can also be argued: since the intangibles of attitude and morale are so important in any system of discipline not based exclusively on fear, discipline may suffer from the resulting dislike and distrust of the enforcement agencies if the innocent are not protected.

124. See Wade v. Hunter, 336 U.S. 684 (1949) (rape committed while Army was racing across Germany in 1945); Day v. Davis, 235 F.2d 379 (10th Cir. 1956) (murder committed in 1950 while Seoul, Korea, was being evacuated in face of Chinese offensive).

125. Almost all interlocutory questions arising in a general court-martial are ruled upon by a law officer who is not a member of the court; interlocutory rulings in a special court-martial are normally made by the president (highest ranking member) of the court. See UCMJ, arts. 28, 41, 51, 10 U.S.C. §§ 828, 841, 851 (1964).
martial. In doing so the court rejected the reasoning of an earlier Fifth Circuit case which held unconstitutional the purposeful inclusion of Negroes on a grand jury list but did not explain why any of the distinguishing characteristics of the military law justified a less color-blind standard in the selection of court-martial members. Were the question to come before a federal habeas corpus court, therefore, the military decision would deserve little if any weight.

A more difficult problem is presented by the way in which enlisted men are selected for service on courts-martial. While courts-martial are traditionally composed of officers, an enlisted defendant may demand a limited number of fellow enlisted men on his court. The custom of appointing enlisted men from the highest ratings has been attacked on the theory that such career men, with certain command responsibilities, will be more likely to find a punishable breach of discipline in, say, a barracks brawl than would a lower-rated enlisted man. The Court of Military Appeals has rejected the argument on the ground that such appointment practices are reasonably designed to meet the statutory requirement that those “best qualified by reason of age, education, training, experience, length of service, and judicial temperament” be appointed. Nor would the military court conclude that senior enlisted men would be prejudicially inclined to find insubordination or a breach of discipline where the average enlisted man would not. The problem can be analogized to that of the “blue ribbon” jury, and by the test adopted in those cases, the enlisted man would have to show the likelihood of bias. The military court is unarguably more qualified to make the necessary evaluation of military attitudes; should the issue come before a civilian habeas corpus court, the military decision should ordinarily be accepted.

Cases of command influence present another area requiring specialized judgment of military psychology. Article 37 of the Uniform

127. Collins v. Walker, 329 F.2d 100 (5th Cir.), on rehearing, 335 F.2d 417, cert. denied, 379 U.S. 901 (1964). The military court’s decision also ignores Justice Reed’s dictum in Cassell v. Texas, 339 U.S. 282, 287 (1950), that “an accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race.” While the Fifth Circuit overruled Collins last summer in Brooks v. Beto, No. 22809, 5th Cir., July 29, 1966, the fragmentation of the Court of Appeals in both cases indicates that the problem of purposeful inclusion cannot yet be considered conclusively resolved.
128. UCMJ, art. 25(c), 10 U.S.C. § 825(c) (1964).
131. Id. at 40, 35 C.M.R. at 12.
Code\textsuperscript{133} forbids command interference with the actions of court-martial, but in such broad outline that the problem can as readily be analyzed by a constitutional test of fundamental fairness. The military court has already driven from the field such heavy-handed practices as the appointment of a new court president in mid-trial after a ruling adverse to the prosecution.\textsuperscript{134} But senior military officers are not easily persuaded that subordinates should be denied guidance merely because of appointment to court-martial boards, and command policy can be expressed in devious ways.\textsuperscript{135} The most popular stratagem is pre-trial orientation pamphlets or lectures, in which bland homilies concerning the duties of a court-martial member are spiced with pointed suggestions on sentencing policies or the need for convictions.\textsuperscript{136}

To decide whether such suggestions denied the defendant an impartial trial, the court must gauge their effect on the court-martial members. The peculiar perspective of the military man toward authority makes this task difficult. The serviceman is unused to receiving suggestions from superior officers. However gently phrased, a recommendation can safely be construed only as an order; the gracious intonation thinly masks the gravelly voice of the parade ground. Moreover, the court-martial member can scarcely forget that the commanding officer who approves the fitness report so vital to his promotion may well consider his court performance.

The military mind may be something of a mystery to even the Court of Military Appeals, but at least its members have had greater exposure to it than most civilian judges. Controlling the zeal of the lecturers and pamphleteers is a task best left, within limits, to the military court.

The problems examined show that the constitutional questions which may arise in the military law do not dissolve into simple answers. In balancing individual rights against military needs, the civilian courts cannot claim a monopoly on wisdom. The federal habeas corpus court must recognize those areas in which the specialized and quite capable voice of the Court of Military Appeals should be heeded.

\textsuperscript{133} 10 U.S.C. § 837 (1964).
Whether in so doing the federal courts limit themselves to a more narrow scope of collateral review than in civilian cases or whether different factors are considered in applying a scope of equal breadth may be a matter of phrasing. "but since phrasing mirrors thought, it is important that the phrasing not obscure the true issue before a federal court." The critical conclusion is that the finality to be allowed a military court determination of constitutional rights should be based on a careful analysis of the competence of civilian judges and not on mere procedural confusion.

A prime example of the latter is the peculiar doctrine mentioned earlier that military courts cannot be considered to have "manifestly refused" to consider "fully and fairly" a claim not raised before them, and hence that the federal court cannot pass upon the issue in a habeas corpus proceeding. Professor Reitz has shown the chaos wrought in the civilian courts by the frequently confused doctrines of waiver, exhaustion of remedies and adequate state grounds. Fay v. Noia eliminated much of the confusion in the civilian case law. Since the desirability of a federal court adjudication of a constitutional claim when no other remedy is still available seems unaffected by any distinctive characteristic of military law, the reasoning of Fay should govern military cases. The Fifth Circuit edged tremulously toward this position in Williams v. Heritage, and it can be hoped that other courts will reach the same conclusion with greater clarity and confidence.

If habeas corpus relief is to be made available to the military prisoner unless he has "deliberately bypassed" the opportunity to raise his claim in the military courts, the civilian courts may find themselves called upon to review constitutional issues which have never been presented to the Court of Military Appeals. Such cases would confront a federal court with a claim deserving adjudication, but one which it might want the military court to decide or at least examine. A procedure by which the petitioner could obtain military review either prior to or in lieu of a federal habeas corpus proceeding would be desirable in these cases.

The problem could be solved forthwith by a statute allowing the federal court to refer petitions in such cases to the military court or

138. See note 51 supra and accompanying text.
139. Reitz, supra note 20, at 1352-72; see also Hart, supra note 20, at 101-19.
141. 323 F.2d 781, 781-82 (5th Cir. 1963).
clearly granting the serviceman the opportunity to collaterally attack his conviction within the military court system. But the Court of Military Appeals seems to have begun a solution within the existing jurisdictional statutes. The court concluded last spring that its jurisdiction under the All Writs Statute\textsuperscript{142} extended to granting writs in the nature of coram nobis.\textsuperscript{143} Apparently, the court contemplates using such writs to allow collateral review of constitutional claims.\textsuperscript{144}

Collateral review procedures within the military system would facilitate cooperation between military and civilian courts. Using a discretionary rule of exhaustion of remedies\textsuperscript{145} federal courts could deny without prejudice petitions for habeas corpus which presented novel constitutional claims. After a decision by the Court of Military Appeals, the federal court could entertain a new writ if it wished.

\textsuperscript{142} 28 U.S.C. § 1651(a) (1964).

\textsuperscript{143} United States v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966). The court concluded that although it had the jurisdiction to issue such a writ, the requirements of the writ were not met by Frischholz because (1) each claim could have been raised on appeal and (2) most in fact had been. \textit{Id.} at 153. While the second reason is unexceptionable, the court may have strayed into an outdated standard of "procedural default" to the extent it failed to consider whether Frischholz had been guilty of inexcusable neglect in failing to raise any claims on appeal. \textit{Cf.} Fay v. Noia, 372 U.S. 391, 488-89. The precise standard applied by the military court in Frischholz is not clear, however.

\textsuperscript{144} This conclusion is indicated by the fact that the military court was motivated to examine the extent of its jurisdiction to entertain petitions for collateral relief, a question it had avoided in two earlier cases, see United States v. Tavares, 10 U.S.C.M.A. 282, 27 C.M.R. 356 (1959); United States v. Buck, 9 U.S.C.M.A. 290, 26 C.M.R. 70 (1958), by the consideration that "part of our responsibility includes the protection and preservation of the Constitutional rights of persons in the armed forces," 16 U.S.C.M.A. at 152.

\textsuperscript{145} The exhaustion rule is, of course, discretionary by nature; as the Supreme Court has held, the rule "is not one defining power but one which relates to the appropriate exercise of power." Fay v. Noia, 372 U.S. 391, 420 (1963).