The Effect of Federal Court Constitutional Law Decisions on Military Law

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INTRODUCTION

Traditionally, military courts were deemed independent of Article III federal courts. This independence was rationalized on the premise that since the military justice system was created by Congress under an express grant of power in Article I of the Constitution, it should be exclusively regulated by Congress. The concept of independence produced a military justice system that was effectively insulated from federal decisional law.

In 1953 the Supreme Court destroyed the independence concept. *Burns v. Wilson,* a military habeas corpus decision, established that military courts must protect a serviceman’s basic constitutional rights. If the military courts failed to protect these rights, then federal courts would grant habeas corpus to military defendants.

Since this landmark case was decided, federal decisional law has had a profound effect on military law. Some federal cases are now given stare decisis effect by military courts. Other cases have induced the military courts to modify their appellate process. I will explore in depth these recent developments in military law.

STRUCTURE AND NATURE OF MILITARY COURTS

Intermediate appellate courts in the military are courts of military review (although there are several courts of military review, one for each respective branch of the military, I will hereafter refer to them collectively as CMR). The CMR consists of three members who are usually career military judges. Jurisdiction of the CMR extends to: all cases affecting general or flag officers; all cases in which commissioned officers, cadets, or midshipmen

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2. Prior to the Military Justice Act of 1968, amending 10 U.S.C. §§ 801-940, the Court of Military Review was known as the Board of Military Review.
are dismissed; all cases in which the sentence is a dishonorable or bad conduct discharge; all cases in which the sentence is one year of confinement or more. Note particularly that sentences of less than one year coupled with a discharge that is not dishonorable or bad conduct are not reviewable by the CMR.

The military's Supreme Court is the Court of Military Appeals (CMA), created by provisions in the Uniform Code of Military Justice in 1950. The CMA consists of three civilian attorneys appointed by the President for fifteen year terms; in addition the President also designates the chief judge. The CMA has power to review questions of law but not fact; the CMR is the highest military court where questions of fact can be reviewed. Lack of power to review questions of fact is a fundamental difference between the CMA and the Supreme Court. Jurisdiction of the CMA extends to: all cases affecting general or flag officers; all cases in which death is imposed; all cases reviewed by the CMR which the Judge Advocate General has certified to be reviewed by the CMA; all cases reviewed by the CMR which, upon petition of the accused to the CMA and good cause shown, the CMA accepts. The President, as commander-in-chief, has the power to review CMA decisions, however, this power is rarely exercised.

Most of the law defining the rights of military personnel is found in the Uniform Code of Military Justice (UCMJ), in the Manual for Courts-Martial, and in CMR and CMA decisions. Twenty years ago it would have been safe to say that practically all the law affecting the military could be found in the above sources. The transition from "practically all" to "most" is primarily the result of military courts responding to civilian law. Today, federal court decisional law does affect the rights of people in the military. To appreciate the transition requires a brief discussion of

5. Id. However, the CMA can review the sufficiency of the evidence to convict. See Karlen, Civilian and Military Justice at the Appellate Level, 1968 Wis. L. Rev. 786 (1968).
6. President Nixon opted to exercise this power in the Lt. Calley case.
8. Manual for Courts-martial (1969 Rev. Ed.). This is the bible for court-martial procedure. Many substantive rights (such as limitation on barrack searches) are also found in the Manual.
the historical view that military courts were independent of Art. III federal courts.

Since military courts were created by Congress by a grant of power in Art. I of the Constitution, the historical view favored a military justice system free of Art. III court interference. In a series of United States Supreme Court decisions up to the early 1950's, the independence of the military courts was deemed to preclude federal court interference via habeas corpus except in those cases in which the military had no jurisdiction to try the accused or in cases in which the military exceeded its own power in the sentence pronounced. This extremely narrow ground for granting habeas corpus effectively insulated the system of military law from civilian law; therefore a military law system developed that was independent of most constitutional provisions. Military rights were spelled out in the UCMJ (or its predecessor) or in military court decisions. Thus, a serviceman's constitutional rights were temporarily suspended while he was in the military unless those rights were also guaranteed in the UCMJ. The independence of the military law system was also evidenced by the fact that military courts never cited civilian court decisions as stare decisis unless they happen to concern jurisdictional issues.

The isolation of military law from federal court interference was predicted on several premises: (1) Courts-martial are Art. I courts, not Art. III courts; (2) Congress, by a liberal reading of the Necessary and Proper Clause, has the sole authority to establish military rights; (3) Courts-martial are bodies primarily created to administer military discipline in order to promote an effective fighting force. The concept of a totally independent military law system was shattered in a Supreme Court case decided in 1953. *Burns v. Wilson* said that a person didn't give up all his constitutional rights just because he was in the military. The Supreme

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10. Lack of jurisdiction is still the primary source of Supreme Court case law granting habeas corpus review of military judgments. See Reid v. Covert, 354 U.S. 1 (1957), military has no power to try civilian dependents of military personnel for capital crimes; Kinsella v. United States, 361 U.S. 234 (1960), extending Covert to non-capital crimes; Grisham v. Hagan, 361 U.S. 278 (1960), extending Kinsella to civilian employees of military; O'Callahan v. Parker, 395 U.S. 258 (1969), military cannot try military personnel for non-service connected crimes. The basis for these decisions was a narrow interpretation of the Necessary and Proper clause. The Court felt that military jurisdiction over non-military personnel or non-service connected crimes could not be justified as a "necessary and proper" function of military courts.
11. See note 1 supra.
Court mandated the military courts to enforce the serviceman's constitutional rights.

Decisions by the Supreme Court after Burns v. Wilson limited the independence of military courts, but recognized that military courts did not have to rank with Art. III courts in protecting an individual’s constitutional rights. The Court stressed that the necessity of military discipline prevents any requirement that military law be identical to civilian law. A typical statement by the Supreme Court is contained in Toth v. Quarles:\(^{12}\)

> We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property. Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars . . . .\(^{13}\)

The disciplinary function of courts-martial was voiced again by Justice Douglas in O'Callahan v. Parker:\(^{14}\) “[A] court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.”\(^{15}\) Unfortunately, the balance of Justice Douglas' dissertation on military discipline in O'Callahan produced an exaggerated and unwarranted attack on the whole military justice system: “[C]ourts-martial as an institution are singularly inept in dealing with the nice subleties of constitutional law.”\(^{16}\) This view gives no credit to the military courts for their responsiveness to civilian law. The major impetus for this responsiveness has been the large number of habeas corpus cases since Burns v. Wilson.

**Federal Habeas Corpus Review: Burns v. Wilson to the Present**

Burns v. Wilson is the fountainhead for federal court review of military court decision in which there is a claim of deprivation of constitutional rights. Unfortunately, it was a poorly written, cryptic, plurality decision\(^{17}\) that has to this day produced a myriad

^{13} Id. at 17.
^{15} Id. at 265.
^{16} Id.
^{17} Most of the references in note 30, infra, have criticized Burns.
of views in the circuits as to precisely what the criteria are for granting habeas review. In the decision, the Court demanded that the military must protect an individual's constitutional rights, except those which expressly or by implication, do not apply to the military. If these rights are not fully and fairly considered by the military courts, then federal courts can grant habeas corpus providing the person seeking habeas has exhausted his military remedies. Burns raised three questions which still have not been resolved in subsequent decisions: (1) which rights by implication do not apply to the military, (2) what does "fully and fairly consider" mean, (3) what constitutes exhaustion of military remedies.

The so-called implication exception is currently used in two different contexts. Some rights are restricted or denied because of the necessity of military discipline, as briefly discussed above. Other rights are deemed not to apply to the military because by historical implication they were never meant to apply to the military. For example, the right to trial by jury, guaranteed by the sixth amendment, has been denied to military personnel. Denial was rationalized on the basis that military defendants have always been tried by courts-martial without a jury. Since courts-martial were in use before the Bill of Rights were enacted, the founding fathers would have expressly abolished them if they had so desired.

A recent example of divergent court views on the implication exception concerns the right to counsel. Two different ex-service men petitioned federal district courts claiming that they were denied the right to legal counsel in special courts-martial. Application of Stapley decided that the sixth amendment right-to-counsel provision applied to the military. The court stated that there was no necessity or discipline requirement to preclude the right of counsel at special courts-martial. Citing Burns, Stapley established that the serviceman was denied a basic constitutional right. In Kennedy v. Commandant the petitioner cited Stapley as prece-

18. Ex Parte Quirin, 317 U.S. 1 (1942). See Larkin, note 8 supra, for good discussion concerning which of the Bill of Rights apply to the military.
dent. The district court summarily rejected the Stapley rationale and stated that if military due process was followed, then an ex-serviceman was precluded from a collateral attack in a federal court. Although the decision was primarily based on an Art. I, sec. 8 independence argument (an argument discredited by Burns), the court also said that, by historical implication, counsel need not be provided at courts-martial. The counsel requirement at special courts-martial was partially resolved by Art. 19 of the Military Justice Act of 1968. Art. 19 now requires that a defendant be represented by a lawyer if the court might impose a bad conduct discharge. Generally, the implication test by federal courts today concerns to what extent constitutional rights apply to the military, rather than whether or not they apply. This is particularly true in the field of speech, religion and equal protection rights. When military personnel seek habeas corpus in speech cases, the federal courts invariably reject their claims by saying that the necessity for military discipline precludes speech rights as expansive as those enjoyed by civilians.

In Cortright v. Resor, members of an army band sought a writ of mandamus to restrain the army from transferring various members to other bases, alleging that the army was acting illegally by chilling the petitioners' first amendment rights. Petitioners in Cortright had protested the Vietnam war by signing their names to an anti-war ad appearing in the New York Times. They also persuaded their wives to wave anti-war signs at a Fourth of July parade in which the band participated. In fact the wives attempted to march in the parade. The district court in a long and well reasoned opinion rejected the government's contention that the transfer orders did not chill first amendment rights, also rejecting an argument that the military alone determines the scope of speech rights. The Second Circuit reversed the decision, saying that a challenge to transfer orders did not present a justiciable issue, basing its decision on administrative law. In dicta, there was criticism of the district court decision. The court felt that the parade incident had a direct effect on military discipline, stressing that the parade incident could promote insubordination. In

conclusion, the Second Circuit felt that the district court also ex-
aggerated the scope of the chilling effect of the transfer orders.

The "fully and fairly consider" requirement of Burns has pro-
duced sharply divergent views in the circuits. Unfortunately, no
Supreme Court decision since Burns has clarified the test. A major
factor that has produced the divergent views is the so-called finality
clause, Art. 76 of the UCMJ. The finality clause states that find-
ings and decisions of military appellate courts shall be binding on
all United States courts. Since Art. 76 was enacted after Burns,
the federal courts said that habeas corpus was an implied excep-
tion to Art. 76. In United States v. Augenblick the Supreme
Court affirmed that habeas is an exception.

It has not been clarified by the Supreme Court as to what effect
Art. 76 has on the "fully and fairly" test. However, other courts,
notably the court of claims, have interpreted the finality clause as
precluding any review of evidentiary facts de novo by federal
courts if the facts were considered at all. Preclusion of reviewing
facts de novo is justified by reliance on a statement in Burns v.
Wilson:

[W]hen a military decision has dealt fully and fairly with an alle-
gation raised in that application, it is not open to a federal civil
court to grant the writ simply to re-evaluate the evidence.

This is the so-called law/fact dichotomy which continually appears
in recent habeas corpus decisions. The dichotomy is best stated
in Shaw v. United States:

[W]e think that . . . abstinence is not to be practiced where the
serviceman presents pure issues of constitutional law unentangled
with an appraisal of a special set of facts. That type of unmixed
legal question this court has always decided for itself.

The narrow scope of review of military judgments varies dra-
matically from the scope of habeas corpus review exercised by
federal courts when reviewing civilian judgments. In civilian ha-
beas cases, federal courts will review evidentiary facts de novo. For
example, assuming a person is beaten and held incommunicado
for thirty days in a dark room (facts) and then confesses to a crime,
the issue of coerced confession is a conclusion of law based on a
set of particular facts. If this fact situation appeared in a mili-
tary judgment, a federal court following the law/fact dichotomy

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26. 346 U.S. at 142.
27. 357 F.2d 949 (Ct. Cl. 1966).
28. Id. at 954.
29. Johnson v. Zerbst, 304 U.S. 458 (1938) is the fountainhead case for
the scope of federal habeas corpus review of state court judgments.
would not grant habeas if the military court considered these facts. However if the factual situation appeared in a state court judgment, the federal court would decide whether these facts constitute a coerced confession in violation of the Constitution. To distinguish, a pure question of law might be whether the dying declaration exception to hearsay violates the confrontation requirement of criminal trials. The federal court would consider this question of law in both civilian and military habeas corpus cases.

The law/fact dichotomy, coupled with non-clarified Burns decisions has produced striking variations in the federal courts on the criteria for granting habeas corpus. Several law review articles have analyzed and classified the different criteria used for granting habeas. The various criteria are summarized below:

1. Only review if there is a “traditional” jurisdiction problem.
2. Only review questions of constitutional fact and law not considered at all if a crude injustice (i.e. denial of very basic constitutional rights) will result.
3. Only review questions of constitutional fact and law not considered at all by a manifest refusal of the military to consider.
4. Review questions of constitutional law if the military courts did not consider the question “fully and fairly” in light of the constitutional importance of the question. Only review fact if not considered at all by a manifest refusal of the military.
5. Review all questions of constitutional law. Review factual questions if not considered at all by a manifest refusal.
6. Review all questions of constitutional fact and law.

Of the six, the first scope of review is the narrowest. Courts expounding this view give lip service to Burns' "full and fair" test but then decline to review using a traditional independence of military courts argument. This view is best explained in Kennedy \textit{v. Commandant}.\textsuperscript{31} The second and third opinions expounded by a few courts preclude review unless the military manifestly refuses to review constitutional claims.\textsuperscript{32} Probably a majority of courts adhere to the fourth position which precludes review of questions of law, unless the military courts did not "fully and fairly" reviewed the constitutional claims.\textsuperscript{33} Of course, this scope of review is precisely what Burns dictated. Although the opinions don't state it as such, the fullness and fairness of review is usually considered relative to the importance (i.e. fundamental right or express right) of the right. Many courts of claims in back pay cases follow the fifth opinion which allows review of all questions of law.\textsuperscript{34} The sixth view, the most liberal, has been embraced by the D.C. circuit in the leading case, \textit{Kauffman v. Secretary}.\textsuperscript{35} \textit{Kauffman} was decided in 1969 and remains the most liberal view of scope of review to date. According to the D.C. Circuit the scope of review for military cases should be identical to that for civilian habeas cases. The court used a "jurisdiction" argument to justify full review. Before \textit{Kauffman} was decided, several courts of claims decisions reasoned that constitutional defects in military courts caused the military to lose jurisdiction of the case when the constitutional defect arose. Thus, the D.C. Circuit argued that since lack of jurisdiction was the traditional grounds for granting habeas corpus, the civilian courts can review all constitutional defects de novo.

In 1969, just before \textit{Kauffman}, the Supreme Court considered this argument in \textit{United States v. Augenblick}.\textsuperscript{36} The majority opinion denied habeas by stating that there were no constitutional defects in the military trials (\textit{Augenblick} had a companion case). Nevertheless, Justice Douglas left the door open for the \textit{Kauffman} jurisdiction argument by stating:

\begin{quote}
[E]ven if we assume \textit{arguendo} that a collateral attack [via a jurisdiction attack] on a courtmartial 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.\textsuperscript{37}
\end{quote}

\textsuperscript{31} See note 20 \textit{supra}.
\textsuperscript{32} The Tenth Circuit voices this narrow view of review.
\textsuperscript{33} The Seventh Circuit voices this.
\textsuperscript{34} See Shaw \textit{v. United States}, \textit{supra} note 27.
\textsuperscript{35} 415 F.2d 991 (1969).
\textsuperscript{36} See note 25 \textit{supra}.
\textsuperscript{37} 393 U.S. at 351.
Kauffman quoted this passage to justify full review; however it is still an extreme minority rule, no other circuit having adopted the reasoning. This decision was probably the high water mark of the scope of habeas corpus review; unfortunately, no Supreme Court since Kauffman, (or Burns for that matter) has clarified the scope of review.

Military Response to Federal Habeas Corpus Cases

Prior to Burns, the Court of Military Appeals stated that soldiers' rights were those defined in the UCMJ. The traditional independence of military law argument was put forth to justify the opinion that the constitution didn't apply to military personnel. In United States v. Clay\(^3\) the CMA coined the phrase "military due process," referring to the rights and procedures guaranteed by the UCMJ and military appellate court decisions. The court stated that civilian due process did not apply in the military. Burns changed this.

From 1953 to 1960 the CMA recognized constitutional rights on a piecemeal basis. For example, in 1954 the court recognized a qualified first amendment right in United States v. Voorhees.\(^3\) Finally in 1960 the Court recognized that the Bill of Rights apply to the military. The CMA, in United States v. Jacoby\(^4\) said, "[I]t is apparent that the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."\(^4\) Three factors are important concerning this case. First, the decision came seven years after Burns, quite a long time to wait to give stare decisis effect to a case. Second, the court did give stare decisis effect to Burns. Jacoby is the first significant case by the CMA to recognize that at least some Supreme Court cases and constitutional provisions are binding on the military courts. Third, the court adopted the implication language of Burns. This implication language has constantly been used by the military to restrict rights which are enjoyed by civilians.

An extraordinary increase in habeas corpus cases occurred during the 1960's. Warren Court decisions in civil rights and criminal

\(^{38}\) 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).
\(^{41}\) Id. at 430-31, 29 C.M.R. at 246-47.
procedure, coupled with dissident views of the Vietnam war, prompted many military defendants to seek federal relief.

Understandably, the military courts were dismayed by this development. They probably felt that the flood of habeas corpus would eventually reduce the military justice system to a state of impotency. The military was also afraid that federal courts, in a zealous effort to civilianize military law, would lose perspective concerning the fighting and discipline function of the military. Military appellate courts responded by becoming more responsive to constitutional demands and by opening new avenues of review and relief within the military justice system.

A typical quote from a CMR decision illustrated the effect that habeas corpus decisions have on military decisions:

There is the further present day consideration [to dispose of this case] that administrative agencies and [federal] courts alike are authorized to review, and less standoffish about reviewing and reversing, action completed [in military courts] in the past. Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965); Shaw v. U.S., 357 F.2d 949 (1965 Ct. Cls.) . . . Section 1552 of Title 10, U.S. Code, gives to military department Secretaries, acting through civilian boards, plenary power to correct military and naval records and to render monetary and other compensation consequent thereon.

Somewhat strict requirements to obtain review by the CMA often precluded review by this court. Many military defendants (particularly those in special courts-martial), frustrated in their attempt to seek military appellate review, sought federal habeas corpus. The CMA, recognizing this trend took an innovative step in the case United States v. Frischholz. The court adopted the view that the All Writs Act can be used by the CMA since it is a Court established by Congress. In Frischholz, the court specifically endorsed the use of the writ of error coram nobis. In Levy v. Resor, the CMA endorsed the writ of mandamus and habeas corpus for the court. Recently, the CMR decided that the authority vested in the All Writs Act is available to the CMR. The CMR affirmed the use of coram nobis relief, in United States v. Draughan.

43. Id. at 698.
45. 28 U.S.C. § 1651(a). This act permits all courts established by Congress “[t]o issue writs necessary or appropriate in aid of their respective jurisdiction and agreeable to common usages or principles of law.” This section permits federal courts to issue writs of mandamus, writs error coram nobis, etc.
Perhaps the most dramatic endorsement of extraordinary review can be found in *United States v. Bevilacqua*. Bevilacqua was convicted by a special court-martial and was unable to obtain appellate review because his sentence was for less than one year. Contending that he was deprived of a basic constitutional right, Bevilacqua appealed to the CMA. The CMA accepted the appeal, endorsing the use of a writ of extraordinary review by the CMA in all cases where military defendants claimed that their constitutional rights were violated. The CMA reviewed *Burns* and mentioned the increasing trend of military defendants to seek federal habeas corpus cases. In particular, the court cited two "liberal" habeas decisions, *Application of Stapley* and *Ashe v. McNamara*. The CMA concluded with an impassioned statement that the military justice system was responsive to constitutional claims and cited the recent use of extraordinary writs.

One military law commentator immediately saw the importance of the CMA granting extraordinary writs:

> 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, by granting extraordinary relief, especially in constitutional cases, the CMA effectively made themselves the final arbiter of constitutional law in the military, not the federal courts. Since exhaustion of military remedies is a condition precedent for federal habeas corpus review (as dictated by *Burns*), the military defendant would now be forced to appeal to the CMA before seeking federal habeas corpus.

The CMA probably recognized that this would reduce the number of federal habeas cases; it probably has. After *Bevilacqua* was decided, the U.S. Supreme Court recognized and approved the CMA's use of extraordinary writs in *United States v. Augen-**

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49. See note 19 supra.
50. 355 F.2d 277 (1st Cir. 1965).
52. Id. at 406.
blick. In Noyd v. Bond the Supreme Court, citing Bevilacqua, Frischholz, and Resor as authority, refused to grant petitioner's request for habeas corpus as he failed to exercise his right to military habeas corpus.

The Bevilacqua, Frischholz, Resor, Augenblick, Noyd line of cases reveals the shrewd approach of the CMA. By becoming more responsive to civilian law (i.e. use of writs and review of constitutional law), the CMR has forced the federal courts to recognize new exhaustion of remedies requirements. These requirements discourage federal habeas corpus and tend to vest more power in the CMR to decide constitutional issues. Civilian court citing of military court decisions and vice versa also illustrate a symbiotic relationship between military and civilian courts.

Unfortunately the CMR backtracked on the use of extraordinary writs in the case United States v. Snyder, saying that extraordinary review only applies to cases in which the CMA has the power to ultimately review. Therefore in certain special courts-martial, non-reviewable by the CMA because of statutory jurisdiction limitations, the use of extraordinary writs is prohibited. For example, sentences of one year or less, providing the discharge is not a bad conduct or dishonorable one, are not reviewable by the CMA. The use of extraordinary writs has probably been a direct result of the pressure of federal habeas corpus. However, the military courts have been extremely reluctant to cite federal habeas corpus cases as precedent (unless they are U.S. Supreme Court cases made expressly binding on the military courts) for defining the constitutional rights of military personnel. This reluctance is understandable in that military courts feel that the CMA or the U.S.Supreme Court should be the only courts who mandatorily dictate which rights exist in the military.

Effect of Federal Court Constitutional Law Decisions on Military Courts

Even after Burns was decided in 1953, there was still doubt as to whether the CMA would give strict stare decisis effect to U.S. Supreme Court decisions on constitutional issues. In the 1950's and early 1960's the usual procedure was for the CMA to endorse a Supreme Court decision in a CMA decision. The CMA would endorse it rather than say that the Supreme Court decision was

53. See note 25 supra.
stare decisis. Lower military courts would rarely if ever cite Supreme Court decisions until they were endorsed by the CMA. This procedure effectively made the CMA the final judge of constitutional issues. Lower military courts (CMR) depended on the CMA, not the Supreme Court, as having the final word on constitutional law. The CMA developed case law by a judicious use of cases on petition from the CMR.

The probable reasons that the military courts were insulated from Supreme Court cases as precedent are manifold: (1) Prior to *Miranda v. Arizona*,56 the UCMJ provided a criminal procedure superior to the civilian system for protecting an accused's rights,57 (2) prior to the Vietnam buildup, the general view of discipline in the military allowed little leeway for first amendment rights, (3) prior to the late 1960's sex and racial equal protection actions were rarely brought in the military. In other words the military was insulated from the criminal procedure, equal protection, and first amendment “revolution” for a long period of time.

After *Miranda* was decided, numerous military defendants appealed to the CMA claiming that the procedural safeguards outlined in *Miranda* applied to the military. Ironically, the *Miranda* safeguards, although they exceeded existing UCMJ safeguards, were prompted by a Warren Court observation that the UCMJ provided a superior system for protecting an accused’s rights.

*Miranda* type appeals to the CMA produced a landmark case, *United States v. Tempia*.58 Here the issue of stare decisis effect of Supreme Court decisions on military law was squarely presented. All the old “independence” arguments were used by the government to contend that Supreme Court decisions were not binding on the military.

Summarily dismissing the government’s arguments, the CMA mandated that Supreme Court decisions are precedent for military courts in areas of constitutional rights which by implication are not meant to be limited to civilians. One concurring opinion of *Tempia* went so far as to say that military courts were inferior

57. The Art. 31 procedures of the UCMJ, Art. 31, U.C.M.J., 10 U.S.C. § 831 (1956), offered guarantees against self incrimination which were much more liberal than civilian guarantees prior to the *Miranda* decision.
federal courts and bound by Supreme Court decisions as any Article III court would be bound. 59 The language of Tempia contains two important points: (1) Supreme Court decisions (and probably lower court decisions) are stare decisis on all military courts on certain constitutional issues, (2) the implication language promulgated in Burns and repeated in Jacoby 60 still allows the military to have some freedom in deciding which Supreme Court decisions to give stare decisis effect.

Burns and Tempia are still the fountainhead cases on the scope of constitutional law in the military and the interrelationship of civilian and military court decisions on constitutional law. After Tempia, the military courts readily adopted the criminal procedure decisions of the Supreme Court. Indeed, military defendants soon obtained the best of two worlds: the UCMJ's guarantees of an accused's rights as well as federal guarantees. The military defendant's lawyer could now use UCMJ provisions, CMR decisions, CMA decisions, recent Supreme Court decisions, and probably recent lower federal court decisions to defend his client.

An example of this "dual" criminal procedure system, cited by Birnbaum, 61 follows. In 1955 the CMA decided in United States v. Ball 62 that a military defendant didn't have to be given his fifth amendment rights before a handwriting exemplar was taken from him. This was an interpretation of the Art. 31 provision of the UCMJ 63 which outlines the fifth amendment rights of an accused. United States v. Minnifield 64 overruled Ball and said that exemplars required a fifth amendment rights warning. Gilbert v. California, 65 a 1967 United States Supreme Court case, held that handwriting exemplars don't violate the fifth amendment and therefore a defendant need not be warned of his rights before giving an exemplar. Two weeks after Gilbert was decided, the CMA had an opportunity to overrule Minnifield in light of Gilbert. The CMA refused to do so in United States v. White 66 reasoning that the CMA decision in Minnifield was an interpretation of the Art. 31 rights afforded by Congress rather than a constitutional question.

Birnbaum concludes that the military enjoys more fifth amend-

59. Id. at 641, 37 C.M.R. at 261 (Kilday, J.).
60. See note 40 supra.
ment rights than civilians are allowed under Schmerber v. California, which holds that non-testimonial evidence, such as handwriting exemplars, does not violate the fifth amendment.

Prior to Tempia, the CMR was very reluctant to cite federal court decisions as precedent. After Tempia, the courts were much less reluctant to cite recent federal cases as stare decisis in the criminal procedure area. A recent example is United States v. Pullen. The search and seizure issue in the case was resolved by the CMR by citing Terry v. Ohio, Katz v. United States and Chimel v. California as precedent. United States v. Lockhart cited a recent Supreme Court case, Chambers v. Maroney as precedent. Not one CMA decision was cited as precedent.

These cases illustrate a recent trend in the intermediate appellate courts in the military. Prior to Tempia almost all precedent cited in CMR cases were CMA decisions. The CMR would generally wait until the CMA endorsed a Supreme Court decision before citing it. Now the CMR’s are willing to cite U.S. Supreme Court, Courts of Appeal, and even district court decisions as precedent in the criminal procedure area.

In areas of constitutional law other than criminal procedure, the military courts are rather reluctant to cite U.S. Supreme Court cases. This is particularly true of first amendment rights or equal protection rights. Military courts justify this reluctance by quoting the “implication” words of Burns, Jacoby, Tempia, and stressing the discipline function of the military. Rather than not recognize a first amendment right, the military courts desire to limit that right to preserve discipline.

Sherman, a learned military law commentator, recently commented on the scope of a soldiers first amendment rights. He analysed recent first amendment cases decided by the CMA,

68. 41 C.M.R. 693 (1970).
70. 389 U.S. 347 (1967).
72. 43 C.M.R. 968 (1971).
75. United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967);
concluding that the CMA invariably refused to cite recent U.S. Supreme Court cases as precedent in the various cases. Indeed in the Howe case, the sole Supreme Court decision cited was Whitney v. California, a 1927 case. Of course, the CMA is understandably trying to avoid a recent liberal trend of first amendment rights established by the Supreme Court, in order to preserve discipline. In fact, recently the CMA transformed the clear and present danger test of speech to a clear and present danger to military discipline test.

In concluding, Sherman stated that the military still has a very restricted first amendment right. The CMA is loath to give stare decisis effect to liberal Supreme Court first amendment decisions. He also indicated that the CMR rarely cites federal cases as precedent for first amendment cases before the cases are endorsed by the CMA; whereas in criminal procedure cases, the CMR shows no reluctance to cite nothing but federal cases as precedent. Sherman believes that the timidity of the CMR to exhibit some independence in the non-criminal procedure areas is one of the basic weaknesses of the CMR.

Even though the first amendment right in the military is still a restricted one, the CMA has shown some degree of responsiveness to Supreme Court cases as evidence in the Voorhees, Gray line of cases. In recent cases, the CMA has tightened the discipline requirement by requiring a showing that speech has a direct effect on discipline before a defendant may be convicted.

Liberalization of military law by the CMA has had the desired effect. Federal courts (at least at the court of appeals level) have been demonstrating an increasing tendency to refuse to grant habeas corpus. Cortright v. Resor, mentioned earlier, is the classic example. In reversing the district court, the court of appeals cited the liberalizing trend of the CMA, refusing to overrule the military on the discipline issue.

Federal courts, however, have recently shown a breakthrough in granting habeas in cases other than criminal procedure or speech. The D.C. Circuit reversed the district court in Anderson v.


76. See note 75 supra.
77. 274 U.S. 357 (1927).
78. See note 39 supra.
79. See note 75 supra.
80. See note 22 supra.

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Laird and held that required attendance at military academy chapel violates the first amendment prohibition against establishing a religion. The court refused to accept the argument by the government that required chapel strengthens military discipline. This and other cases will undoubtedly put pressure on the CMA to "liberalize" other constitutional rights.

CONCLUSION

The result of the interplay of civilian and military law has produced a criminal justice system in the military that in many respects is superior to the civilian system. Nevertheless, constitutional rights other than rights of an accused are still generally restricted in the military. Speech is frequently restricted under a sweeping military discipline argument.

I feel that the federal courts should show a greater tendency to grant habeas corpus in the speech and equal protection areas. This would put the pressure on the military to expand these rights. Perhaps what is needed the most is a Supreme Court decision clarifying the full and fair test of Burns. Such a decision would put the federal courts on firmer ground, allowing them to at least know when they can grant habeas corpus. There is such a divergence in the circuits as to the meaning of Burns that most habeas petitions are denied because courts give a very restricted interpretation of Burns. Furthermore, the CMR should exhibit more independence from the CMA on constitutional issues other than criminal procedure. This independence might induce the CMA to be less reluctant to cite Supreme Court cases as stare decisis.

To summarize, some aspects of the military justice system are superior to their civilian counterparts. A continued responsiveness by military courts to civilian law may someday produce a system superior in all respects.

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82. 466 F.2d 283 (D.C. Cir. 1972).