Washington Law Review

Volume 41 | Number 2

4-1-1966

Federal Habeas Corpus Jurisdiction—The Undeveloped Areas

David F. Berger

COMMENT

FEDERAL HABEAS CORPUS JURISDICTION— THE UNDEVELOPED AREAS

While habeas corpus has been a traditional form of relief[1] in criminal cases,[2] recent developments in governmental activity—nonjudicial as well as judicial—may combine to present the practicing lawyer with questions of federal habeas corpus jurisdiction which have seldom, if ever, been previously litigated. In the non-judicial sphere, a generation of hot war, cold war, international tension and obligatory military service has resulted in direct governmental regulation of the activities of a large proportion of the male population. At the same time, judicial definition of "restraint," which is an essential prerequisite to habeas corpus relief, has been changing from essentially physical terms[3] to restraints of primarily a moral nature,[4] and even to mere "status" without immediate physical restraints of any sort.[5] The result of this combination of factors may be a parallel development of the availability and issuance of the writ of habeas corpus in several areas,—military commissions, American Indian courts, military courts-martial, selective service classification and induction, and alien deportation and exclusion.

This comment is concerned with habeas corpus jurisdiction in terms

[1] The writ of habeas corpus—known also as the Great Writ and the Freedom Writ—serves as a civil action for the purpose of judicial inquiry into the legality of physical restraint of a person. See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1236-68, 1299-312 (1953). The framers of our federal constitution considered the writ of habeas corpus to be an essential component of a government of laws, and provided for it in the first article of the constitution as a guaranteed "privilege." U.S. CONST. art. I, § 9(2). For a readable discussion of the writ's historical development and modern deviation from the classical concept, see Rubenstein, *Habeas Corpus as a Means of Review*, 27 MODERN L. REV. 322 (1964). The writ is not available to be used as an appeal from a judicial decision, but prior adverse adjudications do not operate to foreclose a court from consideration of the writ. Ordinarily, the writ may issue only when outright and immediate release of the restrained person would result. It is not a requisite to issuance of the writ that the physical restraint have resulted from a judicial decision; restraint as a result of administrative action may also be terminated. HART & WECHSLER, *op. cit. supra* at 1239; Note, *Federal Habeas Corpus Review of "Final" Administrative Decisions*, 56 COLUM. L. REV. 551 (1956).

[2] See Mishkin, *Foreword* to *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56 (1965).

[3] See the discussion of habeas corpus in McNally v. Hill, 293 U.S. 131 (1934).

[4] Jones v. Cunningham, 371 U.S. 236 (1963) (parole). See Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966).

[5] *Ex parte* Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952) (selective service classification).

of its availability and issuance in behalf of persons physically restrained by the exercise of federal authority other than article III federal courts. Restraint by article III courts is excluded from discussion because the federal Habeas Corpus Act of 1948[6] fully covers those cases by specific provisions for relief of persons convicted and confined as a result of criminal proceedings in state or federal district courts. Thus, uncertainties as to habeas corpus availability and issuance only exist in regard to "non-article III"[7] restraint.

In 1948, pursuant to recommendation of a Judicial Conference Committee on Habeas Corpus Procedure, Congress passed the Habeas Corpus Act, authorizing issuance of the writ by federal courts under sections 2241 and 2255 of title 28 of United States Code. This act is the sole statutory provision for the procedures governing issuance of the writ of habeas corpus. Section 2255, an entirely new provision "in the nature of . . . *coram nobis*,"[8] creates a procedure whereby a person "under sentence of a court established by Act of Congress"[9] may seek from that court vacation of the sentence. Although not a form of habeas corpus in the strict historical meaning, a proceeding to vacate sentence under section 2255 has been identified as "really and virtually only another kind of habeas corpus to be sought in the trial court."[10] Judicial interpretation in section 2255, however, has not accorded with its "plain meaning;" although courts-martial, and the Juvenile and Municipal Courts of the District of Columbia, are "courts established by Act of Congress," it has been held that they are not empowered by section 2255 to vacate sentences.[11] Therefore, it may also be assumed that section 2255 does not empower an Indian tribal court to vacate a sentence imposed by it. Nor does the language of section 2255 allow for relief from *administrative* detention.[12] It must be concluded, then, that habeas corpus relief in "non-article III" situations may only be

[6] 28 U.S.C. §§ 2241-55 (1964).

[7] This term is quite unsatisfactory, yet efforts to further define the area have been fruitless.

[8] "Statement" of the Judicial Conference Committee on Habeas Corpus Procedure, as quoted in United States v. Hayman, 342 U.S. 205, 217 (1952). The opinion in *Hayman* carefully examines the origin and function of § 2255 (1964).

[9] 28 U.S.C. § 2255 (1964).

[10] Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 13 F.R.D. 407, 424 (1953). This article contains an excellent post-*Hayman* discussion of § 2255, *id.* at 421-24.

[11] Palomera v. Taylor, 344 F.2d 937 (10th Cir. 1965) (courts-martial); Burke v. United States, 103 A.2d 347 (D.C. Munic. Ct. App. 1954) (Juvenile Court); Ingols v. District of Columbia, 103 A.2d 879 (D.C. Munic. Ct. App. 1954) (Municipal Court). The MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951) devotes an entire chapter (ch. 29) to habeas corpus, with no mention of § 2255.

[12] See text accompanying note 9, *supra*.

obtained under section 2241. As opposed to the ordinary situation in which relief has already been denied under section 2255, the "last chance" nature of a section 2241 petition in a "non-article III" situation may unconsciously cause a court to give the petitioner the greater benefit of any doubt.

I. Military Commission

A military commission may be described as an *ad hoc* body convened to try a member or members of the enemy armed force for specific war crimes arising out of formal hostilities. The source of a military commission's power to judge and confine has not been clearly defined, but appears to be an inherent presidential power arising from his constitutional position as commander in chief,[13] and delegated down the military chain of command to high-ranking area and theatre commanders.[14] The Second World War produced a number of convictions, including sentences of death, by military commissions.[15] As would be expected, the issue of habeas corpus availablity and issuance under these circumstances has not been before the courts since 1950.

Petitions for habeas corpus relief from convictions by military commissions have produced deep and fundamental division within the United States Supreme Court.[16] Jurisdiction of the court to entertain the petition was recognized in each case, but relief was denied. The writ, of course, does not provide any *substantive* grounds for freeing the petitioner; rather, it is a *procedural* guarantee that the constitutionality of the petitioners restraint may always be reviewed. Thus, issuance of the writ is dependent upon a showing that petitioner has been denied substantive rights guaranteed him by some other constitutional provision. As would be expected, the alleged substantive basis for a petition is usually a denial of due process. It has been the scope of constitutional due process that has divided the Supreme Court, the majority finding that this constitutional guarantee did not extend to the petitioners because they were aliens and/or non-residents and/or enemies. The minority, on the other hand, argued that the reach of due process was coextensive with the reach of the constitutional power

[13] U. S. Const. art. II, § 2(1).
[14] See Johnson v. Eisentrager, 339 U.S. 763, 768-76 (1950).
[15] *E.g.*, Johnson v. Eisentrager, 339 U.S. 763 (1950); *In re* Yamashita, 327 U.S. 1 (1946); *Ex parte* Quirin, 317 U.S. 1 (1942).
[16] See the dissenting opinions of Mr. Justice Rutledge in *In re* Yamashita, *supra* note 15, at 41, and Mr. Justice Black in Johnson v. Eisentrager, *supra* note 15, at 791. See also Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 Harv. L. Rev. 657, 662-63, 667 (1948).

exercised,—*i.e.*, "equal justice not for citizens alone, but for all persons coming within the ambit of our power."[17]

Chief Justice Warren, not then a member of the Court, has characterized these decisions as "outside the mainstream of American judicial thought," "aberrational," "abhorrent," and due to a "pathological condition" of war.[18] While one is always tempted to conjecture as to what the Court as presently composed would do with problems of an earlier era, guesswork in this area would be particularly fruitless. If Chief Justice Warren is correct in his evaluation, the war which would be required to again pose the problem might well create the same "pathological condition." Judicial development of the circumstances which would warrant issuance of the writ of habeas corpus to persons detained as a result of conviction by a military commission depends on a "case or controversy" which can only arise under similar wartime conditions. Although the area of "habeas corpus and military commissions" is one of the least developed in the law, the peculiar circumstances which create the issue also tend to stifle its development.

II. AMERICAN INDIAN COURTS

The same conceptual difficulty that underlies the decisions in the area of jurisdiction over military commissions exists in regard to jurisdiction over the affairs of the American Indian. Until 1924, Indians on reservations were not considered to be United States citizens, but rather as citizens of the particular Indian tribe to which they belonged.[19] As a consequence, the reservation Indian did not come within the protective ambit of the Constitution. On this basis, the Supreme Court held in 1896 that habeas corpus was not available to test the legality of imprisonment of an Indian by a tribal court.[20] In 1924, Congress amended the Nationality Act to bestow United States citizenship upon Indians born in the United States.[21] Nevertheless, as late as 1963 a federal district court could hold (although incorrectly) that, "from these cases and authorities it is clear that the provisions of the Federal Constitution guaranteeing due process and the right to counsel

---

[17] Johnson v. Eisentrager, 339 U.S. 763, 791 (1950) (dissenting opinion of Black, J.).

[18] Warren, *The Bill of Rights and the Military*, JAG Bull. May-June, 1962, pp. 6, 13, 14 & n.30. *Cf.* I BLACKSTONE, COMMENTARIES 400 (1765): "For martial law, which is built upon no settled principles, but is entirely arbitrary in it's decisions, is... in truth and reality no law, but something indulged, rather than allowed as a law."

[19] *E.g.*, Elk v. Wilkins, 112 U.S. 94 (1884).

[20] Talton v. Mayes, 163 U.S. 376 (1896).

[21] 43 Stat. 253 (1924), 8 U.S.C. § 1401(a)(2) (1964).

do not apply in prosecutions in tribal courts," and deny habeas corpus.[22]

A 1965 decision of the Court of Appeals for the Ninth Circuit[23] could be the turning point in this line of cases. Reversing the same district court that had handed down the 1963 decision quoted above, the Court of Appeals held that habeas corpus relief could be granted to an Indian woman confined by order of a tribal court. The court took particular cognizance of the Wheeler-Howard Indian Reorganization Act, passed by Congress in 1934, which granted authority to a tribe to establish its own judicial system. That statute, coupled with numerous other connections between the Indian courts and the federal government, made the constitutional guarantees of due process applicable to the tribal criminal proceedings.[24] With the jurisdictional problems greatly lessened by these two statutes, and the authority, persuasion, and precedent of this recent decision, it may be assumed that habeas corpus will hereafter be used to free persons restrained by decisions of an Indian court.

III. COURTS-MARTIAL

Convictions by military courts-martial provide a graphic illustration of the agonizing development of habeas corpus concepts. The judicial article of the Constitution makes no provision for military justice. Instead, the framers vested Congress with authority "to make rules for the government and regulation of the land and naval forces."[25] In deference to this specific grant of power, it was long held that civil courts were severely limited on habeas corpus examination of decisions of military tribunals; if the tribunal was found to have had jurisdiction over the person and the offense, and imposed a lawful sentence, then its decision stood.[26] Thus, the availability of the writ was accepted; the limitation was in the permissible scope of review on habeas corpus. The established military judicial procedures categorically satisfied due process requirements, without any consideration of whether the estab-

[22] Glover v. United States, 219 F. Supp. 19, 21 (D. Mont. 1963).

[23] Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965), 79 HARV. L. REV. 436, 26 MONT. L. REV. 235.

[24] *But see* Kane, *Jurisdiction Over Indians and Indian Reservations,* 6 ARIZ. L. REV. 237, 254-55 (1965).

[25] U. S. CONST. Art. I, § 8(13).

[26] See Hiatt v. Brown, 339 U.S. 103 (1950), and cases cited therein. See also Warren, *op. cit. supra* note 18; Bishop, *Civilian Judges and Military Justice; Collateral Review of Court-Martial Convictions,* 61 COLUM. L. REV. 40 (1961); Snedeker, *Habeas Corpus and Court-Martial Prisoners,* 6 VAND. L. REV. 288 (1953); Trubow, *Review of Military Convictions Through Habeas Corpus,* 29 J.B.A. KAN. 191 (1960); Note, *Scope of Civil Review of Courts-Martial,* 5 SYRACUSE L. REV. 116 (1953).

lished procedures preserved to the accused his ordinary constitutional rights. It was generally considered that one surrendered his constitutional rights when he entered the service.

However, a suggestion of a broader scope of review appeared in 1950 in the decision in *Whelchel v. McDonald*.[27] In 1953, the decision of *Burns v. Wilson*[28] elaborated upon the earlier "suggestion" in identifiable, if not lucid, terms. The writ was not issued in *Burns*, but the language used and the extent of review clearly indicated an intent on the part of the Court to expand the scope of review on habeas corpus. Chief Justice Warren, in his article mentioned above, considered the holding to require a scope of review sufficient to determine whether the accused had been assured his "basic rights."[29] The most recent discussion of the case, appearing in a military law journal, concluded that *Burns* has established a scope of habeas corpus review by civil courts over military judicial proceedings which is roughly equivalent to that presently exercised over state criminal proceedings.[30] Examination of the case results can only lead to a contrary conclusion. Hundreds of habeas corpus petitions have been considered by all levels of the federal court system, but it was not until 1965, in *Application of Stapley*,[31] that a writ of habeas corpus issued to free a military prisoner. This decision by a federal district court, as yet not appealed, held that the prisoner had been effectively denied his constitutional right to counsel guaranteed by the sixth amendment. The decision in *Stapley* remains an intriguing exception; several months after that decision, and although cited to it, another district court refused to issue the writ on a similar set of facts.[32] That a new

---

[27] 340 U.S. 122 (1950).

[28] 346 U.S. 137, 52 MICH. L. REV. 602 (1954), 27 So. CAL. L. REV. 333 (1954), 22 U. CINC. L. REV. 501 (1953). No single opinion carried a majority of the court. In addition to the opinion of the court, there were two concurring opinions and one dissenting opinion, plus a refusal to decide by Mr. Justice Frankfurter.

[29] Warren, *op. cit. supra* note 18, at 11.

[30] Kraft, *Collateral Review of Courts-Martial by Civilian Courts: Burns v. Wilson Revisited*, JAG Bull., March-April, 1963, p. 14.

[31] 246 F. Supp. 316 (D. Utah). Although the prisoner was freed in an earlier habeas corpus proceeding, DeCoster v. Madigan, 223 F.2d 906 (7th Cir. 1955), the basis for issuance of the writ was the long-standing one of imposition of an unlawful sentence. Ironically, DeCoster's two co-defendants were denied habeas corpus relief in their respective districts and took their cases to the Supreme Court, which affirmed the lower courts and continued the detention. Fowler v. Wilkinson, 353 U.S. 583 (1957); Jackson v. Taylor, 353 U.S. 569 (1957). The government had not appealed the decision in *DeCoster*, and he remained free.

[32] LeBallister v. Warden, 247 F. Supp. 349 (D. Kan. 1965). The two cases could have been meaningfully distinguished on the facts, but the court did not attempt to do so, and merely recited the conventional "jurisdictional" limitation on review. For an example of a truly onerous decision resulting from the equivocation in *Burns*, see Williams v. Heritage, 323 F.2d 731 (5th Cir. 1963).

scope of habeas corpus review now exists, however, cannot be denied.[33]

The Uniform Code of Military Justice,[34] which Congress enacted to establish a uniform judicial system for all branches of the military, also provided for court-martial jurisdiction over dependents and civilian employees of the military while stationed outside the continental United States, and over discharged service personnel for offenses committed prior to discharge. In a series of habeas corpus cases beginning in 1956, each of these provisions was found to be an unconstitutional denial of the constitutional guarantees of a jury trial and grand jury indictment.[35] These decisions took cognizance of the continuity of the cold war, of military obligations abroad, of the morale value of having dependents accompany military personnel into noncombat areas, and of the advantages of employing civilians to perform many of the modern noncombat military operations.

A like list of considerations could be cited in support of a broadened scope of habeas corpus review over court-martial convictions of military personnel. Prior to 1940 (except for a brief period during World War I) the military had not played, historically, a very prominent part in American life. Beginning just before World War II, however, involuntary military service has been a continuing fact of our society. The once casually accepted observation that a man voluntarily surrendered his constitutional rights when he joined the service is no longer acceptable. Nor, in fact, is the traditional justification of military exigency valid; the vast majority of courts-martial occur in noncombat areas and arise from noncombat activities. Future decisions as to the requirements of "military due process"[36] could distinguish between combat and noncombat areas and activities, as well as between those offenses ordinarily criminal and those which are inherently military in nature and noncriminal under civil law.[37]

[33] See the excellent summary of this area of law entitled "Scope of Review in Habeas Corpus Involving a Military Prisoner," in Swisher v. United States, 237 F. Supp. 921, 924-29 (W. D. Mo., 1965).

[34] 10 U.S.C. §§ 801-940 (1964).

[35] United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1956) (discharged person); Reid v. Covert, 354 U.S. 1 (1957) (dependent, capital offense); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (dependent, non-capital offense); Grisham v. Taylor, 361 U.S. 278 (1960) (employee, capital offense); McElroy v. Guagliardo, 361 U.S. 281 (1960) (employee, non-capital offense). These cases cast doubt on the continued validity of Kahn v. Anderson, 255 U.S. 1 (1921), which held that a prisoner serving a court-martial sentence is still subject to court-martial authority for offenses committed while in confinement, even though discharged many years previously. Nevertheless, *Kahn* was followed in Ragan v. Cox, 320 F.2d 815 (10th Cir. 1963).

[36] For an excellent discussion of the problems in this area which are yet to be decided, see Bishop, *supra* note 26, at 51, 70.

[37] *E.g.*, unauthorized absence, desertion, disobedience of the lawful order of a superior officer.

The increase in our military forces as a result of hostilities in Viet Nam, with its probable attendant increase in courts-martial convictions, may well mean that a rapid evolution of the law governing the issuance of writs of habeas corpus to persons convicted by courts-martial may occur in the next few years.

IV. SELECTIVE SERVICE CLASSIFICATION AND INDUCTION

The same conditions which result in an increase in courts-martial will produce an increase in the volume of selective service classification and induction cases. One major difference exists, however. Selective service classification and induction is, at present, a wholly administrative process. An intricate system of locally-administered rules, decisions, appeals, and reviews has been provided by Congress in the Universal Military Training and Service Act.[38] Congress has provided that these administrative decisions are "final,"[39] and no statutory provision for judicial review exists.

The registrant's usual claim is that he has been wrongfully classified by his local board. Since that misclassification has resulted in an order for his induction, he is faced with a choice between reporting for induction and being charged with criminal prosecution for failing to report.[40] Even though habeas corpus would be available to test the legality of his induction,[41] submission to the induction requires the registrant to surrender his freedom before his right to it can be judicially determined. As a consequence, the misclassified registrant usually chooses to face the criminal prosecution for failure to report, and defends on the basis that he was misclassified. Even in that situation, the Supreme Court has held that the defense of misclassification is not available to the registrant if he has failed to exhaust his administrative remedies in pursuance of correct classification.[42] If convicted over the defense of wrongful classification, the scope of review on appeal, or on a petition for a writ of habeas corpus, is limited to determining whether there was *any* evidence (apparently, no matter how slight) to support the order, or procedural irregularities

[38] 62 Stat. 604-27 (1948), as amended, 50 U. S. C. APP. §§ 451-73 (1964).
[39] 62 Stat. 619-20 (1948), as amended, 50 U. S. C. APP. § 460(b)(3) (1964).
[40] See Note, *Federal Habeas Corpus Review of "Final" Administrative Decisions*, 56 COLUM. L. REV. 551 (1956). See also Berman, *Selective Service and the Courts—Why a Registrant Must First Exhaust His Administrative Remedies*, 5 N.Y.L.F. 179 (1959); Note, *Habeas Corpus and Judicial Review of Draft Classifications*, 28 IND. L.J. 244 (1953); Note, *Judicial Review of Draft Board Orders*, 10 WYO. L.J. 208 (1956).
[41] United States v. Capson, 347 F.2d 959, 962 (1965); *cf.* Estep v. United States, 327 U.S. 114, 123-34 (1946) (dictum).
[42] Falbo v. United States, 320 U.S. 549 (1944).

of such a nature or magnitude as to render the hearing manifestly unfair.[43] While partaking of due process, the applicable standard sounds like review of an administrative rate-making decision.

As in the other areas which have been discussed in this comment, the major decisions were made by a different Court in a different era.[44] And, as in the other areas considered, there are indications that the decision would be different today. The major indication arises from a little-followed decision by a federal district court in 1952 that habeas corpus was available to review a selective service classification *prior to actual induction.*[45] This decision has been criticized by the courts and acclaimed by student note-writers.[46] But its true significance may be in the fact that it was cited in a footnote in 1963 by the Supreme Court, in a landmark decision which held that habeas corpus was available to a convicted federal criminal despite the absence of actual physical custody of him.[47] Furthermore, the case was cited for the proposition that "habeas corpus has also been consistently regarded by lower federal courts as the appropriate procedural vehicle for questioning the legality of an induction or enlistment into the military service."[48] Citation in this context, and for this proposition, indicates that (absent wartime conditions, a caveat that must be added in all of these military and quasi-military areas of the law) habeas corpus could perhaps become what the Supreme Court has declared it to be presently in the area of selective service classification and induction.

V. Alien Deportation and Exclusion

Until the last dozen years, alien deportation and exclusion was an area of the law often likened to selective service classification and induction. The decisions were administrative, although by federal authorities rather than state, and statutorily declared to be "final."[49] Perhaps because of federal administration rather than local, or because alien deportation and exclusion did not involve questions of "war powers" or military exigency, development of the two areas of the

[43] Eagles v. United States *ex rel.* Samuels, 329 U.S. 304 (1946).

[44] The older cases dealt with a system in which classification occurred at the time of induction. Consequently, the induction satisfied the requirement of restraint. Under the present system, classification may precede induction by several years, and always precedes induction by at least a few weeks. But mere classification as draft-eligible, although virtually insuring eventual induction, is not a physical restraint.

[45] *Ex parte* Fabiani, 105 F.Supp. 139 (E. D. Pa.).

[46] 28 Ind. L.J. 244 (1952), 37 Minn. L. Rev. 69 (1952). (Most male students, of course, are potentially interested parties to this subject matter.).

[47] Jones v. Cunningham, 371 U.S. 236, 240 & n. 11 (1963).

[48] *Ibid.*

[49] Immigration and Nationality Act of 1952 § 242(b), 66 Stat. 210 (1952), 8 U.S.C. § 1252(b) (1964).

law has been different. While selective service classification and induction is still a relative no-man's-land for the judiciary, self-involvement by the courts in the area of alien deportation and exclusion dates back to the turn of the century, in the *Japanese Immigrant Case*.[50] Ever since this landmark decision, the courts and Congress have engaged in a colloquy concerning the finality of administrative deportation and exclusion orders.[51]

Although the question of alien deportation and exclusion had already taken on due process dimensions,[52] the passage of the Administrative Procedure Act in 1946,[53] and the Immigration and Nationality Act of 1952[54] established the basis for Supreme Court decisions to extend direct judicial review to deportation orders in 1955[55] and exclusion orders in 1956.[56] Congress responded by passing an immigration bill in 1961 which contained, for the first time, a detailed statutory scheme for judicial review of deportation and exclusion orders.[57] The statute expressly recognized a judicial *fait accompli,* by providing that habeas corpus is available to review both deportation and exclusion orders,[58] but making it the exclusive remedy as to the latter.[59] Direct judicial review of a deportation order is provided in the statute,[60] but it must be sought within six months of the issuance of the order,[61] and in the appropriate federal court of appeals.[62] Again, habeas corpus remains available, and without temporal limitation. To date, the statute seems to be functioning well, with an absence of judicial criticism or patently unjust results.

The importance of the 1961 immigration bill lies in the fact that it represents a reasonable compromise between judicial guardianship of the availability of the great writ and legislative assertions of the finality of administrative decisions. Congress was understandably concerned that judicial maneuvers could be misused by undesirable aliens to delay interminably the day of their departure.[63] The courts,

[50] Yamataya v. Fisher, 189 U.S. 86 (1903).
[51] See Note, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts,* 71 YALE L.J. 760 (1962).
[52] Heikkila v. Barber, 345 U.S. 229, 236 (1953); Bridges v. Wixon, 326 U.S. 135 (1945).
[53] 60 Stat. 237-44 (1946), 5 U.S.C. §§ 1001-11 (1964).
[54] 66 Stat. 163-282 (1952), 8 U.S.C. §§ 1101-503 (1964).
[55] Shaughnessy v. Pedreiro, 349 U.S. 48.
[56] Brownell v. Tom We Shung, 352 US. 180.
[57] 75 Stat. 650-57 (1961), 8 U.S.C. §§ 1101-486 (1964).
[58] 75 Stat. 652-53 (1961), 8 U.S.C. §§ 1105a(a)(9), (b) (1964).
[59] 75 Stat. 653 (1961), 8 U.S.C. § 1105a(b) (1964).
[60] 75 Stat. 651 (1961), 8 U.S.C. § 1105a(a) (1964).
[61] 75 Stat. 651 (1961), 8 U.S.C. § 1105a(a)(1) (1964).
[62] 75 Stat 651 (1961), 8 U.S.C. § 1105a(a)(2) (1964).
[63] Note, *Deportation and Exclusion: A Continuing Dialogue Between Congress*

on the other hand, are the final authority on the constitutional rights of the aliens involved. The statute, as a compromise, insures the availability of habeas corpus and provides for direct judicial review of deportation orders, while placing reasonable procedural restrictions on the direct review. If the practices of the last five years are any indication, it may well be that judicial insistence on the availability of habeas corpus has resulted in a statutory settlement of the area of alien deportation and exclusion to everyone's general satisfaction.

VI. Conclusion

As the reader has no doubt perceived, the different areas of the exercise of federal authority considered have been presented in the order of their increasing sophistication and satisfactory operation. It should be apparent that peculiar problems will always exist in each individual area. Cases involving military commissions and Indian tribal courts arise so seldom that the law will be long in transition, unless the courts don seven-league boots. Courts-martial and selective service classification and induction cases vary in quantity according to the state of international tension, and the near future may bring an abundance of "cases and controversies" for the evolution of this part of federal jurisdiction. Too, the three areas which involve military considerations carry some "pathological conditioning," to use Chief Justice Warren's terminology,[64] and may develop at only a snail's pace. Finally, the oft-litigated area of alien deportation and exclusion seems to have reached a satisfactory plateau, to function as a model for lawyers and lawmakers dealing with the problems of the other four areas.

Three conclusions may be drawn concerning "non-article III" federal courts:

1. The Existence of Habeas Corpus Jurisdiction is Coextensive With the Reach of Federal Power. This conclusion applies only to availability of habeas corpus as a procedural remedy, and does not relate to the substantive rights which may be exercised in the hearing on the petition. The miliary commission cases, and older Indian tribal court cases, suggest that one may be constitutionally guaranteed a remedy without a right! This tail-wags-dog proposition is not surprising when it is recalled that habeas corpus is a *procedural,* rather than a sub-

and the Courts, 71 Yale L. J. 760 (1962). See Note, *Federal Habeas Corpus Review of "Final" Administrative Decisions,* 56 Colum. L. Rev. 551 (1956).

[64] Warren, *op. cit. supra* note 18, at 13.

stantive, guarantee of a hearing on the legality of one's restraint. "Legality" is the key word, for it circumscribes the substantive rights which are enforceable by habeas corpus proceedings. At present, the substantive rights of an accused before a military commission seem limited to the most elementary right to have a "non-ultra vires" trial.

2. The Substantive Rights Which Will Be Enforced in a Habeas Corpus Proceeding Are Limited To the Constitutional Rights Enjoyed by the Petitioner in the Original Hearing. Although this proposition seems obvious, no doubt, it is now and will continue to be the battleground over which habeas corpus litigation is fought. A truce has been struck, at least for the present, in the area of alien exclusion and deportation, but battle has only begun in cases involving military commissions and Indian tribal courts, and is currently being waged in areas of courts-martial and selective service classification. A reverse effect could also result, in which the existence of habeas corpus relief will cause the underlying court to take greater cognizance of constitutional rights. Thus, the present rudimentary concepts of justice in many Indian tribal courts may be greatly affected by the availability of habeas corpus relief.

3. The Importance of the Law-making Function of Habeas Corpus Decreases as the Substantive Rights of the Petitioner Increase in Both Scope and Definition. The substantive rights of aliens were defined in detail by statute in 1962, and no landmark decisions have occurred since that time. However, the intricacy of the statute is alone insufficient; the substantive rights to be exercised must also be expanded before habeas corpus decreases in importance. Witness the Uniform Code of Military Justice, which is considered by some to be as deficient in substantive rights as it is explicit in procedural rights. In fact, it could be argued that the detailed procedural devices for review in the Uniform Code have hampered development of the substantive rights, by providing a statutory basis for those who would limit habeas corpus proceedings to consideration of only due process questions.

The legal merit of the writ of habeas corpus lies not only in its mere availability; a remedy has little value in the absence of a substantive right to exercise. Habeas corpus also serves as the chief procedural device whereby substantive rights are expanded and defined. Thus, habeas corpus proceedings are the primary vehicle by which the undeveloped areas in administrative and criminal proceedings will be brought into line with modern concepts of an individual's

constitutional rights. Almost certainly the end result, which may be far in the offing, will be equation of the substantive rights to be enforced in a habeas corpus proceeding with the availability of the proceeding itself. Both aspects of habeas corpus jurisdiction should be limited only by the practicable considerations of time and place, and not by the conceptual difficulties which have plagued the courts in the past.

DAVID F. BERGER