Procedural Substitute for Habeas Corpus: A Critical Analysis and Comparison
PROCEDURAL SUBSTITUTE FOR HABEAS CORPUS: A CRITICAL
ANALYSIS AND COMPARISON

Introduction

The purpose of this article is to compare section 2255 of Title 28, United States Code, with habeas corpus, distinguish it from other post-conviction remedies, and in conclusion evaluate section 2255 in its present position as a substitute for habeas corpus for those in federal custody. A general history of habeas corpus and an enumeration of the grounds necessary for its issuance will prove helpful since the substantive grounds for the section are the same as those for habeas corpus. Much of the substantive law of habeas corpus has developed from federal courts collaterally reviewing state court convictions, and although this article is concerned with collateral review of federal court convictions, the state court conviction cases are included since there seems to be no distinction in substantive principle and since they are necessary for a full understanding of habeas corpus development.

Background

The origin of the writ of habeas corpus, "this famous bulwark of our liberties," is disputed. Some trace it to the Romans and others claim it is strictly of Anglo-Saxon heritage. Whatever its origin, it has become known as the "shield for the oppressed and a barrier to the exercise of tyrannical power." In view of this it is surprising to note that it was first used to put individuals in jail and later became a writ of freedom. Despite the Magna Carta and the early development of habeas corpus, there was no effective remedy

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2 See United States v. Hayman, 342 U.S. 205 (1952); Clough v. Hunter, 191 F.2d 516 (10th Cir. 1951); "The test, therefore, it seems to the Court, is whether the issue now being raised could have been raised on an application for a writ of habeas corpus..." United States v. Meyers, 84 F. Supp. 766, 767 (D.D.C.), aff'd, 181 F.2d 802 (D.C. Cir.), cert. denied, 336 U.S. 917 (1949).
4 Jenks, The Story of the Habeas Corpus, 18 L.Q. Rev. 64 (1902).
5 Glass, Historical Aspects of Habeas Corpus, 9 St. John's L. Rev. 55 (1934); Jenks, supra note 4; Longsdorf, Habeas Corpus a Protean Writ and Remedy, 8 F.R.D. 179 (1949).
6 Glass, supra note 5, at 55.
7 Holsworthy, A History of English Law 108-12 (1926 ed.).
8 Glass, supra note 5, at 55.
9 Jenks, supra note 4, at 65; cited with approval, Longsdorf, supra note 5, at 179-80.
against the unreasonable exercise of the king's power until the Petition of Right of 1628, which authorized habeas corpus to release prisoners arbitrarily imprisoned by the king's order. Direct maintenance of unlimited power being so controlled, the throne resorted to making use of defects still existing in the writ. The Habeas Corpus Act of 1679 remedied these defects and provided additional protections including the use of all proper legal processes. Although there were no habeas corpus statutes in early America, the writ was considered a basic right of all English subjects, and generally issued without question. It followed as a natural development that when the federal government was organized, habeas corpus became a protected constitutional privilege which "shall not be suspended, unless ... the public Safety may require it." The Federal Judiciary Act of 1789 provided that the writ could issue out of a federal court only where the prisoner was in federal custody. Desirous of guaranteeing the war-won liberty of all persons, Congress passed the act of 1867 which authorized the federal courts to issue the writ for any detention in violation of the constitution, laws or treaties of the United States.

10 "... Magna Carta and these later statutes [habeas corpus] were supposed to prove that arrests by order of the king or Council were illegal. But we have seen that this interpretation was never acquiesced in by the crown." 9 Holdsworth, op. cit. supra note 7, at 112.

9 Ibid. note 7, at 112.

11 16 Car. 1, c. 1088.

12 Ibid. "... As a result of that enactment, the king lost his right to imprison 'per speciale mandatum' without showing cause." 9 Holdsworth, A HISTORY OF ENGLISH LAW 115 (1926 ed.); Glass, Historical Aspects of Habeas Corpus, 9 ST. JOHN'S L. REV. 55, 62 (1934). See Note, 61 HARV. L. Rev. 657, 658 (1948).

13 Two specific examples of this practice were: (1) imprisonment beyond the reach of habeas corpus and (2) taking advantage of the doubtful power to issue the writ during court vacation. See 9 Holdsworth, op. cit. supra note 12, at 115-16.

14 2 Stat. 73 (1789).

15 31 Car. 2, c. 2 (1679). The writ now issued during court vacation, and Englishmen were not to be imprisoned beyond the seas. Ibid. "... This Act made the writ of Habeas Corpus ad sub jiciendum the most effective weapon yet devised for the protection of the liberty of the subject, by providing both for a speedy judicial inquiry into the justice of any imprisonment on a criminal charge, and for a speedy trial of prisoners remanded to await trial." 9 Holdsworth, op. cit. supra note 12, at 118. (Holdsworth also sets out the provisions of the Act. Ibid.)


18 Glass, Historical Aspects of Habeas Corpus, 9 ST. JOHN'S L. Rev. 55, 63 (1934).


20 Ibid. Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866); Ex parte Bollman, 8 U.S. (4 Cranch.) 75 (1807).

21 1 Stat. 81-82 (1789). See Ex parte Dorr, 44 U.S. (3 How.) 103 (1845).


24 Ibid. In re Neagle, 135 U.S. 1, 23 (1890).
NOTES

Development of the Writ

There are few reliable rules governing the grounds necessary for the issuance of habeas corpus. However, there are certain basic precepts which serve as guides through this "untidy area of law." Originally the writ would issue only where the sentencing court was completely without jurisdiction over the person, or act. Specific examples of a court's lack of jurisdiction were where the indictment did not charge a crime under the laws of the United States, or where there was double jeopardy. Also, initially, the court was confined to the record in a habeas corpus proceeding. The writ was broadened by the act of 1867 which provided that the petitioner "may have a judicial inquiry . . . into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction . . ." The writ was further enlarged by United States Supreme Court decisions holding that the writ would issue where the sentencing court had initial jurisdiction but proceeded to judgment in violation of petitioner's fundamental constitutional rights. Most habeas corpus petitions are based on the contention that petitioner was deprived of his constitutional right to counsel. However, the breach of any constitutional guaranty is generally sufficient ground for issuance of the writ where the right has not been intelligently waived, and where there is no other effective means of preserving it. In many cases constitu-

29 Ex parte Rowland, 104 U.S. 604 (1881); Underhill v. Hernandez, 65 Fed. 577 (2d Cir. 1895); see In re Coy, 127 U.S. 731 (1888).
30 See Van Gorder v. Johnston, 87 F.2d 654 (9th Cir. 1937).
31 Matter of Nielson, 131 U.S. 176, 188 (1889); In re Snow, 120 U.S. 274 (1886); Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873).
32 See Frank v. Mangum, supra note 33, at 331, quoted with approval in Johnson v. Zerbst, supra note 35; see also Frank v. Mangum, 237 U.S. 309, 327-28 (1915).
33 14 Stat. 335 (1867).
34 Frank v. Mangum, supra note 33, at 331, quoted with approval in Johnson v. Zerbst, 304 U.S. 458, 466 (1938).
36 This was first established as a ground for habeas corpus in Johnson v. Zerbst, supra note 35; see Peters, Collateral Attack by Habeas Corpus Upon Federal Judgments in Criminal Cases, 23 WASH. L. Rev. 87, 102 (1948).
37 See Sunal v. Large, 332 U.S. 174 (1947). "The issue here was appropriately raised by the habeas corpus petition. The facts relied on are dehors
tional violations have been considered waived 39 where the petitioner intelligently pleaded guilty, 40 or failed to assert the violations at the trial, 41 or failed to appeal. 42 However, there are "exceptional circumstances" where collateral attack may be allowed despite these omissions. There seem to be no real criteria for determining what constitutes "exceptional circumstances." 43 Collateral attack by habeas corpus has been allowed where the petitioner showed some disability preventing him from making an intelligent waiver of his rights, 44 or where the facts relied on were dehors the record and not reviewable on appeal. 45 In Sunal v. Large 46 the United States Supreme Court mentions circumstances in which the writ had issued without consideration of the adequacy of appellate relief. 47 However, the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." Waley v. Johnston, 316 U.S. 101, 104-05 (1942).

39 Although constitutional violations may be waived, the trial court's lack of initial jurisdiction cannot be waived. Smith v. United States, 360 U.S. 1 (1959).

40 Jorgensen v. Swope, 114 F.2d 988 (9th Cir. 1940); Cooke v. Swope, 109 F.2d 955 (9th Cir. 1940); Buckner v. Hudspeth, 105 F.2d 396 (10th Cir.), cert. denied, 308 U.S. 553 (1939); McCoy v. Hudspeth, 106 F.2d 810 (10th Cir. 1939); cf. Canizio v. New York, 327 U.S. 82 (1946). But see Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942).

41 "To allow an accused person, with actual advance knowledge that perjured evidence was knowingly to be used by the prosecution, to remain silent as to that situation during the entire trial and after his conviction to attempt to set the judgment aside by collateral attack would seriously interfere with the proper orderly administration of criminal law." Taylor v. United States, 229 F.2d 826 (8th Cir.), cert. denied, 351 U.S. 906 (1956) (§ 2255); cf. cases cited note 40 supra.

42 Sunal v. Large, supra note 38; see Howell v. United States, 172 F.2d 213 (4th Cir.), cert. denied, 337 U.S. 906 (1949).

43 For an example of the Court's confusion as to what constitutes "exceptional circumstances," see Sunal v. Large, 332 U.S. 174, 178-79 (1947).


47 The circumstances mentioned were: "where the conviction was under a federal statute alleged to be unconstitutional, where there was a conviction by a federal court whose jurisdiction over the person or the offense was challenged, where the trial or sentence by a federal court violated specific constitutional guarantees." Sunal v. Large, 332 U.S. 174, 178-79 (1947). These grounds labeled "exceptional circumstances" exemplify the uncertainty in the area, since they are generally the grounds necessary for the issuance of the writ in all circumstances.
Court goes on to say that these circumstances cannot be considered absolute norms, for habeas corpus is increasingly denied where appellate review was available for correction of the error. 48

The courts have consistently maintained that habeas corpus is not a substitute for appellate review. 49 In *Sunal v. Large* 50 the Court said:

[T]he writ is not designed for collateral review of errors of law committed by the trial court—the existence of any evidence to support the conviction, irregularities in the grand jury procedure, departure from a statutory grant of time in which to prepare for trial, and other errors in trial procedure which do not cross the jurisdictional line. 51

Speaking further of errors of law committed by the trial court the Court continued: "[I]f in such circumstances, *habeas corpus* could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed." 52 Despite this pronouncement the Supreme Court has reached and decided questions of statutory construction where there had been no constitutional or jurisdictional defects at the trial, and the questions were raised by collateral attack on consecutive sentences. 53 Although the Court has refused to directly hold that habeas corpus or section 2255 applies in such a situation, they have considered the matter on the merits when presented under section 2255 and *habeas corpus*. 54

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51 Sunal v. Large, *supra* note 47, at 179 (Footnotes omitted); see Bocock v. United States, 226 F.2d 720 (7th Cir. 1955) (per curiam), *cert. denied*, 350 U.S. 999 (1956). "Section 2255, Title 28, does not provide a method to try over again cases in which defendants have been adjudged guilty of crime. Whether the questions raised be as to the sufficiency of the evidence or involve alleged error of fact or law, they may be raised only by timely appeal." *Id.* at 720.
53 Ladner v. United States, 358 U.S. 169 (1958) (§ 2255); Gore v. United States, 357 U.S. 386 (1958) (§ 2255); Ebeling v. Morgan, 237 U.S. 625 (1915) (*habeas corpus*); Morgan v. Devine, 237 U.S. 632 (1915) (*habeas corpus*). In *Ladner v. United States*, *supra*, there was no jurisdictional defect, no violation of constitutional rights, only a *possibility of an error of law*, and there had been no appeal. The Court went into the merits "without, however, intimating any view as to the availability of a collateral remedy in another case where that question is properly raised, and is adequately briefed and argued in this Court." *Ladner v. United States*, *supra*, at 173. See vigorous dissent by Mr. Justice Clark.
The scope and application of habeas corpus, already broadened by the act of 1867, was further extended by a series of Supreme Court cases holding that the writ, subject to waiver, could issue for any conviction which violated the constitutional rights of the accused. These cases, particularly *Johnston v. Zerbst*, opened a “Pandora’s box” from which an enormous increase of cases flowed. The doctrine of res judicata did not apply to successive habeas corpus petitions, and unless the record refuted the allegations, petitioner had to be granted a hearing at which his presence was required no matter how frivolous his claims were. The resulting abuses were groundless applications and successive applications on the same or similar grounds. Because prisoners applied for habeas corpus to the district courts of their confinement, these increased applications presented an acute problem in those districts wherein federal prisons were located. This situation brought about considerable con-

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56 See cases cited note 36 supra.
57 304 U.S. 458 (1938) (denial of counsel).
59 During 1936 and 1937 an annual average of 310 applications were filed in district courts and an average of 22 persons were released. In 1943, 1944, and 1945 the annual average was 845 applications although only an average of 26 prisoners were released. United States v. Hayman, 342 U.S. 205, 212 n.13 (1952). See statistics and comments in the following sources: Dorsey v. Gill, 148 F.2d 857 (D.C. Cir.), cert. denied, 325 U.S. 890 (1945); Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313 (1948); Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1949) (Judge Parker was chairman of the committee which recommended § 2255); Speck, *Statistics on Federal Habeas Corpus*, 10 Ohio St. L.J. 337 (1949) (complete statistics).
60 Salinger v. Loisel, 265 U.S. 224 (1924); see United States ex rel. Robinson v. Johnston, 316 U.S. 649 (1942) (per curiam); Waley v. Johnston, 316 U.S. 101 (1942); Longsdorf, *Habeas Corpus a Protean Writ and Remedy*, 8 F.R.D. 179, 190 (1949). Although there is no res judicata in habeas corpus, the court in the exercise of sound judicial discretion may generally refuse to allow a prisoner to relitigate the validity of his sentence upon a question which was presented or could have been presented in a prior proceeding. See Collins v. United States, 206 F.2d 918 (8th Cir. 1953); Dorsey v. Gill, supra note 59, at 869-70; Reviser’s Note, 28 U.S.C. § 2244 (1958).
61 Waley v. Johnston, supra note 60.
62 See Goodman, supra note 59; Parker, supra note 59.
64 Ahrens v. Clark, 335 U.S. 188 (1948); White v. United States, 190 F.2d 365 (6th Cir. 1951) (per curiam); see United States v. Hayman, 342 U.S. 205, 213 (1952).
65 In 1947 and 1948 in Kansas habeas corpus constituted 26.8% of all cases and 65.2% of all trials. Speck, *Statistics on Federal Habeas Corpus*, 10 Ohio St. L.J. 337, 350 (1949). “Of all habeas corpus applications filed by federal prisoners, 63% were filed in but five of the eighty-four District Courts. And,
cern and section 2255 was proposed and enacted as a procedural device to minimize the abuses and difficulties prevalent in the administration of habeas corpus petitions filed by federal prisoners. There was no intention to restrict or broaden the prisoner's right of collateral attack. The grounds which may be urged for relief by mo-

although habeas corpus trials average only 3% of all trials in all districts, the proportion of habeas corpus trials in those five districts has run from 20% to as high as 65% of all trials conducted in the district. United States v. Hayman, supra note 64, at 214 n.18. Because the files and records of the trial are at the sentencing court and not at the district court of confinement this presented an added disadvantage. See United States v. Hayman, supra note 64, at 212-13.


67 "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255 (1958).

68 The Judicial Conference of Senior Circuit Judges headed by Judge Parker proposed the section. See Parker, supra note 66.

69 See United States v. Hayman, 342 U.S. 205 (1952); Longsdorf, Habeas Corpus a Protean Writ and Remedy, 8 F.R.D. 179 (1949); Parker, supra note 66.

70 See United States v. Hayman, supra note 69; Longsdorf, supra note 69; Parker, supra note 66.
tion under section 2255 are the same as could be raised by habeas corpus. Although it was not intended to restrict the prisoner’s right of collateral attack, the following changes resulted:

(1) He now had to make his motion to the sentencing court rather than applying to the district court of confinement.

(2) His presence was no longer required at the hearing.

(3) The doctrine of res judicata was now applicable to successive motions.

(4) He no longer had a definite time guarantee on the hearing but instead was assured a “prompt” hearing.

(5) His right to proceed by habeas corpus was abolished unless section 2255 was “inadequate or ineffective to test the legality of his detention.”

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7 See Clough v. Hunter, 191 F.2d 516 (10th Cir. 1951); Birtch v. United States, 173 F.2d 316 (4th Cir.) (per curiam), cert. denied, 337 U.S. 944 (1949). “The test, therefore, it seems to the Court, is whether the issue now being raised could have been raised on an application for a writ of habeas corpus . . .” United States v. Meyers, 84 F. Supp. 766, 767 (D.D.C.), aff’d, 181 F.2d 802 (D.C. Cir.), cert. denied, 336 U.S. 912 (1949); see Note, 59 Yale L.J. 1183 (1950).

72 28 U.S.C. § 2255 (1958). See Birtch v. United States, supra note 71. In contrast, habeas corpus petitions are made to the district court of confinement, and a filing in the district where sentenced instead of the district of incarceration is insufficient. Ahrens v. Clark, 335 U.S. 188 (1948); White v. United States, 190 F.2d 365 (6th Cir. 1951) (per curiam).

73 28 U.S.C. § 2255 (1958). See Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171 (1949). In contrast, under habeas corpus the prisoner’s presence is mandatory if there is involved more than issues of law. 28 U.S.C. § 2243 (1958). “A basic consideration in habeas corpus practice is that the prisoner will be produced before the court. This is the crux of the statutory scheme established by the Congress; indeed, it is inherent in the very term ‘habeas corpus.’” Johnson v. Eisentrager, 339 U.S. 763, 778 (1950) (Footnotes omitted).


NOTES

Section 2255 as Conunstrued

Section 2255 was challenged as an unconstitutional suspension of the right to habeas corpus in Barrett v. Hunter.77 The Tenth Circuit upheld the constitutionality of section 2255 by construing the ex parte hearing provision to mean that the court does not have an absolute discretion to entertain and determine the motion without the presence of the prisoner:

Rather, we think the intention was to provide that the court may entertain and determine the motion without requiring the production of the prisoner when the motion or the records and files of the case conclusively show that the prisoner is not entitled to any relief, or where the presence of the prisoner is unnecessary to afford him the relief to which he is entitled, or where only issues of law are presented. But where the motion and any response thereto present material and substantial issues of fact requiring a hearing, generally, in the exercise of a sound discretion, the court should require the production of the prisoner.78

The ex parte hearing provision was given a similar construction in the case of United States v. Hayman.79 The District Court had conducted the hearing without the prisoner being physically present and dismissed his motion. On appeal the Circuit Court treated section 2255 as a nullity and dismissed the motion directing the prisoner to proceed by habeas corpus in the district of his confinement.80 The Supreme Court avoided passing directly on the constitutionality of section 2255 by construing the ex parte hearing provision to mean: "Where, as here, there are substantial issues of fact as to events in which the prisoner participated, the trial court should require his production for a hearing."81 The Court, in concluding that the District Court did not proceed in conformity with section 2255 in determining the factual issues without notice to the prisoner and without his presence, said:

We hold that the required hearing can be afforded respondent under the procedure established in Section 2255. The Court of Appeals correctly reversed the order of the District Court but should have remanded the case for a hearing under Section 2255 instead of ordering respondent's motion dismissed.82

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77 180 F.2d 510 (10th Cir.), cert. denied, 340 U.S. 897 (1950).
78 Barrett v. Hunter, supra note 76, at 514 (Footnotes omitted.). "We conclude that § 2255 thus construed preserves the essentials of the remedy afforded by the great writ of freedom ..." Barrett v. Hunter, supra note 76, at 516 (Emphasis added.) (Huxman, J., dissented on the ground that to find constitutionality where there is none is an unwarranted construction.).
80 Hayman v. United States, 187 F.2d 456 (9th Cir. 1950).
Although this construction appears to have guaranteed the constitutionality of section 2255 it presented the problem of the sentencing court ordering the presence of a prisoner confined in another district. The court in a habeas corpus proceeding is powerless to do this; in a section 2255 proceeding it may invoke the authority of the all-writs section of the Judicial Code. While the prisoner’s presence is now required where there are substantial issues of fact, a determination of the motion without requiring the presence of the prisoner has presumptive validity and if the court erred in failing to order the prisoner’s presence it is at most error, and relief is by appeal and not by habeas corpus claiming that section 2255 is inadequate to test the detention.

The res judicata provision of section 2255 has been given a similar liberal construction. In Barrett v. Hunter, the Tenth Circuit construed this provision to mean that the court does not have an unqualified discretion to refuse to entertain a second or successive motion but should dispose of the motion:

in the exercise of sound judicial discretion, guided and controlled by a consideration of whatever has a rational bearing on the propriety of the relief sought, among which is a prior refusal to grant relief on a like motion. If the second or successive motion sets up new or dissimilar grounds for relief which are within the purview of the grounds enumerated in the third paragraph of § 2255, and the motion and the records and files in the case do not conclusively show that the prisoner is entitled to no relief, the court should ordinarily entertain such second or successive motion.

This construction is in accord with the treatment of second or successive applications in habeas corpus proceedings. Although it has been declared that res judicata is applicable to section 2255 proceedings, the reasons for dismissing the second or successive motion have been the same as would justify a dismissal of a second or successive habeas corpus application. To the same effect, see Estep v. United States, 226 F.2d 812 (8th Cir. 1955), cert. denied, 350 U.S. 971 (1955), with Wong Doo v. United States, supra note 88 (habeas corpus), and Swihart v. Johnston, 150 F.2d 721 (9th Cir. 1945), cert. denied, 327 U.S. 789 (1946) (habeas corpus).

83 See Ahrens v. Clark, 335 U.S. 188 (1948) (Presence of the prisoner within the district of the court is a prerequisite to habeas corpus.). Comment, 18 ALBANY L. REV. 13 (1954).
85 United States v. Winhoven, 14 F.R.D. 18 (S.D. Cal.), appeal dismissed, 209 F.2d 417 (9th Cir. 1953); see United States v. Hayman, supra note 81.
86 180 F.2d 510 (10th Cir.), cert. denied, 340 U.S. 897 (1950).
before the Supreme Court indicates that even this lip service to strict res judicata may disappear:

The statute further provides: "A motion for such relief may be made at any time." This latter provision simply means that, as in habeas corpus, there is no statute of limitations, no res judicata, and that the doctrine of laches is inapplicable.90

As a result of these cases it would seem that there is generally no difference between the treatment of second or successive petitions under section 2255 and under habeas corpus.

The last clause of section 2255, limiting the petitioner's right to habeas corpus unless his remedy by motion is "inadequate or ineffective to test the legality of his detention," originally resulted in a difference of opinion as to whether section 2255 was a substitute for habeas corpus save in those cases where section 2255 was "inadequate or ineffective,"91 or whether practical compliance with section 2255 was merely a condition precedent to proceeding by habeas corpus.92

The prevailing view is that section 2255 is a substitute for habeas corpus normally superseding it and providing the exclusive remedy for federal prisoners where the issues in controversy are such as have traditionally been within the reach of habeas corpus.93 In view of the fact that there have been only three cases94 in which section 2255 has been held "inadequate or ineffective" and these three cases seem to have been overruled sub silentio,95 the issue as to whether section 2255 is a substitute or pre-requisite for habeas corpus seems settled. It would seem that section 2255 is not only normally the exclusive remedy but is always the exclusive remedy for federal prisoners claiming the right to be released because of a jurisdictional or constitutional defect at the trial.96

94. Mugavero v. Swope, 86 F. Supp. 45 (N.D. Cal. 1949), rev'd on other grounds, 188 F.2d 601 (9th Cir. 1951) (habeas corpus granted before § 2255); St. Clair v. Hiatt, supra note 92 (habeas corpus granted after § 2255); Stidham v. Swope, supra note 92 (habeas corpus granted before § 2255).
95. All three cases were cited in Hayman v. United States, 187 F.2d 456 (9th Cir. 1950), to sustain the inadequacy of § 2255. The case was reversed in United States v. Hayman, 342 U.S. 205 (1952). For a case illustrating how meaningless the "inadequate or ineffective" clause has become, see United States ex rel. Leguillou v. Davis, supra note 93, holding that the fact that a sentencing court judge may have to review his own actions at the trial does not make § 2255 inadequate or ineffective to test the legality of the detention.
96. Had not § 2255 been so liberally construed, a broader interpretation and
Section 2255 was thought for a time to be a substitute for the ancient writ of error coram nobis. This is attributable in part to the Reviser's Note to section 2255 to the effect that the section "restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis." This Note is misleading since section 2255 was enacted not to adopt coram nobis but to provide a procedural remedy to correct the abuses in federal prisoners' habeas corpus applications. Furthermore, the same grounds have to be asserted under section 2255 as under habeas corpus. The procedure is similar to coram nobis only in that the attack is made to the sentencing court after judgment. The Supreme Court in United States v. Morgan, in a five to four decision, held that section 2255 did not preclude use of coram nobis in the federal courts. Respondent sought by motion under section 2255 to have a federal conviction set aside although he had served his full term. After serving his sentence he had been convicted of a New York offense and was sentenced to a longer term as a second offender because of his prior federal conviction. Under section 2255 the petitioner has to be in custody under the sentence he is attacking. However, the Court treated the motion under section 2255 as an application for a writ of error coram nobis and went into the merits. Although there was no statute specifically providing for coram nobis it was held that the power to grant the writ must come from the all-writs section of the Judicial Code. The result of the decision is that even after

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98 28 U.S.C. § 2255 (1952). The confusion can be exemplified by this statement from United States v. Kranz, 86 F. Supp. 776 (D.N.J. 1949), "§ 2255 of Title 28 U.S.C.A. is in the nature of an application for a writ of error coram nobis and is governed by the general principles applicable to habeas corpus." Id. at 777.

99 See note 69 supra and accompanying text.

100 See authorities cited notes 70 and 71 supra.


103 United States v. Morgan, 346 U.S. 502, 510-11 (1954). Fed. R. Civ. P. 60(b), expressly abolishing coram nobis in civil cases, was held inapplicable because this motion was a step in a criminal proceeding. Id. at 505 n.4. But see Heflin v. United States, 358 U.S. 415, 418 n.7 (1959), where § 2255 is considered an independent civil suit and not a proceeding in the original criminal prosecution.


105 United States v. Morgan, supra note 103, at 505. "The Supreme Court
the term is served there is an effective means of obtaining relief from an invalid conviction. Prior to this decision there had been considerable concern about the lack of an adequate remedy against the consequences of conviction which extend beyond the period of custody. In a recent case the petitioner had been in prison under the sentence he was attacking at the time he commenced proceedings under section 2255 but by the time certiorari had been granted he had been released. The Supreme Court went into the merits of the case. The significance of the case seems to be that although the petitioner must be in custody when he begins section 2255 proceedings he need not be in custody to have the motion determined on the merits.

Under Rule 33 of the Federal Rules of Criminal Procedure, a motion for a new trial on the ground of newly discovered evidence may be made within two years after final judgment. The scope of inquiry extends only to guilt or innocence and the court has no jurisdiction to entertain a motion after the two-year period. Under section 2255 a motion may be made at any time petitioner is in custody under the sentence he is attacking. The question of guilt or innocence is not a proper issue under section 2255 and the discovery of new evidence which establishes innocence but does not show a jurisdictional or constitutional defect is not sufficient grounds for section 2255. If the evidence is discovered after two years and it does not show a denial of a constitutional right nor a jurisdictional and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1958).

106 Some specific examples of post-conviction consequences are: loss of civil rights, multiple offender statutes, and social and economic repercussions. See Donnelly, Unconvicting the Innocent, 6 VAND. L. REV. 20, 29-30 (1952); Note, 63 YALE L.J. 115 (1952); Note, 59 YALE L.J. 786, 789-90 (1950).

107 Pollard v. United States, 352 U.S. 354 (1957); see also Dickson v. Castle, 244 F.2d 665 (9th Cir. 1957).


110 FED. R. CRIM. P. 33.


112 Marion v. United States, 171 F.2d 185 (9th Cir.), cert. denied, 337 U.S. 944 (1944).


defect, the only remedy is by executive clemency,115 or possibly by coram nobis.116

Rule 34 of the Federal Rules of Criminal Procedure117 may be maintained only on the grounds that the indictment does not charge a crime, or that the court had no jurisdiction.118 "The motion in arrest of judgment shall be made within five days after determination of guilt or within such further time as the court may fix during the 5-day period."119 The scope of inquiry is limited to a defect appearing on the face of the record,120 and the record includes only the plea, the verdict, and the sentence.121 Any ruling, the validity of which depends upon the evidence taken at the trial, is not reviewable by a motion in arrest of judgment under Rule 34.122 The petitioner need not be in custody under Rule 34. Under section 2255 there are much broader grounds of attack,124 and the scope of inquiry extends to matters dehors the record.125 The petitioner must be in custody under the sentence he is attacking126 and there is no time limit on the motion.127

Rule 35 of the Federal Rules of Criminal Procedure, allowing the correction of an illegal sentence at any time,128 covers no other error in a criminal record than the correction of a sentence, the imposition of which was not authorized by the judgment of conviction.129 It merely affords a procedure for bringing an improper sentence imposed upon a valid conviction into conformity with law.130 It was

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117 Fed. R. Crim. P. 34.
120 United States v. Zisblatt, 172 F.2d 740, 741-42 (2d Cir. 1949).
122 United States v. Zisblatt, supra note 120.
130 Duggins v. United States, 240 F.2d 479 (6th Cir. 1957); Cook v. United States, 171 F.2d 567 (1st Cir. 1948), cert. denied, 336 U.S. 926 (1949).
NOTES

not meant to meet the problems in a habeas corpus proceeding or a collateral attack upon a judgment. Section 2255 is available only to attack a sentence under which the petitioner is in custody; relief under Rule 35 is available not only where the petitioner is in custody but also where he is not in custody, at least where matters dehors the record are not involved. Under Rule 35, the illegal sentence may be corrected where the defendant has not actually started serving sentence, or where the defendant already served his sentence. Under section 2255 the petitioner must be claiming the right to be released and he has no right to have the validity of his sentence adjudicated if he would still be confined in the same penitentiary under another existing sentence. Rule 35 does not guarantee release if successful but merely provides a procedure for bringing the sentence into conformity with the law.

Rule 36, providing for the correction of clerical mistakes in judgments at any time, is not an independent and collateral attack upon judgments as they stand as in section 2255. The judgments to be corrected are not necessarily void judgments subject to collateral attack.

Conclusion

Section 2255, as interpreted by the courts, has lost much of the administrative effectiveness which prompted its passage. The res judicata provision has been interpreted to mean the same as the "sound discretion" norm applicable to traditional habeas corpus proceedings. Thus, the anticipated remedy against second or successive motions does not exist. Although the constitutionality of section 2255 has been assured by construing the ex parte hearing provision to mean that the petitioner's presence is required where there are substantial issues of fact, this construction presents other problems. It may be necessary to make expensive and time-consuming arrangements for the transportation of the prisoner to the sentencing court.

131 Duggins v. United States, supra note 130.
133 Holloway v. United States, 191 F.2d 504, 507 (D.D.C. 1951); Duggins v. United States, supra note 130.
135 Oughton v. United States, 215 F.2d 578 (9th Cir. 1954) (per curiam), cert. denied, 352 U.S. 975 (1957); Winhoven v. United States, 209 F.2d 417 (9th Cir. 1953).
136 Duggins v. United States, 240 F.2d 479 (6th Cir. 1957); Cook v. United States, 171 F.2d 567 (1st Cir. 1948), cert. denied, 336 U.S. 926 (1949).
which may be a considerable distance from the court of confinement.\textsuperscript{140} In a habeas corpus proceeding, the distance to be traveled to the district court is relatively short and the same for all prisoners. Furthermore, in habeas corpus, the prisoner is guaranteed a hearing within five days after the writ is returned.\textsuperscript{141} The only time limitation in a section 2255 proceeding is that a "prompt hearing" must be granted,\textsuperscript{142} and where the petitioner is brought from a distant prison there may be considerable delay.

Requiring the prisoner to make his motion to the sentencing court rather than to the district court of confinement places him at a distinct disadvantage. Despite the advantage of having the files, records and witnesses at the sentencing court, the disadvantages to the prisoner are more compelling. In addition to the fact that the prisoner's hearing may be considerably delayed if his presence is required, where his presence is not required he may have to communicate with his attorney by mail, a method less conducive to a full disclosure than direct interview. Where there is only one district court judge, the judge may be passing on his own actions at the trial,\textsuperscript{143} and, even in those districts having more than one judge, a brother judge may be reluctant to overrule his associate. The atmosphere of the sentencing court would seem to be less objective than the detached attitude of the uninterested district court of confinement. The construction given section 2255 has resulted in its becoming the prisoner's exclusive remedy, leaving him no hope of proceeding by habeas corpus in the district court of confinement by a showing that section 2255 is inadequate.

In an effort to conform section 2255 to the substance of habeas corpus, the courts have destroyed most of the procedural effectiveness. It would seem that the only remaining advantages are that the files, records and witnesses need not be called to the district courts of confinement, and the district courts of confinement are no longer overburdened with applications for relief.\textsuperscript{144} By repealing section 2255

\textsuperscript{141} "The writ . . . shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed. . . . When the writ . . . is returned a day shall be set for a hearing, not more than five days after the return unless for good cause additional time is allowed." 28 U.S.C. § 2243 (1958).
\textsuperscript{143} See, e.g., United States ex rel. Leguillou v. Davis, 212 F.2d 681 (3d Cir. 1954). Even this situation does not render § 2255 "inadequate or ineffective" to test the legality of detention. Ibid.
\textsuperscript{144} Since the enactment of § 2255 there has been some decrease in the number of habeas corpus cases filed in the districts wherein federal prisons are located. (Note, however, that there has been an increase in Kansas where the overburdening prior to § 2255 caused considerable concern. See note 65 supra.) The following statistics are contained in a letter from Joseph F. Spaniol, Jr., Administrative Office of the United States Courts, to \textit{St. John's Law Review}, Nov. 5, 1959:
and by special assignment providing more judges in district courts of confinement, the burden on these courts would still be alleviated and the more compelling disadvantages of requiring the petitioner to file at the sentencing court would no longer exist.

MARITIME CASES AND THE "FEDERAL QUESTION"

Exercise of the original jurisdiction of the lower federal courts on a "federal question" basis has been vexing the judiciary ever since the United States Supreme Court attempted to define the scope of the constitutional grant of power in Osborn v. Bank of the United States.\(^1\) Except for an abortive attempt to authorize such jurisdiction in 1801,\(^2\) the power given Congress by Article III of the Constitution to invest the inferior federal courts with jurisdiction to enforce rights arising under the Constitution and laws of the United States was not exercised until the vast expansion of federal power after the Civil War, in the Judiciary Act of 1875,\(^3\) section 1 of which is the predecessor of the present section 1331 of Title 28 of the United States Code.\(^4\)

Not the least vexatious of the problems surrounding the interpretation of section 1331 has been a recent controversy\(^5\) as to its fundamental scope, and indeed as to the interpretation to be given Article III itself. The controversy has centered around the juris-

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<th>District</th>
<th>habeas corpus cases filed 1945-48</th>
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<td>89</td>
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<tr>
<td>Washington</td>
<td>116</td>
<td>64</td>
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\(^{145}\) 28 U.S.C. § 292 (1958) dealing with assignment of judges would authorize such special assignments.

\(^1\) 9 Wheat. (22 U.S.) 738 (1824).

\(^2\) Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 92, repealed by Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132.

\(^3\) Act of March 3, 1875, ch. 137, 18 Stat. 470.

\(^4\) "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1958).

\(^5\) It arose over a theory advanced in a dictum by Judge Magruder in Jansson v. Swedish American Line, 185 F.2d 212, 217 (1st Cir. 1950). Four days later the Third Circuit rejected the theory in Jordine v. Walling, 185 F.2d 662 (3d Cir. 1950).