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Failing to appear as ordered for a pre-induction physical examination, petitioner Davis was declared "delinquent" by his local draft board and ordered to report for induction. When Davis did not appear at the time specified, he was prosecuted and convicted under the Military Service Act of 1967. While Davis's appeal was pending in the Court of Appeals for the Ninth Circuit, the Supreme Court determined in Gutknecht v. United States that the selective service regulations which permitted the accelerated induction of delinquent registrants were without adequate guidelines and punitive in nature. Although the court of appeals remanded Davis's case for reconsideration in light of Gutknecht, neither the district court nor the court of appeals on review found that Davis's conviction was affected. Subsequently in United States v. Fox, the same court of appeals inter-

1. 32 C.F.R. § 1642.4(a) (1967) was in effect at the time of the ruling by Davis's local board and provided in pertinent part:
Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction . . . or the duty to comply with an Order to Report for Civilian Work . . . the local board may declare him to be a delinquent.
There were, in fact, two grounds on which Davis's delinquency status was based: his failure to report for physical examination pursuant to 32 C.F.R. § 1641.4 (1967) and his failure to keep the local board apprised of his current mailing address as required by 32 C.F.R. § 1641.7(a) (1967).
2. Under 32 C.F.R. § 1631.7 (1967), registrants declared delinquent could be assigned first priority in order of induction, regardless of their status prior to the delinquency declaration.
3. [A]ny person . . . who . . . shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . ., or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment.
5. See note 2 supra.
6. 396 U.S. at 306-07.
7. United States v. Davis, 432 F.2d 1009 (9th Cir. 1970).
9. 454 F.2d 593 (9th Cir. 1971).
preted the Gutknecht decision as rendering invalid the delinquency regulations under which Davis had been convicted.\textsuperscript{10} After commencing his prison sentence, Davis filed a motion under section 2255 of the Judicial Code,\textsuperscript{11} claiming that the court of appeals had effected a change in the law of the Ninth Circuit which required that his sentence be vacated. The district court denied Davis's motion, and the court of appeals affirmed, indicating that the change in the decisional law of the circuit could not be raised collaterally, since the issue had been litigated on direct appeal.\textsuperscript{12} The Supreme Court reversed, holding that an intervening change in decisional law invalidating, on nonconstitutional grounds, the regulations under which a prisoner has been convicted is cognizable in a collateral proceeding under section 2255. \textit{Davis v. United States}, 417 U.S. 333 (1974).\textsuperscript{18}

\textsuperscript{10} It is unclear whether the holding in Gutknecht actually invalidated the delinquency regulations under all circumstances or merely rendered them void when applied punitively. The majority opinion in Davis read Gutknecht as rendering void the delinquency regulations under which Davis was convicted. Justice Powell, in his separate opinion, stated that the holding in Gutknecht "invalidated those regulations only insofar as they were applied punitively to advance the date of a registrant's induction or to deprive him of procedural rights, that he had not waived." \textit{Davis v. United States}, 417 U.S. 333, 348 (1974). Petitioner's argument that Fox represented an intervening change in law would, thus, be unsupported under Justice Powell's interpretation of Gutknecht. The issue remains largely unresolved, although several courts have given Gutknecht the same interpretation as the Fox court. See Zack v. Benson, 454 F.2d 596 (9th Cir. 1971); Kelly v. United States, 314 F. Supp. 500 (E.D.N.Y. 1970). For a more extensive analysis of the Gutknecht case, see \textit{The Supreme Court, 1969 Term}, 84 Harv. L. Rev. 1, 222 (1970) and \textit{Note, Accelerated Induction—The End of the Old Fast Shuffle: Gutknecht v. United States}, 4 Loyola U.L. Rev. 408 (1971).

\textsuperscript{11} 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. If the court finds ... 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. 28 U.S.C. § 2255 (1970).

\textsuperscript{12} United States v. Davis, 472 F.2d 596 (9th Cir. 1972).

\textsuperscript{13} Collateral petitions based on intervening changes in law frequently involve consideration of two closely intertwined issues: (1) whether the change in law is to be retroactively applied, see \textit{Linkletter v. Walker}, 381 U.S. 618, 627 (1965), and (2) whether the petition is cog-
The Court disagreed with the determination of the court of appeals that a rejection of a claim on direct review is "the law of the case" and precludes collateral consideration of the same issue.\(^1\) Relying on the language of two section 2255 cases,\(^1\) the majority indicated that collateral review would be available when a change in law occurs after affirmance of a conviction, even though the legal issue has been determined against the petitioner on appeal.\(^1\) Justice Stewart, writing for the majority, reasoned that the language, legislative history, and purpose of section 2255 suggested that claims of a nonconstitutional nature were within the statute's intended scope.\(^1\) The Court qualified its holding, however, with the requirement that the claim be one which "presents exceptional circumstances" justifying collateral review.\(^1\)

Section 2255 was enacted to relieve federal courts of the nizable in collateral proceedings, see Davis v. United States, 417 U.S. 333, 341 n.12 (1974). The resolution of each issue generally depends on the degree of prejudice the petitioner is likely to sustain if relief is denied. Id. at 346-47. Cf. James v. United States, 366 U.S. 213, 221 (1961); Sunal v. Large, 332 U.S. 174, 181 (1947). The Davis majority was careful to avoid decision of the retroactivity issue. 417 U.S. at 341 n.12.

As a finding of prejudice is generally central to both determinations, it might be argued that the Court's decision to recognize the availability to Davis of collateral proceedings predetermined the resolution of the retroactivity issue on remand. It appears, however, that certiorari was granted in Davis so that the Court might define the scope of relief available under section 2255 and prevent lower courts from summarily disposing of nonconstitutional claims without considering the degree of prejudice involved.

\(^{14}\) 417 U.S. at 342.
\(^{16}\) 417 U.S. at 342. Although the majority regarded passages from Kaufman and Sanders, quoted in note 56 infra, as holdings, the language can hardly be considered such in the strict sense of that term. Furthermore, the applicability of these cases to the situation in Davis is questionable, as neither case dealt with a change in law of a nonconstitutional nature. See note 56 infra.
\(^{17}\) 417 U.S. at 342-45. Although another equally convincing interpretation of the statutory language was available, see note 30 infra, the majority failed to recognize the ambiguities of the statute or to buttress its opinion by relying more heavily on the strong, independent policies supporting its holding.
\(^{18}\) 417 U.S. at 346-47. The importance of this qualifying language may well be overlooked. The "exceptional circumstances" language is separated from the holding it was intended to limit—that nonconstitutional claims are properly cognizable under section 2255—and for this reason its role as a qualification on the cognizability of a nonconstitutional claim may not be readily apparent. Moreover, the phrase itself is ambiguous enough that difficulties of interpretation may discourage its application. But see United States v. Travers, No. 74-1737 (2d Cir., Dec. 16, 1974), discussed in note 68 infra.
burden that had resulted from the administration of habeas corpus jurisdiction. Previously a federal prisoner instituting a habeas corpus action had to file his motion in the district of his confinement. As a result, those courts with major federal penitentiaries in their territorial jurisdictions were forced to dispose of an inordinate number of habeas corpus actions.10 Frequently, the court with habeas corpus jurisdiction was remote from the site of the original trial, rendering the transportation of records, evidence, and witnesses inconvenient. The reliability of fact-finding procedures suffered accordingly. Section 2255 was intended to provide federal prisoners a post-conviction remedy in the forum best suited to handle the proceedings—the forum of the original trial—with the scope of the remedy identical to that of habeas corpus.20

In general, habeas corpus relief has been available in the case of (1) a conviction rendered by a court without jurisdiction,21 (2) a conviction under a statute declared unconstitutional,22 (3)

20. Id. at 216-17. See Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 175 (1948). In United States v. Hayman, 342 U.S. 205, 210-19 (1952), the Court presented an exhaustive analysis of the intended scope and purposes behind the enactment of section 2255. “Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners’ rights of collateral attack upon their convictions” Id. at 219. See also Hill v. United States, 368 U.S. 424, 427 (1952).
21. In re Mayfield, 141 U.S. 107 (1891) (habeas corpus available where jurisdiction properly lay with the courts of the Cherokee Nation); Ex parte Kearney, 20 U.S. 38 (1822) (petition discharged where jurisdiction of convicting court established).

During the period following the Civil War, the notion of “lack of jurisdiction” in habeas corpus actions was expanded beyond questions of personal or subject matter competency. The Court held that convictions obtained without an indictment by a grand jury or based on an unconstitutional statute exceeded the jurisdiction of the federal courts. Ex parte Wilson, 114 U.S. 417 (1885); Ex parte Siebold, 100 U.S. 371 (1879). One possible explanation for the Court’s willingness to expand the concept of jurisdiction during this period is that it lacked appellate jurisdiction over several areas of the federal criminal law. The concept of jurisdiction may have been expanded to enable the Court to review egregious errors of the circuit courts in areas of the law from which it had been statutorily excluded. In subsequent years, the concept of jurisdiction was expanded to permit consideration of the merits of various due process claims. Ultimately, in Waley v. Johnston, 316 U.S. 101 (1942), the Court discarded the fiction of jurisdiction and expressly recognized that both constitutional claims and questions of jurisdiction were cognizable in habeas corpus actions. For a more detailed analysis of the changing concept of jurisdiction, see Developments in the Law: Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1042-55 (1970).

22. Ex parte Siebold, 100 U.S. 371 (1879) (conviction based on unconstitutional statute held cognizable in habeas corpus proceeding). See also Amsterdam, Search, Seizure and Section 2255, 112 U. Pa. L. Rev. 378, 394 (1964).
infringement by a federal or state court of a constitutional guarantee,\(^\text{23}\) (4) an illegal sentence,\(^\text{24}\) or (5) exceptional circumstances where no other remedy is available.\(^\text{25}\) Various courts have recognized the utility of a flexible habeas corpus doctrine.\(^\text{26}\) For this reason, the scope of the writ has not been more clearly defined.\(^\text{27}\) Present uncertainty with respect to the relief afforded by section 2255 can be attributed in part to this indefinite character of its parent doctrine.\(^\text{28}\) Ambiguities in the language of the statute itself, however, have also caused considerable confusion. Under the most convincing interpretation of the statute's language, two of its provisions appear to be contradictory: the grounds on which a motion for relief may be entertained, as defined in the first paragraph of section 2255, are broader than the bases for granting relief specified in the third paragraph. A strict reading of the two provisions suggests that although a federal prisoner may be entitled to a hearing for any substantial violation of federal law, relief will be withheld unless a prejudicial denial of constitutional rights can be shown.\(^\text{29}\) Al-

\(^{23}\) Frank v. Mangum, 237 U.S. 309 (1915) (petitioner's claim of denial of due process based on conviction in mob-controlled trial recognized as ground for habeas corpus); In re Snow, 120 U.S. 274 (1887) (federal prisoner held under consecutive sentences based on indictments stating one charge ordered released).

\(^{24}\) In re Bonner, 151 U.S. 242 (1894) (authority of the court to impose penalties not recognized by statute held subject to challenge by habeas corpus).

\(^{25}\) Justice Frankfurter, dissenting in Sunal v. Large, 332 U.S. 174, 186 (1947), noted that "[d]efects in jury panel, in trial procedure, exclusion or insufficiency of evidence, are rarely held ground for relief on habeas corpus. But when no other remedy was available and the error appeared flagrant, there have been instances of relief."


\(^{27}\) See Sunal v. Large, 322 U.S. 174, 187 (1947) (Frankfurter, J., dissenting).

\(^{28}\) Justice Frankfurter suggested the extent to which the scope of habeas corpus has remained undefined: "I think it is fair to say that the scope of habeas corpus in the federal courts is an untidy area of our law that calls for much more systematic consideration than it has thus far received." Id. at 184.

\(^{29}\) The first paragraph of section 2255 permits a prisoner to move at any time to vacate his sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States." The third paragraph includes "a denial or infringement of the constitutional rights of the prisoner" as a ground for relief but excludes the language of the first paragraph referring to sentences "in violation of the ... laws of the United States." See note 11 supra for the text of the two paragraphs. In the Davis situation, Justice Rehnquist's reading of the statute would allow relief only if denial of a significant constitutional right could be shown. 417 U.S. at 357.
though it is unlikely that Congress intended to allow prisoners to obtain hearings on grounds for which relief is unavailable, the difficulty of reconciling the two paragraphs has resulted in substantial confusion among those interpreting the statute. While some courts have attempted to determine which paragraph should control the availability of relief,30 others have chosen to disregard the statutory provisions entirely.31

The decisional law under section 2255 has been relatively consistent in dealing with three types of changes in the law after affirmance of conviction. First, where the change renders unconstitutional the statute under which petitioner has been convicted32 or makes available a constitutional guarantee denied pe-

30. United States v. Sobell, 314 F.2d 314 (2d Cir. 1963), represents the only opinion to define and explicate adequately the statutory inconsistencies in section 2255. After tracing the somewhat circuitous statutory path, Judge Friendly concluded, "[I]t [may] be deemed futile to endeavor to draw much meaning from the rather murky language of section 2255...." Id. at 322. He arrived at this conclusion after attempting to decipher the literal language of the statute:

Juxtaposition of the two paragraphs thus suggests a reading that although any substantial claim of violation of federal "law"... will get a federal prisoner into court under section 2255 in the sense of giving the court the power and duty to consider his motion, he can stay there and obtain relief only if he shows... that the sentence or judgment is subject to collateral attack, leaving the meaning of this last phrase to be worked out by the courts—with an indication that although constitutional rights stand on a very high plane, not every "denial or infringement" even of them makes the judgment "vulnerable to collateral attack." Id. at 322.

Thus, in United States v. Gaitan, 189 F. Supp. 674 (D. Colo. 1960), aff'd, 295 F.2d 277 (10th Cir. 1961), petitioner's request for a vacation of sentence under section 2255 was denied. The court found that the statutory language of the third paragraph prohibited collateral relief based upon an intervening change in law of a nonconstitutional nature. In Eby v. United States, 286 F. Supp. 387 (N.D. Okla. 1968), aff'd, 415 F.2d 319 (10th Cir. 1969), the court also refused relief based on an intervening change in law but cited the motion provision of the first paragraph as justification. Unfortunately, neither court presented a rationale for choosing the paragraph it determined to be controlling; the two courts simply read the statute differently.

31. The fact that relatively few decisions have referred to the statute itself in defining the scope of relief under section 2255 suggests the confusion its wording has caused the federal courts. In Kaufman v. United States, 394 U.S. 217 (1969), cited by Justice Rehnquist as one of the "two most significant section 2255 decisions in recent years," 417 U.S. at 361, no mention of the statutory language was made in the body of the opinion. Similarly, in Thornton v. United States, 368 F.2d 822 (D.C. Cir. 1969), another case regarded as authoritative on the scope of section 2255, consideration of the statutory language was conspicuously avoided. See also Hayman v. United States, 342 U.S. 205 (1952).

32. Professor Amsterdam indicates that "the Supreme Court has consistently entertained federal prisoners' collateral challenges to the
titioner at trial, courts have generally allowed collateral attack upon a showing of prejudice. Thus, it has been held that changes in the law expanding the privilege against self-incrimination, protecting the right to trial by jury from coercive state statutory schemes, securing the right to counsel, recognizing the right to cross-examine adverse witnesses, or protecting against double jeopardy are properly cognizable in collateral proceedings under section 2255.

In a second situation, where the change in the law affects nonconstitutional evidentiary or procedural rules of trial conduct, courts have denied collateral relief unless the circumstances presented show substantial prejudice and no other remedy is available. Thus, errors of law relating to the sufficiency of the indictment, the admissibility or sufficiency of evidence, "face" constitutionality of the underlying criminal statute. Amsterdam, supra note 22, at 384. See Baender v. Barnett, 255 U.S. 224 (1921); Ex parte Siebold, 100 U.S. 371 (1879). The writ of habeas corpus was denied in each case, but the constitutionality of the statute was passed upon by the Court. See also Bowen v. Johnston, 306 U.S. 19 (1939); Johnson v. Hoy, 227 U.S. 245 (1913).

33. An error of law of constitutional magnitude is generally presumed to be prejudicial to a petitioner. To prevent the reversal of a conviction for constitutional error, the prosecution must show beyond a reasonable doubt that the alleged error was "harmless." Fahy v. United States, 375 U.S. 85 (1963).


39. See Kaufman v. United States, 394 U.S. 217, 223 (1969); United States v. Sobell, 314 F.2d 314, 321 (2d Cir. 1963). Prejudice is thus a factor common to successful collateral attacks for both constitutional and nonconstitutional errors of law. While petitioners are generally presumed to have been prejudiced by constitutional errors, however, see note 33 supra, petitioners such as Davis, who are affected by nonconstitutional errors, must establish that those errors represent exceptional prejudicial circumstances justifying collateral relief, rather than "mere errors of law." "Mere errors of law" is an expression which subsumes a variety of nonprejudicial substantive and procedural errors that may be committed by the court during trial. See generally Sunal v. Large, 332 U.S. 174, 185-87 (1947) (Frankfurter, J., dissenting).

40. DeMaro v. Willingham, 401 F.2d 105 (7th Cir. 1968).


42. Genovese v. United States, 378 F.2d 748 (2d Cir. 1967).
the availability of evidence to counsel, and the failure of the court to offer defendant an opportunity to speak before sentencing have been held insufficient bases for collateral relief in the absence of a showing of substantial prejudice.

A third line of decisions involves circumstances similar to those of the petitioner in Davis: the subsequent change in the law is of a nonconstitutional nature but nonetheless invalidates the statute under which petitioner has been prosecuted or otherwise acts as a complete defense to his conviction. In such situations, relief has generally been granted because of the injustice of punishing an individual for an act the law no longer makes criminal. For example, in United States v. Kelly, the court

45. Brough v. United States, 454 F.2d 370 (7th Cir. 1971); Ramos v. United States, 319 F. Supp. 1207 (D.R.I. 1970); United States v. Langford, 315 F. Supp. 472 (D. Minn. 1970); United States v. Kelly, 314 F. Supp. 500 (E.D.N.Y. 1970). In Brough, petitioner was indicted approximately five and one-half years after his eighteenth birthday for failing to register with the selective service. In a subsequent decision, Toussie v. United States, 397 U.S. 112 (1970), the Supreme Court held that the statute of limitations clause applicable in Brough prohibited indictment unless brought within five years and five days of the individual's eighteenth birthday. The court in Brough held that a nonconstitutional intervening change of law of this nature could be raised under section 2255. In Langford, petitioner was convicted of having knowingly used the mails for "carriage and delivery" of obscene matter. The Supreme Court's subsequent decision in Stanley v. Georgia, 394 U.S. 557 (1969), altering the standard with respect to the use of obscene materials, was recognized by the court in Langford as a basis for collateral attack.

Two holdings to the contrary are United States v. Rodgers, 288 F. Supp. 57 (W.D. Okla. 1968), and Eby v. United States, 286 F. Supp. 387 (N.D. Okla. 1968), aff'd, 415 F.2d 319 (10th Cir. 1969). Both held that decisional changes in the law after conviction did not entitle a petitioner to relief by habeas corpus. Their reliability as precedent is questionable, however. Both applied principles of res judicata to issues sought to be raised collaterally. In Eby, for example, petitioner's failure to raise the issue of self-incrimination on direct appeal was held to foreclose consideration on collateral attack even though the change in law extending the privilege against self-incrimination had occurred after the exhaustion of appeals. Several courts have recognized the inapplicability of res judicata to collateral proceedings. See Sanders v. United States, 373 U.S. 1, 7 (1963); Fay v. Noia, 372 U.S. 391, 423 (1963). Moreover, the logic of requiring an appellant to anticipate a subsequent change in law has been questioned. See Scogin v. United States, 446 F.2d 416, 419 (8th Cir. 1971). In part, the holdings in Rodgers and Eby may have reflected a certain reticence on the part of the two district courts to recognize and apply the newly extended privilege against self-incrimination.

46. The invalidation of a statute by judicial decision, as in Davis, must be distinguished from invalidation through legislative repeal. Because the latter has traditionally been considered prospective in nature, it does not seem unjust to deny collateral relief to a petitioner who has
indicated that "it would be a gross miscarriage of justice to foreclose this defendant from now challenging his conviction, when, in the intervening period, the statutes upon which his conviction was based have been declared void."\(^\text{48}\) Similarly, in *Ramos v. United States*,\(^\text{49}\) the court answered affirmatively the question whether "the criterion for determination of conscientious objector status [had] been so broadened by subsequent judicial interpretation of existing law . . . that it would be a miscarriage of justice not to review the [petitioner's] classification . . . ."\(^\text{50}\)

It is clear that the circumstances in *Davis* were quite similar to those in *Kelly* and *Ramos*. The *Fox* decision, coming after the affirmance of Davis's conviction on appeal, had rendered invalid the set of regulations on which his conviction had been based. The change in law was as exceptional as that in *Kelly* and *Ramos*, and continued confinement thereunder was equally unjust. The *Davis* Court, however, avoided disposition on the "exceptional circumstances" ground, clearly intending that it be of secondary importance.\(^\text{51}\) The majority arrived at the princi-

\(^{47}\) 314 F. Supp. 500 (E.D.N.Y. 1970). The district court applied *Gutknecht* and *Breen v. Selective Serv. Local Bd. No. 16*, 398 U.S. 460 (1970), retroactively in vacating the conviction and sentence, for failure to report for induction in the armed forces, of the petitioner whose induction had been accelerated pursuant to the delinquency regulations of the Selective Service. *See* *note 2* supra. Petitioner had refused to keep required selective service forms in his possession and had returned them, along with all correspondence, to his local board.

\(^{48}\) 314 F. Supp. at 504-05.

\(^{49}\) 319 F. Supp. 1207 (D.R.I. 1970). The court vacated petitioner's sentence for refusing to report for induction. The Supreme Court decision in *Welsh v. United States*, 398 U.S. 333 (1970), had interpreted the criterion for conscientious objector status "so expansively that there would be no basis in fact for the local board's action if [the] case were before [the court] for the first time today." 319 F. Supp. at 1219.

\(^{50}\) Id. at 1213.

\(^{51}\) The *Davis* opinion was constructed in such a manner as to emphasize the importance of the majority's principal ground for reversal. The statutory language in the first paragraph of section 2255 was quoted four times in the opinion and on each occasion the Court noted that the provision permits collateral relief for nonconstitutional questions of law. 417 U.S. at 342-45. Mention of the exceptional circumstances ground was reserved until the close of the opinion and its substantive function was merely to limit the principal ground. *Id.*

The majority also avoided a statutory ground that could have pro-
pal ground of reversal by interpreting the first paragraph of section 2255 to permit relief for claims involving questions of nonconstitutional federal law.62

Whether collateral proceedings are available for nonconstitutional claims has been the subject of some considerable disagreement.63 As a result, treatment by the federal courts of petitioners asserting such claims has been somewhat disparate.64 Many of the courts granting relief in such situations65 have relied on the questionable dicta of two section 2255 opinions.66 The Davis

vided a disposition similar to that under the exceptional circumstances doctrine. The language in paragraph 3 of section 2255 permitting relief from “a sentence ... otherwise open to collateral attack” is similar in purpose to that of the judicially developed exceptional circumstances rule. The majority described the former as a “catch all” phrase designed to provide relief where substantial prejudice is shown, id. at 344, but never explicitly acknowledged that this language could have been dispositive in the Davis circumstances. That both grounds were available but bypassed suggests that the Court was intent on using a broader rationale to justify relief.

52. An argument can be made that the majority’s use of the word “laws” to encompass federal decisional law is a departure from the original meaning of the term. The language of section 2255 regarding sentences in violation of the “laws” of the United States can be traced directly to the Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385 (repealed 1868). The term “law” in the Act of 1867 may have referred to all federal rules outside the Constitution or only to federal statutes. But, according to the view prevailing at the time the Act was adopted, “in the ordinary use of the language, it will hardly be contended that the decisions of the Courts constitute laws.” Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842). See United States v. Sobell, 314 F.2d 314, 321 n.4 (2d Cir. 1965). The modern approach of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and Guaranty Trust Co. v. York, 326 U.S. 99 (1945), however, does treat federal decisions as “law.” The approach to be taken to section 2255 was an unresolved question prior to Davis. Justice Rehnquist, in his dissenting opinion, preferred the traditional approach of Swift with “some allowance for judicial lawmaking.” 417 U.S. at 359-60. Rejecting such a limited interpretation, the majority apparently adopted the modern approach of Erie and York.

The approach taken by Justice Rehnquist can be attacked on the ground that the Court in Swift v. Tyson misinterpreted the intent of the framers of the Federal Judiciary Act of 1789. The interpretation of “laws” allegedly incorporated into the Habeas Corpus Act of 1867 incorrectly excluded judicial decisions from the word’s definition. It was this argument, in part, that provided the basis for the eventual overruling of Swift. See Warren, New Light On the History Of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923).

53. See Developments, supra note 21, at 1067-69.


56. In Davis, the majority interprets as holdings statements from
majority correctly rejected the distinction traditionally drawn between constitutional and nonconstitutional issues with respect to the availability of collateral proceedings and prohibited the summary dismissal of nonconstitutional claims. In accordance with decisional law prior to Davis, the majority did not extend the availability of collateral relief to nonprejudicial errors of law: the Court suggested that the circumstances of each petition must be considered to determine whether the claimed error of law is so exceptional as to justify resort to habeas corpus. But the mere fact that a contention is based on "the laws," rather than the Constitution, of the United States would not preclude its assertion in a section 2255 proceeding.

The Court's decision to reject the distinction between constitutional and nonconstitutional issues is consistent with the policies underlying the availability of collateral relief. Courts granting collateral petitions have generally focused on both the degree of prejudice to the petitioner and the availability of normal


In Sanders, the Court held inter alia, that even though the legal issue raised in a § 2255 motion "was determined against [the applicant] on the merits on a prior application," "the applicant may [nevertheless] be entitled to a new hearing upon showing an intervening change in the law . . . ." The same rule applies when the prior determination was made on direct appeal from the applicant's conviction, instead of in an earlier § 2255 proceeding, "if new law has been made . . . since the trial and appeal." [citing Kaufman]

417 U.S. at 342. Neither were holdings in the strict sense of the word. Moreover, though both cases dealt with claims of a constitutional nature concededly within the reach of section 2255, the majority cites each as controlling in the Davis situation where the change of law at issue was nonconstitutional. For a discussion of the Kaufman dictum, see Developments, supra note 21, at 1067-69.

57. See, e.g., Lothridge v. United States, 441 F.2d 919 (6th Cir. 1971), cert. denied, 404 U.S. 1003 (1971); DeMaro v. Willingham, 401 F.2d 105 (7th Cir. 1968); Genovese v. United States, 378 F.2d 748 (2d Cir. 1967).

58. For examples of the type of summary disposition the Court sought to prevent, see United States v. Rodgers, 286 F. Supp. 57 (W.D. Okla. 1968), and Eby v. United States, 286 F. Supp. 387 (N.D. Okla. 1968), aff'd, 415 F.2d 319 (10th Cir. 1969).


60. 417 U.S. at 346.

61. Id. at 346-47.

62. See Sunal v. Large, 332 U.S. 174, 187-88 (1947) (Rutledge, J., dissenting); United States ex rel. Kulick v. Kennedy, 157 F.2d 811, 813 (1946). For examples of violations of specific constitutional rights as grounds for habeas corpus, see Sunal v. Large, supra at 185-86 (Frankfurter, J., dissenting). The need for a detailed review of the evidence would seem less acute in a Davis-type situation as the issues on appeal require legal, rather than factual, findings.
appellate procedures to rectify the error. Certainly there is no ineluctable relationship between the constitutional nature of the claim raised and the degree of prejudice suffered. A petitioner may indeed be more prejudiced by a nonconstitutional error than by one of a constitutional nature.

Justice Rehnquist, dissenting in *Davis*, attacked the decision of the majority to abandon the distinction between constitutional and nonconstitutional issues as an unwarranted expansion of collateral relief which would increase the caseload of the already overburdened federal courts. Other authorities have asserted that a further broadening of the availability of habeas corpus may adversely affect the administration of the federal court system in a number of ways. When limited by the exceptional circumstances doctrine, however, the decision in *Davis* does not represent a significant expansion of grounds for relief under section 2255. Moreover, the impact of recognizing nonconstitutional claims can be further limited if the availability of relief is controlled by an effective rule of waiver. In the absence of adequate justification, petitioners who have deliberately bypassed available appellate procedures should be held to have waived their right to collateral attack.

63. Frequently, the Court has stated that habeas corpus cannot do service for appeal from conviction in the federal courts. *Sunal v. Large*, 332 U.S. 174, 178 (1947) (deliberate bypass of the appeal process in favor of collateral proceedings held ground for denying collateral relief). It is well settled that matters given full consideration on direct appeal will not be relitigated in collateral proceedings. See, e.g., *Castellana v. United States*, 378 F.2d 231 (2d Cir. 1967). Where petitioner is unable on appeal to assert a particular ground later made available to him by a change in law or where the bypassing is deliberate but for a justifiable reason, relief through collateral proceedings has been granted. See, e.g., *Fay v. Noia*, 372 U.S. 391 (1963) (choice by defendant not to appeal held justified, since an appeal would have risked a heavier penalty).

64. For example, a petitioner may be substantially more prejudiced by denial of a nonconstitutional claim based on the sufficiency of an indictment than by denial of a constitutional claim relating to defendant's right to cross-examine adverse witnesses. Few errors are more prejudicial than one in which a change in law renders invalid a regulation upon which conviction was based. *Compare DeMaro v. Willingham*, 401 F.2d 105 (7th Cir. 1968), with *Smith v. United States*, 431 F.2d 1 (8th Cir. 1970), and *United States v. Sobell*, 314 F.2d 314 (2d Cir. 1963).

65. 417 U.S. at 364.


67. See *Sunal v. Large*, 332 U.S. 174, 181 (1947); *Developments, supra* note 21, at 1070. But see *Friendly, supra* note 66, at 159-60.
Whether the opinion in Davis will be confined to its narrow holding in subsequent interpretation by the federal courts is a matter of some concern. The analysis of the Court lacks adequate reference to factually consistent case law, convincing statutory language, or reasoned policy grounds. Under an inaccurate, but highly probable, interpretation of the majority opinion, the grounds for collateral attack could be expanded by reference to the nonconstitutional issue language without mention of the exceptional circumstances limitation. Had the Court adequately supported its position, the likelihood of such expansive interpretations by lower federal courts would have been lessened considerably.

Decisions tending to broaden the scope of habeas corpus have been attacked on the ground that the factfinding process in collateral proceedings is considerably less reliable than that in the original trial. It is illogical, however, to deny collateral attack to prisoners able to make a minimal showing of innocence because of the difficulty of retrial. The problem is basically one of court administration and the appropriate solution therefore would be to reform administrative procedures rather than to deny substantive rights.

Expansion of the availability of collateral relief has also been criticized as undermining fundamental aims of the criminal law. Deterrent and rehabilitative functions are advanced if the convict realizes soon after his incarceration that he is justly subject to sanction, that he stands in need of rehabilitation; and a process of reeducation cannot ... begin ... if society ... continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place.

At some point judgments must become final so as to prevent

68. The recent case of United States v. Travers, No. 74-1737 (2d Cir., Dec. 16, 1974), suggests that federal courts may be slow to expand upon the Davis Court's narrow holding. In Travers, the court held that “exceptional circumstances” justifying collateral relief under section 2255 were presented by the Government's failure to establish an element of the offense of conspiracy, the proof of which was required by a subsequent judicial decision. Writing for the majority, Judge Friendly expressly acknowledged the exceptional circumstances limitation on the holding in Davis. Id. at 814.
69. See 417 U.S. at 342-46.
71. See Amsterdam, supra note 22, at 383-84; Developments, supra note 21, at 1059.
72. See generally Bator, supra note 66.
73. Id. at 432.
repeated petitioning for post-conviction relief. It is clear, however, that such concerns are inapplicable to petitioners able to show substantial prejudice from the error alleged. It would seem a difficult task, indeed, to convince an individual confined under a regulation subsequently held invalid "that he is justly subject to sanction." If an offender feels the system has treated him unfairly, he may develop a resentment and disrespect for it that impairs his "reeducation and treatment," thereby retarding the rehabilitation process.

Accordingly, the Davis decision, limited to its narrow holding, is clearly consistent with the policies underlying the availability of collateral relief. The majority's failure to support its decision adequately, however, may result in expansive lower court interpretations recognizing nonconstitutional claims which do not prejudice the petitioner as totally as the intervening change in the law in Davis. Interpreted in this way, the Court's position would be more difficult to defend.

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74. Professor Amsterdam lists a number of aims of the criminal law which are undermined by the present availability of post-conviction remedies. Amsterdam, supra note 22, at 383-84. As an example, he cites "delay in setting the criminal procedures to rest," id. at 383, but he recognizes that none of the elements of finality are significantly offended by a petition to redress a conviction under a statute unconstitutional on its face. He indicates that "[r]epose in convictions under a constitutionally unauthorized statute, however, does not serve the deterrent or rehabilitative purposes of the criminal law." Id. at 384 n.30. There is no reason to suppose that his conclusion would be different with respect to a statute invalid on nonconstitutional grounds.