THE "CUSTODY" REQUIREMENT FOR HABEAS CORPUS

A Thesis

Presented To

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The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U.S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

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SCOPE

An examination of case law, civilian and military, that inquires into the issue of restraint as it applies to habeas corpus.

TABLE OF CONTENTS

CHAPTER I

THE FUNCTION OF HABEAS CORPUS

Habeas corpus, we have all been told, is a "discretionary writ, extraordinary in nature, issued by a civil court to inquire into the legality of any restraint upon the body of a person."[1] Historically, the writ served the function of affording the prisoner a judicial inquiry into the validity of his pretrial restraint.[2] In 1830, the Supreme Court put it this way:

> The Writ of Habeas Corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause.[3]

More recently, Mr. Chief Justice Warren expressing the unanimous view of the Supreme Court in Peyton v. Rowe[4] stated:

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[1]Manual for Courts-Martial, United States, 1951, para. 214 A.

[2]See generally Holtzoff, Collateral Review of Convictions in Federal Courts, 25 B.U.L. Rev. 26 (1945).

[3]Ex Parte Watkins, 28 U.S. (3 Peters) 193, 201 (1830).

[4]391 U.S. 54 (1968).

> The Writ of Habeas Corpus is a procedural device for subjecting executive, judicial, or private restraints on liberty to judicial scrutiny. Where it is available, it assures among other things that a prisoner may require his jailer to justify the detention under law.[5]

It is apparent that the writ lies to enforce the right of personal liberty with the remedy being "some form of discharge from custody."[6] However, it is submitted and recent case law suggests that habeas relief is not limited to judicial inquiry to test the legality of a petitioner's current detention. Consider, for example, the following cases. In Walker v. Wainwright[7] the Supreme Court in a per curiam opinion granted habeas relief in order to allow a prisoner serving a life sentence to challenge the legality of his current imprisonment, even though a subsequent sentence for another crime would be imposed if the petitioner should successfully establish the illegality of his confinement and the unconstitutionally of the underlying conviction. Furthermore, lower federal courts have fashioned appropriate

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[5] Id. at 58.

[6] Fay v. Noia, 372 U.S. 391, 427, note 38 (1963).

[7] 390 U.S. 335 (1968).

conditional habeas corpus orders as a vehicle for post-conviction process. In Davis v. North Carolina,[8] the Supreme Court ordered the release of a petitioner on habeas corpus in a coerced confession case to be postponed in order to allow "the State a reasonable time in which to retry petitioner."[9] The Supreme Court in Jackson v. Denno,[10] reversed a lower federal court decision denying habeas relief and remanded the case to the district court with instructions to release the petitioner if after a "reasonable time"[11] the State fails to afford the applicant a hearing on his claim of an involuntary confession or retry him. More recently, in Shepard v. Maxwell,[12] the Supreme Court held that since the state trial judge did not fulfill his duty to protect the petitioner from the "inherently prejudicial

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[8] 384 U.S. 737 (1966); Accord. Rogers v. Richmond, 365 U.S. 534 (1960).

[9] Id. at 753.

[10] 378 U.S. 368 (1964).

[11] Id. at 396.

[12] 384 U.S. 333 (1966).

publicity which saturated the community"[13] the case was remanded to the district court "with instructions to issue the writ and order that Shepard be released from custody unless the State puts him to its charges again within a reasonable time."[14] These decisions aptly illustrate the fact that habeas relief is substantially broader than merely ordering the immediate release of an applicant from unlawful detention. Furthermore, it is submitted that habeas relief not only operates on the body of the petitioner but on the underlying conviction. By ordering the applicant's release, the court's order precludes the custodian or warden from thereafter detaining the applicant under the invalidated conviction. However, in these latter cases where the petitioners were able to show to the satisfaction of the court that the basis for their present confinement is unlawful their release was postponed and conditioned on the state retrying them within a specified period of time. Such conditional orders have, in recent times, become quite

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[13] Id. at 363.

[14] Id. at 363.

common in habeas cases.[15]

> Courts finding in favor of applicants are frequently reluctant to order them immediately discharged from custody, where there is no bar to the re-prosecution of the charges against them. A device sometimes used is the conditional order, providing for release at the end of six months (or some similar and extensive period) unless a new conviction is obtained within that time.[16]

Since the extent of judicial inquiry by habeas corpus is beyond the scope of this paper reference to the contemporary function of habeas corpus is made in this thesis only in so far as it involves the court's discussion and disposition of the statutory requirement of "in custody."

The Federal Habeas Corpus Statute, which codifies the common law writ,[17] is set forth in sections 2241-2254 of Chapter 153, Title 28 of the United States Code. The jurisdiction of a district court to grant a writ of habeas corpus is governed by 28 U.S.C. section

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[15] American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies, sec. 4.7 (Tentative Draft, 1967).

[16] Id. at 80.

[17] See generally Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 93-101 (1807); McNally v. Hill, 293 U.S. 131, 136 (1934).

2241 (1964)[18] which makes the writ available only when a petitioner is "in custody." One writer observed that the "overwhelming bulk"[19] of habeas petitions filed in the federal courts are brought under section 2241 (c)(3) of Title 28, United States Code (1964) which provides

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[18] 28 U.S.C. sec. 2241 (1964) provides in relevant part as follows:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
> (b) The Supreme Court, any justice, thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
> (1) He is in custody under or by color of the authority of United States or is committed for trial before some court thereof; or
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; . . . .

[19] Sokol, A Handbook of Federal Habeas Corpus, 10 (1965).

"The writ of habeas corpus shall not extend to a prisoner unless . . . /inter alia/ he is in custody in violation of the Constitution or laws or treaties of the United States. . . ."

Although the federal habeas corpus statute explicitly prescribes that the petitioner must be "in custody" before the writ will lie, the drafters did not attempt to define the term. Accordingly, the question of what kind of restraint or detention constitutes custody is not a problem of statutory construction but of judicial definition. To determine whether a particular petitioner is "in custody," the Supreme Court has looked to the "common law usages, and the history of habeas corpus both in England and in the United States."[20]

An examination of the habeas corpus legislation in the United States reveals that several terms have been used to limit the availability of the writ. The origin of the writ of habeas corpus in this country can be traced to the Federal Judiciary Act of September 24, 1789[21] which authorized federal judges to issue writs

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[20] Jones v. Cunningham, 371 U.S. 236, 238 (1963).

[21] Act of Sept. 24, 1789, ch. 20, sec. 14, 1 Stat. 81-82.

of habeas corpus on behalf of persons in federal custody. In section 14 of the Act, the "cause of commitment" was made the "purpose of the inquiry." The word "custody" was used only to limit jurisdiction to prisoners in federal custody. Thereafter, in anticipation of Southern resistance to the legal measures following the Civil War[22] Congress enacted the Federal Habeas Corpus Act of 1867[23] which extended the availability of the writ to state prisoners. Furthermore, the scope of the writ was expanded to include "all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States." The only reference to "custody" is found in the provision requiring that the writ "shall be directed to the person in whose custody the party is detained. . . ." The scope of this Act was recognized by the Supreme Court in Fay v. Noia[24] as being "'to enlarge the

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[22] Hart and Wechsler, The Federal Courts and The Federal System, 1236 (1953).

[23] Act of Feb. 5, 1867, ch. 28, sec. 1, 14 Stat. 385.

[24] 372 U.S. 391 (1963).

privilege of the writ . . . and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them. It is a bill of the largest liberty.'"[25] In 1874, the jurisdictional grants of earlier legislation were consolidated in section 753 of Title 13 of Revised Statutes of 1874.[26] Section 753 provides:

> The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States . . . or is in custody in violation of the constitution or of a law or treaty of the United States;. . . .[27]

Here, in section 753, the clause governing the issuance of the writ, the expression "in custody" was substituted for the phrase "restrained of his or her liberty." Except for minor changes in phraseology, our current federal habeas corpus legislation is a codification of this 1874 Act. The phrase "in jail" has been omitted, but the reviser's notes indicate that "changes in phraseology /were/ necessary to effect the consolidation."[28]

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[25] Id. at 417 (Quoting remarks of Representative Lawrence of Ohio, Cong. Globe, 39th Cong., 1st Sess. 4151).

[26] Rev. Stat. sec. 751-753 (1874), 13 Stat. 142.

[27] Id. at sec. 753.

[28] Reviser's note, 28 U.S.C., sec. 2241 (1964).

Also, the words "for the purpose of an inquiry into the cause of the restraint of liberty" in title 13 of Revised Statutes of 1874, section 752, were deleted because they were considered to be "merely descriptive of the writ."[29]

As a corollary of the custody requirement, the common law required that if the petitioner's detention is in violation of the "fundamental requirements of law, the individual is entitled to his immediate release."[30] Nevertheless, it is submitted that our current federal legislation and its substantially identical forerunners were so written as to authorize flexible relief. However, until recently, these statutes have been construed strictly to require the petitioner seeking habeas relief to be subject to an immediate and confining restraint of his liberty.[31] A close reading of the current federal habeas corpus statute, suggests that relief need

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[29] H.R. Rep. No. 308, 80th Cong., 1st Sess. A-169 (1947).

[30] Fay v. Noia, 372 U.S. 391, 402 (1963).

[31] In In Re Rowland, 85 F. Supp. 550 (W.D. Ark. 1949) the court concluded that since the habeas statute used the words "prisoner" and "custody" actual confinement was a necessary prerequisite to the issuance of the writ. Accordingly, the court refused to entertain a petition where the applicant had been released on bail.

not be limited to discharge from all custody. Today, the relief authorized is to discharge the writ "as law and justice require."[32] Furthermore, the 1867 Act provided that "if it shall appear that the petitioner is deprived of his or her liberty, in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty."[33] See also section 14 of the Judiciary Act of 1789 which authorized the issuance of the writ "agreeable to the principles and usages of law" and "for the purpose of an inquiry into the cause of commitment."[34]

The Supreme Court has recently said of the Great Writ:

> Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve it grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.[35]

Accordingly, the nature and function of the writ of

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[32] 28 U.S.C. sec. 2243 (1964).

[33] Act of Feb. 5, 1867, ch. 28, 14 Stat. 384-385.

[34] Act of Sept. 24, 1789, ch. 20, 1 Stat. 81-82.

[35] Jones v. Cunningham, 371 U.S. 236, 243 (1963).

habeas corpus is not limited to judicially reviewing the legality of iron-bar confinement but is a procedural device for providing "a prompt and efficacious remedy for whatever society deems to be intolerable restraints."[36] Therefore, the writ of habeas corpus has developed into a dynamic remedy which may, in the proper case, issue to provide post conviction relief; to promptly adjudicate the validity of the challenged restraint; and to determine on the merits the allegation of deprivations of constitutional rights.[37]

In summary, it can be said that these descriptions of the modern function of habeas corpus indicate to this writer that the lower federal courts have the power to fashion appropriate relief to petitioners whenever it appears that there has been a violation of constitutional due process or statutory rights.

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[36] Fay v. Noia, 372 U.S. 391, 401-402 (1963).

[37] Peyton v. Rowe, 391 U.S. 54, 59 (1968).

CHAPTER II

THE MEANING OF CUSTODY

A United States District Court has jurisdiction under the Federal Habeas Corpus Statute to grant a writ of habeas corpus to a prisoner ". . . in custody in violation of the Constitution or laws or treaties of the United States. . . ."[38] However, before the writ will issue the court must first be satisfied that the petitioner is "in custody" within the meaning of this section. Therefore, the threshhold question which must be resolved is whether the degree of restraint upon one's personal liberty is sufficient "custody" to warrant the issuance of the writ.

In 1885, Mr. Justice Miller speaking for the Supreme Court in Wales v. Whitney[39] stated that the scope of habeas corpus encompasses:

> Confinement under civil and criminal process. . . . Wives restrained by husbands, children

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[38] 28 U.S.C. sec. 2241(c)(3) (1964).

[39] 114 U.S. 564 (1885).

> withheld from their proper parent or guardian, persons held under arbitrary custody by private individuals, as in a madhouse, as well as those under military control. . . .[40]

Furthermore, Mr. Justice Miller acknowledged the difficulty of judicially defining the ambiguous meaning of the word "custody" for purposes of habeas corpus when he observed: "Obviously, the extent and character of the restraint which justifies the writ must vary according to the nature of the control which is asserted over the party in whose behalf the writ is prayed."[41] Unfortunately, this problem of definition continues to plague the jurist and frustrate the petitioner.

Recent case law suggests that the federal courts are departing from the requirement that the petitioner be in actual confinement and are considering milder forms of restraint sufficient to invoke the writ of habeas corpus. In Jones v. Cunningham,[42] the Supreme Court held that the conditions and restrictions of

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[40] Id. at 571.

[41] Id. at 571.

[42] 371 U.S. 236 (1963). Prior to Jones only two states, Florida and California, had held the status of parole to be a sufficient restraint upon liberty to constitute custody. E.g. Sellers v. Bridges, 153 Fla. 586, 15 So. 2d 293 (1943); In Re Marzec, 25 Cal. 2d 794, 154 P.2d 873 (1945).

parole were a sufficient restraint of liberty to satisfy the statutory requirement of custody. Jones was convicted and confined in a Virginia prison for ten years as a habitual offender. While serving sentence, he petitioned to a federal district court for a writ of habeas corpus alleging he was being held in custody in violation of his constitutional rights by having been denied counsel at his first trial in 1946. This petition was dismissed. While Jones' appeal was pending in the Fourth Circuit Court of Appeals, Jones was paroled. Thereafter, the Court of Appeals dismissed the petition as moot inasmuch as Jones was not in actual physical confinement. The Supreme Court reversed and held that a state prisoner on parole is in the control of the parole board and therefore in custody for purposes of federal habeas corpus. In holding that the status of parole is sufficient custody, the court equated the requirement of "in custody" with any "restraint of liberty" and rejected the Fourth Circuit's contention that a writ may issue only when the petitioner is in actual physical custody.

> /W/hat matters is that /the status of parole/ significantly restrain petitioners liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of

> the Great Writ. . . . While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; that is enough to keep him in the "custody" of the members of the Virginia Parole Board within the meaning of the habeas corpus statute. . . .[43]

This reasoning is supported by 18 U.S.C. Sec. 4203 (1964) which places a federal parolee in the "legal custody and under the control of the Attorney General until the expiration of the maximum term or terms for which he is sentenced."[44] Because the status of parole is considered to be part of the sentence,[45] the restraints and conditions of parole may be equated to service of sentence. Since the rationale of Jones is premised on the assumption that the parolee is "in custody" of his parole board,[46] it should make no difference whether

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[43] Id. at 243.

[44] 18 U.S.C. sec. 4203 (1964).

[45] See Anderson v. Corall, 263 U.S. 193, 196 (1923) where the court stated "While /parole/ is an amelioration of punishment, it is in effect punishment."

[46] The conditions and restrictions in Jones' parole agreement were as follows: (1) parolee is confined to a particular community, house and job; (2) parolee cannot drive an automobile without permission; (3) parolee must periodically report to his parole

the petition for habeas relief is filed before or after release from physical confinement.

Although Jones v. Cunningham held that habeas relief was available to the parolee, the Supreme Court did not spell out with specificity what restraints were necessary to satisfy the custody requirement. However, it has been suggested that the only distinction between parole and probation is that the parolee serves a period of time in confinement whereas the probationer or defendant whose sentence has been suspended never enters a jail.[47] In all instances, the individual may have conditions placed on his associations, travels and activities. Further, the defendant on probation or at liberty under a suspended sentence is in custody of the court which tried and convicted him just as much as the prisoner on parole is in the legal custody of the parole

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officer, permit the officer to visit his home and job at any time; (4) parolee must keep good company, work regularly, and live a clean, honest, and temperate life; parolee can be rearrested at any time the Board or parole officer believes he has violated any term of condition of his parole. The Court in a footnote indicates that the restrictions placed upon Jones by his parole agreement "appears to be the common ones." 371 U.S. at 243 n. 20.

[47]Dressler, Probation and Parole, 13 (1951).

board or the attorney general. Of course, there is always the threat of incarceration for violation of any of the imposed conditions. Since these restraints and conditions are so similar, it is submitted that the probationer and the individual under a suspended sentence should be able to seek habeas relief. However, the cases are not unanimous.

The Ninth Circuit in Benson v. California[48] relying on Jones held that probation constitutes sufficient "custody" for issuance of the writ. In Arketa v. Wilson[49] a prisoner whose adjudication as an habitual criminal resulted in his ineligibility for probation was entitled to habeas relief to attack the validity of a prior conviction on federal constitutional grounds. Arketa, who had been convicted on two occasions, asserted that if his first conviction was declared void he would be entitled to probation on the second conviction vice confinement. Though not relevant to its decision the Ninth Circuit Court of Appeals stated that

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[48] 328 F.2d 159 (9th Cir. 1964); see Garnick v. Miller, 81 Nev. 372, 403 P.2d 850 (1965).

[49] 373 F.2d 582 (9th Cir. 1967).

a "convict who is on probation is as much in custody as one who is on parole; /since/ he remains subject to the control of the probation officer and the court."[50]

However, there are two conflicting decisions involving suspended sentences. In Walker v. State of North Carolina[51] a habeas petition was entertained to attack a 30 day suspended sentence for violating a building code regulation. The court held that a petitioner under a suspended sentence is in custody so long as the convicting court has the power to vacate the suspension and order it into execution. In reaching this decision, the court reasoned that the expectation of future imprisonment is a sufficient restraint of liberty to invoke the writ. However, in Green v. Yeager[52] the petitioner had been convicted of armed robbery and carrying a concealed weapon but was given a suspended sentence on the latter charge. In entertaining the writ the court stated it would only consider

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[50] Id. at 583.

[51] 262 F. Supp. 102 (W.D.N.C. 1966), app'd 372 F.2d 129 (4th Cir. 1967).

[52] 223 F. Supp. 554 (D.N.J. 1963), app'd 332 F.2d 794 (3rd Cir. 1964).

the robbery conviction since a suspended sentence is not such a restraint of liberty to warrant habeas corpus consideration.

Although the decisions are not uniform, there appears to be few substantial differences between the status of parole which has been expressly held by the Supreme Court in Jones v. Cunningham to be a sufficient restraint of liberty to invoke the aid of habeas corpus and the restrictions and conditions of probation and a suspended sentence.

Another area where judges have displayed differing attitudes towards the custody requirement is in regard to the restraints surrounding the petitioner at liberty on bail. Because the writ of habeas corpus was originally a device to secure a judicial inquiry into pretrial imprisonment,[53] petitions have been denied if the detention involved a lesser form of restraint of liberty. Thus, the restraint imposed upon an applicant at liberty on bail before commencing the service of his sentence was considered insufficient. For purposes of this discussion, the word "bail" is defined as a means

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[53] See generally Hart and Wechsler, The Federal Courts and The Federal System 1236 (1953).

"to procure the release of a person from legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction and judgment of the court."[54] Practically speaking, the refusal of a court to entertain habeas corpus on behalf of a defendant on bail because of insufficient restraint of liberty is normally not prejudicial since the applicant within a short period of time will most likely be confined and can then, most certainly, petition the court for appropriate relief. Furthermore, the legal consequences flowing from a refusal to entertain the petition are not significant since, in most cases, the convicted defendant has not, as yet, exhausted his appellate remedies. For example, in Duncombe v. State of New York,[55] habeas relief was refused a convicted defendant on bail for failure to exhaust state judicial remedies notwithstanding the court's finding that a person released on bail is legally in custody for purposes of the federal habeas corpus statute.

In an early Seventh Circuit decision the court

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[54] Black's Law Dictionary 177 (4th ed. 1957).

[55] 267 F. Supp. 103 (S.D.N.Y. 1967).

held in Mackenzie v. Barrett[56] that a petitioner who after his arrest was released on bail into the custody of his sureties was sufficiently restrained of his liberty to seek habeas corpus since "it restrained the party of the right to go without question."[57] Thereafter the Supreme Court of the United States on two occasions[58] held that a person at liberty on bail awaiting trial is only morally restrained and, therefore, not entitled to test the validity of his indictment by habeas corpus. In Johnson v. Hoy,[59] the Court reasoned that since the applicant was at liberty on bond no further relief could be granted by habeas while in Stallings v. Splain,[60] habeas relief was denied on the theory that an applicant on bond is not actually restrained of his liberty. Accordingly, most courts have

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[56] 141 Fed. 964 (7th Cir. 1905), cert. denied 203 U.S. 588 (1906).

[57] Id. at 966.

[58] Johnson v. Hoy, 227 U.S. 245 (1912); Stallings v. Splain, 253 U.S. 339 (1920).

[59] 227 U.S. 245 (1912).

[60] 253 U.S. 339 (1920).

held that the restraint of liberty on an individual free on bail is insufficient to invoke the habeas jurisdiction of a federal court.[61] Although the Supreme Court in Johnson and Stallings held that an individual is not in custody when he is at liberty on bail, the precedent value of these decisions is questionable when considered in light of Jones v. Cunningham which held that a petitioner on parole is "in custody" for purposes of habeas. It is submitted that the limitations placed upon an individual released on bail or bond and the parolee are not so dissimilar as to warrant different results since both restraints "significantly restrain petitioners liberty to do those things which in this country free men are entitled to do."[62]

It is suggested that since the function of the writ is to allow judicial investigation into "the legality of the detention of one in the custody of another,"[63] the test as to what constitutes sufficient

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[61] Allen v. United States, 349 F.2d 362 (1st Cir. 1965); Moss v. State of Maryland, 272 F. Supp. 371 (D. Md. 1967); Matysek v. United States, 339 F.2d 389 (9th Cir. 1964).

[62] Jones v. Cunningham, 371 U.S. 236, 243 (1963).

[63] McNally v. Hill, 293 U.S. 131, 136 (1934).

custody should be the same for the petitioner at liberty on bail regardless of the posture of his case. To require the individual at liberty on bail or bond to surrender himself for physical detention in order to obtain a factual determination of an alleged deprivation of constitutional rights is inconsistent with the function of habeas corpus which is to promptly adjudicate the validity of a challenged restraint.[64] Postponement of this hearing may, in many cases, result in the loss of evidence. Furthermore, should the applicant prevail and obtain the relief requested the state would be in a better position to reprosecute if a retrial is deemed necessary. If the function of the writ is to protect "individuals against erosion of their right to be free from wrongful restraints upon their liberty"[65] habeas relief should be available at the earliest possible time notwithstanding the point in time of criminal prosecution. Accordingly, habeas corpus ought to be available in those situations where the petitioner has exhausted all other remedies.

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[64] Peyton v. Rowe, 391 U.S. 54, 59 (1965).

[65] Jones v. Cunningham, 371 U.S. 236, 243 (1963).

Recently several courts relying on Jones v. Cunningham have entertained habeas petitions on behalf of individuals restrained by milder forms of restraint of liberty than actual physical control. Duncombe v. State of New York,[66] held that a criminal defendant who was at liberty on bail pending appeal following a conviction based on a plea of guilty is legally in custody for purposes of habeas corpus. In June, 1968, the Court of Appeals for the Seventh Circuit held in Burris v. Ryan[67] that a petitioner free on bond following a mistrial and pending a retrial was entitled to challenge the legality of the second indictment by habeas corpus. The court in Burris relied on Jones v. Cunningham and Mackenzie v. Barrett in holding that bail is a sufficient restraint of liberty to constitute custody. It should be observed that Burris appears to overrule United States v. Tittemore[68] which denied a petition for habeas brought by an individual on bail. In Tittemore the court without mentioning its decision

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[66] 267 F. Supp. 103 (S.D.N.Y. 1967).

[67] 397 F.2d 553 (7th Cir. 1968).

[68] 61 F.2d 909 (7th Cir. 1932).

in Mackenzie adopted the reasoning of Stallings v. Spain for the authority that before a petition will be entertained the petitioner must show that he is actually restrained.

Matzer v. Davenport[69] held that a petitioner who had been released from physical confinement into the custody of his attorney was sufficiently restrained of his liberty to question the delay of the state in bringing his case to trial. The applicant in this case had been indicted for murder. In Foster v. Gilbert[70] the court relying on Jones v. Cunningham stated that "while petitioner has been released into the custody of his attorney, and such release frees him from immediate physical confinement, it imposes conditions which significantly confine and restrain his freedom. This is enough to constitute custody."[71]

This trend of taking more seriously any restraints that are imposed on an individual's liberty as a basis for granting habeas petitions is evident in

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[69] 288 F. Supp. 636 (D.N.J. 1968).

[70] 264 F. Supp. 209 (S.D. Fla. 1967).

[71] Id. at 212.

deportation cases where habeas corpus has been utilized by aliens who seek judicial review of their deportation orders. In Varga v. Rosenberg[72] the court held that an individual under a deportation order free on bond awaiting execution of the order was subject to such restraint as to permit a habeas attack. The court relying on Jones stated that "the fact petitioner has actual freedom of movement pending deportation does not deprive this court of jurisdiction to grant habeas corpus relief."[73] The court reasoned that since Varga could be ordered to appear for actual deportation at any time, his liberty was sufficiently restrained for purposes of issuing the writ. To the same effect see United States ex rel Martinez-Angosto v. Mason[74] where the court issued the writ to attack the legality of a deportation order where the petitioner, who was a Spanish seaman, had been released into the custody of his wife and local parish priest, pending a final decision on his petition.

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[72] 237 F. Supp. 282 (S.D. Cal. 1964).

[73] Id. at 285.

[74] 344 F.2d 673 (2nd Cir. 1965).

The Supreme Court has repeatedly granted habeas corpus to determine the validity of an alien's exclusion from the United States.[75] Furthermore, since the Immigration Act of 1961[76] the only procedure by which an alien can test an order of exclusion is by habeas corpus. Suffice it to say, the current trend in case law is to construe the phrase "in custody" broadly and allow habeas attacks on a wide variety of legal impairments for which no other remedy lies.

Although Jones v. Cunningham constituted a significant departure from the requirement of actual confinement by stating that an individual is "in custody" if he is restrained of his liberty "to do those things which in this country free men are entitled to do,"[77] it was not until Peyton v. Rowe[78] that a prisoner could obtain a habeas corpus review of a sentence he was not then serving.

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[75] Brownell v. Tom We Shung, 352 U.S. 180 (1956); Shaughnessy v. United States ex rel Mezei, 345 U.S. 206 (1953).

[76] 75 Stat. 651 (1961), 8 U.S.C. sec. 1105 A(b) (1964).

[77] 371 U.S. 236, 243 (1963).

[78] 391 U.S. 54 (1968).

In Peyton, Chief Justice Warren, speaking for a unanimous Supreme Court, held that a prisoner serving the first of two consecutive sentences may challenge the validity of the second by habeas. Accordingly, habeas corpus is available to a petitioner even though he is not presently serving the sentence upon which the habeas petition is premised. In deciding Peyton the court overruled McNally v. Hill[79] which held that a federal prisoner cannot attack by habeas corpus a sentence which he is not then serving and that habeas is not available to secure a judicial decision on a question which will not result in the petitioner's immediate release. McNally alleged that an unconstitutional sentence was being taken into account in computing his eligibility for parole. He further alleged that if only his valid sentence were considered he would be eligible for parole. In rejecting this argument, the court reasoned that the writ would only issue under the statute "for the purpose of inquiring into the cause of restraint of liberty"[80] and that a "sentence which the

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[79] 293 U.S. 131 (1934).

[80] Id. at 135.

prisoner has not yet begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry."[81] Although the Court rejected McNally's petition as premature it did suggest that mandamus of the parole board would be the appropriate method to secure relief.[82]

In Peyton the Court reviewed McNally and concluded that it was inconsistent with the purpose of the writ of habeas corpus which is "to provide for swift judicial review of alleged unlawful restraints on liberty."[83] Mr. Chief Justice Warren also pointed out the three characteristics of habeas corpus: (1) to provide post-conviction relief; (2) to promptly adjudicate the validity of the challenged restraint; and (3) to determine on the merits of the alleged deprivation of constitutional rights.[84] Thereafter, the Court quoting from Jones v. Cunningham reaffirmed that the "'grand

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[81] Id. at 138.

[82] Id. at 140.

[83] 391 U.S. 54, 63 (1968).

[84] Id. at 59.

purpose'" of the writ of habeas corpus is "'the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty'"[85] and held that "in common understanding 'custody' comprehends . . . the entire duration of . . . imprisonment."[86] Thus, a prisoner is "in custody" in violation of the constitution if any consecutive sentence he is scheduled to serve was imposed as a result of a deprivation of constitutional rights.

However, even before Peyton several lower federal courts had refused to strictly adhere to the McNally rule.[87] In Martin v. Virginia,[88] the Fourth Circuit rejected the McNally definition of custody and held that a "denial of eligibility for parole is a restraint of liberty no less substantial than the tech-

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[85] Id. at 66.

[86] Id. at 64.

[87] See, e.g. Arketa v. Wilson, 373 F.2d 582, 584 (9th Cir. 1967); United States ex rel Burke v. Mancusi, 276 F. Supp. 148, 150-153 (E.D.N.Y. 1967); Martin v. Virginia, 349 F.2d 781, 783-84 (4th Cir. 1965).

[88] 349 F.2d 781 (4th Cir. 1965).

nical restraint of parole."[89] The court then reasoned that habeas relief is available to challenge the legality of a future sentence which the petitioner has not yet begun to serve.[90]

Recently, the United States Court of Appeals for the Fourth Circuit extended the scope of Peyton v. Rowe by granting relief to a Virginia prisoner who was attempting to challenge a North Carolina conviction in a North Carolina federal district court.[91] In holding that habeas is the proper procedural remedy for a state prisoner to attack, on constitutional grounds, a conviction in another state, the Court found sufficient restraint in the North Carolina detainer which was filed with the Virginia prison officials and the Virginia commitment. The court noted that the "prisoner has no hope of release until both authorizations are ended, for if either is withdrawn or expires, the warden will continue to hold him under the other."[92] However, in

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[89] Id. at 784.

[90] Id. at 784.

[91] Word v. North Carolina, 4 Crl. 2333 (4th Cir. Jan. 15, 1969).

[92] Id. at 2334.

Van Scoten v. Pennsylvania,[93] the Third Circuit Court of Appeals held that a Pennsylvania district court was without jurisdiction to entertain a New Jersey prisoner's habeas corpus petition challenging the validity of a Pennsylvania state court sentence which was scheduled to commence upon completion of the applicant's New Jersey imprisonment. The court reasoned that notwithstanding Peyton, the federal habeas corpus statute limits the power of the federal court to issue habeas petitions to persons detained within its territorial jurisdiction.[94] Therefore, the Pennsylvania district court had no jurisdiction to entertain the habeas petition on behalf of a New Jersey applicant.

The requirement that the petitioner be "in custody" in order to seek habeas relief is most significant when the applicant seeks to challenge a sentence which he has already served. Zimmerman v. Walker[95]

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[93] 4 Crl. 2329 (3rd Cir. Dec. 19, 1968).

[94] Id. at 2329. 28 U.S.C. sec. 2241 (A) (1964) provides in part: "Writs of habeas corpus may be granted by the Supreme Court, and justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . ."

[95] 319 U.S. 744 (1943).

held that habeas relief was not available to a petitioner who had been released from military detention. In Zimmerman, the Supreme Court in denying a writ of certiorari stated in a per curiam opinion that since the petitioner had been released from the custody of the respondents the case was moot. However, if the prisoner is in custody when his petition is filed his subsequent release from confinement will not render moot his application for federal habeas corpus. In Carafas v. LaVallee,[96] an unanimous Supreme Court overruled Parker v. Ellis[97] which had held that expiration of a prisoner's sentence terminated federal jurisdiction for purposes of seeking habeas corpus relief and held that if the petitioner is in custody at the time he initiates his application, jurisdiction has attached notwithstanding the prisoner's subsequent release. It is clear that the rationale of Carafas is limited to those situations where the applicant is "in custody" when the petition is filed since the federal habeas corpus statute[98]

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[96] 391 U.S. 234 (1968).

[97] 362 U.S. 574 (1960).

[98] See 28 U.S.C. sec. 2241(c)(3) (1964).

expressly requires that the petitioner must be in custody when the writ is issued. In discussing the statutory requirement of custody, the court stated that the province of the writ "is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person."[99] Yet, as one writer aptly observed:

> If . . . /this/ statement is taken at face value, however, it is difficult to see what justification there is for continuing the habeas proceeding when the prisoner has been released from the detention which is the subject of inquiry.[100]

In Carafas, the court adopted Chief Justice Warren's dissent in Parker which emphasized that the statutory requirement for the petitioner to be in custody only applies to the issuance to the writ and not at the time relief is granted.[101] The Chief Justice in Parker also noted that the relief in habeas cases is not limited to release from custody, but the statute directs the judge to "'dispose of the matter as law and justice, 28 U.S.C.

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[99] 391 U.S. 234, 238 (1968).

[100] The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 251 (1968).

[101] 362 U.S. 574, 582 (1960).

sec. 2243'"[102] Therefore, by relying on the statutory requirement to "dispose of the matter as law and justice require," the court retained the power to declare that the applicant's detention was unlawful even though he is released from all restraint before the court takes action.

However, the courts are uniform in holding that habeas is not the appropriate procedural remedy to attack the legality of a fine. But, if the non-payment of a fine is punishable by confinement and the applicant is incarcerated, then habeas relief would be available to attack the validity of the penalty.[103] But, if the fine and confinement are separate punishments, the petitioner has no standing for habeas corpus. In Bledsoe v. Johnson,[104] the petitioner had been convicted and sentenced to confinement and to pay a fine. He then made application for habeas corpus alleging the imposition of the fine was excessive punishment and,

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[102] Id. at 582.

[103] Cahill v. Biddle, 13 F.2d 827 (8th Cir. 1926).

[104] 61 F. Supp. 707 (N.D. Cal., 1945); aff'd. 154 F.2d 458 (9th Cir. 1946).

therefore, unlawful. In refusing to entertain the writ the court held that habeas corpus is not available to attack the legality of the imposition of the fine which does not provide for confinement in lieu of default in payment. Habeas is also not available to aid a petitioner in recovering a partially paid fine.[105] These holdings are consistent with the traditional function of the writ which is to secure a judicial inquiry into the legality of detention. Since a fine without a provision for punishment for non-payment imposes no restrictions or conditions upon the liberty of the defendant there is no detention upon which habeas can attach. Therefore, so long as habeas corpus is exclusively a remedy for unlawful and illegal detention an unlawful fine or forfeiture is not a proper subject for inquiry.

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[105] Waldon v. Swope, 193 F.2d 389 (9th Cir. 1951).

CHAPTER III

MILITARY STATUS AND THE CUSTODY REQUIREMENT

As early as 1866 the Supreme Court acknowledged that civil courts have the power to entertain writs of habeas corpus for military prisoners.[106] More recently, in Burns v. Wilson[107] the court stated:

> The statute which vests federal courts with jurisdiction over applications for habeas corpus for persons confined by military courts, is the same statute which vests them with jurisdiction over the applications of persons confined by civil courts.[108]

Accordingly, the first concern of the court is to determine whether the petitioner is "in custody" for purposes of habeas corpus relief. Thus, the threshhold question is how much restraint on one's liberty is necessary before the writ will issue?

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[106] Ex Parte Milligan, 4 Wall (71 U.S.) 2 (1866).

[107] 346 U.S. 137 (1953).

[108] Id. at 139.

In the early case of Wales v. Whitney,[109] the surgeon-general of the Navy sought habeas corpus relief from an order of the Secretary of the Navy who had placed Wales under arrest and ordered him to remain within the limits of Washington, D.C. pending his court-martial. In denying the writ, the court noted that Wales was required by his military duties to remain within the District of Columbia irrespective of his status of arrest. In holding that this restraint was not the type of "restraint or imprisonment suffered by a person applying for a writ of habeas corpus,"[110] the court stated that "something more than moral restraint is necessary . . . there must be actual confinement or the present means of enforcing it. . . ."[111] Nevertheless, Wales does not stand for the proposition that a petitioner is not in "custody" if a person is confined to a city. An alternative ground for decision can be seen in the following passage:

> . . . /A/s Medical Director, he was residing in Washington and performing there the duties of

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[109] 114 U.S. 564 (1885).

[110] Id. at 571.

[111] Id. at 572.

> his office. It is beyond dispute that the Secretary of the Navy had the right to direct him to reside in the city in performance of these duties. . . . It is not easy to see how he is under any restraint of his personal liberty by the order of arrest, which he was not under before.[112]

The point of the case is that the order confining Wales to the limits of the District of Columbia subjected him to no more restraint than he was previously under being subject to military orders. Therefore, since the restraint was lawful, the Supreme Court correctly ruled that petitioner was not "in custody" for purposes of habeas corpus.[113]

In Wales, the court declared, "There must be actual confinement or the present means of enforcing it."[114] This requirement of "actual confinement" is not limited to actual physical restraint such as detention in jail. Habeas relief was entertained on behalf of three American servicemen who were retained in Japan beyond their rotation dates to the United States. In

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[112] Id. at 569-570.

[113] See Sokol, A Handbook of Federal Habeas Corpus 26-28 (1965); United States ex rel Altieri v. Flint, 54 F. Supp. 889 (D. Conn. 1943).

[114] 114 U.S. 564, 572 (1885).

Cozart v. Wilson,[115] the petitioner, an American serviceman on active duty in Japan, was indicted under Japanese law for criminal negligence in the operation of a privately owned motor vehicle. Cozart's enlistment had not expired, but he was retained in Japan by military authorities past the effective date of his rotation to the United States. The court in Cozart also considered the petitions of two other American servicemen who were awaiting retrial by the Japanese authorities for rape. For the purpose of retrial Germait and Makarenko were retained in the service and in Japan beyond the expiration of their tours of obligated service. In granting their petitions to allow the petitioners to attack the constitutionality of the "Status of Forces" agreement between the United States and Japan, the court noted that "since the petitioners were not at liberty to leave Japan, they were sufficiently restrained for purposes of habeas corpus."[116] See also Girard v. Wilson[117] where

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[115] 236 F.2d 732 (D.C. Cir. 1956).

[116] Id. at 733.

[117] 152 F. Supp. 21 (D.D.C. 1957), rev'd on other grounds, 354 U.S. 524 (1957); see In Re McDonald, 16 Fed. Cas 17 (No. 8741) (D.C.E.D. Mo., 1861) where the writ was granted to allow a petitioner to attack his confinement to a military arsenal.

habeas relief was available to a soldier who was "administratively restricted" to the limits of his military installation.

Accordingly, as these decisions indicate actual physical restraint is not necessary. It is sufficient if the restraint deprives the individual of going when and where he pleases. These decisions are consistent with the historical function of the writ.[118] Suffice it to say, it is the physical power which controls the petitioner's freedom of movement which determines the availability of the writ.

However, the writ will not lie if the petitioner is not restrained of his liberty.[119] If the writ were issued in the absence of detention, the only effect of the ruling would be to render an advisory opinion. In Hooper v. Hartman[120] a retired officer of the Regular component of the United States Navy was convicted by

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[118] See Ferris & Ferris, The Law of Extraordinary Legal Remedies, 32-33 (1926).

[119] 114 U.S. 564, 570 (1884).

[120] 163 F. Supp. 437 (S.D. Cal. 1958), aff'd 274 F.2d 429 (9th Cir. 1959).

General Court-Martial and sentenced to dismissal from the service and to forfeit all pay and allowances. In holding that habeas relief would not be granted to challenge the jurisdiction of the court-martial the court stated: "The court has no power to issue a writ of habeas corpus . . . where it appears plaintiff is neither under any form of custody or personal restraint, nor liable to be under same in the circumstances."[121] Accordingly, since Hooper was not actually confined or restrained of his liberty by arrest or restriction he was not considered "in custody." Kanewske v. Nitze[122] held that a petitioner who had completed the serving of his General Court-Martial sentence and was unconditionally discharged from his enlistment and service status had no standing to attack the legality of his punitive discharge by habeas corpus. In dismissing Kanewske's petition as moot, the court adhered to the traditional function of habeas as extending to custody and detention and refused to consider the possible disabilities flowing from a bad conduct discharge.

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[121] Id. at 440.

[122] 383 F.2d 389 (9th Cir. 1967).

In Jones v. Cunningham,[123] Mr. Justice Black stated 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."[124] The question that must be answered is: at what stage in the induction process may a military draftee petition the federal district court for a writ of habeas corpus? The Military Selective Service Act of 1967[125] contains a provision concerning the availability of judicial review for attacking a selective service classification or the administrative procedures followed within the Selective Service System. The 1967 Act provides:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the president, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for

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[123] 371 U.S. 236 (1963).

[124] Id. at 240.

[125] 81 Stat. 100, 50 U.S.C.A. App. sec. 451-73 (Supp. 1967).

> civilian work in the case of a registrant determined to be opposed to participation in war in any form.[126]

Earlier Military Selective Service Acts did not contain this amendment although these draft laws did provide that decisions of local and appeals boards were "final."[127] However, a body of case law developed during the forties concerning the question of judicial review of draft classifications. As a result of these decisions, a registrant who presents himself for induction may challenge his classification by petitioning for a writ of habeas corpus after his induction or he can obtain judicial review by raising his classification as a defense in a criminal prosecution.[128] Accordingly, this amendment to the 1967 Act does not alter the existing law but merely enunciates the existing rule regarding the judicial review of the civilian selective service

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[126] Id. at 104.

[127] Act of Sep. 16, 1940, ch. 720, sec. 10(a)(2), 54 Stat. 893; Act of May 18, 1917, ch. 15, sec. 4, 40 Stat. 80.

[128] Estep v. United States, 327 U.S. 114, 123-125 (1946); Witmer v. United States, 348 U.S. 375, 377 (1955).

system prior to induction.[129]

Notwithstanding, the statutory prohibition against a judicial review of a draft classification by habeas corpus prior to induction, the Supreme Court in Oestereich v. Selective Service System Local Board No. 11[130] held that a pre-induction review of a selective service reclassification in the case of a registrant who had a clear statutory exemption is not precluded by section 10(b)(3) of the Military Selective Service Act of 1967. Oestereich, a theological student, was reclassified 1-A for failure to have his "registration certificate in his possession, and for failure to provide the Board with notice of his local status."[131] The petitioner had returned his draft card to the government "for the sole purpose"[132] of expressing his dissent over the United States involvement in the Vietnam conflict. The Court reasoned that to limit judicial review to a defense in a criminal prosecution

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[129] See Comment, Judicial Review of Selective Service Action: A Need for Reform, 56 Calif. L. Rev. 448 (1968).

[130] 37 U.S.L.W. 4053 (U.S. Dec. 16, 1968).

[131] Id. at 4053.

[132] Id. at 4053.

or to habeas proceedings after induction would lead to "unnecessary harshness."[133] Thus, pre-induction judicial review is authorized in those instances where a "person registers and qualifies for a statutory exemption" and the local board deprives him of that exemption "because of conduct or activities unrelated to the merits of . . . that exemption."[134] Furthermore, the case of Ex Parte Fabiani,[135] which was cited with approval by the Supreme Court in a footnote in Jones v. Cunningham,[136] allowed a petitioner to challenge his classification by habeas corpus even though he had not yet reported for his pre-induction physical examination nor had been inducted. Fabiani was an American studying medicine in Italy. He was ordered to report for induction or be indicted after his draft board had rejected his claim for a statutory exemption as a medical student. In discussing the propriety of entertaining the writ, the court stated:

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[133] Id. at 4054.

[134] Id. at 4054.

[135] 105 F. Supp. 139 (E.D. Pa. 1952).

[136] 371 U.S. 236, 240, n. 11 (1963).

> The court is of the opinion that the petitioner is presently in constructive custody of the government by reason of the United States Attorney's direction to him to return to the United States by February 15 or be indicted. He is not free to go where he pleases; in a sense, he is enjoying jail liberties.[137]

This theory of "constructive custody" was initially advanced in Collins v. Biron[138] where under similar facts sufficient restraint of liberty was found so as to entitle the petitioner to a hearing on his petition for a writ of habeas corpus. The court noted that "assuming that one may be restrained of his liberty though not held in physical confinement, the court cannot escape the conviction that if the petitioner must obey the final order of the board or go to the penitentiary, his liberty is restrained. . . ."[139] However, this reasoning was rejected on appeal and the decision was overruled because according to the Court of Appeals for the Fifth Circuit[140] this concept deviated from the traditional

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[137] 105 F. Supp. 139, 148 (E.D. Pa. 1952).

[138] 56 F. Supp. 357 (S.D. Ala. 1944).

[139] Id. at 361.

[140] 145 F.2d 758 (5th Cir. 1944).

definition of habeas corpus and the weight of authority.[141] However, see Ex Parte Stewart[142] where the court entertained a writ of habeas corpus questioning a selective service classification where the petitioner had been arrested for failing to report for induction and was taken into custody by the United States marshal for failing to report for induction. The court stated:

> . . . /I/f an inductee is restrained of his liberty, in consequence of what he alleges to be the arbitrary action of a selective service board, no matter at what state he is restrained, he may, by writ of habeas corpus, question whether there was evidence to sustain the action by the board.[143]

Although Fabiani was cited with approval in Jones v. Cunningham, lower federal courts have consistently refused to entertain petitions for habeas relief unless the petitioner has been, in fact, inducted into the armed forces and becomes subjected to military jurisdiction and discipline. DeRozario v. Commanding Officer[144] held that a petitioner who had not submitted

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[141] Id. at 759.

[142] 47 F. Supp. 410 (S.D. Cal. 1942).

[143] Id. at 414; see Goodwin v. Rowe, 49 F. Supp. 703 (D.D.C. 1943).

[144] 390 F.2d 532 (9th Cir. 1967).

to induction was not in custody for purposes of habeas relief. The court reasoned that since the writ's function is to test the legality of detention, "it hardly seems burdensome to require that appellant submit to induction in order to test the validity of that detention."[145] DeRozario alleged he was being unlawfully detained of his liberty because he had been reclassified 1-A (available for military service) by his local draft board. See also McDowell v. Sacramento Local Board Group, Boards 21, 22 and 23, Selective Service System[146] where the court held that the mere receipt of an induction notice does not, in and of itself, constitute sufficient restraint for a petition for habeas corpus to lie. The court recognized that the definition of custody had been broadened in recent years to include restraints of liberty other than actual physical confinement but refused to further liberalize the definition of custody to allow a registrant, by petitioning for habeas relief, to escape the choice between entering military service and defending in a criminal prosecution

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[145] Id. at 535.

[146] 264 F. Supp. 492 (E.D. Cal. 1967).

for refusal to submit to induction.[147] In denying the writ to McDowell, the district court agreed with the analysis of the District of Columbia Circuit, which, when presented with the identical question in Lynch v. Hershey,[148] stated:

> The case differs in no essential respect from any criminal case in which prosecution is threatened for failure to obey a lawful statutory command. If habeas corpus was the applicable remedy here the writ would of necessity have to be made available to every person who anticipates prosecution for violation of the law.[149]

Although the Fabiani doctrine of "constructive custody" has not been followed by the lower federal courts, it is submitted that fundamental concepts of due process appear to be violated when a registrant is required to undergo criminal prosecution in order to obtain judicial review of his classification or in the alternative to submit to induction and thereafter petition for habeas corpus. Nevertheless, the courts have adhered to the traditional function of habeas corpus which was

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[147] Id. at 495.

[148] 208 F.2d 523 (D.C. Cir. 1953) cert. denied, 347 U.S. 917 (1954).

[149] Id. at 524.

concerned only with the status of the petitioner and have rejected the Fabiani approach on the grounds that until the petitioner is subject to military control he has no standing to question his detention. However, to require the registrant to submit to the humiliation of being indicted and tried for a felony before he can raise the issue of the legality of his classification as a defense to prosecution for failure to submit to induction would in most cases result in social and economic embarrassment. Also, to require the applicant to submit to induction before petitioning for the writ causes unnecessary inconveniences and hardships. Thus, as Mr. Justice Murphy stated:

> ...If a person is inducted and a quest is made for a writ of habeas corpus, the outlook is often bleak. The proceedings must be brought in a jurisdiction in which the person is then detained by the military which may be thousands of miles from his home, his friends, his counsel, his local board, and the witnesses who can testify in his behalf.[150]

Furthermore, a registrant by being required to enter the armed forces to obtain judicial review of a board classification must, by necessity, leave his occupation for

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[150] Estep v. United States, 327 U.S. 114, 130 (1946) (concurring opinion).

an unnecessary amount of time.[151]

It is submitted that since "a principal aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty,"[152] review by habeas corpus prior to induction of an alleged erroneous classification would be not only a practical solution but consistent with the nature and function of habeas corpus. Furthermore, by entertaining habeas petitions of selective service registrants prior to induction would relieve the armed forces of the problems, both administrative and disciplinary, created by these individuals.

Although Jones v. Cunningham represented a significant departure from the traditional definition of "custody," habeas relief was already available for military inductees challenging the legality of their inductions. Thus, once the inductee submits to military jurisdiction he can obtain judicial review of his classification by habeas corpus. Sufficient restraint of liberty has been found to justify the issuance of

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[151] See Note, Habeas Corpus and Judicial Review of Draft Classifications, 28 Ind. L. J. 244, 252-53 (1953).

[152] Peyton v. Rowe, 391 U.S. 54, 60 (1968).

the writ by virtue of being subject to military jurisdiction and control. For example, in United States ex rel Steinberg v. Graham,[153] the court entertained a habeas petition brought by an inductee's father on behalf of his son for an alleged arbitrary reclassification and induction. Although the inductee was under "no more restraint than any other soldier on active duty, who is subject to all the orders of his superiors, both general orders and those directed to him personally"[154] the court found sufficient restraint of liberty to warrant the issuance of the writ.

At least one federal court has extended the definition of "custody" to include the military status of an enlisted inactive reservist in the United States

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[153] 57 F. Supp. 938 (E.D. Ark. 1944).

[154] Id. at 941; See United States ex rel Altieri v. Flint, 54 F. Supp. 889 (D. Conn. 1944) where the court granted the writ to judicially review an arbitrary classification of an inductee, who after reporting for induction was assigned to the enlisted reserve for a specified period in order to arrange his personal and business affairs before reporting to the reception center for active service. The Court rejected the argument that Altieri was not actually confined and held that although Altieri "is physically at large, he is subject to military call and hence subject to a restraint upon the otherwise unrestricted course of conduct open to him." Id. at 892.

Navy Reserve who was merely in receipt of orders to report for active duty.[155] In Hammond, the petitioner challenged the present legality of restraint to which he was subjected after having received orders to report for active duty for failure to attend regularly scheduled reserve meetings. In entertaining Hammond's petition for habeas corpus to obtain judicial review of an administrative decision which denied his request for discharge the Court of Appeals for the Second Circuit relying upon their earlier decision of United States ex rel Altieri v. Flint and Jones v. Cunningham rejected the argument that Hammond is not "in custody" because he is subject to no more restraint than other persons under military orders and stated "it is the validity of that very restraint which his petition has brought into question."[156] Therefore, even though Hammond was an inactive reservist in receipt of orders to report for active duty, he was able to attack by habeas corpus the validity of what had become an "in custody" restraint on his liberty. Although not on active duty, Hammond

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[155] Hammond v. Lenfest, 398 F.2d 705 (2nd Cir. 1968).

[156] Id. at 712.

by virtue of his reserve status was subject to military jurisdiction and control. Habeas corpus was also entertained on behalf of a reservist called to active duty who challenged the order ordering him to active duty. Unlike Hammond, the petitioner in United States ex rel Schonbrun v. Commanding Officer[157] did not seek to be discharged entirely from the military but attacked his call-up to active duty on grounds of "extreme personal and community hardship."[158] In both Hammond and Schonbrun, sufficient restraint of liberty was found in their status as members in the armed forces. For purposes of habeas corpus it is submitted that a transfer from a reserve status to active duty is analogous to parole or suspended sentence to imprisonment since in these situations the applicant's freedom of movement is subject to the control and discipline by the military in the former and the probation officer and the court in the latter. This type of status should be distinguished from and compared with the inductee in receipt of an induction notice to report for active

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[157] 403 F.2d 371 (2nd Cir. 1968).

[158] Id. at 371.

duty. In this instance, habeas relief is not generally available on the theory the inductee is not, as yet, subject to the restraint which he is attacking as unlawful. This is logical since the inductee does not acquire a military status which subjects him to the control and discipline of the armed forces until he submits to the induction ceremony.

However, if the military has no power to subject an individual to military jurisdiction without his consent the petition will fail for lack of custody. In United States v. Eichstaedt,[159] the petitioner after voluntarily enlisting in the United States Army Reserve became conscientiously opposed to war and after being unsuccessful in obtaining a discharge petitioned for habeas relief. In refusing to entertain the writ the court held that an enlistee in the Army Reserve who is not subject to "any pre-emptory orders or to any actual detention by the Army Reserve without his consent nor . . . subject to any discipline by the Army Reserve arising out of his refusal to consent to active duty training. . ."[160] is not in custody for habeas

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[159] 285 F. Supp. 476 (N.D. Cal. 1967).

[160] Id. at 126.

jurisdiction. However, had the applicant petitioned for habeas relief after he had reported for his tour of active duty for training, the court would have entertained his petition. As a practical matter, the court in Hammond was more realistic in their approach to the problem of when the writ should issue when they stated: "We fail to perceive how the interests of justice would be served on the question . . . would be meaningfully different had Hammond first reported for active duty and then applied for the writ."[161] To require the applicant to wait until he reports for active duty for training or until he is inducted for not fulfilling his reserve commitment merely postpones a hearing on the merits.

Several lower federal courts have granted habeas petitions on behalf of enlistees on active duty who have questioned the present legality of their continued detention in the armed forces though subject to only normal military control and supervision. Gann v. Wilson[162] held that habeas relief was available to an enlistee on

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[161] 398 F.2d 705, 711 (2nd Cir. 1968).

[162] 289 F. Supp. 191 (N.D. Cal. 1968).

active duty in the Army after his request for discharge as a conscientious objector had been denied. See, also, Crane v. Hedrick[163] where the court faced with identical facts allowed a Navy apprentice seaman on active duty to challenge the lawfulness of his detention for religious reasons which developed subsequently to entry into the service. In rejecting the argument that Crane was not "in custody" the court noted: "While there is some support for this contention, the overwhelming weight of authority is to the contrary."[164] Furthermore, the court reasoned that if the applicant is being detained in violation of his constitutional rights any distinction between an attack on the validity of an induction or enlistment and the validity of continued detention is not persuasive for purposes of whether an applicant is "in custody."[165]

On the other hand, United States ex rel McKiever v. Jack[166] held that habeas corpus was not available to

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[163] 284 F. Supp. 250 (N.D. Cal. 1968).

[164] Id. at 251.

[165] Id. at 252.

[166] 351 F.2d 672 (2nd Cir. 1965).

determine whether a Navy steward had been induced to enlist on false statement made to him. Without citing any authority, the court stated: "It is clear that the normal restraint upon an individual's free movement incident to service in the Armed Forces is not such restraint that one may predicate a petition for habeas corpus relief thereon."[167] However, this decision was not followed by the same court in Hammond. Accordingly, it is believed that had the petitioner exhausted his administrative remedies prior to seeking judicial relief the court might have entertained the writ. One line of cases has held that habeas relief is not available to an individual in the Armed Forces who is serving a tour for which he voluntarily enlisted.[168] The

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[167] Id. at 673.

[168] See In Re Grimley, 137 U.S. 147 (1890) where the Supreme Court said of the enlistment contract: "Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of contract destroys the new status or relieves /one/ from the obligations which its existence imposes." Id. at 151; accord. In Re Green, 156 F. Supp. 174 (S.D. Cal. 1957). However, In Re Green seems to have been overruled in a subsequent decision by the same court in In Re Phillips, 167 F. Supp. 139 (S.D. Cal. 1958) which held that an enlisted member of the armed forces on active duty is "in custody" for habeas corpus.

rationale of these decisions is based on the fact that since the detention complained of results from a valid enforceable contract there is no restraint of liberty upon which habeas jurisdiction can attach. For example, in an early World War II Fifth Circuit decision, the court held in McCord v. Page[169] that an enlisted soldier "engaged in serving the period in the Army for which he voluntarily enlisted cannot obtain his release from the military service by writ of habeas corpus /since/ his detention results from the enforcement of a valid contract and is not unlawful."[170] McCord had attempted to avoid completing his enlistment on the ground that his religious tenets were incompatible with his military duties.

Since habeas relief is available to test the validity of a deprivation of liberty, the presence of an enlistment contract should not preclude a petitioner from challenging his present status. Consider the analogous situation of a patient in a hospital. In

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[169] 124 F.2d 68 (5th Cir. 1941).

[170] Id. at 70.

Hammond v. Lenfest,[171] Judge Kaufman pin-pointed the problem with the following illustration:

> A person who voluntarily commits himself to the care of a hospital or other institution is obviously not "in custody" so long as it is his desire to remain. But it cannot be doubted that if he wishes to leave and is prevented from doing so, he can petition for a writ of habeas corpus to test the validity of what has become an "in custody" restraint on his liberty.[172]

Habeas corpus is the proper remedy for a patient in a mental institution to challenge his continued confinement after having recovered his sanity.[173] The rationale underlying the issuance of the writ in this situation is that since the patient has regained his sanity the purpose for his detention has ended and his confinement is invalid.

Though McCord had voluntarily enlisted in the Armed Forces, he claimed his subsequent religious affiliation as an ordained minister in the Watch Tower Bible and Tract Society was incompatible with his military

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[171] 398 F.2d 705 (2d Cir. 1968).

[172] Id. at 712, n. 10.

[173] See, e.g., Lake v. Cameron, 364 F.2d 657, 662 (D.C. Cir. 1966); Miller v. Overholser, 206 F.2d 415, 421 (D.C. Cir. 1953).

duties to salute superior officers and the United States flag.[174] Recent case law[175] suggests that where there are "competing policies and when . . . a serious threat to the exercise of First Amendment rights exist, the policy favoring the preservation of these rights must prevail.[176]

It is submitted that this theory of denying habeas corpus to a petitioner who voluntarily entered into a contract with the government ignores the function of the writ which is designed to afford a remedy for inquiring into the legality of detention. The fact that an enlistment contract was valid when executed does not mean that the status of enlistment cannot be challenged by habeas attack for subsequent events.

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[174] 124 F.2d 68, 69 (5th Cir. 1941).

[175] Wolff v. Selective Service Local Bd. No. 16, 372 F.2d 817 (2nd Cir. 1967).

[176] Id. at 825.

CHAPTER IV

HABEAS CORPUS AND THE MILITARY PRISONER

In 1953, the Supreme Court indicated in Burns v. Wilson,[177] that Court-Martial proceedings could be challenged in the federal courts by habeas corpus. Notwithstanding Article 76 of the Uniform Code of Military Justice which provides that the judgments of military tribunals shall be "final and conclusive" and "binding upon all . . . courts . . . of the United States"[178] a court-martial prisoner has a statutory right to petition for habeas corpus relief.[179] Furthermore, the legislative history of the provision makes clear that habeas relief was an implied exception to that finality clause.[180]

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[177] 346 U.S. 137 (1953).

[178] Uniform Code of Military Justice, Art. 76, 10 U.S.C. sec. 876 (1964).

[179] 28 U.S.C. 2241 (1964).

[180] S. Rep. No. 486, 81st Cong., 1st Sess., 32 (1949); H.R. Rep. No. 491, 81st Cong., 1st Sess., 35 (1949).

Recent Supreme Court decisions[181] reveal that lower federal courts have broad powers to make independent fact determinations on allegations by civilian prisoners of constitutional due process violations during their trials. However, this expansion of the writ to include the overturning of state convictions which were obtained without affording the accused his constitutional guarantees has not generally been extended to military courts.[182] Yet, the federal courts might very well reject the argument that military law is "separate and apart"[183] from federal law and exercise civilian judicial control over the military establishment. It should be noted that Winthrop did not consider the independence of military tribunals to be based on the constitutional principle of separation of powers:

> . . . the court-martial being no part of the Judiciary of the nation, and no statute

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[181] See, e.g., Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Brown v. Allen, 344 U.S. 443 (1953).

[182] See Katz and Nelson, The Need for Clarification in Military Habeas Corpus, 27 Ohio St. L. J. 193, 211-217 (1966).

[183] Burns v. Wilson, 346 U.S. 137, 140 (1953).

> having placed it in legal relation therewith, its proceedings are not subject to be directly reviewed by any federal court, either by certiorari, writ of error, or otherwise. . . .[184]

As Mr. Chief Justice Warren stated,

> When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.[185]

Nevertheless, the military petitioner has the statutory right to petition for habeas corpus and is subject to the same limiting devices on the issuance of the writ as is the state applicant.

Since the decision in Jones v. Cunningham,[186] federal courts in civilian habeas cases have extended the concept of custody to encompass restraints on a person's liberty not involving physical confinement. These holdings which recognize the milder forms of restraint such as parole and bail or a suspended sentence as sufficient to invoke the writ are consistent with the

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[184] W. Winthrop, Military Law and Precedents 50 (2d ed. rev. and enl. 1920).

[185] Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181, 188 (1962).

[186] 371 U.S. 236 (1963).

expanding function of the writ. Accordingly, the subtle restraints which can be imposed under the Code on a soldier's liberty can equally serve as the basis for a habeas corpus attack on an alleged unlawful detention. For example, in a recent Second Circuit decision,[187] the court held that the Navy's exercise of jurisdiction over the petitioner and its right to subject him to orders was sufficient restraint to constitute the jurisdictional prerequisite of "custody" irrespective of the absence of physical confinement.[188] It is submitted that in order "to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints"[189] the federal courts will entertain habeas petitions on behalf of military petitioners who are challenging those same types of restraints of liberty for which petitions lie to accommodate civilian petitioners.

Recently, the Court of Military Appeals has held that in the proper case it possesses the power to issue writs of habeas corpus to test the legality of an

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[187] Hammond v. Lenfest, 398 F.2d 705 (2nd Cir. 1968).

[188] Id. at 711.

[189] Fay v. Noia, 372 U.S. 391, 405 (1963).

applicant's restraint.[190] In Jones v. Ignatius,[191] the court granted the writ of habeas corpus to review a record of trial where the convening authority utilized the bad-conduct discharge part of a special court-martial sentence to increase the period of confinement beyond which the court could legally adjudge. See also Lowe v. Laird[192] where a petition for habeas relief was entertained to inquire into the legality of a soldier's pre-trial confinement. In neither of the above referenced cases did the court discuss the necessary degree of physical control requisite for the issuance of the writ. It should be noted that both

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[190] Levy v. Resor, 17 U.S.C.M.A., 37 C.M.R. 399 (1967). See generally United States v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. 306, 308 (1966) where Chief Judge Quinn speaking for a unanimous court stated that the Court of Military Appeals is a "court established by act of Congress within the meaning of the All Writs Act." See also United States v. Augenblick, 37 U.S.L.W. 4081 (U.S. Jan. 14, 1969) where the Supreme Court acknowledged that the Court of Military Appeals has the power to fashion an appropriate remedy "'to accord relief to an accused who has palpably been denied constitutional rights in any court-martial. . . .'" (Quoting from United States v. Bevilacqua, 18 U.S.C.M.A. 10, 12, 39 C.M.R. 10, 12 (1968).

[191] 18 U.S.C.M.A., 39 C.M.R. 7 (1965).

[192] Lowe v. Laird, No. 69-4 (U.S.C.M.A., March 4, 1969).

Jones and Lowe involved the legality of iron-bar physical confinement. However, in Levy v. Resor,[193] the writ was granted to a petitioner following trial and conviction by general court-martial who was detained in a military hospital room under guard awaiting action by the convening authority under Article 64 of the Uniform Code of Military Justice.

It is believed that the number of habeas petitions filed by military personnel with the Court of Military Appeals will substantially increase with the passage of time. Furthermore, it is submitted that our court will reject the traditional view requiring actual physical confinement as a prerequisite to habeas relief and adopt the modern view that besides physical detention there are other kinds of restraints that warrant habeas relief.

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[193] 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967).

CHAPTER V

CONCLUSION

Unfortunately, any attempt to define the contemporary meaning of the phrase "in custody" is analogous to Humpty Dumpty's response to Alice on the meaning of a word— "'When I use a word,' Humpty Dumpty said . . . 'it means just what I choose it to mean—nothing more nor less.'"[194] Recent decisions reveal that the courts have liberalized the definition of "in custody" and are "taking more and more seriously any restraints that are imposed on a person's liberty."[195] Perhaps the traditional requirement that the applicant must be in actual confinement before he could petition for habeas relief was appropriate in an age when the only alternatives were imprisonment and freedom. However, in a society which makes sophisticated distinctions in types and forms of punishment such a strict rule thwarts the

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[194]Carroll, Alice's Adventures in Wonderland and Looking Through the Looking Glass, 228, undated, printed by Grosset and Dunlap.

[195]Sokol, A Handbook of Federal Habeas Corpus 29 (1965).

function of habeas which is designed "to remedy any kind of government restraint contrary to fundamental law."[196] This is particularly true in an age when our courts are concerned with individual rights and constitutional due process. Accordingly, as the scope of federal habeas corpus expands to search out and discover violations of constitutional due process in trial court proceedings milder forms of custody will be deemed sufficient restraint to support a habeas petition.

It can be argued that if the court's disposition of the custody issue is extended to its logical conclusion, the end result might well be to issue the writ where the only restraints on liberty are the collateral consequences flowing from a conviction such as disfranchisement or the inability to engage in a business or join certain organizations. However, congressional concern[197] over the expanding function and scope of habeas inquiry has lead one writer to suggest that the language used by the Supreme Court in Carafas v. LaVallee emphasizing the

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[196] Fay v. Noia, 372 U.S. 391, 405 (1963).

[197] See S. Rep. No. 1097, 90th Cong., 2d Sess. 10, 63-66, 233-34 (1968); 114 Cong. Rec. S5915-22, S5924-26 (daily ed. May 20, 1968).

importance of the custody requirement and equating custody with detention[198] "seems to serve no purpose other than to prevent speculation that the case will be extended to turn habeas into a general post-conviction remedy."[199]

In 1967, The American Bar Association Advisory Committee on Sentencing and Review recommended the abandonment of the custody requirement in order to provide the applicant with a general post-conviction remedy.[200] By eliminating the custody requirement petitioners would be able to challenge sentences of imprisonment already served; concurrent sentences or other unchallenged sentences; or sentences of fine, probation, or suspended sentences[201] without regard for the individual judge's definition of restraint of liberty.

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[198] 391 U.S. 234, 238 (1968).

[199] The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 254 (1968).

[200] American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies, sec. 2.3 (Tentative Draft, 1967).

[201] Op. cit. at 43.

Although the courts have liberalized the definition of custody by judicial definition, any abandonment of the statutory "in custody" requirement must come from the legislature. Until the Congress acts a petitioner could be denied an appropriate remedy because of the technical statutory "in custody" requirement. Possibly, Mr. John S. Wise, Jr., arguing on behalf of prisoner Charles L. McNally before the Supreme Court summed it all up:

> The argument that the subject cannot be brought up on habeas corpus is specious, for it involves the liberty of a citizen which cannot be disposed of by the refinements of procedure.[202]

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[202]McNally v. Hill, 293 U.S. 131, 132 (1934).

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