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down in the past as unreasonable.\textsuperscript{46} Hopefully, the Court will maintain a vigilant eye on the ever increasing power of organized labor and not lose sight of the invaluable rights granted the individual worker in section 7.

\textbf{THOMAS C. LIBER}

\textbf{HABEAS CORPUS — EXHAUSTION OF REMEDIES — MILITARY CASES}


The United States Supreme Court has not decided a military habeas corpus case for over 10 years.\textsuperscript{1} During this period the lower federal courts have faced the problem of subordinating the military to civilian control by balancing the interests of military effectiveness against the affirmative value of keeping military power in check. In weighing these interests, federal courts have applied the concept of exhaustion of military remedies.\textsuperscript{2} The doctrine is directed toward minimizing the potential conflict between the civilian and the military courts by permitting each to function in its appropriate sphere. The recent case of \textit{Noyd v. Bond}\textsuperscript{3} illustrates that the application of this concept dissolves into no simple formula.

In \textit{Noyd} a general court-martial tried the accused, found him guilty of willfully disobeying a command,\textsuperscript{4} and sentenced him to 1 year of confinement at hard labor. Pending military review on appeal,\textsuperscript{5} Noyd's commanding officer, General Bond, ordered him to be transferred from Canon Air Force Base to the United States Disciplinary Barracks at Fort Leavenworth, Kansas. Noyd sought habeas corpus in the federal district court and challenged the order as an execution of a sentence prior to final military review, prohibited by article 71 of the \textit{Uniform Code of Military Justice}.\textsuperscript{6} He further alleged that he could not be restrained at Fort Canon more rigorously than was required to insure his presence on appeal.\textsuperscript{7}

\footnotesize{United States . . . . " Id. The union's failure to proceed under a section 301 action may indicate that neither party regarded the ceiling as a term of the employment contract.

\textsuperscript{46} See, e.g., Prinzi Leather Co., 94 N.L.R.B. 1312 (1951) (Board found an unfair labor practice by union and employer where an employee was discharged for violation of a union rule limiting production).}
The district court found that the military authorities had exceeded their statutory mandate by transferring Noyd to Fort Leavenworth and held the order void. The court declined, however, to inquire into the degree of restraint the military could impose upon Noyd at Fort Canon. The court justified this result by reasoning that because the military possessed the power to restrain Noyd at Fort Canon, the question of the proper exercise of this power was more properly committed to military determination.

However, the Court of Appeals for the Tenth Circuit found that the district court should not have reviewed either issue because Noyd had failed to exhaust his military remedies. Although Noyd was not making a collateral attack upon a court-martial proceeding, the court stated that he could obtain relief by resort to the proper military tribunal. The court further stated that the proper


2 The exhaustion concept is premised upon the belief that all available remedies provided by law should be pursued prior to using the extraordinary remedy of habeas corpus. See Snedeker, Habeas Corpus and Court-Martial Prisoners, 6 VAND. L. REV. 288, 292 (1953). Thus, in the military context this simply means that one is normally required to avail himself of the remedies provided within the military structure under the Uniform Code of Military Justice (U.C.M.J.) prior to bringing habeas corpus in the federal courts.

3 402 F.2d 441 (10th Cir. 1968), cert. granted, 37 U.S.L.W. 3259 (U.S. Jan. 21, 1969) (No. 830).

4 Article 90 (2) of the U.C.M.J., 10 U.S.C. § 890(2) (1964), provides punishment by court-martial for willfully disobeying a command.

5 Appellate review of court-martial convictions by a military board of review is provided in article 66 of the U.C.M.J., 10 U.S.C. § 866 (1964).


7 Noyd argued that due process of law under the fifth amendment as applied to the military required that the military justify the necessity to restrain him at Fort Canon pending his appeal. Brief for Appellant, at 37-41, Noyd v. Bond, 402 F.2d 441 (10th Cir. 1968), cert. granted, 37 U.S.L.W. 3259 (U.S. Jan. 21, 1969) (No. 830).


9 Article 36 of the U.C.M.J., 10 U.S.C. § 836 (1964), gives the President the power to prescribe rules for the military courts. He has promulgated the Manual for Courts-Martial, Exec. Order No. 10,214, 3 C.F.R. 408 (Comp. 1949-1953) [hereinafter cited as Manual]. Pursuant to the Manual the commanding officer has the power to "take prompt and appropriate action with respect to the restraint of the person tried." Manual § 21(d).

10 The Court of Appeals for the Tenth Circuit has clearly required exhaustion of all military remedies when an attack on a court-martial conviction is lodged in the federal courts. See, e.g., Gorko v. Commanding Officer, 314 F.2d 858 (10th Cir. 1963). However, Noyd was not collaterally attacking his conviction by a general court-martial, but was challenging the legality of an order of his commanding officer which would restrain him at Fort Leavenworth.

11 The district court, never specifically identifying Noyd's available military rem-
utilization of review procedures would include a writ of habeas corpus to the Court of Military Appeals.\textsuperscript{12}

Federal courts have habeas corpus jurisdiction to review military cases\textsuperscript{13} and they have exercised this jurisdiction not only to circumscribe the nature of the power delegated by Congress under article I of the Constitution,\textsuperscript{14} but also to restrain the military from exceeding the scope of its delegated power.\textsuperscript{15} In the latter situation, they have distinguished circumstances in which the military exceeds the grant of power delegated by Congress from those in which power properly vested in the military is challenged as being improperly exercised.\textsuperscript{16} As a matter of judicial self-restraint, the
courts have limited their scope of habeas corpus review\textsuperscript{17} and have applied the doctrine of exhaustion of remedies.\textsuperscript{18} In state cases the Supreme Court has held that this requirement "is not one defining power but one which relates to the appropriate exercise of power"\textsuperscript{19} and is based upon considerations of comity rather than defining the scope of habeas corpus inquiry.\textsuperscript{20} Federal courts have recognized the applicability of this rationale to military cases and have applied the doctrine as a rule of discretion.\textsuperscript{21} Thus, the crucial question in military habeas corpus cases becomes whether the federal courts, as a matter of judicial discretion, should defer to the judgment of military tribunals.

It is significant that the thrust of Noyd's complaint was \textit{not the defective exercise of military power already possessed},\textsuperscript{22} but that the military order transferring him to Fort Leavenworth was \textit{void for want of any power}.\textsuperscript{23} However, alluding to the desirability of military tribunals coping with problems peculiar to the supervision of military personnel,\textsuperscript{24} the court deferred to the judgment of the Court of Military Appeals.\textsuperscript{25} The underlying reason for denying review, however, is the court's apparent belief that it is not the proper function of civilian courts to adjust the rights of service-men.\textsuperscript{26} Consequently, the court's application of the exhaustion doctrine results in far too crude a resolution of competing policy

\textsuperscript{17} Burns v. Wilson, 346 U.S. 137 (1953). The Court reasoned that because Congress had established a statutory scheme of judicial proceedings within the military, the federal courts should not disregard these prior proceedings. Deference to the military courts therefore requires that the scope of inquiry in a federal court should be limited simply to whether the military fully and fairly dealt with the case rather than the correctness of the conclusions rendered. \textit{Id.} at 142.

\textsuperscript{18} See, e.g., Hammond v. Lenfest, 398 F.2d 705 (1968); Gorko v. Commanding Officer, 314 F.2d 858 (10th Cir. 1963).


\textsuperscript{20} Fay v. Noia, 372 U.S. 391, 418 (1963). Although Fay involved state rather than military habeas corpus, the Court recognized in formulating the exhaustion of military remedies doctrine that the same policy was applicable to each. Gusik v. Schilder, 340 U.S. 128, 131 (1950).

\textsuperscript{21} Williams v. Heritage, 323 F.2d 731, 732 (5th Cir. 1963), \textit{cert. denied}, 377 U.S. 945 (1964). See Hammond v. Lenfest, 398 F.2d 705, 714 (2d Cir. 1968). Other jurisdictions, although not rejecting this view, have not affirmatively accepted it. The issue is therefore as unresolved as it was in 1953 when Mr. Justice Frankfurter urged that the Court consider the question. Burns v. Wilson, 346 U.S. 137, \textit{rehearing denied}, 346 U.S. 844 (1953) (separate opinion).

\textsuperscript{22} Noyd did, however, argue this issue in the alternative. \textit{See note 7 supra.}

\textsuperscript{23} \textit{See} text accompanying note 6 supra.

\textsuperscript{24} 402 F.2d at 442.

\textsuperscript{25} Cf. text accompanying note 12 supra.

\textsuperscript{26} \textit{See} 402 F.2d at 443.
considerations and amounts to little more than a strict non-reviewability doctrine.\textsuperscript{27}

The essential function of exhaustion of military remedies is to afford a remedy "much better adapted to reach justice than any within the power of the district court"\textsuperscript{28} and it is therefore premised upon the assumption that the expertise of a military tribunal is necessary for an adequate determination of the issues. But it is a gross fiction to assume that the task of determining whether military authorities have exceeded the scope of their delegated powers is inherently dependent upon knowledge peculiar to military authorities and that a military tribunal is therefore more capable of resolving the issue than a civilian court. Moreover, under article III of the Constitution the function of restraining a branch of government from exercising powers not delegated to it traditionally has been judicial.\textsuperscript{29} The Court of Military Appeals is an article I tribunal created by Congress to assist in the making of rules and regulations for land and naval forces.\textsuperscript{30} The decision of the tenth circuit vests priority in a legislative as distinguished from a judicial tribunal to determine the breadth of the power delegated by Congress. By mechanically applying the exhaustion concept in a circumstance where neither military requirements nor the need for the specialized knowledge of a military court indicate the wisdom of judicial abstention, the court has abdicated its duty to check the unauthorized exercise of military power. It is difficult to fathom the interest in military efficiency or national defense reigning so paramount that federal courts must abdicate this responsibility.\textsuperscript{31}

\textsuperscript{27} For discussion of the doctrine regarding administrative agencies, see 4 K. C. Davis, \textit{Administrative Law Treatise} §§ 28.03, 28.16 (Supp. 1965); Saferstein, \textit{Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"}, 82 Harv. L. Rev. 367 (1968).

\textsuperscript{28} Whelchel v. McDonald, 176 F.2d 260, 263 (5th Cir. 1949), \textit{aff'd}, 340 U.S. 122 (1950).

\textsuperscript{29} Mr. Chief Justice Marshall said in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803): "It is, emphatically, the province and duty of the judicial department, to say what the law is." \textit{Id.} at 177 (emphasis added). The Court has often checked the unauthorized use of delegated power by executive officers. \textit{See, e.g.,} Leedom v. Kyne, 358 U.S. 184 (1958); Harmon v. Brucker, 355 U.S. 579 (1958); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).

\textsuperscript{30} Military courts are legislative courts created by Congress under article I of the Constitution. \textit{See} U.S. Const. art. I, § 8. Their jurisdiction has no connection with the judicial power established under article III. \textit{In re} Vidal, 179 U.S. 126, 127 (1900); Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857). \textit{Cf.} note 46 infra.

\textsuperscript{31} Regarding the priority to be given national defense, the Court has said: This concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal... It would indeed be ironic if, in the name of national defense, we would sanction
The importance that a free society attaches to civilian control of the military\textsuperscript{32} should make federal courts loath to permit the erosion of their power to determine whether the military has exceeded the scope of its congressional mandate. Moreover, during the last 20 years the nature of the military function has been transformed from an instrument of national defense into an affirmative tool of diplomacy used to shape foreign policy.\textsuperscript{33} Consequently, the nation's commitments to protect other sovereigns from military intervention\textsuperscript{34} have necessitated the establishment of a large standing army\textsuperscript{35} which in turn requires a selective service system capable of routinely channeling large numbers of recruits into the military service.\textsuperscript{36} When military power ascends to such prominence and when it begins to significantly affect the lives of so many Americans,\textsuperscript{37} it is unsatisfactory to view the military as a separate enclave\textsuperscript{38} possessed with discretion so absolute that it can determine the limits of its own power.\textsuperscript{39} Thus, the court's view of the mili-


\textsuperscript{33} See Note, Congress, The President, and The Power to Commit Forces to Combat, 81 HARV. L. REV. 1771, 1791 (1968).

\textsuperscript{34} Secretary of State Rusk testified that the United States has over 40 commitments to protect other nations. Hearings on S. 1432 Before the Senate Comm. on Armed Services, 90th Cong., 1st Sess. 143 (1967).

\textsuperscript{35} Military personnel in active service numbered approximately 12 million during World War II. Between 1947 and 1950 the number dropped to 1.5 million and, since 1950, it has numbered approximately 3 million. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1957, at 736-37 (1960), as summarized in Note, supra note 33, at 1791 n.106.

\textsuperscript{36} The influence that the United States commitment to South Vietnam has had on the Selective Service System can be observed in the draft calls which in January 1965 were 5400 per month and by December 1965 had increased to 40,200 per month. 1966 DIR. SEL. SERV. ANN. REP. 86.

\textsuperscript{37} Mr. Chief Justice Warren has stated that active military service occupies a minimum of 4 percent of the adult male's life and that reserve obligations may extend over 10 percent of his adult life. Warren, The Bill of Rights and the Military, 37 N.Y.U.L. REV. 183, 187-88 (1962).

\textsuperscript{38} Chief Justice Quinn of the Court of Military Appeals, rejecting the concept of military separateness, stated that "the points of contact between the civilian community and the Armed Forces are today so numerous and intimate that it can be truly said that military life is an immediate and integral part of American life." Quinn, The United States Court of Military Appeals and Military Due Process, 35 ST. JOHN'S L. REV. 225, 254 (1961).

\textsuperscript{39} Particularly in times of military confrontation does the history of American mili-
tary as an isolated system beyond the legitimate concern of civilian courts results in an exceedingly narrow standard for civilian control of the burgeoning military power.

Suppose, however, that the court in *Noyd* had correctly applied the exhaustion rationale: Is there a remedy of habeas corpus to the Court of Military Appeals? That court has held that under the All Writs Act it has habeas corpus jurisdiction over the military. The language employed by Congress, however, suggests that the Act was not intended to apply to article I courts. The Court of Military Appeals has suggested that even if the Act is interpreted to apply only to article III courts, the reasoning in *Glidden Co. v.*
Zdanok,

where both the Court of Claims and the Court of Customs and Patent Appeals were held to be article III courts, indicates that because it functions in a specialized area of federal law does not mean that it is not a part of the federal judiciary. The reasoning in Glidden is inapposite to this situation because there a divided majority emphasized that Congress had manifested its unambiguous intent to treat these courts as article III tribunals. No similar congressional intent is gleaned through congressional treatment of the Court of Military Appeals. Furthermore, the Supreme Court has firmly acknowledged the article I nature of the military courts.

Finally, habeas corpus under the All Writs Act has been applied only where an appellate court has existing jurisdiction over a case and the writ is merely auxiliary to complete the exercise of its jurisdiction rather than an independent and original basis for jurisdiction. But the jurisdiction of the Court of Military Appeals is limited to a very narrow range of cases dealing exclusively with review of the military boards of review. A general power to issue writs of habeas corpus would expand its jurisdiction to in-

44 Mr. Justice Harlan, writing the Court opinion for himself and Justices Stewart and Brennan, viewed recent statutes clearly manifesting the congressional intent to treat both courts as article III courts as "persuasive evidence," but did not base his opinion on them. Glidden v. Zdanok, 370 U.S. 530, 542 (1962). Mr. Justice Clark, concurring for himself and Chief Justice Warren, viewed the statutes as being determinative. Id. at 586-87. Justices Douglas and Black dissented in an opinion written by the former. Id. at 589.
45 In fact, Congress has conferred all the indicia of an administrative tribunal upon the Court of Military Appeals. It is located for administrative purposes in the Department of Defense. U.C.M.J. art. 67(a)(1), 10 U.S.C. § 867(a)(1) (1964). It is required to meet with the Judge Advocate General and to report annually to legislative committees and executive departments. Id. § 867(g). Its judges are removable by the President for neglect of duty or malfeasance. Id. § 867(a)(3).
46 In United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955), the Court said:
We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts. . . . Unlike courts, it is the primary business of armies and navies to fight . . . wars. . . . But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. Id. at 17.
See cases cited note 30 supra.
clude original proceedings in what Congress intended to be only an appellate tribunal.\textsuperscript{49}

In view of the necessity to preserve the federal courts’ power to determine whether military authorities have exceeded the congressional mandate,\textsuperscript{50} and assuming that the Court of Military Appeals possesses no habeas corpus jurisdiction,\textsuperscript{51} it does not necessarily follow that federal courts should always decide military cases in the first instance or that habeas corpus within the military would not be desirable in appropriate circumstances. For example, Noyd also alleged that the degree of restraint imposed upon him at Fort Canon was more rigorous than required to insure his presence on appeal and that it constituted a violation of his fifth amendment rights.\textsuperscript{52}

There are at least two elements implicit in this question which militate against an initial determination by the federal courts. First, the limitations traditionally placed upon freedom of movement in the military suggest that the question of reasonable degree of restraint is intrinsic to military considerations.\textsuperscript{53} Thus, the benefit of having a military tribunal apply its specialized knowledge of military requirements to resolve this question prior to its possible disposition in the federal courts is readily apparent. Secondly, since the question does not concern whether the military possesses any power to restrain Noyd, but whether there has been an improper exercise of power already possessed,\textsuperscript{54} the policy reasons otherwise demanding initial determination by federal courts do not weigh as

\textsuperscript{49} That Congress intended the Court of Military Appeals to be an appellate tribunal is suggested not only by its limited jurisdiction (see text accompanying note 48 supra), but also by practical considerations which indicate the inadequacy and inconvenience of having a three-judge court located in Washington, D.C., consider the multitude of military habeas corpus petitions coming from throughout the land.

\textsuperscript{50} See notes 28-39 supra & accompanying text.

\textsuperscript{51} See notes 40-49 supra & accompanying text.


\textsuperscript{53} Cf. Henderson, supra note 52, at 316.

\textsuperscript{54} See notes 7 & 9 supra.
heavily. Therefore, a procedure whereby Noyd could obtain habeas corpus review by the Court of Military Appeals would facilitate the ultimate disposition of the case if later brought to the federal courts. Additionally, military personnel in a predicament similar to that of Noyd could obtain judicial review within the military if the Uniform Code of Military Justice contained such a provision. However, since Congress has not clothed the Court of Military Appeals with habeas corpus jurisdiction, the valid exercise of such power could be accomplished only by federal statute.

The exhaustion doctrine is a judicial device used to maintain a viable and efficient military establishment and to circumscribe the unauthorized exercise of military power. The concept does not serve its purpose when employed absolutely, in disregard of the considerations which merit its application. Federal courts through a discretionary application of the doctrine should grant immediate review in cases where the military is challenged as having exceeded its statutory power, thus giving rise to the duty of the federal courts to check the unauthorized expansion of military power. On the other hand, they should deny initial review to those petitions alleging merely the defective exercise of authorized military power, thus requiring the more specialized attention of a military tribunal in the first instance. The exhaustion doctrine could be more effectively implemented if the Court of Military Appeals had habeas corpus jurisdiction. Accordingly, in cases where federal courts recognize the impropriety of judicial intervention, they could abstain with the assurance that if later faced with the same petition they would have the benefit of a military court's expertise.

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55 Cf. note 11 supra.

56 At least one writer has suggested that habeas corpus within the military would be desirable for the purpose of attacking a court-martial conviction. Note, Servicemen in Civilian Courts, supra note 52, at 403-04.