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THE APPLICABILITY OF THE BILL OF RIGHTS TO A COURT-MARTIAL PROCEEDING

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This comment will consider the extent to which a federal court, by the use of the writ of habeas corpus, may upset decisions of military courts-martial in cases involving members of the United States Armed Forces.

It would seem logical that the Bill of Rights of the United States Constitution would apply equally to servicemen as well as civilians. This premise, however, cannot be summarily assumed. The applicability of due process standards to a court-martial proceeding has long been a subject of misinterpretation and in light of recent cases may disclose defects in the courts-martial system.

Courts-martial are independent tribunals created by statute pursuant to the federal constitution. They have complete power and jurisdiction to determine judicially any cause involving offenses under the Uniform Code of Military Justice.[1] Judicial review by federal courts over the decisions of military tribunals can only be exercised when the military courts have exceeded the bounds of the jurisdiction marked out for them by law. Within these bounds they may act freely, and the civil courts will respect their action as final. But once they overstep these bounds, jurisdiction is lost, and the federal courts may intervene.

This power to intervene stems from the constitution through the use of the writ of habeas corpus.[2] The purpose of the writ is to secure the release, by judicial decree, of persons who are illegally restrained. It is a writ of liberty and will not issue for the purpose of correction of errors in the proceedings of the court, for there a writ of error may be granted. The writ of habeas corpus is a collateral attack and will be granted only where a determination has been made that the tribunal rendering the judgment was without jurisdiction.[3]

Elements of Traditional Jurisdiction

Jurisdiction can best be defined in its traditional sense by an examination of early cases which have acknowledged the power of the federal district courts to act. In *Dynes v. Hoover*,[4] the court restricted the scope of a collateral attack of the judgment of the military tribunal to cases in which the court-martial is found not to have jurisdiction over the subject matter or offense or in which it fails to observe the procedural rules prescribed by law for the conduct of the trial. A finding of no jurisdiction has the effect of voiding the entire proceedings and allows the civil courts to issue the writ of habeas corpus.

There are three well defined jurisdictional categories which may always be attacked by the writ of habeas corpus. The first, and probably the most common, is the consideration of the status of the person, i.e., whether the accused is within the court-martial jurisdiction.[5] The second consideration is whether the offense charged is within the jurisdiction of a court-martial;[6] the third con-

[1] By the authority granted in the U.S. CONST. art. I, §8, cl. 14, Congress has the power: "To make Rules for the Government and Regulation of the land and naval Forces. . . ." Pursuant to this power, Congress has enacted the Uniform Code of Military Justice, 64 STAT. 108 (1950), 50 U.S.C. §§551–741 (1952).

[2] U.S. CONST. art. I, §9, cl. 2. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." See: 28 U.S.C.A. §2241 (1959) for statutory enactment of power to grant writ.

[3] Swaim v. United States, 165 U.S. 553 (1897). Imperfections in appointment of the officer acting as judge advocate will not affect the jurisdiction of the court-martial. The jurisdiction will be affected only when the person accused of the offense charged is not within the scope of the court-martial power.

[4] 61 U.S. (20 How.) 65 (1857). *In re* Grimley, 137 U.S. 147 (1890), petitioner claimed his enlistment was void because he was over-age, hence he was not subject to jurisdiction of court-martial. See also Collins v. McDonald, 258 U.S. 416 (1922).

[5] United States v. McIntyre, 4 F.2d 823 (9th Cir. 1925), (question of petitioner's ever having been inducted); United States *ex rel.* Pasela v. Fenno, 167 F.2d 593 (2nd Cir. 1948), (considering whether a reservist was lawfully on active duty status); Hironimus v. Durant, 168 F.2d 288 (4th Cir. 1948), (question of whether an officer on terminal leave was subject to trial.)

[6] Johnson v. Biddle, 12 F.2d 366 (8th Cir. 1926), (whether offense was committed in wartime); United States v. Maney, 61 Fed. 140 (C.C. Minn. 1894) (whether offense was triable only in state courts.)

sideration is concerned with the legal competency of the personnel making up the court-martial.[7]

The rationale for limiting the scope of review of the civil courts to jurisdictional questions stems from matters of policy concerning the military court-martial and is historical in nature. The discipline necessary to maintain the efficiency of the armed forces requires other and swifter modes of trial than are furnished by civil courts. Pursuant to the power conferred by the constitution, Congress has declared the kind of trial and the manner in which it should be conducted for offenses committed while in the military.[8] It was stated a century ago that a person who enters the military surrenders his rights to be tried by the civil courts and the rules and procedures which guide them.[9] Consequently, the power of Congress in the governing of land and naval forces was not to be affected by the specific trial guarantees of the Bill of Rights.

The courts have been consistent in applying this doctrine, particularly with respect to the fifth and sixth amendments. In claims of denial of due process and other violations of fifth and sixth amendment rights, the civil courts have held that such allegations of error, urged singly or collectively, do not amount to a denial of a fair trial so as to cause the court-martial to lose its jurisdiction.[10] It is to be remembered that the procedure followed in military courts is sanctioned by law, and must be viewed in the context of the military, even though some of these procedures might not be in harmony with the ideals for the administration of justice in a civil court. With this philosophy in mind, the civil courts have repeatedly stated that all that remains for determination in a habeas corpus proceeding is the question of jurisdiction.[11] Thus they impliedly state that any constitutional deprivations will not merit a review through habeas corpus.

Military Due Process

The military courts, however, have been able to rationalize their actions by the obscure phrase "military due process." Much has been written of military due process, yet it still remains undefined. It is not jurisdictional, nor is it constitutional due process. It is not general prejudice, and it has not once been mentioned by Congress in the Uniform Code of Military Justice. Speaking generally then, it seems that a substantial violation of a provision of the Uniform Code of Military Justice resulting in error which the Court of Military Appeals[12] finds materially prejudiced the rights of an accused, would constitute a want of military due process. Conversely, any military tribunal's action, within its jurisdiction, supported by "some substantial evidence" in which the court finds no error materially prejudicial to the rights of the accused, is one complying with military due process.[13] To face the problem in more concrete terms, the Supreme Court has said in *Reaves v. Ainsworth*:[14]

> "[W]hat is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal, *acting within the scope of its lawful powers*, cannot be . . . set aside by the [civil] courts." (Emphasis added.)

Civilian Use of Habeas Corpus

In contrast, it is clearly settled by statutory mandate that a civilian who suffers an unconstitutionally conducted trial in a civil court can get

[7] Uniform Code of Military Justice art. 26(a), 64 Stat. 108 (1950), 50 U.S.C. §590 (1952). The question of the qualifications of the law officer goes to the jurisdiction of the tribunal. McClaughry v. Deming, 186 U.S. 49 (1902). See also: Uniform Code of Military Justice art. 27(a), (c), 64 Stat. 108 (1950), 50 U.S.C. §591 (1952).

[8] Uniform Code of Military Justice, 64 Stat. 108 (1950), 50 U.S.C. §§551-741 (1952).

[9] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

[10] Durant v. Hiatt, 81 F. Supp. 948 (N.D. Ga. 1948). Petitioner was convicted by a general court-martial of larceny. He set up numerous grounds for denial of due process, *e.g.*, illegality of arrest, violations of confidential relationship between attorney and client, misconduct of trial judge, and the unlawful absence of an assistant trial judge; but the court found the totality of such errors did not constitute a denial of due process. See also *Ex parte* Quirin, 317 U.S. 1, 39 (1942), where the Court explained that § 2 of Article III of the constitution provided that, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." And that the intent of the framers of the constitution was not to enlarge the common law right to trial by jury, but was to preserve unimpaired trial by jury in all those cases where it had been recognized by the common law. The Court went on to say that the existence of the fifth and sixth amendments did not enlarge this right.

[11] *Ex parte* Quirin, 317 U.S. 1 (1942).

[12] Uniform Code of Military Justice, 64 Stat. 108 (1950), 50 U.S.C. §§551-741 (1952). Review of courts-martial for errors of law.

[13] Wurfel, *Military Due Process: What is It?*, 6 VAND. L. REV. 251 (1952).

[14] 219 U.S. 296, 304 (1911). Petitioner, an officer in the United States Army, was retired with pay for life after failing an examination. He claimed that his commission constituted property of which he could not be deprived without due process of law. See also; United States *ex rel.*, French v. Weeks, 259 U.S. 326 (1922).

relief through the writ of habeas corpus.[15] Historically, the scope of review for persons convicted in civil courts has always been considerably wider than that of military courts. In examining constitutional violations, the federal courts have inquired deeply into the facts of the individual cases to determine if the allegation was true and whether it could be explained away in order to leave the prior proceeding untouched. For example, the Supreme Court acknowledged its jurisdiction and granted habeas corpus after examining the facts of a case which claimed denial of due process due to mob domination of the trial.[16] In light of this wider scope of review, the Court granted habeas corpus in another case because of the introduction of perjured testimony which the Court said was inconsistent with the demands of justice and was in violation of due process of law.[17] Such cases are illustrative of the more liberal approach in the treatment of cases originating in civil cases as opposed to cases coming from military courts.

The most important judicial determination of federal courts' jurisdiction to grant habeas corpus in civil cases came in *Johnson v. Zerbst*.[18] The court here noted that the scope of review in habeas corpus proceedings has been constantly broadened and desired to take the step breaking completely from the concept of "traditional jurisdiction" and entered the realm of constitutional defect. Reviewing courts, in habeas corpus proceedings, have often said that they will look beyond mere form and inquire into the substance of the matter and the practicalities of the situation. In this case, the Court limited its discussion to the applicability of the sixth amendment to an accused person (but impliedly the whole Bill of Rights has been encompassed). The Court said the application of the sixth amendment is mandatory, and thus an essential jurisdictional prerequisite to a court's depriving a citizen of his life or liberty. It is important to note that this was the first instance in which the Supreme Court announced that a constitutional deprivation goes to the jurisdiction of the trial court, hence allowing habeas corpus as an appropriate remedy. The court stated that the sixth amendment, if not properly applied, stands as a jurisdictional bar to a valid conviction. The effect of the decision is that if any constitutional requirements are not complied with, the court will lose its jurisdiction to proceed. Any judgment of conviction pronounced by a court without jurisdiction is void.[19]

The precedent set by *Johnson v. Zerbst* has been consistently applied throughout the federal system. Courts have paid particular attention to the preservation of constitutional rights, especially those encompassed within the fifth and sixth amendments.[20] In 1950, in *Smith v. United States*,[21] the Court of Appeals of the District of Columbia reexamined the scope of habeas corpus on the basis of past Supreme Court cases and concluded that habeas corpus was available to correct the withholding of any constitutional right which amounted to a denial of a fair trial. This, in effect, is a total application of *Johnson v. Zerbst*.

In such environment, the civil courts have not been completely inactive in keeping pace with changing concepts of justice as applied to the military field. For example, the protection against double jeopardy afforded by the fifth amendment has been recognized as applicable to courts-martial.[22] Civil courts will also entertain a writ of habeas corpus in courts-martial cases to consider the severity of the sentence as a possible violation of the eighth amendment.[23] Presumably it is a

[15] 28 U.S.C.A. §2241(c)(3) (1959): "The writ of habeas corpus shall not extend to a prisoner unless—He is in custody in violation of the Constitution or laws or treaties of the United States. . . ."

[16] Moore v. Dempsey, 261 U.S. 86 (1923). Petitioner claimed his trial was a total sham because of mob pressures constituting a complete denial of due process.

[17] Mooney v. Holohan, 294 U.S. 103 (1935). (Federal Court reviewed state court's decision where petitioner claimed a violation of due process due to admission of perjured testimony.) For similar treatment, see Walker v. Johnson, 312 U.S. 275 (1941) and *Ex parte* Neilsen, 131 U.S. 176 (1889).

[18] 304 U.S. 458 (1938). After petitioner's conviction in a district court for possession of counterfeit money, he petitioned the Court for a writ of habeas corpus alleging a denial of the sixth amendment because he had no lawyer, but respondent contended the right was waived. The case was reversed.

[19] *Id.* at 468.

[20] Jones v. Huff, 152 F.2d 14 (D.C. Cir. 1945), held that the use of the writ of habeas corpus extends to those exceptional cases where a conviction has been found in disregard of constitutional rights and where the writ is the only effective means of preserving such rights. Scott v. Aderhold, 116 F.2d 797 (10th Cir. 1940), held that habeas corpus was the proper remedy where petitioner was denied benefit of counsel in a criminal case.

[21] 187 F.2d 192 (D.C. Cir. 1950). At petitioner's trial, a policeman who interrogated petitioner during period of illegal detention, was allowed to testify; this was the basis of a claim of denial of due process.

[22] Sanford v. Robbins, 115 F.2d 435 (5th Cir. 1940). (Claim of double jeopardy was frivolous because jeopardy had not yet attached, for President had not signed order of first conviction.)

[23] Powers v. Hunter, 178 F.2d 141 (10th Cir. 1949). Petitioner claimed that his sentence violated the prohibition against cruel and unusual punishment. After

matter of natural justice that the prohibition against cruel and unusual punishments be incorporated in all court-martial proceedings. The Court of Appeals for the Tenth Circuit in acknowledging the fact that they have jurisdiction to determine such violations said:

> "The sentence in each instance must be commensurate with the crime, otherwise it would violate the constitutional prohibition against cruel and unusual punishment."[24]

The years following World War II found the federal courts subscribing to a more liberal approach where a denial of due process in a military proceeding was claimed. The lower civil courts were attempting to give a greater semblance of fairness to the military proceeding by reducing the disparity between the concept of military due process and that of constitutional or fifth amendment due process. For example, the Court of Appeals for the Third Circuit, in dicta, defined the status of a person in the armed forces:

> "We think [the] basic guarantee of fairness afforded by the due process clause of the fifth amendment applies to a defendant in criminal proceedings in a federal military court as well as in a federal civil court. An individual does not cease to be a person within the protection of the fifth amendment of the Constitution because he has joined the... armed forces and has taken the oath to support that Constitution with his life, if need be."[25]

The court went on to say that these constitutional guarantees do not require the same exactness in a military court as in a civil court, but rather must be applied in the context of military law or military "due process." Nevertheless, the due process clause guarantees to servicemen that military court procedure will be applied to them in a fundamentally fair way.

The crest of liberality was reached in *Shapiro v. United States*.[26] Borrowing heavily from the treatment of habeas corpus given to cases originating in civil courts, the court cited *Johnson v. Zerbst*[27] and declared that jurisdiction may be lost in the course of the trial due to constitutional deprivations and that, "it would... go without saying that these amendments apply as well to military tribunals as to civil ones."[28] This was an express application, without reservation, of the fifth and sixth amendments, and even went so far as to equate military and civil courts, stating that in both systems of justice a denial of defendant's rights under the fifth and sixth amendments deprives the court of jurisdiction to proceed, and any conviction rendered would be void.

The Supreme Court, in later cases, refused to accept this theory and adhered to the idea that the scope of review by a civil court of a court-martial proceeding would not extend to constitutional questions.[29] The Court pointed out, in dicta, that review is only extended to cases where there has been a gross abuse of discretion which would, in effect, give rise to a defect in the jurisdiction of the court-martial. This was the rationale of the courts in refusing to hear subsequent cases alleging the denial of due process in matters affecting such things as sufficiency of evidence, adequacy of pre-trial investigation, and competency of defense counsel.[30]

Once more the traditional concept of "jurisdiction," that is, a properly constituted court-martial having jurisdiction over the person and subject matter and having the power to impose a sentence, became the critical test. And it appeared that the civil courts, in reviewing a petition for habeas corpus of a military prisoner, refused to take judicial notice of the wide scope of review offered

a careful review, the petition was dismissed. *But cf., Ex parte* Dickey, 204 Fed. 322 (D. Mo. 1913), where the court said the severity of a sentence cannot be reviewed by a writ of habeas corpus.

[24] Powers v. Hunter, 178 F.2d 141, 145 (10th Cir. 1949).

[25] Innes v. Hiatt, 141 F.2d 664, 666 (3rd Cir. 1944). After a lengthy discussion of due process, the court found that the points argued by petitioner lacked merit and the petition was denied. See also Hayes v. Hunter, 83 F. Supp. 940 (D. Kan. 1948), where the court said that total lack of evidence at the trial level is a sufficient allegation to give civil courts jurisdiction to grant writ of habeas corpus.

[26] 69 F. Supp. 205 (Ct. Cl. 1947). Petitioner in a suit to recover salary alleged that the court-martial lost jurisdiction to render a verdict because of the unfair treatment accorded him which amounted to a denial of his rights under the fifth and sixth amendments.

[27] See note 18 *supra*.

[28] See note 26, *supra*, at 207.

[29] See note 30 *infra*.

[30] Humphrey v. Smith, 336 U.S. 695 (1949). Petitioner's allegation, as in Henry v. Hodges, 76 F. Supp. 968 (S.D. N.Y. 1948), was that the court-martial lost its jurisdiction because of an impartial pre-trial investigation, i. e. the arresting officer was one appointed to conduct pre-trial investigation. The Supreme Court rejected this contention and stated that pre-trial investigation cannot properly be construed as an indispensable requisite to the exercise of general court-martial jurisdiction, and therefore does not empower civil courts in habeas corpus proceedings to invalidate court-martial judgments.

to a petitioner for habeas corpus originating from a federal civil court.

Present Application of Habeas Corpus to Servicemen

The case of *Burns v. Wilson*[31] blazed a new trail and broadened the scope of review of court-martial cases through habeas corpus. Decided by the United States Supreme Court in 1953, it was a case in which petitioners alleged that they were subjected to illegal detention, that coerced confessions were extorted from them, that they were denied counsel of their choice, and that there were gross abuses of due process.

The Court first considered its jurisdiction in habeas corpus cases and stated that the statute which grants jurisdiction over persons confined by the military courts is the same statute which vests the Court with jurisdiction over persons confined by civil courts. The Court noted, however, that in military habeas corpus proceedings the scope of review had always been more narrow than in civil cases. It is important to bear in mind that there is an ever existing disparity between military and federal law which prevails to preserve the overriding demands of discipline and duty in the military. The court took notice of this and stated:

> "Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. . . . [T]he rights of men in the armed forces must perforce 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."[32]

The Court recognized the importance of protecting the constitutional rights of a member of the armed forces when considering the possibility that the military reviewing court may refuse to hear claims such as in petitioner's case:

> ". . . For the constitutional guarantee of due process is meaningful enough and sufficiently adaptable to protect soldiers . . . as well as civilians . . . from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which long have been recognized and honored by the military as well as the civil courts."[33]

It was noted that these rights may be modified by the requirements of discipline, but they cannot be completely ignored merely because a person is in uniform. The court broke the bounds of the traditional limit of jurisdiction and announced that the test should be one of "fundamental fairness." When it is established in the habeas corpus proceeding that an appellate military court has fully and fairly heard the charges of unfairness, its decision is binding on civil courts. Consequently, *the civil courts would issue habeas corpus only if it decided that the military reviewing court failed to give the allegations full and fair consideration.*

After a careful examination of the record, the Court said that the military court had carefully scrutinized all allegations of the petitioner and had found no due process violations. Therefore, it is now the limited function of the civil courts to determine only if the military courts have given a full and fair consideration to each of the claims. It is not the function of the civil courts merely to reweigh the evidence. Consequently, in order to maintain a successful application for a writ of habeas corpus, it becomes necessary for petitioner to show that the military review was legally inadequate to resolve the claims which are urged upon the civil court.

The rationale of Justice Douglas' dissent was that habeas corpus should be granted if the facts showed the military court erred in applying the standards of due process as formulated by the civil courts. He helps describe this adherence to the basic constitutional guarantees by noting that judicial review of military courts-martial is no longer limited to questions of jurisdiction in the "traditional" sense. To amplify this, it is important to analyize the fifth amendment.[34] The fifth amend-

[31] 346 U.S. 137 (1953). Petitioner, a member of the United States Air Force, was tried by court-martial and was found guilty of murder and rape and sentenced to death. Petitioner in his allegations claimed he was denied due process and listed many alleged violations such as being mistreated and subjected to continuous questioning without being informed of his rights, the planting of evidence against petitioner by the military authorities, being detained without arraignment until the court-martial convened, and many others. All of these allegations were found to be without merit. The Supreme Court recognized this and denied the writ.

[32] *Id.* at 140.

[33] *Id.* at 142.

[34] U.S. CONST. amend. V. "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; nor shall any person be subject for the

ment expresses only one specific exception to its general application, and that is for cases "arising in land or naval forces" no indictment is needed before trial. Applying the legal maxim—the express mention of one thing implies the exclusion of all others, it seems irrational, in light of the above, that the other provisions of the fifth amendment (and of the Constitution) can mean one thing in civil courts and another in military courts. Therefore, a military court should be under an obligation to apply the rules of due process as formulated by the Supreme Court, and not those formulated by a military tribunal.

On petition for rehearing, Justice Frankfurter, dissenting, was quick to reject the stand that the review of military cases through habeas corpus has always been more narrow than that of civil cases. He noted that throughout the years the review available through habeas corpus has been limited to questions of jurisdiction in both civil and military cases. But in 1937 the Court decided *Johnson v. Zerbst* and gave new content to the term "jurisdiction" so as to encompass constitutional deprivations. Whether the holding of that case is to be applied in the military sphere can only be implied from the language of Justice Frankfurter, but it appears that he is an advocate of that view. He said:

> "This court has never considered the applicability of *Johnson v. Zerbst* to military habeas corpus cases . . . [but] if a denial of due process deprives a civil body of "jurisdiction", is not a military body equally without "jurisdiction" when it makes such a denial, whatever the requirements of due process in the particular circumstances may be."[35]

A military reviewing court must give full and fair consideration to questions relating to the guarantees afforded an accused by the Constitution; and if and when this is done to the satisfaction of the civil courts, the latter will not review the case. This principle, as laid down by *Burns v. Wilson*, has been strictly applied in subsequent cases.[36] The philosophy of the courts, in reviewing military cases, is that if the allegations of the petitioner affect either jurisdiction or are of a constitutional nature, the court will have jurisdiction to issue the writ. However, the writ will issue only after the decision that there was not a full and adequate review by the military courts. The scope of review has been expanded and emphasis has been shifted from mere "jurisdiction" to broader considerations of the fullness and fundamental fairness of the totality of the court-martial proceedings in compliance with the Constitution.[37]

Since 1953, the various circuits have not been unanimous in their interpretation of the *Burns* case. The Court of Appeals for the Third Circuit has apparently struck out on its own in its interpretation of *Burns* and bases its decisions on the phrase "a fundamentally fair trial."[38] Rather than look to the record of the military appellate court, this court has considered the procedures of the trial court and their adherence to the federal Constitution. The court stated:

> ". . . if the court-[martial] were shown to have fixed 'guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts', it would be open to the federal civil courts to grant the writ sought. . . . Our own careful examination of the record does not reveal that appellant's *trial* was in violation of that rule."[39] (emphasis added).

The theory that the federal court should examine

same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[35] Burns v. Wilson, *supra*, note at 848.

[36] Dixon v. United States, 237 F.2d 509 (10th Cir. 1956); Day v. Davis, 235 F.2d 379 (10th Cir. 1956); and Dickenson v. Davis, 143 F. Supp. 421 (D. Kans. 1956). Cases concerning themselves with the concept of fullness and fairness of the review by the military reviewing court. The cases are in full accord with *Burns v. Wilson*.

[37] In Young v. Brucker, No. 2567 H.C. (D. Kans. 1958) the court followed the test laid down by the *Burns* case, but in an interesting portion of dicta said that if a civil court, in examining the record, should find an absence of any evidence to support the conclusion, it is a matter of law that the military court had not given full and fair consideration to petitioner's claim. See also Thomas v. Davis, 249 F.2d 232 (10th Cir. 1957); Bouchier v. Van Metre, 223 F.2d 646 (D.C. Cir. 1955); De Coster v. Madigan, 223 F.2d 906 (7th Cir. 1955).

[38] White v. Humphrey, 212 F.2d 503 (3rd Cir. 1954). Petitioner claims he was denied constitutional and military due process because in his trial there was no instruction by the law member in open court to the members of the court-martial defining the crime of voluntary manslaughter and its elements, and self defense as related to the defendant. The court decided the record was not sufficient to establish that defendant's trial lacked due process, and petition was denied.

[39] *Id.* at 507.

the record of the military trial court to find constitutional deprivations was espoused by the dissenting justices in the *Burns* case. However, this is not the law as set down by that case.

Conclusion

Currently, the law defining scope of review available to a convicted serviceman in the civil courts is well formulated. The doctrine as recited in *Burns v. Wilson* is that a civil court cannot grant a petition for habeas corpus if the military tribunals have fully and fairly considered the allegations of the petitioner. An analysis of *Burns*, however, shows that this case actually accomplished little in giving a military prisoner any added protection against infringements of his civil liberties. This can be best illustrated by an example of the gross abuse of due process and a showing of the ineffective relief a defendant would get from a federal district court under the present interpretation of the *Burns case.*

Hypothetically, a soldier is on trial for a crime, and in the course of the trial the prosecution offers various witnesses who present very damaging testimony. At no time is counsel for the defense allowed to cross-examine the witnesses, and consequently the defendant is convicted. The defendant then appeals to the Court of Military Appeals alleging denial of due process because of the lack of the opportunity to cross-examine. After careful consideration, the appellate court decides that no injustice had been committed and justifies the actions of the trial court as a part of military due process. The defendant then petitions the federal district court for a writ of habeas corpus again alleging a denial of due process. We now come to the unfortunate situation resulting from the *Burns* decision. The hands of the federal court are tied. The Court of Military Appeals has given the case a full and fair hearing, and therefore the federal court cannot interfere, because as it is argued, military law "is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment" and therefore the decision must stand.

This argument is untenable. The desire to preserve military law with its overriding demands of discipline and duty should in no way affect court room procedures or abridge the rights of any serviceman accused of a crime. Once the accused enters the court room he should be afforded the same protections as any civilian in a similar situation. The constitutional protections inherent in our citizenship will in no way alter or amend the application of military law as prescribed in the Uniform Code of Military Justice. It is anomalous that one who enters the armed forces is performing his greatest role as a citizen and yet is reduced to a status where he no longer can enjoy the rights which protect his civilian counterpart.[40]

[40] Of the members of the Supreme Court who joined in the majority opinion in *Burns v. Wilson*, only Mr. Justice Clark is still on the Court. However, all three dissenting justices are still present. One may speculate as to the result of another *Burns* type case if presented to the Supreme Court today. This writer believes the view of the dissenters would prevail.

ABSTRACTS OF RECENT CASES

Failure To Deny Incriminatory Statements Made by Co-conspirator Is Admissible in Evidence Against Silent Defendant—Petitioner, a Negro, was convicted of first degree murder and sentenced to death. A confession made by petitioner was excluded at the trial as involuntary, since it was obtained after a law enforcement officer informed the defendant that a large group of white people was looking for him. After defendant had been incarcerated, his co-conspirators confessed the crime and implicated the defendant by statements made in his presence. Petitioner refused to affirm or deny the accusations levelled against him. Upon appeal the Supreme Court of Arkansas held that petitioner's failure to deny the accusations made by his co-conspirators was admissible in evidence against him as an admission, since their statements were made in his presence while he was in custody and thus secure from possible mob violence. *Boyd v. State*, 328 S.W.2d 122, (Ark. 1959).

In *Commonwealth v. Machado*, 162 N.E.2d 71 (Mass. 1959) a similar result was reached. Petitioner was convicted of incest with his 16 year old step-daughter. The stepdaughter gave the police a detailed, signed statement accusing the defendant of having intercourse with her on several occasions. At the trial, a police officer was permitted to testify that when he showed the defendant the child's signed statement and asked him what he had to say about it defendant replied "that he neither admitted it nor denied it." Upon appeal, the Supreme Judicial Court of Massachusetts affirmed, holding that the officer's testimony

was properly admitted since "it is the well settled law of this Commonwealth that where an accused responds to incriminating accusations made of him in an equivocal, evasive, or irresponsive way inconsistent with his innocence, both the accusations and his answer are admissible." Petitioners's contention that he was within his constitutional rights in refusing to answer and that the use of such a refusal against him made a mockery of his privilege against self-incrimination was dismissed without discussion.

In *Moreland v. United States*, 270 F.2d 887 (10th Cir. 1959), the petitioner was convicted of robbing and stealing money and property of the United States from the man lawfully in charge of a postal contract station. Admitted into evidence over his objection were statements made to police officers while they were taking him back to jail after his arraignment. These statements consisted mainly of inquiries as to whether he could make some sort of deal with the authorities and as to the possibility of receiving a light sentence in return. The Court of Appeals affirmed the conviction, holding that the statements were admissible as an implied admission of guilt since it seemed "quite clear that they were not induced by threats, promises, or coercion of any character and were freely and voluntarily made."

Failure To Grant Opportunity To Speak in Mitigation of Sentence Constitutes Reversible Error—Petitioner was convicted of assault in a bench trial before the Municipal Court for the District of Columbia. The trial judge imposed the maximum sentence authorized by law without giving petitioner an opportunity to present any information in mitigation of punishment. Prior to sentencing, the trial judge asked for the previous record of the petitioner, and after examining documents presented by the prosecution, the judge made the following remarks:

"The Court: Well, you haven't got any record that could be cited against you as you sat on the stand, but you've been arrested for investigation three times; you forfeited for drinking in a public place; you forfeited for disorderly conduct on the street four different times, and you have been charged twice and acquitted twice for robbery; is that right?

"The Defendant: Yes, sir.

"The Court: I'm afraid the string for you has run out. In this case you are going to have to serve one year's straight time and you are going to have to pay a fine of five hundred dollars or serve another year. Step him back."

The Municipal Court of Appeals for the District of Columbia affirmed the conviction but remanded the cause for re-sentencing, holding that the sentencing procedure contained in *Fed. Rule Crim. Proc. 32 a.*, was mandatory and not permissive, and that defendant therefore must have an opportunity to speak in mitigation. *Hensley v. United States*, 155 A.2d 77 (Mun. Ct. App. D.C. 1959).

Statutes Implementing Constitutional Right to Speedy Trial Are Interpreted—Petitioner was indicted for the murder of his wife and another man while the three of them were drinking. After several mistrials, he was convicted of manslaughter in the first degree for the killing of the other man and was sentenced to eight years in the state penitentiary. Two years later he moved for dismissal of an indictment charging him with the murder of his wife. He based his claim upon a state statute which provided for the dismissal of a prosecution against one accused of a public offense where the accused is not brought to trial at the next term of court in which the offense is triable. The Court of Criminal Appeals of Oklahoma dismissed the indictment, holding that no good cause for the delay in trying the indictment had been shown. *Jordan v. Phillips*, 344 P.2d 600 (Okla. Crim. App. 1959).

A similar statute providing for dismissal with prejudice of a warrant, indictment or information followed by 180 days of inexcusable delay in prosecution was considered in *People v. Hendershot*, 98 N.W.2d 568 (Mich. 1959). The petitioner was charged by warrant with unlawfully carrying a concealed weapon. After seven months, petitioner filed a writ of habeas corpus requesting that the warrant be dismissed. The Supreme Court of Michigan dismissed the writ, holding that the prosecution had in good faith attempted to ready the cause for trial, but that defendant's delaying motions had caused the matter to extend beyond the 180 day period. Such dilatory tactics by the defendant rendered the delay excusable.

Indictment for Murder Ten Years After Unsuccessful Court-Martial for Same Offense Denies