Federal Jurisdiction -- An Apparent Expansion of the Scope of Military Habeas Corpus Review

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The scope of review by a federal district court in a habeas corpus proceeding is particularly important, since by means of the writ a single federal judge can overturn the results of the most considered and reasoned opinions of entire court systems. It would seem that any area of the law so fraught with inherent impact, frictions, and opportunities for judicial inefficiency should be characterized by clear principles. However, while the scope of review is reasonably well defined with respect to petitions for writs of habeas corpus by state and non-military federal prisoners, the federal district court judge faces extreme confusion and sparse guidance when the petitioner happens to be in confinement as a result of a military court-martial. In *Allen v. VanCantfort* the Court of Appeals for the First Circuit appears to have expanded significantly the scope of review available to the military prisoner and thus the opportunities for abuse of the writ without clarifying substantially the controlling principles.

On September 9, 1968, Allen, then a Marine lance corporal, pleaded guilty to five specifications of premeditated murder in a general court-martial convened at Da Nang, South Vietnam. After exhausting all available military remedies, Allen petitioned the United States District Court for the District of Maine for a writ of habeas corpus. The

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343 F.2d 625 (1st Cir. 1971).

Id. at 628. As a general rule the prisoner must unsuccessfully pursue all statutorily provided direct attacks on his confinement before he will be allowed to attack it collaterally. *Brown v. Allen*, 344 U.S. 443 (1953). Two previous habeas corpus petitions had been dismissed for failure to exhaust all available military remedies.
district court denied the writ by following the apparent rationale of Supreme Court precedent and limiting its inquiry to whether the military courts system had given full and fair consideration to the constitutional claims of the petitioner. Although the First Circuit affirmed the denial of the petition, it not only reviewed the constitutional issues on the merits but also held that it could and must review allegations of statutory error committed during the trial. The court's resolution of the statutory-error issue marks a drastic expansion of the scope of review which is best appreciated with the benefit of historical perspective.

In 1858 the Supreme Court held that civil courts have no inherent power to interfere with courts-martial decisions. Because of the exigencies of military life and the unique ability of the military courts to determine their disciplinary standards, the Court treated the military courts as an autonomous and separate system of jurisprudence. The bases for this position are article I of the Constitution, which gives Congress the power to "make Rules for the Government and Regulation of the land and naval Forces," and article II, which provides that the President shall be commander-in-chief of the armed forces. Thus the military courts were and are considered agencies of the executive branch. The one exception to the hands-off policy was the exercise of the habeas corpus jurisdiction of federal courts, although as a result of the general reluctance of civil courts to review military decisions the scope of review was very limited. Originally inquiry was confined to whether the military court had jurisdiction over the person concerned and the subject matter of the case. Expansion soon followed when federal civil courts inquired whether the military court had exceeded its

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[116x610]Ex parte Reed, 100 U.S. 13 (1879). The Supreme Court had previously considered the subject of military habeas corpus in the case of persons imprisoned by a military commission. Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866). However, Reed was the first case in which the petitioner was detained as a result of a court-martial conviction. See W. Aycock & S. Wurfel, Military Law Under the Uniform Code of Military Justice 325 n.40 (1955) [hereinafter cited as Aycock & Wurfel].
power in the imposition of the sentence, but this examination was still characterized as "jurisdictional."

The first real crack in this armor of autonomy occurred in 1947 when the Court of Claims followed the reasoning of the Supreme Court in Johnson v. Zerbst and held that military courts having jurisdiction at the outset may lose that jurisdiction if they deprive the accused of constitutional rights during the course of the trial. However, this expansion of the review by civil courts of military court decisions was soon undermined by the Supreme Court in Hiatt v. Brown: "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.'" After Hiatt was decided the scope of federal habeas corpus review of state-court decisions, which previously had paralleled the development of military habeas corpus, was expanded substantially. This was the situation when the Supreme Court decided the landmark case of Burns v. Wilson in 1953. Chief Justice Vinson, speaking for a plurality, said:

These records make it plain that the military courts have heard petitioners out on every significant [constitutional] allegation . . . . Accordingly it is not the duty of the civil courts simply to repeat the process . . . . It is the limited function of the civil courts to determine whether the military have [sic] given fair consideration to each of these claims.

Burns is generally thought to stand for the proposition that the civil courts should not consider the constitutional contentions of a military petitioner that have been dealt with "fully and fairly" by the military tribunal. This expansion of the previous narrow jurisdictional inquiry

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16304 U.S. 458 (1938).
18339 U.S. 103 (1950).
19Id. at 111.
21346 U.S. 137 (1953).
22Id. at 144.
23Some courts have stated that once the military tribunal has given fair consideration to the petitioner's constitutional contentions, the other federal courts cannot re-examine them. E.g., Kennedy v. Commandant, 377 F.2d 339 (10th Cir. 1967); Reed v. Franke, 297 F.2d 12 (4th Cir. 1961);
has been rejected by one authority who states that even after Burns "the
record of the Supreme Court of never having sanctioned the granting of
a writ of habeas corpus in a military case on due process, as distin-
guished from jurisdictional grounds, remains intact." Subsequent Su-
preme Court decisions have failed to clarify the Burns test; consequently,
the lower courts have used varied approaches to its application in the
cases in which the petitioner alleges a denial of a constitutional right,
and at least one court has applied the Burns test to all the petitioner's
contentions, not just those of a constitutional dimension.

The First Circuit in Allen, after referring to the confusion surround-
ing the Burns decision, treated the constitutional issues in the same
manner as an increasing number of federal civil courts have done. That
is, the court reviewed the merits of the petitioner's constitutional claims
and determined that since they were insufficiently supported by the re-
cord and had been thoroughly considered by the military reviewing au-
thorities, the petition should be dismissed without deciding the scope of
review of the constitutional issues. Taking this reasoning full circle, a
court finding support for the petitioner's allegations after a brief review
on the merits would then have to go back and determine if this finding
were within the permissible scope of review. Such a procedure is awk-
ward at best.

However, the crucial and significant aspect of Allen is not the
circumvention of the issue of the scope of review of alleged constitutional
errors; it is, rather, the court's holding that federal civil courts have the
power to and must review a military prisoner's allegations of statutory
error committed by the military tribunal. The specific error alleged in
Allen was that the petitioner's guilty plea had been accepted in violation
of a clear Uniform Code of Military Justice mandate that it not be

Mitchell v. Swope, 224 F.2d 365 (9th Cir. 1955). Other courts have reviewed the issues of constit-
tional law de novo by either ignoring or bypassing Burns. See, e.g., Burns v. Harris, 340 F.2d 383
(8th Cir. 1965); Fischer v. Ruffner, 277 F.2d 756 (5th Cir. 1960); White v. Humphrey, 212 F.2d
503 (3d Cir. 1954). At least one lower court has implied that a determination of the fairness of
consideration by the military court necessarily involves an inquiry into the correctness of its deci-

See, e.g., cases cited note 23 supra.


E.g., Swisher v. United States, 354 F.2d 472 (8th Cir. 1966); Kasey v. Goodwyn, 291 F.2d

436 F.2d at 628-29.
In holding that review of the alleged statutory error was required, the court concerned itself only with the language of the applicable habeas corpus statute, which provides that “[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws . . . of the United States,” and stated: “Given this language, we cannot refuse to consider all alleged errors of law committed by the military without explicit authority for doing so.” The court avoided the Burns full-and-fair-consideration test for this procedural question by interpreting Burns as being limited to questions of a constitutional magnitude. Even assuming such a limitation on Burns, it is nonetheless a questionable interpretation of the federal habeas corpus statute that would require the court to consider alleged procedural defects unless explicit authority exists for not doing so; the language of the statute merely prohibits granting the writ if the petitioner is not confined in violation of the “laws” and does not affirmatively require his release if he is so confined.

The First Circuit’s interpretation of the habeas corpus statute effectively grants the military prisoner a virtual trial de novo in the federal court when he merely alleges departures from the statutorily prescribed pretrial procedure to be followed by the convening authority or the court-martial. Thus an entirely new area of review is opened at a time when the federal courts are striving to find a solution to the almost overwhelming flood of habeas corpus petitions of recent years. Moreover, apparently Allen would require a district court to consider a petitioner’s allegations of violations of procedural statutes notwithstanding exhaustive, fair review of the same alleged errors by the military courts, and still the district court could refuse to consider the petitioner’s more serious, constitutional allegations by resort to the Burns full-and-fair-consideration language.

The priority of a petitioner’s constitutional allegations is well settled when the petitioner is a state prisoner. The court may not review alleged procedural or statutory error unless there is a substantial allegation of a denial of a constitutional right. When the petitioner is a non-

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31436 F.2d at 629.
34See authorities cited note 4 supra.
military federal prisoner, his constitutional claims still receive priority even though the pertinent habeas corpus statute provides that the petition may be granted if the petitioner is held "in violation of the Constitution or laws . . . of the United States." In cases involving non-military federal prisoners, the courts have considered the legislative history of the statute and have determined that the term "laws" is to be construed narrowly and that relief will not be granted in every case where the prisoner is held in violation of the federal laws. Thus the Allen result—a great expansion of the power of federal courts to review allegations by military prisoners of statutory error and an apparent retention of the relatively narrow scope of review of their constitutional allegations—is contrary to the history of the development of the writ and is in marked contrast to the scope and priorities of review of petitions by state and non-military federal prisoners.

Although Allen clarifies the scope of review of statutory error—by holding that all such errors are to be reviewed—and thus contributes to certainty in this area of the law, the decision will precipitate a barrage of issues respecting the manner in which such review is to be carried out and the relief to be afforded. For example, when the statutory correctness of a pre-trial procedure turns on disputed facts, the court must either accept the government's version of the history of events or resolve the factual dispute de novo as is done with respect to facts upon which the constitutional rights of state prisoners depend. And, of course, there is the possibility of treating some statutory errors as "harmless"—but which ones? Furthermore, as a practical matter, the government won the case but lost the issue. How is the government to appeal expansion of the scope of review of habeas corpus if the reviewing court requires the government to engage in a factual dispute and then denies the writ? Allen typifies the hopeless situation in which the lower federal courts find themselves; their attempts to settle habeas corpus issues seem to result only in the geometric multiplication of issues. That fact and Allen's distortion of the priorities of review make it imperative that the Supreme Court take the first opportunity to clarify its guidelines and restore symmetry in the area of military habeas corpus.

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30FED. R. CRIM. P. 52.
31See, e.g., Katz & Nelson.