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The scope of review by a federal district court in a habeas corpus[1] proceeding is particularly important,[2] 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.[3] 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[4] and non-military federal[5] 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.[6] In *Allen v. VanCantfort*[7] 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.[8] The

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[1]28 U.S.C. §§ 2241-55 (1970) provide the statutory framework within which federal courts entertain collateral attacks on the confinement of state, federal non-military, and military prisoners.

[2]The Supreme Court has stated that the history of the writ of habeas corpus "is inextricably intertwined with the growth of fundamental rights of personal liberty." Fay v. Noia, 372 U.S. 391, 401 (1963). *See also* Hart, *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 101-25 (1959); Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact Finding Responsibility*, 75 YALE L.J. 895, 897-906 (1966).

[3]Good discussions of this problem appear in Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960).

[4]Townsend v. Sain, 372 U.S. 293 (1963); Fay v. Noia, 372 U.S. 391 (1963); 28 U.S.C. § 2254 (1970). See Wright & Sofaer, *supra* note 2, at 895.

[5]*See, e.g.*, Waley v. Johnston, 316 U.S. 101 (1942); 28 U.S.C. § 2255 (1970); Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378 (1964).

[6]Katz & Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 OHIO ST. L.J. 193, 194 (1966) [hereinafter cited as Katz & Nelson].

[7]436 F.2d 625 (1st Cir. 1971).

[8]*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.[9] 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.[10] 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.[11] The one exception to the hands-off policy was the exercise of the habeas corpus jurisdiction of federal courts,[12] although as a result of the general reluctance of civil courts to review military decisions the scope of review was very limited.[13] Originally inquiry was confined to whether the military court had jurisdiction over the person concerned and the subject matter of the case.[14] Expansion soon followed when federal civil courts inquired whether the military court had exceeded its

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[9]Allen v. VanCantfort, 316 F. Supp. 222 (D. Maine 1970).

[10]*Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1864); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858).

[11]By contrast, the federal civil judiciary, for example, has its roots in U.S. CONST. art. III, § 1.

[12]*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].

[13]Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 43 (1961); Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 VA. L. REV. 483, 488 (1969).

[14]*Ex parte* Reed, 100 U.S. 13 (1879). *See generally* AYCOCK & WURFEL 314-29.

power in the imposition of the sentence,[15] 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*[16] 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.[17] However, this expansion of the review by civil courts of military court decisions was soon undermined by the Supreme Court in *Hiatt v. Brown*:[18] "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.' "[19] 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.[20] This was the situation when the Supreme Court decided the landmark case of *Burns v. Wilson*[21] 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 . . . . [A]ccordingly 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.[22]

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.[23] This expansion of the previous narrow jurisdictional inquiry

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[15]Carter v. McClaughery, 183 U.S. 365 (1902).

[16]304 U.S. 458 (1938).

[17]Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947). The apparent, temporary expansion of military habeas corpus is considered in Katz & Nelson 200-02.

[18]339 U.S. 103 (1950).

[19]*Id.* at 111.

[20]*See generally* Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960).

[21]346 U.S. 137 (1953).

[22]*Id.* at 144.

[23]Some 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 distinguished from jurisdictional grounds, remains intact."[24] Subsequent Supreme 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,[25] and at least one court has applied the *Burns* test to all the petitioner's contentions, not just those of a constitutional dimension.[26]

The First Circuit in *Allen*, after referring to the confusion surrounding the *Burns* decision, treated the constitutional issues in the same manner as an increasing number of federal civil courts have done.[27] That is, the court reviewed the merits of the petitioner's constitutional claims and determined that since they were insufficiently supported by the record *and* had been thoroughly considered by the military reviewing authorities, the petition should be dismissed without deciding the scope of review of the constitutional issues.[28] 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 awkward 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

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Mitchell v. Swope, 224 F.2d 365 (9th Cir. 1955). Other courts have reviewed the issues of constitutional 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 decision. Sweet v. Taylor, 178 F. Supp. 456, 458 (D. Kan. 1959).

[24]AYCOCK & WURFEL 371.

[25]*See, e.g.*, cases cited note 23 *supra*.

[26]Bourchier v. Van Metre, 223 F.2d 646 (D.C. Cir. 1955).

[27]*E.g.*, Swisher v. United States, 354 F.2d 472 (8th Cir. 1966); Kasey v. Goodwyn, 291 F.2d 174 (4th Cir. 1961). *See also* Katz & Nelson 206-11.

[28]436 F.2d at 628-29.

accepted.[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,"[30] 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."[31] 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.[32]

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.[33] 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.[34] When the petitioner is a non-

[29] *See* 10 U.S.C. § 845(b) (1970).

[30] 28 U.S.C. § 2241(c)(3) (1970) (emphasis added).

[31] 436 F.2d at 629.

[32] 28 U.S.C. § 2241(c)(3) (1970).

[33] C. WRIGHT, LAW OF FEDERAL COURTS 217 (2d ed. 1970).

[34] *See* 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."[35] 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.[36] 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?[37] 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.[38]

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[35]28 U.S.C. § 2241(c)(3) (1970).

[36]Hill v. United States, 368 U.S. 424 (1962); United States v. Hayman, 342 U.S. 205 (1952).

[37]FED. R. CRIM. P. 52.

[38]*See, e.g.*, Katz & Nelson.