COLLATERAL ATTACK ON
COURT-MARTIAL CONVICTIONS

Lt Col Robinson O. Everett

Under the literal wording of Article 76 of the Uniform Code of Military Justice,¹ the proceedings, findings, and sentences of courts-martial, upon completion of the appellate review authorized by the Code, are “final and conclusive.” It is becoming more apparent, however, that this wording should not be relied on literally and that court-martial findings and sentences may be subject to collateral attack in several ways.

I. ADMINISTRATIVE REVIEW

In some instances, review of court-martial action can take place through the Discharge Review Boards authorized under 10 U.S.C. 1553. This section provides that the Secretary of a military department shall establish a five-member board to “review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his department.” The reference to sentence of a general court-martial contains the negative implica-

¹ Ed. Note: Although Lt Col Everett is not assigned to the Air Force Systems Command, his article is considered to have such timeliness as to warrant inclusion in this special issue.

Lt Col Everett is a Professor of Law at Duke University and also practices law in North Carolina and the District of Columbia. He served as a Commissioner of the Court of Military Appeals (1953-55) and as Counsel to the Senate Subcommittee on Constitutional Rights (1964). Author of a book and numerous articles on military justice, he received his A.B. and J.D. from Harvard and his L.L.M. from Duke. He is a member of the Bars of North Carolina, District of Columbia, and the United States Supreme Court. His reserve assignment is with the Special Activities Group, Office of The Judge Advocate General, USAF.


2 See Hearings, Subcommittee on Constitutional Rights of the Committee on the Judiciary, 87th Congress, 2d Session, at 865, 920, 954. The question concerns the effect of action by the Correction Board: Does it constitute a setting aside of the findings and sentence, or is it more in the nature of clemency action? Concerning the Correction Boards, see also Everett, Military Administrative Discharges—The Pendulum Swings, 1956 Duke L.J. 41, 62-67.

² Hertsg v. United States, 167 Ct. Cl. 277 (1964); Betts v. United States, 145 Ct. Cl. 530, 172 (footnote continued on page 403)
that the arbitrary refusal of a Correction Board to grant remedy where the court-martial action clearly infringed the applicant's rights may give rise to a judicial remedy.  

II. RELIEF THROUGH THE JUDGE ADVOCATE GENERAL

As originally enacted, the Uniform Code of Military Justice provided in Article 694 that every record of trial by general court-martial would be examined in the Office of the Judge Advocate General, who might in turn direct that the record be reviewed by a Board of Review. The decision of the Board could in turn be certified to the Court of Military Appeals under Article 67(b)(2), but no provision was made for petition by the accused. Under Article 73 of the Code,5 a petition for new trial based on newly discovered evidence or fraud on the court might be submitted to The Judge Advocate General within one year after approval by the convening authority if the court-martial sentence extended to death, dismissal, dishonorable or bad conduct discharge, or to confinement for one year. Thus, in the Army such a petition would normally be available only in general court-martial cases; in the other Services, it would be available also in special court-martial cases where the sentence approved by the convening authority included a bad conduct discharge.

The Military Justice Act of 19686 substantially extended the authority of The Judge Advocate General. Article 69 was amended to provide that, notwithstanding the finality provisions of Article 76, "the findings or sentence, or both, in a court-martial case which has been finally reviewed, but has not been reviewed by a Court of Military Review may be vacated or modified, in whole or in part, by the Judge Advocate General on the ground of newly-discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused." In view of the provisions of Articles 66, this expansion of Article 69 would empower The Judge Advocate General to grant relief in every court-martial case where the approved sentence did not affect a general or flag officer or extend to death, dismissal of a commissioned officer, cadet or midshipman, dishonorable discharge, or confinement for one year or more.7

By means of this amendment, a serviceman who considers himself aggrieved by court-martial action not reviewed by a Court of Military Review has a remedy available without applying to a Correction Board. Moreover, the expanded authority of The Judge Advocate General under Article 69 is not subject to any express time limitation; on the other hand, the application to a Correction Board is subject to such a limitation. There is no express provision that the authority of The Judge Advocate General under Article 69 shall in any way limit the


4 Ashe v. McNamara, 355 F. 2d 277 (1st Cir. 1965); Smith v. McNamara, 385 F. 2d 896 (10th Cir. 1968); Owing v. Secretary of the Air Force (Civ. Action No. 2381-65) (D.D.C. 22 March 1969).

5 10 U.S.C. 869.

6 10 U.S.C. 877.

7 10 U.S.C. 872.


9 The wording of Article 69 seems to contemplate that in cases tried by general court-martial where relief seems appropriate, The Judge Advocate General shall refer the record to the Court of Military Review for review in accordance with Article 66 of the Code. In such instances, the accused cannot petition the Court of Military Appeals for review under Article 67(b)(1); but, if the accused chooses, The Judge Advocate General may certify the case to the Court of Military Appeals. Cases tried by special court-martial where the approved sentence does not include a bad conduct discharge and those tried by summary court-martial cannot be referred to the Court of Military Review but are acted upon by The Judge Advocate General himself. In view of Articles 66 and 69 of the Code, the Judge Advocate General have power in his own right to give relief from findings or sentence which, he considers unjust but which either fall within the jurisdiction of the Court of Military Review pursuant to Article 66 or could be referred to such a Court pursuant to Article 69? The Court of Military Appeals recently held that it lacks jurisdiction to review a denial by The Judge Advocate General of relief under Article 69. United States v. Snyder, USCMCA, CMR (Misc. Docket No. 69-281; decided 14 August 1969.)
power of the Correction Board to grant relief with respect to court-martial action; and since repeals by implication are not favored, one would suppose that the power of the Correction Board is not curtailed by the 1968 legislation.

The Military Justice Act of 1968 also expands Article 73 by allowing two years for submission of a petition for new trial and authorizing such a petition with respect to any type of court-martial action. Thus, the petition for new trial becomes available with respect to summary courts-martial and special court cases not involving an approved sentence to had conduct discharge.

III. EXTRAORDINARY REMEDIES IN THE COURT OF MILITARY APPEALS

In 1953 the Supreme Court decided *Burns v. Wilson*,¹⁰ which in many quarters was interpreted to mean that a conviction by court-martial is insulated from successful collateral attack in a Federal civil court if military authorities have given “full and fair” consideration to the constitutional claims of the accused service member.¹¹ Under this interpretation, convictions by court-martial were less subject to collateral review than were state court convictions.¹²

In dealing with state court convictions, the Supreme Court had enunciated a requirement of exhaustion of available state court remedies.¹³ Partly in response to that requirement, many states have resurrected long forgotten extraordinary common law writs, such as the writ of error coram nobis,¹⁴ or had enacted statutes providing for post-conviction procedures.¹⁵

There was also some precedent suggesting that exhaustion of remedies was required for collateral attack on courts-martial.¹⁶ And certainly the remedies available in military law for reviewing a convicted serviceman’s claim that his constitutional rights had been violated would affect the opportunity for “full and fair” consideration of his claim by military authorities. Thus, if a convicted serviceman had not presented a constitutional issue during the appellate review of his conviction pursuant to the Uniform Code and if no other procedure were available for asserting that claim to military authorities, there would be no opportunity for “full and fair” consideration of his constitutional contentions; and so his path into the Federal courts would not be blocked by *Burns v. Wilson*.

Against this backdrop the Court of Military Appeals in 1954 considered *United States v. Ferguson*.¹⁷ The accused soldiers had been convicted of mutiny at a post stockade and had received lengthy sentences to confinement. While their case was pending before a Board of Review, the Board furnished a transcript of remarks by the convening authority’s staff judge advocate at a conference held with the court-martial

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¹² The desirability of this result was questioned by Mr. Justice Frankfurter in *Burns v. Wilson*, *supra*, note 10 at 851. Seeing no reason why court-martial convictions should be more insulated from Federal civil court review than would be true of state court convictions, the Court of Appeals for the District of Columbia recently rejected the criterion of full fair consideration. See *Kauffman v. Secretary of the Air Force* (No. 21, 227) (D.C. Cir. 26 June 1969). See also *Weinberger, Courts-Martial and the Bill of Rights: The Original Practice*, 72 Harv. L. Rev. 266, 302.4 (1958).
¹⁷ 5 USCMA 89, 17 CMR 68.
member the day before trial commenced. The Board of Review concluded that, although this pretrial lecture was outside the scope of the record proper, it pertained to the jurisdiction of the court-martial and therefore could be reviewed by the Board. Furthermore, the pretrial conference revealed command control over the members; the court-martial had no jurisdiction to proceed; and a new trial before another court-martial was authorized.

The Judge Advocate General of the Army certified the case on four issues, which included the Board’s right to consider the transcript of the pretrial conference and whether the pretrial conference constituted jurisdictional error, rendering void the findings and sentence. In disposing of the case, each Judge of the Court of Military Appeals wrote a separate opinion.

In Judge Latimer’s view, evidence of command control would not deprive the court-martial of jurisdiction, and therefore the Board of Review did not have authority to consider the transcript of testimony. Chief Judge Quinn agreed that the exercise of command control would not deprive the court-martial of jurisdiction to try an accused, but in his opinion “a board of review has the power to ascertain the existence of such control, even though no suggestion of it appears in the record of trial itself.” This power he based on the grave effect of command control on the military community.

Judge Brosman took the position that command control was present but “that the error was not jurisdictional—as we understand the term.” Since the error was nonjurisdictional, he concluded that a rehearing should be ordered, rather than “another trial,” as the Board of Review had directed. In support of his view that the Board of Review had properly considered the transcript, Judge Brosman noted that the writ of error coram nobis still survived in the Federal Courts and was used frequently by state courts in reviewing claims of violation of due process. He added:

The Supreme Court has rested the use of coram nobis on the All Writs Act, 28 USC 1651(a). Whether this Act has application to this Court, or to the several boards of review, I need not now resolve—although I dislike to the belief that this Court, at least, falls within its broad sweep.

It might also be observed that the provision of such a remedy for service personnel conforms to basic Congressional intent to the effect that a military accused person shall be granted, wherever possible, rights analogous to those enjoyed by the civilian criminal defendant. Since the protection of 28 USC 2255 does not, in terms, seem applicable to military law administration, I believe that the basic scheme erected by Congress, together with the recent Supreme Court decision in the Morgan case, supra, suggest that the writ of error coram nobis must be held usable here. Certainly it offers a powerful analogy.

In a footnote, Judge Brosman added two further observations. First, the civilian common law precedents indicated to him that, after a case had “coursed through the hierarchy of judicial review, a writ of error coram nobis must be addressed to the highest appellate tribunal.” Secondly, “in military law, unlike its civilian counterpart, the basis for the writ must be deemed to expire on the termination of the confinement of the accused.” The latter conclusion was based on the premise that the legislation establishing Correction Boards, 10 U.S.C. 1552, “preempted the field of relief once an accused’s status as a prisoner has ended.”

The applicability of the All Writs Act, 28 U.S.C. 1651(a), has been before the Court of Military Appeals on several occasions since the Ferguson case. In United States v. Buck, a former Marine master sergeant was attempting to reopen the proceedings in his conviction by general court-martial, which

18 Id. at 83. Had the error been deemed jurisdictional, it would have constituted almost an invitation for Federal civil courts to determine in collateral proceedings whether courts-martial had lost jurisdiction because of command control. Also, the accused might not be entitled to protection against a heavier sentence on retrial if his first conviction were by a court-martial which lacked jurisdiction See Article 63 of the Code, which provides more sweeping protection than is constitutionally required by North Carolina v. Pearce, 395 U.S. 711 (1969).
19 Id. at 83. In this regard, see United States v. Morgan, 346 U.S. 502 (1954).
20 Id. at 80-7.
21 Id. at 87.
22 9 USCMA 290, 26 CMR 70 (1958).
had previously been reviewed by the Court. In denying his motion, the Court commented:

Assuming the All Writs Act, 28 USC § 1651 (a) permits us to extend relief under extraordinary circumstances there is no basis for the exercise of such power in this case.

In United States v. Tavares, the accused, who had been convicted of rape and whose petition for review had then been denied by the Court of Military Appeals, thereafter moved the Court for dismissal of the charge on the basis of insanity. He labelled his motion as being in the nature of a petition for a writ of error coram nobis. The Court stated:

This court has never had occasion to determine whether or not we have jurisdiction to entertain a writ of error coram nobis, nor do we find it necessary to do so now because, assuming without deciding that we have such authority, this case presents no grounds for invoking such extraordinary relief.

In a footnote the Court observed that it was unnecessary then to choose between competing rules as to the role played by an appellate court in connection with coram nobis relief. However, it was noted that "additional problems might arise within the military sphere due to the lack of permanence of the court-martial and to the presence of a board of review with fact-finding powers."

Finally, in 1966, more than a decade after Judge Brosman's opinion in Ferguson, the Court of Military Appeals asserted that it was empowered by the All Writs Act to issue writs of error coram nobis. In United States v. Frischholz, a petition for a "Writ in the Nature of Error Coram Nobis" was submitted by the accused, a former Air Force officer who had been dismissed several years earlier pursuant to the sentence of a general court-martial. On the direct appeal of the conviction, the accused's petition to review had been denied by the Court of Military Appeals.

In resisting the petition for a writ of error coram nobis, the Government contended that the Court of Military Appeals lacked jurisdiction under Article 67 of the Code and was prohibited by the finality provisions of Article 76. With respect to Article 76, Chief Judge Quinn wrote for the Court:

This provision does not insulate a conviction from subsequent attack in an appropriate forum. At best it provides finality only as to interpretations of military law by this Court. United States v. Armbruster, 11 USCMR 596, 29 CMR 412. It has never been held to bar review of a court-martial, when fundamental questions of jurisdiction are involved.

Replying to the Government's contention that the All Writs Act applies only to Article III courts, the opinion noted that the term "all courts established by Act of Congress"—used in the All Writs Act—is more comprehensive than the term "courts of the United States," and includes courts other than those established by Congress under Article III. "We entertain no doubt, therefore, that this Court is a court established by act of Congress within the meaning of the All Writs Act." The Court's conclusion as to its jurisdiction did not aid Captain Frischholz; Chief Judge Quinn went on to say that the accused was really asking for reconsideration of the Court's earlier decision denying his petition for review and so did not qualify for the extraordinary relief available through coram nobis if "exceptional circumstances" were present.

In United States v. O'Callahan the Court of Military Appeals considered a petition for a writ of error coram nobis submitted by an accused seeking to set aside a 1956 conviction for assault with intent to commit rape and other offenses. O'Callahan contended that he was deprived of due process of law by the admission in evidence of deposition testimony—testimony that was admissible under then-prevailing law but would not have been received under the rule established several years after his conviction. The petitioner contended that his Sixth Amendment rights to confrontation had been infringed by the conviction; the Government insisted that the petition was predicated only upon a change in decisional law and so did not justify collateral relief. The Court did not choose between these arguments, since it ruled that the deposition evidence complained of was not prejudicial.

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31 16 USCMA 568, 37 CMR 88 (1967).
dicial to the accused, whose guilt was established beyond reasonable doubt by evidence apart from those depositions.

O'Callahana must have been undaunted by this decision, since he persisted in his attacks on the conviction and later prevailed in the Supreme Court where it was held that his alleged offenses were not subject to military jurisdiction.27

Issuance of writs of habeas corpus or mandamus was sought in Levy v. Resor.28 The petitioner, an Army officer who had been convicted of several offenses connected with his statement against the Viet Nam war, was seeking to contest his confinement pending final disposition of his appeal. The Court's per curiam opinion remarks:

Petitioner seeks the issuance of writs of habeas corpus or mandamus. In a proper case, this Court has the authority to issue such writs. United States v. Frischholz, 16 USCMA 150, 36 CMR 306. The former would test the legality of petitioner's restraint, while the latter is addressed to the enforcement of that judgment and discretion which a public officer, duty bound in law, has failed to exercise.

But then the opinion goes on to explain that the petition should be denied, since bail is unavailable to a military prisoner and since release from confinement without bail was not mandatory under the circumstances.

In Gale v. United States29 the Court was petitioned to grant extraordinary relief prior to conclusion of the trial. A general court-martial had been convened to hear charges of carnal knowledge against Sergeant Gale. Following arraignment the defense counsel had moved for a dismissal of the charges on the basis of denial of a speedy trial and improper pretrial confinement. The law officer dismissed the charges; but pursuant to order of the convening authority, the court-martial was subsequently reconvened. The convening authority ordered the law officer to reconsider his ruling and the trial to proceed. Reversing his former action, although adhering to his previous findings of fact and conclusions of law, the law officer directed that trial proceed. Thereupon the accused submitted to the Court of Military Appeals a petition for writ of certiorari and/or writ of prohibition; and the Government in turn moved to dismiss this petition.

The Court rejected the contention that it lacked jurisdiction to grant extraordinary relief to an accused prior to return of findings and sentence; it stated that Article 67 did not purport to act as a jurisdictional prohibition against granting extraordinary relief at an earlier stage of criminal proceedings against an accused. While that article limited the Court's review "in cases properly before us to questions of law," it also "indicates the intent of Congress to confer upon this Court a general supervisory power over the administration of military justice." Citing Frischholz for the proposition that the All Writs Act applies to the Court of Military Appeals, the Court emphasizes:

We cannot believe Congress, in revolutionizing military justice and creating for the first time in the armed services a supreme civilian court in the image of the normal Federal judicial system, intended it not to exercise power to grant relief on an extraordinary basis, when the circumstances so require.

Having established its power to grant the extraordinary relief, the Court then determined that in its discretion the petition should be denied. In so doing, it commented that the accused had been released from confinement and "we are certain, absent a change in circumstances, that he will not again be imprisoned pending disposition of this matter." Furthermore, the "proceedings now pending against the accused are not void for want of jurisdiction, but merely involve a question whether the law officer's ruling was final and binding on the issues presented." Since piecemeal appeals are not favored, the Court concluded that the case should wind its way through the normal channels before further consideration by the Court.

A similar result was reached in denying the application for writ of habeas corpus ad subjiciendum and writ of mandamus submitted by a civilian seaman who was awaiting trial by court-martial in Viet Nam

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28 17 USCMA 150, 36 CMR 306 (1967).
29 17 USCMA 40, 37 CMR 304 (1967).
for an offense allegedly committed there. Although that petitioner's case would seem to involve an issue of jurisdiction, which the Court did not find present in Gale, the Court concluded that the matter of jurisdiction "can be better resolved at the trial of this case, in which evidence may be taken upon the issue, questions of fact resolved, and a complete record made regarding Latney's status."

In granting recently a petition for writ of error coram nobis, the Court of Military Appeals has made clear the procedure that will be followed in determining factual issues raised by such a petition. There the petitioner, whose conviction had previously been affirmed by the Court, subsequently raised issues of mental responsibility and capacity. Remarkling that such issues should be determined at the trial level, the Court ordered that the case be returned to the Judge Advocate General of the Army

... for remand to an appropriate convening authority for reference to a general court-martial to determine the mental responsibility of the accused at the time of the offense of which he stands convicted, his mental capacity at the time of the trial, and his present capacity to understand and participate in these and any further proceedings. See United States v. DuBay, 17 USCMA 147, 37 CMR 411.

In DuBay, cited in this order, questions of command influence had been raised outside the original record of trial. Noting that the conflicts in evidence made resort to affidavits unsatisfactory, the Court's per curiam opinion then outlined the following procedure for resolving such issues:

In each such case, the record will be remanded to a convening authority other than the one who appointed the court-martial concerned and one who is at a higher echelon of command. That convening authority will refer the record to a general court-martial for another trial. Upon convening the court, the law officer will order an out-of-court hearing, in which he will hear the respective contentions of the parties on the question, permit the presentation of witnesses and evidence in support thereof, and enter findings of fact and conclusions of law thereon. If he determines the proceedings by which the accused was originally tried were infected with command control, he will set aside the findings or sentence, or both, as the case may require, and proceed with the necessary rehearing. If he determines that command control did not in fact exist, he will return the record to the convening authority, who will review the findings and take action thereon, in accordance with Code, supra, Articles 61 and 64, 10 USC § 861, 864. The convening authority will forward the record, together with his action thereon, to the Judge Advocate General for review by a board of review, in accordance with Code, supra, Article 66, 10 USC § 866. From the board's decision, the accused may appeal to this Court on petition, or the decision may be certified here by the Judge Advocate General, under the provisions of Code, supra, Article 67, 10 USC § 867.

In a footnote to DuBay, the Court observes that normally collateral issues of this type would, on remand in the civil courts, be settled in a hearing before the trial judge, but that the court-martial structure under the Uniform Code precludes this and requires that the matter be referred to a court-martial as such, although it is to be heard by the law officer alone. The recent restructuring of courts-martial under the Military Justice Act of 1968 will permit reference of the matter to a "military judge" for determination.

Of special importance is the Court's exposition in United States v. Bevilacqua of its power to grant extraordinary relief. There both accused had been tried by a special court-martial for wrongful possession and use of marijuana and had been sentenced to reduction in grade and partial forfeitures. The conviction was approved and ordered executed by the convening authority, after which application for further review was made to the general court-martial authority and denied. Application for relief from the Air Force Board for Correction of Military Records was also unsuccessful. Thereupon the two petitioners—only one of whom was


23 Note 2, 17 USCMA 149, 37 CMR 419 (1967).


25 18 USCMA 10, 39 CMR 10 (1968).
still in the service—filed an application for a writ of error coram nobis with the Court of Military Appeals.

The Government contended that the Court lacked power to entertain these petitions since the sentences involved did not include either a punitive discharge or confinement for one year or more, as provided in Articles 66 and 67 of the Uniform Code. While conceding that Article 67 limited the Court's authority to review a court-martial conviction by direct appeal, Chief Judge Quinn emphasized that "Article 67 does not describe the full panoply of power possessed by this Court." Prior "comments and decisions certainly tend to indicate that this Court is not powerless to accord relief to an accused who had palpably been denied constitutional rights in any court-martial; and that an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary."

Although the petitioners provided an occasion for the Court to enunciate an important legal rule, they received no benefit therefrom. The Court ruled that none of the assignments of error contained in the petition for relief demonstrated that the accused was denied a constitutional right or "any fundamental right accorded by the Uniform Code of Military Justice."

It seems clear that in its decisions concerning extraordinary remedies the Court of Military Appeals has been aware of the importance of providing an opportunity within the military justice system for "full and fair consideration" of claims by accused persons that their rights have been invaded. In this way the likelihood is reduced of successful collateral attack in the Federal civil courts.

Thus, in reversing two decisions of the Court of Claims which had allowed collateral attack on court-martial convictions by suits for back pay, the Supreme Court noted in United States v. Augenblick that:

An additional remedy, apparently now available but not clearly known at the time of these court-martial convictions, is review by the Court of Military Appeals. In United States v. Bevilacqua, 18 US Ct M A 10, 12, decided November 8, 1968, that court held that it has jurisdiction "to accord relief to an accused who has palpably been denied constitutional rights in any court-martial and that an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary."

Since the Bevilacqua decision had been handed down after the submission of the briefs in Augenblick, although prior to the oral argument, the Supreme Court was not in a favorable position to discuss in detail what effect the availability of extraordinary relief from the Court of Military Appeals might have on attempts to attack court-martial convictions in the Federal civil courts. However, a few months later the Supreme Court did apply the exhaustion requirement to collateral attack in a habeas corpus proceeding, and probably in future cases Government counsel will argue that any sort of collateral attack must be preceded by exhaustion of remedies available through the Court of Military Appeals.

By its decision in Bevilacqua—a special court-martial case not involving a bad conduct discharge—the Court of Military Appeals seemed to assert its authority over a vast class of courts-martial that previously it had not reviewed. Such an assertion may have been foreshadowed in 1957 in United States v. Rinehart, when, after holding that it could not sanction the then-prevailing military practice which "permits court members to rummage through a treatise on military law, such as the Manual" for Courts-Martial, the Court directed "that the practice of using the Manual by members of a general court-martial (except the president) during the course of the trial or while deliberating on findings and sentence be completely discon-

34 To the extent that exhaustion of remedies is required this opportunity within the military justice system must be utilized before going into the Federal civil courts. The Court of Military Appeals has also been reluctant to characterize certain serious errors as jurisdictional, since to do so might make court-martial convictions more vulnerable to collateral attack in the civil courts. Cf. United States v. Ferguson, 5 USCMA 68, 17 CMR 68 (1964).
36 Noyd v. Bond, supra note 16.
37 8 USCMA 402, 24 CMR 212 (1957).
continued at a date no later than thirty days after the promulgation of the mandate in this case."40

Even so, there was little general recognition that the Court of Military Appeals might have jurisdiction apart from that expressly conferred by Article 67 of the Code. Thus, in the Juhl litigation, where a serviceman sued in the Court of Claims to recover pay forfeited under a general court-martial sentence that did not fall within Articles 66 and 67 of the Code, his petition alleged that "No appeal was possible under law to the Court of Military Appeals" and the Government's answer admitted the allegation.41

The All Writs Act42 has no direct relevance, of course, to the question of whether the Court of Military Appeals may properly review cases that do not fall explicitly within Article 67. It only provides that the courts to which it applies may issue writs "in aid of their respective jurisdictions"—whatever those jurisdictions may be. However, without invoking the aid of the All Writs Act, the Court of Military Appeals would have encountered difficulty in creating procedures by which to exercise the broad authority it seemed to assert in Bevilacqua. Thus, Judge Brosman's opinion in United States v. Ferguson, in suggesting that the All Writs Act applies to the Court of Military Appeals, planted the seed from which ultimately sprung the sweeping statements of Bevilacqua.

The pronouncements in Bevilacqua appeared to presage a flood of requests for extraordinary relief in cases involving trials by special or summary court-martial. Moreover, in light of O'Callahan v. Parker,43 it was foreseeable that there often would be claims that the court-martial convictions had been void because of lack of jurisdiction over the offenses.

Such considerations might have led to second thoughts on the part of the Court of Military Appeals. Or perhaps the Court concluded that the amendment of Article 69 would suffice to protect the rights of service personnel by granting expanded authority to The Judge Advocate General. In any event, in United States v. Snyder,44 decided 14 August 1969, the Court of Military Appeals retreated from the position which it apparently had taken in Bevilacqua. Snyder, whom a special court-martial had found guilty of adultery and sentenced to detention of pay and reduction, submitted an appeal to The Judge Advocate General of the Air Force pursuant to Article 69. This appeal having been denied, he filed a "Petition for Review and Writ of Coram Nobis" with the Court of Military Appeals, wherein he alleged, inter alia, a lack of jurisdiction over the offense under the principles laid down in O'Callahan v. Parker. The Court did not reach the merits of the petition since it concluded that it lacked jurisdiction to entertain an "appeal" from a decision of The Judge Advocate General taken pursuant to Article 69. The memorandum opinion of the Court comments:45

There can be no doubt of the fact that this Court does possess the authority to resort to extraordinary writs under the All Writs Act, 28 USC § 1651. Noyd v. Bond, 395 US 23 L ed 24 631, 89 S Ct (1969), specifically recognizes our authority in this area. And see United States v. Fischholz, supra; Jones v. Ignatius, supra. But such resort is had, under the very terms of the statute, in aid of the exercise of our jurisdiction over cases properly before us or which may come here eventually. Our jurisdiction to hear appeals, no matter how well-founded, is set out by Congress in Code, supra, Article 67. We cannot by judicial fiat enlarge the scope of our appellate review to embrace those cases which Congress thought justified no remedy

40 8 USCMA at 410, 24 CMR at 220.
41 Supra note 37 at footnote 4.
43 Supra note 27. The Supreme Court has not yet decided whether O'Callahan applies retroactively.
44 USCMA, CMR (Mia. Docket No. 69-22).
45 The Court of Military Appeals may also have been induced to reconsider its assertions of jurisdiction in Bevilacqua by the Supreme Court's comment in a footnote to Noyd v. Bond, supra note 16, at 695, footnote 7: "... We do not believe that there can be any doubt as to the power of the Court of Military Appeals to issue an emergency writ of habeas corpus in cases, like the present one, which may ultimately be reviewed by that court. A different question would, of course, arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes. Cf. United States v. Bevilacqua, 18 USCMA 10 (1969)."
beyond the powers it was recently confided to the Judge Advocate General under Code, supra, Article 69.

In sum, then, we believe the accused misreads our language in United States v. Blevins, supra. What we there stated concerning our duty and responsibility to correct deprivations of constitutional rights within the military system must be taken to refer to cases in which we have jurisdiction to hear appeals or to those to which our jurisdiction may extend when a sentence is finally adjudged and approved. Resort to extraordinary remedies such as those available under the All Writs Act, supra, cannot serve to enlarge our power to review cases but only to aid us in the exercise of the authority we already have. As such, therefore, we find no basis which permits us to review a special court-martial in which the adjudged and approved sentence extends only to reduction.

Despite the holdings by the Court of Military Appeals that it is subject to the All Writs Act, the possibility existed that other tribunals might disagree and that such authority might be challenged collaterally.\textsuperscript{44} Any such challenge might have relied on the Supreme Court's recent decision that the Declaratory Judgment Act\textsuperscript{47} does not apply to the Court of Claims\textsuperscript{48}—which is considered an Article III court.\textsuperscript{49} And the argument would be that a fortiori, the Court of Military Appeals, which is not an Article III court, is not included within the authority granted by the All Writs Act.

On the other hand, the Declaratory Judgment Act applies only to any "court of the United States," while, as the Court of Military Appeals has emphasized,\textsuperscript{50} the All Writs Act extends to "all courts established by Act of Congress"—seemingly a broader category. Furthermore, recent amendments of Article 67\textsuperscript{51} indicate a Congressional intent to enhance the status and prestige of the Court of Military Appeals, and thus supply a basis for concluding that the Court should receive the full benefits of the All Writs Act. Whatever the arguments on either side, the Supreme Court has now resolved the question by ruling that the All Writs Act is applicable to the Court of Military Appeals.\textsuperscript{52}

Would the same reasoning apply to the newly-created Courts of Military Review? In reconstituting the Boards of Review as Courts of Military Review, the Military Justice Act of 1968 clearly intended to elevate the status of the Boards and assimilate their functions to those of courts. And they are "established by Act of Congress."

Perhaps, under some common law principle, such as that adverted to by Judge Brosman in his Ferguson concurrence,\textsuperscript{53} a basis may exist for limiting the authority of the Courts of Military Review to entertain some, or all, extraordinary writs. However, the Army Court of Military Review has concluded that it does possess authority to issue extraordinary writs.\textsuperscript{54}

If, indeed, the Courts of Military Review are authorized to grant extraordinary relief,

\textsuperscript{44} For an illustration of this possibility, see the conflict of opinion that arose between the Court of Military Appeals and the Court of Claims and led to the enactment of Article 68a of the Uniform Code. United States v. Armbruster, 11 USCMA 596, 29 CMR 412 (1960).

\textsuperscript{47} 28 U.S.C. 2201.


\textsuperscript{50} United States v. Friehenhain, 16 USCMA 150, 38 CMR 306 (1966).

\textsuperscript{51} Military Justice Act of 1968, supra note 8.

\textsuperscript{52} See note 45 supra.

\textsuperscript{53} Supra note 21.

\textsuperscript{54} In United States v. Delby, CM 419804, the accused, whose appeal was then pending before the Army Court of Military Review, filed a Petition for Writ of Habeas Corpus and Other Appropriate Relief. He complained that there is no procedure for bail in the military justice system and "that it is apparently not the practice to grant parole pending completion of appellate review in a case," with the result that accused would remain in confinement pending disposition of his appeal. The Government moved to dismiss the petition for lack of jurisdiction. Its contentions were that (a) the Court of Military Review is neither an Article I legislative court nor an Article III constitutional court but is merely an administrative body established by The Judge Advocate General and deriving no power from the All Writs Act to issue extraordinary writs, and (b) as a creature of statute, the Court lacks inherent jurisdiction to issue such writs. Rejecting the Government's argument, the Court of Military Review concluded that, in light of the revisions in Article 66 of the Code which had been made by the Military Justice Act of 1968, the Court was established by Act of Congress within the meaning of the All Writs Act. Thus, it was entitled to issue extraordinary writs, although in the case at hand the Court denied the petition. See decision dated 19 September 1969.

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does the principle of exhaustion of remedies signify that a petition for extraordinary relief should in the first instance be submitted to the Court of Military Review for action before it is presented to the Court of Military Appeals? This question can only be stated, not answered, at the present time.

Under the standard applicable for many years in the Federal courts, judicial relief was not available to contest a conviction after the confinement imposed under that sentence had been served. However, in recent years access to the courts has become less restricted. Thus, in United States v. Morgan, the petitioner for habeas corpus was contesting a state court conviction of burglary and grand larceny. However, the petition for writ of certiorari was granted several months after his unconditional release from custody; and so the state contended that the case had become moot. Overruling a prior decision, the Supreme Court stated that, “It is clear that petitioner’s cause is not moot.” In Sibron v. New York the defendant had appealed from a sentence to six months in jail. Not having been released on bail pending appeal, Sibron had served his sentence before his appeal could be heard. Even so, the Supreme Court concluded that review would be permissible; and it comments “that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.”

In his Ferguson opinion Judge Brosman suggested that a writ of error coram nobis might not be available in the military justice system for an accused who had completed his sentence, on the ground that the legislation establishing the Correction Boards preempted the Court’s jurisdiction in such cases. However, no other Judges of the Court have as yet subscribed to that position; and, in light of the Supreme Court precedents broadening the availability of extraordinary remedies to challenge convictions under which the sentence has already been served, the Court of Military Appeals may decide simply to follow the test adopted in Sibron v. New York. Under that test there should be little difficulty in challenging sentences that have already been served. Although the effect given to a court-martial conviction may vary from jurisdiction to jurisdiction with respect to such matters as habitual offender laws, impeachment of credibility, eligibility for a license, or forfeiture of civil rights, such a conviction is by a court established under Federal authority and, in most instances, should generate some “collateral legal consequences.” At the very least, it would be difficult to show that there is “no possibility” of such consequences.

If the Court of Military Appeals takes a restricted view of the justiciability of court-martial convictions under which all the confinement has been served, then a convicted accused has one less remedy to exhaust before seeking relief in a Federal District Court. If, as seems more likely, a liberal view of justiciability is adopted in such cases, there may well be a flood of petitions for extraordinary write from the Court. And indeed, the flood may already have begun.

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56 Supra note 19.
57 Supra note 15.
59 Id. at 237.
60 392 U.S. 40 (1968).
62 Supra note 21.
63 This consequence might itself help prompt the Court of Military Appeals to take a broad view of justiciability; presumably the Court would rather have errors corrected within the military justice system instead of being the subject of correction by the Federal civil courts.
64 The Court’s miscellaneous docket begins with Number 68-1, which was filed on 17 October 1966. There was one other case on this docket in 1966; 5 cases on the docket in 1967; and 20 in 1968. However, by 2 June 1969 21 matters were on the Court’s miscellaneous docket, more than in the entire preceding year. The decision of the Supreme Court in O’Callahan v. Parker, supra note 27, will increase the number of petitions for extraordinary relief.
From its inception the Court of Military Appeals has ruled that it had no jurisdiction to review cases on which appellate review had been substantially completed prior to 31 May 1951 when the Uniform Code took effect. The Court has now made clear that it will not use extraordinary writs to bypass this limitation on its jurisdiction.

COLLATERAL ATTACK IN THE CIVIL COURTS

The traditional method for collateral attack on courts-martial convictions has been through petitions for writs of habeas corpus in the Federal District Court for the district wherein the petitioner was confined. Despite a statutory finality clause in the Article 76 of the Uniform Code, it is clear that Congress did not intend to preclude use of this remedy.

The Court of Claims opened another route of collateral attack in Shapiro v. United States, where an officer who had been dismissed pursuant to court-martial sentence sued successfully for back-pay. The Court concluded that because of the incredibly unfair procedures used in Shapiro’s trial he had been deprived of important constitutional rights and his conviction was void. In subsequent cases, culminating in Augenblick v. United States and Juhl v. United States, the Court of Claims expanded the class of cases in which court-martial convictions could be successfully attacked in suits for back-pay.

A third method of collateral attack was utilized in Ashe v. McNamara. There the plaintiff, who had been convicted by a Navy general court-martial prior to the enactment of the Uniform Code of Military Justice, sought relief from the Navy Board for the Correction of Naval Records; he claimed that in his trial he had been denied his constitutional right to the assistance of counsel for his defense. After relief was denied by the Board, Ashe utilized the remedy of mandamus to set aside his conviction. Other cases reach the same conclusion that suits for mandatory and declaratory relief are available to attack convictions by court-martial.

In United States v. Augenblick the Government recently contended that except for writs of habeas corpus, Article 76 of the Uniform Code provided finality for all court-martial convictions. Under this view a serviceman who is not still in confinement could not successfully attack his conviction by court-martial, since the remedy of habeas

United States v. Souvenchein, 1 USCMA 64, 1 CMR 64 (1951). However, under the unusual circumstances of United States v. Ferguson, 17 USCMA 200, 37 CMR 484 (1967), the Court upheld the power of a Board of Review to complete review in 1967 of a court-martial conviction that had taken place in February 1961, prior to the effective date of the Uniform Code.


See United States v. Augenblick, 393 U.S. 245, 250, n. 3 (1969), and cases cited there.

10 U.S.C. 876. A similar provision existed in Article 50(h) of the 1948 Articles of War.

See Kaufman v. Secretary of the Air Force, supra note 12, at 6 (slip op.), where the Court of Appeals comments that: "The legislative history of the finality clause demonstrates that Congress intended to preserve the collateral remedy of habeas corpus . . . . the Supreme Court has held that review by this route in civilian courts remains available. Guzik v. Schilder, 340 U.S. 126, 92-93 (1950); Burns v. Wilson, 348 U.S. 137, 142 (1953)."

108 Ct. Cl. 650, 65 F. Supp. 305 (1947). Even prior to Shapiro, the Court of Claims had long entertained suits for back pay brought by servicemen who had been convicted by court-martial. See, e.g., Keye v. United States, 109 U.S. 336 (1888); Runke v. United States, 122 U.S. 543 (1897); Swatim v. United States, 165 U.S. 553 (1897); United States v. Brown, 206 U.S. 240 (1907).

377 F. 2d 596 (Ct. Cl. 1967).

383 F. 2d 1009 (Ct. Cl. 1967).

555 F. 2d 277 (1st Cir. 1975).

Smith v. McNamara, 361 F. 2d 896 (10th Cir. 1968); Kaufman v. Secretary of the Air Force, supra note 12; Gallagher v. Quinn, 563 F. 2d 301 (D.C. Cir. 1966), cert. denied, 385 U.S. 881 (1966).

Supra note 37.


Brief for the Government at 36-40. According to the Government, the exception for habeas corpus merely respects the special constitutional status of the writ of habeas corpus under the Suspension Clause (Article I, Section 9) of the Constitution. Id. at 37. Moreover, the establishment of the Court of Military Appeals had provided for civilian review within the military justice system and so, it was argued, had obviated the need for collateral review through back pay suits and the like. Id. at 38.
corpus has traditionally depended on custody of the petitioner. Thus, a back-pay suit collaterally attacking a court-martial conviction could not be entertained by the Court of Claims or a Federal District Court; nor would a District Court be authorized, whether by mandamus, mandatory injunction, or declaratory judgment, to invalidate a court-martial conviction.

The Supreme Court did not choose to resolve this issue in Augenblick. However, on 26 June 1969 the Court of Appeals for the District of Columbia Circuit ruled in Kaufman v. Secretary of the Air Force, that habeas corpus to secure release from confinement is not the exclusive collateral remedy for attacking court-martial action, and therefore attack on a court-martial conviction is not barred even if the plaintiff is no longer in custody. In reaching this conclusion, the Court reasoned that, since a military discharge under other than honorable conditions imposes a lifelong disability and stigma—akin to the concept of infamy—review should be available by a constitutional Article III court, regardless of whether the person discharged was still in custody or had ever been in custody. Secondly, to hold that collateral review is contingent on confinement "would arbitrarily condition the serviceman's access to civilian review of constitutional errors upon a factor unrelated to the gravity of the offense, the punishment, and the violations of the serviceman's rights." Finally, to require confinement as a condition of access to constitutional courts would be especially arbitrary where, as in the Kaufman case itself, a sentence of confinement had been imposed but had been served before the military remedies had been exhausted.

It seems quite likely that the view taken in the Kaufman case will prevail. It is supported by a body of precedent, which was not disapproved by the Supreme Court when in Augenblick it had the opportunity to do so. A military administrative discharge can be collaterally attacked either in a District Court or in the Court of Claims; it is doubtful that punitive discharges will be given greater insulation from collateral review by holding that they can only be attacked when confinement is involved. Moreover, since the Supreme Court, in connection with collateral attacks on state court convictions, has recently relaxed the requirement of custody as a prerequisite for habeas corpus and has emphasized the continuing disabilities of a criminal conviction, it would be incongruous to use custody as the touchstone for collateral review of convictions by court-martial.

If a suit for back-pay is permissible despite the finality provision in Article 76, then a Federal District Court would seem to have concurrent jurisdiction thereof with the Court of Claims up to $10,000. If the amount sought is greater than this, it seems

78 See Kaufman v. Secretary, supra note 12 at 9 (slip op.). In Noyd v. Bond, supra note 16, the Government argued that the case had become moot because, under one construction, Captain Noyd had already served his sentence to confinement. The Court did not appear to disagree with the rule of law invoked, but rejected the Government's premise that the sentence to confinement had been served. In some recent cases, such as Carafas v. LaVallee, supra note 58 and supra note 60, the Court has moved away from the position that a petition for habeas corpus becomes moot if the petitioner has completed his sentence to confinement while the case is pending.

Supra note 12.
80 Slip op. at 9, quoting Everett, Military Administrative Discharges—The Pendulum Swings, 1966 Duke L.J. 41, 50.

81 The Court of Appeals cited Carafas v. LaVallee, supra note 78, in this connection. Compare the situation in Noyd v. Bond, supra note 78.

82 See Everett, supra note 80, at 67-75.
83 Carafas v. LaVallee, supra note 58; Sibron v. New York, supra note 60.

84 Under 28 U.S.C. 1346(a)(2) (1964), the district courts have concurrent jurisdiction with the Courts of Claims up to $10,000. However, before 1964 the district courts, unlike the Court of Claims, could not entertain "any civil action or claim to recover fees, salary or compensation for official services of officers or employees of the United States." Act of October 31, 1961, chap. 926, sec. 50(b), 65 Stat. 727. This limitation was removed by the Act of August 30, 1964, 78 Stat. 699 (1964). Apparently the removal was induced by the 1962 enactment which had made it feasible to sue in the district courts for reinstatement. See 28 U.S.C. 1361, 1391 (1964). It seemed desirable to authorize a means whereby, in most cases, accompanying claims for back pay could be disposed of in the same proceeding that involved the request for reinstatement.
doubtful that a District Court could order payment of back-pay as an adjunct to declaring that the conviction was invalid and that the plaintiff's military records should be corrected to eliminate the conviction and any action based thereon.86

Conversely, in a back-pay action the Court of Claims would lack jurisdiction to compel any correction of the plaintiff's records or to enter a judgment declaring that the conviction was void.

Would a District Court judgment invalidating a conviction be conclusive on the Court of Claims in a back-pay action where the claim depended on the invalidity of the same conviction? And would an award of back-pay by the Court of Claims be binding in a District Court action by the same plaintiff seeking to obtain a declaration that the court-martial conviction was void and that his records should be corrected? Technically it might be argued that collateral estoppel would not apply, since the parties defendant would be different in the two actions—one being against the United States and the other against some designated official or officials of the Department of Defense. However, both proceedings would be defended by the Department of Justice, and the issues would be the same. In light of the policy against repetitious litigation, it seems that collateral estoppel could be invoked and that a motion for summary judgment predicated on a judgment in the other court would be granted.

At one time an action for mandamus to set aside a court-martial conviction could hardly have been pursued outside the District of Columbia. If the plaintiff sued elsewhere, he would have been confronted with the objection that he had not joined an indispensable party—namely, the secretary of the military department involved.84 As a practical matter that party could only be served in the District of Columbia. Furthermore, only the Federal district courts in the District of Columbia were deemed to have authority to issue writs of mandamus.

In 1962 Congress removed both of these obstacles by providing that:

A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.87

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.88

Accordingly, even if the plaintiff brings an action in the nature of mandamus, he may sue in the judicial district where he resides. Also, he may sue in the district where "the cause of action arose"—which would prob-

86 In Quinlan v. Secretary of the Air Force (Civil Action No. 2381-65) (D.D.C. 1969), the plaintiff sought reinstatement in the Air Force or a declaration that his discharge was void, correction of his military records, and $50,000 in damages. The Court's opinion on cross motions for summary judgment does not discuss any jurisdictional problem that might be raised by the amount of damages requested. The judgment in the case declared that the Air Force Board for the Correlation of Military Records had erred in failing to conclude that the court-martial sentence directing plaintiff's bad conduct discharge was void as violative of his constitutional rights, remanded to the Board with directions to take appropriate corrective action, and retained jurisdiction in the District Court. The Correction Board has no jurisdictional limit on the amount of back pay that it can award and thus the corrective action might involve payment in excess of $10,000. Whether this is a permissible method of bypassing the $10,000 jurisdictional limit on the District Court is an open question.


ably include the district where the trial by court-martial took place.98

EXHAUSTION OF REMEDIES

In several instances the Supreme Court has ruled that available remedies within the military must be exhausted before recourse to the civil courts.99 Most recently this was held in Noyd v. Bond,91 where, while appellate review of Captain Noyd’s conviction was continuing within the military justice system, he sought habeas corpus relief from the civilian courts. The District Court had refused to apply the exhaustion principle, on the ground “that the military court system did not provide petitioner with an adequate remedy by which he could test the validity of his confinement, pending appeal, in an expeditious manner.” The Court of Appeals emphasized that the Court of Military Appeals had recently held that it possessed the power to issue a habeas corpus writ and applied the requirement of exhaustion of remedies.

In affirming, initially the Supreme Court confronted the Government’s contention that the case had become moot because the sentence to confinement had expired.92 However, the Court concluded that an order of release entered previously by Mr. Justice Douglas had the effect of tolled the sentence; thus two days confinement remained to be served, and the case was not moot.

Relying on Gusik v. Schilder93 and on the parallel principle that state remedies be exhausted prior to collateral attack on a state court conviction, the Court emphasized the desirability of providing an opportunity for review by the Court of Military Appeals, “to which Congress has confided primary responsibility for the supervision of military justice in this country and abroad,” before allowing intervention by Federal district courts.94 Needless friction might otherwise result—and unnecessarily so since the petitioner here had “at no time attempted to show that prompt and effective relief was unavailable from the court of Military Appeals in his case.”95

In connection with the relief available, the Supreme Court pointed out that under the All Writs Act,96 which applies to all courts “established by Act of Congress,” the Court of Military Appeals possesses the power to issue emergency writs, such as writs of habeas corpus, “in cases like the present one, which may ultimately be reviewed by that court.”97 At the same time the Court’s opinion reserves the question of whether the Court of Military Appeals is empowered by the All Writs Act to issue such writs in cases which it is not authorized to review under Article 67 of the Uniform Code.98

In connection with the Government’s argument that, under the exhaustion principle, Captain Noyd should also have requested the Air Force Board of Review to release him pending completion of his appeal, the Court noted that the Government had cited no statute which purported to grant such

98 In a case where the plaintiff had been discharged pursuant to the sentence of a court-martial which he was collaterally attacking, could he successfully contend that the cause of action arose with the execution of the discharge and that accordingly he was entitled to sue in the judicial district where he had been at the time of the execution of the discharge? Conversely, if plaintiff sued in the judicial district within which he had been court-martialled, could the Government maintain that it is not the place of trial which is important but instead the place where the sentence is executed? Or does a cause of action arise in both places?


91 Supra note 16. Subsequent to the Supreme Court’s decision, the Court of Military Appeals decided against Captain Noyd on the merits. United States v. Noyd, USCMA, 40 CMR (No.), decided 15 Aug 1969. As to exhaustion of remedies, see also United States ex rel. Berry v. Commanding General, 411 F. 2d 522 (5th Cir. 1969).

92 Supra note 16. Interestingly, the Supreme Court did not discuss the possible relevance of Carafoe v. Lavallee, supra note 58, and Sibron v. New York, supra note 60, to the Government’s mootness contention.

93 Supra note 90.
94 Supra note 16 at 695.
95 Id. at 696.
97 29 U.S. at 695, footnote 7.
98 Ibid.
authority. Therefore, absent "any attempt by the Boards of Review to assert such a power, we do not believe that petitioner may properly be required to exhaust a remedy which may not exist." 105

Since there was no showing that the Court of Military Appeals would not respond rapidly to an application for an emergency writ, the Supreme Court did not need to "decide how long a serviceman must wait for a decision on his application by the Court of Military Appeals before he may petition for a writ of habeas corpus from the appropriate civilian court." 106 Petitioner had contended that in several cases which had reached the Supreme Court and concerned jurisdiction over various classes of civilians connected with the military, no requirement of exhaustion of remedies had been imposed. 107 These cases were distinguished with the comment: 108

We did so, however, because we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion of military remedies when the petitioners raised substantial arguments denying the right of the military to try them at all. Neither of these factors is present in the case before us. Many questions remain unanswered in the wake of Boyd v. Bond. In the first place, if it proves true that habeas corpus is not the exclusive method for collateral attack in the Federal civil courts, does the exhaustion requirement apply equally to suits for back pay, writs of mandamus, and declaratory relief? Certainly such a conclusion would seem logical. If exhaustion is required in cases involving personal freedom of a serviceman in confinement—where each day's delay of release from custody is irremediable—then it should be required in the less urgent cases involving elimination of the stigma of a punitive discharge or the recovery of back pay.

Secondly, since the Boyd case arose while the conviction was still being reviewed on direct appeal under Articles 66 and 67 of the Code, it is unclear that the same result would be reached if the direct review had been completed. In short, would the petitioner be required also to exhaust all available extraordinary remedies before seeking relief in the civil courts? The policy of the exhaustion requirement would dictate this result, at least, if as in Boyd the extraordinary relief seems reasonably accessible within the military system. Gustik v. Schilder, 109 which was relied on in Boyd, invoked the requirement that the petitioner exhaust the remedy of a petition for new trial—a remedy which seems analogous to a request for extraordinary relief. Furthermore, the precedents that have developed in the context of Federal-state relations would appear to require resort to available extraordinary remedies in the military system, even though direct appellate review has been completed.

Will the exhaustion-of-military-remedy requirements apply to collateral attacks based on the recent Supreme Court decision in O'Callahan v. Parker, 110 where it was ruled that courts-martial cannot try offenses by service personnel which are not "service-connected"? It could be argued that such attacks, based on lack of jurisdiction over the subject matter, are akin to attacks predicated on lack of jurisdiction over the accused —where admittedly, the Supreme Court has sometimes not required exhaustion of remedy. On the other hand, perhaps the "expertise of military courts" would be helpful in providing tests of service-connection. 111

105 395 U.S. at 698, footnote 11. The case was decided prior to 1 August 1969 when the Boards of Review became Courts of Military Review, pursuant to the Military Justice Act of 1968.
106 Ibid.
107 395 U.S. at 697, footnote 9.
109 Ibid.
110 Supra note 90.
111 Supra note 27.

Service-connection is a familiar concept in military law, but not in the context of military justice. Indeed, it seems quite probable that the service-connection concept employed by Mr. Justice Douglas' opinion in O'Callahan was quite distinct from the concept as generally known in military law. Even so, by reason of their familiarity with the military environment and society, "military courts" might possess, or readily develop, some special expertise in determining what cases were truly service-connected.
The Supreme Court commented that no statute had been cited which empowered Boards of Review to grant emergency interlocutory relief. However, Noyd v. Bond was decided before 1 August 1969, when Boards of Review were replaced by Courts of Military Review. As noted earlier, the Courts of Military Review might qualify as courts "established by Act of Congress" within the meaning of the All Writs Act. In that event, they would seem empowered to provide extraordinary relief; and perhaps, as argued by the Government in Noyd, a petitioner would also be required to exhaust his remedies in the Court of Military Review.

The Military Justice Act of 1968 expanded Article 57 of the Code to provide:

On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement. The deferment shall terminate when the sentence is ordered executed. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned.

This power to defer a sentence to confinement is somewhat akin to the procedure in civil courts for releasing a man on bail while he appeals his case. Does the statutory grant of this power to the convening authority and the officer exercising general court-martial jurisdiction over the accused reveal a congressional intent that Courts of Military Review, or even the Court of Military Appeals, not grant emergency writs pursuant to the All Writs Act to defer service of the accused's sentence to confinement pending completion of review? The question probably was not anticipated by the draftsmen of the Military Justice Act of 1968; and, absent more compelling statutory language, it seems unlikely that either the Courts of Military Review or the Court of Military Appeals would hold that Article 57(d) of the Code constituted an implied limitation on powers they otherwise would possess under the All Writs Act.

For one seeking the relief requested by Captain Noyd—or by Captain Howard Levy in other much-publicized litigation—resort to an application for deferment of confinement pursuant to Article 57(d) might be deemed part of the exhaustion requirement. However, this procedure for deferment of sentence was not available until 1 August 1969; and therefore the Supreme Court had no occasion to consider its effect in deciding Noyd v. Bond. However, the Court of Military Appeals has required such exhaustion in one case.

As noted earlier in this article, the Military Justice Act of 1968 broadened the authority of the Judge Advocate General under Article 69 of the Uniform Code. Pursuant to the exhaustion requirement is an accused required to request relief from the Judge Advocate General in a case in which Article 69 would apply before going into a civil court? In Noyd v. Bond the Supreme Court gave weight to the desirability of

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107 395 U.S. at 698, footnote 11.
108 The Army Court of Military Review reached this conclusion in United States v. Dolby, supra note 54.
111 At the same time that the accused in United States v. Dolby, supra note 54, petitioned the Court of Military Review for extraordinary relief, he submitted a similar petition to the Court of Military Appeals. That Court ruled that, "it appearing that petitioner has not applied for deferment of the sentence to confinement in accordance with the provisions of Article 57(d), Uniform Code of Military Justice," the petition should be denied. However, the Order also stated "This action is without prejudice to the right of petitioner to support, in an application for deferment of confinement, his contention that there is a policy against releasing on parole individuals whose convictions are in the process of appellate review, and that he is otherwise eligible for parole." Dolby v. United States (Misc. Docket No. 69-41) (5 September 1969).
Meanwhile, the accused had, in fact, applied for deferment of sentence under Article 57(d); and this was denied. However, he was released on parole in September 1969.
having guidance from the Court of Military Appeals before civil courts were permitted to intervene in a case. Similarly, in cases subject to Article 69 of the Code, it would seem desirable to require, where feasible, that The Judge Advocate General have an opportunity to consider a case before it was disposed of by the civil courts. Obviously, in cases involving confinement, it would be all the easier to insist on exhaustion of remedies if service of the confinement had been deferred pursuant to Article 57(d).

Since convictions by court-martial may be considered by Correction Boards in the military departments, should the exhaustion requirement also be deemed to require application for relief from these Boards? Where a punitive discharge is involved, the conviction by court-martial will be reviewed by a Court of Military Review pursuant to Article 66—and sometimes by the Court of Military Appeals pursuant to Article 67—before the discharge is executed. Under the All Writs Act extraordinary relief is available—at least from the Court of Military Appeals and perhaps the Courts of Military Review. To require invariably that, in addition to these remedies, the accused apply to a Correction Board would overdo the exhaustion requirement. It is doubtful that, as now constituted, a Correction Board could provide guidance in such matters that would not already be available from the tribunals established under Articles 66 and 67 of the Uniform Code.

Similarly, in cases not involving a discharge the accused would usually have available resort to The Judge Advocate General pursuant to Article 69. Here again it is doubtful that any significant additional guidance or assistance would be forthcoming from a Correction Board; and so the exhaustion requirement should not apply.

In Noyd v. Bond the Court adverted in a footnote to one other problem of exhaustion of remedies:

Before this incident took place, Captain Noyd sought to invoke the jurisdiction of the civilian federal courts in an effort to require the Air Force either to assign him to duties consistent with his beliefs or to dismiss him. The United States District Court for the District of Colorado denied relief because petitioner had not yet been court-martialed for refusing to obey orders and so had not fully exhausted his remedies within the military system. Noyd v. McNamara, 267 F Supp 701 (1967). The Court of Appeals for the Tenth Circuit affirmed, 378 F2d 638 (1967), and this Court denied certiorari, 389 US 1022, 19 L Ed 2d 667, 88 S Ct 593 (1967). The Courts of Appeals for the Second and Fifth Circuits have however subsequently decided that the exhaustion doctrine did not necessarily require a serviceman to await the military's decision to convene a court-martial before seeking relief in the civilian courts. Hammond v. Lenfest, 396 F2d 705 (CA2d Cir 1968); In re Kelly, 401 F2d 211 (CA5th Cir 1968). Cf. Brown v. McNamara, 387 F2d 150 (CA3d Cir 1967). We have not found it necessary to resolve this conflict among the circuits in order to decide the narrow issue in this case.

Inevitably there will be efforts in the future to forestall court-martial action by seeking relief from the civil courts either (a) to prevent continuation of the situation which may give rise to a court-martial or (b) to enjoin the convening of a court-martial or its trial of the case. Typical of the former situation are attempts by alleged conscientious objectors to compel their reassignment or separation from the service, so that they will not be compelled to choose between the demands of their conscience and their military duties. Typical of the latter are efforts by accused servicemen to enjoin their trial by court-martial for offenses which they claim are not sufficiently service-connected to fall within military jurisdiction under

112 Supra at 399. See also Ashe v. McNamara, supra note 73, and Owings v. Secretary of the Air Force, supra note 85.

113 In Owings v. Secretary, supra note 85, one of the plaintiff's grounds for collateral attack concerned the manner in which the Correction Board had reviewed his case. The District Judge recounts that, although the Board was aware in advance that the plaintiff's application to the Board was based on some complex legal arguments, "... no member of the Board hearing the case had legal training and the record discloses some confusion on the legal theory upon which the petition was based. Perhaps due to this confusion, and without notice to plaintiff's counsel, the Board referred the matter to the Air Force Judge Advocate General for an opinion and then adopted his conclusions as theirs."

114 386 U.S. at 685, footnote 1.

118 The Noyd case exemplifies this situation.

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O'Callahan v. Parker. That the civil courts will be reluctant to intervene precipitously in such cases is suggested by this passage from the Noyd case:116

\[\ldots\] Nevertheless other considerations require a substantial degree of civilian defense to military tribunals. In reviewing military decisions, we must accommodate the demands of individual rights and the social order in a context which is far removed from those which we encounter in the ordinary run of civilian litigation, whether state or federal. In doing so, we must interpret a legal tradition which is radically different from that which is common in civil courts.\ldots

SCOPE OF REVIEW

Traditionally civil courts reviewed court-martial convictions only to determine if the court-martial had jurisdiction of the accused and of the offense and was properly constituted.117 However, the Supreme Court's ruling in Johnson v. Zerbst118 that failure to appoint a lawyer to defend an indigent deprived a Federal District Court of its jurisdiction led to holdings that a Federal civil court could collaboratively review a court-martial conviction to determine if jurisdiction over the accused had been lost because of failure to protect his constitutional rights—especially his right to due process. Thus, in 1947 the Court of Claims awarded back pay in this Shapiro case after deciding that his conviction by court-martial was void due to flagrant violations of plaintiff's constitutional rights.119

In Burns v. Wilson120 the Supreme Court considered petitions by three airmen for a writ of habeas corpus to set aside their conviction by court-martial. They claimed that their constitutional rights had been infringed by the procedures used in the pretrial investigation and in the trial itself. Although only four Justices subscribed to the principal opinion in the case, a majority were in agreement that the airmen were entitled to collateral review of their constitutional claim.121 However, the principal opinion concluded that the civil court could only consider whether the military tribunal had given full and fair consideration to the constitutional claim.122 Many commentators and courts have taken their cue from this principal opinion and have interpreted Burns v. Wilson as holding that collateral review of a court-martial conviction can go no further than to assure that military authorities have given full and fair consideration to the constitutional claim involved.123 Under this approach a civil court is not concerned with the correctness of the result reached by the military authorities—except insofar as a palpably incorrect result might suggest that the military's consideration of the claim had been only perfunctory.

In United States v. Augenblick124 the Supreme Court had occasion to determine if the Court of Claims exceeded the permissible scope of collateral review in two awards of back pay. Augenblick, then a Navy commander, had been charged with sodomy, con-

115 See, e.g., Keyes v. United States, supra note 70; Swain v. United States, supra note 70; Mc- Claughry v. Denning, 186 U.S. 49 (1902); Collins v. McDonald, 258 U.S. 416 (1922).
116 304 U.S. 458 (1938).
118 346 U.S. 137 (1953).
119 Only one Justice took the position that the traditional limitations on collateral review should apply. The other Justices agreed that constitutional claims could be reviewed by the civil courts if they had not been fully and fairly considered by military courts. Cf. Gruik v. Schilder, 340 U.S. 128 (1950); See also Judge Kilday's concurring opinion in United States v. Tempio, 16 USCMA 628, 643, 37 CMR 249 (1967), where, after reviewing the precedents, he comments: "To summarize, I can but again reiterate my certainty that this Court is bound by the Supreme Court on questions of constitutional import; that our actions in this area are reviewable by civil tribunals; that any other view adopted by us raises the specter of possible harm to an accused with no lasting benefit to the Government; and that finality of litigation occurs only if we face such issue squarely."
120 346 U.S. at 142, 144, 146.
vicited by general court-martial of the lesser offense of an indecent act, and sentenced to dismissal. A Navy Board of Review affirmed, one member dissenting:125 and the Court of Military Appeals denied a petition for review without opinion. The Secretary of the Navy declined review, and Augenblick was dismissed. Later he applied unsuccessfully to the Board for the Correction of Naval Records. In his suit for back pay, Augenblick claimed that his conviction had been invalid because in the trial his constitutional rights had been violated. Ruling for the plaintiff, the Court of Claims found that infractions of the Jencks Act126 and denial of discovery requested by the accused at his trial had "seriously impeded his right to a fair trial" in violation "of the Due Process Clause of the Constitution."127

In the second case, which the Supreme Court disposed of by its opinion in Augenblick, Sergeant Juhl had been convicted by court-martial for selling overseas merchandise of an Air Force Exchange. He was sentenced to reduction in rank, partial forfeiture of pay, and confinement for six months. After exhausting his military remedies, Juhl also had sued for back pay. The Court of Claims found that, in violation of paragraph 153(a) of the Manual for Courts-Martial, 1951, plaintiff had been convicted "upon the uncorroborated testimony of a purported accomplice" whose "testimony is self-contradictory, uncertain, or improbable" and that accordingly his conviction was invalid.128

In a unanimous opinion reversing both cases, the Court commented that "even if we assume arguendo that a collateral attack on a court-martial judgment may be made in the Court of Claims through a back-pay suit alleging a 'constitutional' defect in the military decision, these present cases on their facts do not rise to that level."129 Concerning Juhl's case, the opinion noted that, although the Manual for Court-Martial's requirement that certain accomplice testimony be corroborated precludes an evidentiary rule designed to further fair trials, "unfairness in result is no sure measure of unconstitutionality." The Court continued:130

When we look at the requirements of procedural due process, the use of accomplice testimony is not catalogued with constitutional restrictions. Of course, if knowing use of its perjured character were linked with any testimony (Mooney v. Holohan, 294 US 103, 79 L Ed 791, 55 S Ct 340, 98 ALR 406; Brady v. Maryland, 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194), we would have a problem of different dimensions. But nothing of the kind is involved here.

As to Augenblick's claim that he had been denied due process by the prosecution's failure to produce certain evidence for inspection by the defense, the Supreme Court's opinion first emphasizes that the "record is devoid of credible evidence that" the requested evidence was suppressed. Then the Court continued:131

Whether Mendelsohn should have been recalled is a matter of debate and perhaps doubt. But questions of that character do not rise to a constitutional level. Indeed our Jencks decision and the Jencks Act were not cast in constitutional terms. Palermo v. United States, supra, at 345, 362, 3 L Ed 2d at 1291, 1300. They state rules of evidence governing trials before federal tribunals; and we have never extended their principles to state criminal trials. It may be that in some situations, denial of a Jencks Act type of a statement might be a denial of a Sixth Amendment right. There is, for example, the command of the Sixth Amendment that criminal defendants have compulsory process to obtain witnesses for their defense. Palermo v. United States, 360 US 343, 362, 3 L Ed 2d 1287, 1300 (concerning opinion). But certain it is that this case is not a worthy candidate for consideration at the constitutional level.

In regard to the Supreme Court's opinion, it seems fair to conclude that Augenblick's chances of success would have been enhanced had Juhl's case not been before the Supreme Court at the same time. Even though transgression of a specific mandate in the Manual for Courts-Martial—which for some

125 21 L. Ed. 2d at 541, note 1. The Board of Review opinion is unpublished, but is discussed by the Court of Claims in its opinion. 377 F. 2d 586.
127 377 F. 2d at 606.
128 383 F. 2d 1009.
129 293 U.S. at 361-2.
130 Id. at 352-3.
131 Id. at 356.
purposes at least has force of law— is a serious matter, it does not reach constitutional proportions. On the other hand, there were those who had believed that the Jencks Act had constitutional aspects.

Furthermore, if Augenblick could have established suppression of the evidence—a concept which has been broadened by cases such as Brady v. Maryland— the Supreme Court would probably have found a violation of the accused's constitutional rights and affirmed the Court of Claims. Indeed, subsequent to the Supreme Court decision Augenblick's counsel moved the Court of Claims for leave to amend his complaint in order to allege that suppression of the evidence had occurred.

Finally, it seems ironic that the opinion of the Court in Augenblick was written by Justice Douglas, who wrote the principal opinion in O'Callahan v. Parker. Since Augenblick's alleged offense had occurred in Washington, D.C. away from any military reservation and when the accused was not in uniform, there might be some question as to whether his offense was sufficiently "service-connected" to create jurisdiction in the court-martial which tried him—a matter clearly of constitutional proportions. However, this possibility was not discussed.

As an aftermath of Augenblick, persons challenging court-martial action in civil courts will endeavor to attribute constitutional dimensions to any errors complained of. If an alleged error does involve the violation either of an express constitutional mandate or of the right to a fair trial conferred by the Due Process Clause, what is the permissible scope of collateral review by a civil court? Is it limited to inquiring whether military authorities gave full and fair consideration to the constitutional claim, or does it go further?

In its significant decision in Kauffman v. Secretary of the Air Force, the Court of Appeals gives its answer. Noting that the "Supreme Court has never clarified the standard of full and fair consideration," which derives from the plurality opinion in Burns v. Wilson, the Court of Appeals suggests that, when properly interpreted, "the principal opinion in Burns did not apply a standard of review different from that currently imposed in habeas corpus review of State convictions. The Court's denial of relief on the merits of the serviceman's claims can be explained as a decision based upon deference to military findings of fact, similar to the general nonreviewability of state factual findings prevailing at the time."

Then the Court of Appeals stated:

We hold that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule. The military establishment is not a foreign jurisdiction; it is a specialized one. The wholesale exclusion of constitutional errors from civilian review and the perfunctory review of servicemen's remaining claims urged by the government are limitations with no rational relation to the military circumstances which may qualify constitutional requirements. The benefits of collateral review of military judgments are lost if civilian courts apply a vague and watered-down standard of full and fair consideration that fails, on the one hand, to protect the rights of servicemen, and, on the other, to articulate and defend the needs of the services as they affect those rights.

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132 Article 36 of the Code authorizes the President to prescribe regulations concerning the "procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals." Within the area of this delegated power, it seems clear that the rules promulgated by the President through Executive order— i.e., the Manual for Courts-Martial—would have the effect of law. Cf. United States v. Paul, Paul v. United States, 371 U.S. 245 (1963); G. L. Christen & Associates v. United States, 109 Ct. Cl. 1, 320 F. 2d 345, cert. denied, 375 U.S. 954 (1965).


134 Information supplied by Joseph H. Sharlitt, Esq., Counsel for Augenblick. A further petition for certiorari was filed by Augenblick on 2 September 1969. See 38 U.S.L.W. (U.S.), 3087 Augenblick v. United States (No. 551). For an interesting post-Augenblick decision from the Court of Claims, see Geisinger v. United States, 412 F. 2d 882 (CT. Cl. 1969), which invalidated a court-martial conviction predicated on an unconstitutional presumption, but, in determining the damages, refused to speculate concerning the promotions that the convicted officer might have received had his career not been terminated by court-martial action.

135 Supra note 12.
During the period since Burns v. Wilson was decided in 1953, the Supreme Court has displayed increased willingness for Federal district courts to undertake collateral review of state court convictions. In the face of this trend, it appears improbable that collateral review of court-martial action will be limited to determining if military authorities gave full and fair consideration to constitutional claims advanced. The indefiniteness of this standard hardly commends its further use. And if a majority of the Court continues to subscribe to the derogatory view of military justice expressed by Mr. Justice Douglas' opinion of the Court in O'Callahan v. Parker, it would be surprising if courts-martial were granted greater insulation from collateral attack than is afforded civil tribunals.

In Owings v. Secretary of the Air Force, the United States District Court for the District of Columbia undertook collateral review of a special court-martial conviction in 1960. His conviction for larceny resulted from the use of worthless checks to obtain cash that Owings had used for gambling. After the conviction had been affirmed on direct review, plaintiff had applied unsuccessfully to the Air Force Board for the Correction of Military Records. Then, in turn, he sought collateral review by the District Court.

Citing Augenblick, District Judge Gasch pointed out that:

Subsequently, however, the Supreme Court has held that the jurisdiction of the Court of Claims in collateral attacks on courts-martial is limited to the correction of errors of constitutional proportions.

It would appear from these authorities that the scope of review by this Court is limited to: (1) the procedural history of the case including a determination of whether the service followed the statutes and regulations by which it is bound; and (2) the record in the case including its merits to the extent a decision might have been without basis in fact or to the extent an issue of constitutional proportions may be raised.

Proceeding to the merits, the Court quoted from a 1966 decision of the Court of Military Appeals to the effect that "this court on the basis of public policy, consistently refused to sustain criminal proceedings based upon the issuance of worthless or subsequently dishonored checks in connection with gambling games." According to the Court, this principle was applicable to the facts of the plaintiff's case, as those facts had been determined by the Air Force Correction Board. As for a Government contention that the plaintiff should not benefit from principles of substantive criminal law established in a decision rendered six years after his conviction, the Court replied that the decision had antedated the review by the Correction Board and therefore was binding on the Board. In the words of Judge Gasch, the Board

... could not overlook the fact that the highest judicial authority for the military had indicated that the acts for which this plaintiff was discharged were not, should not and will not be considered violations of the UCMJ. It appears that this is precisely the circumstance in which the Correction Board should act to correct an injustice of constitutional proportions. There can be no doubt that the Board is bound by the pronouncements of the highest judicial authority of the military just as it is bound by their enabling statute and regulations.

Under the Owings view, a change in substantive military law, if not given retroactive effect by military authorities, gives rise to an error of constitutional proportions which can be collaterally reviewed by civil courts. Under this same approach any serviceman who had been convicted by court-martial prior to the decision in O'Callahan v. Parker could obtain the benefit of that case by applying to the Correction Board and, if relief is denied, asserting that an error of constitutional dimensions occurred which can be remedied in a Federal civil court.

The far-reaching consequences of the Owings rationale suggests that the District Court may have relied on an erroneous premise. District Judge Gasch quoted Thorpe v. Housing Authority for the proposition that, "The general rule, however, is that an

135 266 U.S. at 266 ("travesties of justice perpetrated under the UCMJ"). Id. at 266, footnote 7 ("so-called military justice").
136 Supra note 85.
appellate court must apply the law in effect at the time it renders its decision." In Thorpe the action of a local housing authority was being considered on direct review when a new Federal directive was promulgated; and the Supreme Court gave effect to that new directive. On the other hand, in Owings the direct review of the conviction had been completed several years before plaintiff applied to the Correction Board. It seems questionable that even the Thorpe opinion requires that a change in substantive criminal law, grounded by the Court of Military Appeals on "public policy," be applied to convictions rendered several years before.

CONCLUSION

Within and without the military justice system new remedies have become available for collateral attack on court-martial convictions. The expansion of these remedies within the military justice system tends to delay or preclude the collateral review in the civil courts because of the required exhaustion of remedies. To invoke civil court jurisdiction, a constitutional claim must be asserted; but if it is asserted and if military remedies have been exhausted, then the civil courts may make their own determination of whether the questioned court-martial action departed from constitutional standards.