Vanderbilt Law Review

Volume 57 | Issue 4 Article 5

5-2004

Reforming Federal Habeas Review of Military Convictions: Why AEDPA Would Improve the Scope and Standard of Review

John K. Chapman

Reforming Federal Habeas Review of Military Convictions: Why AEDPA Would Improve the Scope and Standard of Review

I. INTRODUCTION

The writ of habeas corpus is a collateral remedy[1] available to prisoners[2] who have exhausted all available appellate remedies.[3] Habeas corpus, which literally means "to have or produce the body," involves a court order directing the custodian of a prisoner to bring the prisoner before the court in order to assess the validity of the prisoner's confinement.[4] The importance of habeas corpus in the federal system has been recognized since the drafting of the Constitution[5] and its historical roots trace back as far as the 12th Century in England.[6] It is a procedure designed to protect individuals by forcing the government to "always be accountable to the judiciary for a man's imprisonment."[7] Under our constitutional framework, the courts established pursuant to Article III of the United States Constitution ("federal courts"), through the writ of habeas corpus, provide independent review of constitutional claims of error from both state and military convictions.[8]

When a federal court reviews a petition for a writ of habeas corpus from either a state or military conviction, it almost always reviews questions of fact or law that have been previously litigated in the original judicial system.[9] The extent of federal review of the merits of a claim is a product of both the scope of review—the range of issues cognizable on review—and the standard of review—the level of deference accorded to the original judicial system's determination of the issue. Expanding the scope of review or decreasing the deference

1. By collateral remedy, that is to say, a habeas proceeding is "independent of the proceeding underlying the original detention." 39 C.J.S. *Habeas Corpus* § 2 (2003).

2. As a general rule, in order to seek habeas relief, the petitioner must he confined or be under some restraint as to his or her liberty. *Id* § 1.

3. *Id.* § 13. A federal court generally cannot entertain a writ of habeas corpus if there is available an adequate remedy in the form of an appeal or writ of error. *Id.*

4. NEIL P. COHEN & DONALD J. HALL, CRIMINAL PROCEDURE: THE POST INVESTIGATIVE PROCESS, CASES AND MATERIALS 830-31 (2d ed. 2000).

5. "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

6. COHEN & HALL, *supra* note 4, at 830.

7. *Id.* (quoting Faye v. Noia, 372 U.S. 391, 401 (1963)).

8. "Writs of habeas corpus may be granted by the Supreme Court, any justice tbereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a) (2000).

9. *See* 39 C.J.S. *Habeas Corpus* § 49 (2003).

in the standard of review has the effect of increasing a federal court's ability to review determinations of the original judicial system, since restrictions on the federal courts' ability to review have been removed.

The standard and scope of review applied by a federal court implicate two types of competing policy considerations, which I shall refer to as individual policy considerations and institutional policy considerations. Increased federal review, either through a broadened scope of review and/or a less deferential standard of review, furthers individual policy considerations, such as the protection of individual liberties. At the same time, however, increased federal review undermines institutional policy considerations, such as the autonomy of the original judicial system. Determining the proper standard and scope of review, and, by extension, the proper level of federal review of habeas petitions, involves striking a balance between these individual and institutional policy considerations.

Until 1953, federal habeas review of both state court and military court convictions was the same. A federal court would simply ask whether the original court's jurisdiction was proper and end its inquiry there. In *Brown v. Allen,* however, the Supreme Court drastically expanded the scope of review for state habeas by broadening the range of issues that were cognizable on review to include claims alleging violations of the United States Constitution.[10] Further, *Brown* allowed federal courts to undertake essentially de novo review of both state factual and legal determinations.[11]

Less than four months after *Brown's* expansion of federal review of state convictions, the Supreme Court, in *Burns v. Wilson,*[12] expanded the scope of review for military habeas beyond the constraints of the jurisdictional inquiry. The Court, reasoning that different policies apply in the military context than in the state context, did not broaden the scope of review as far as it had for state habeas. The Court limited federal courts to reviewing constitutional claims that had not been dealt with "fully and fairly" by the military courts.[13] In doing so, the Court did not articulate a distinct standard of review.

The Court's decision in *Burns* is problematic for at least three reasons. First, the "rule" that emerges from the case is unclear as to

10. 344 U.S. 443 (1953).

11. *Id.* at 463-64; *see* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 HARV. L. REV. 441, 500 (1963) ("[E]ver since *Brown v. Allen* the Supreme Court has continued to assume, without discussion, that it is the purpose of federal habeas corpus jurisdiction to redetermine the merits of federal constitutional questions . . . .").

12. 346 U.S. 137 (1953).

13. *Id.* at 142, 144.

when a federal court may review a constitutional claim of error. The Court did not expand on what constitutes a "full and fair" dealing by the military, such that federal review is precluded. As a result, the Circuit Courts of Appeal have struggled for fifty years to find a principled approach to determining the proper scope of review for military habeas. Some Circuits have attempted to lay out clear rules prescribing when a federal court may review an issue, while others have developed what can at best be classified as an ad hoc approach.[14] Consequently, the issues that a military prisoner may raise in a habeas proceeding depend on where the petitioner is incarcerated.

The second problem with the *Burns* decision is that many Circuits have interpreted the decision as precluding habeas review of factual determinations made by military courts. Some federal courts preclude review of factual determinations because the Court, in laying out its rule in *Burns*, provided little guidance as to how that rule should be applied and interpreted. Because the *Burns* rule is so ambiguous, most Circuits have attempted to interpret it by looking at the policies underlying the decision.[15] The Court, however, couched its policy rationales in terms of why the scope of review for military habeas should not extend as far as the recently expanded scope of review for state habeas. In relying so heavily on the difference between military and state habeas, the Court forever cast military habeas as a more restricted version of state habeas. State habeas has drastically changed since *Burns*, and some Circuits have attempted to preserve this lower level of federal review for military habeas by drawing artificial boundaries as to which type of issues they can review. Some courts have interpreted the case as allowing federal review of military legal determinations but precluding federal review of military factual determinations.[16]

The final problem with the *Burns* decision is that because federal review of state legal determinations has changed so much since the case was decided, military habeas no longer meets the perceived requirement of *Burns* that it constitute a more restricted version of state habeas. With the enactment of the Anti-Terrorism and Effective Death Penalty Act (AEDPA)[17] and the Supreme Court's

14. *See infra* Part II.B.2.

15. *Id.*

16. The two Circuits that have most notably drawn a clear cut line between review of legal determinations and review of factual determinations are the Fifth and Tenth Circuits. *See* Dodson v. Zelez, 917 F.2d 1250, 1252-53 (10th Cir. 1990); Calley v. Callaway, 519 F.2d 184, 200 (5th Cir. 1975).

17. 28 U.S.C. § 2254 (2000).

decision in *Williams v. Taylor*,[18] federal courts must now accord significant deference to state legal determinations. This creates an anomaly because some Circuits' interpretations of *Burns* allow for what is essentially de novo review of military legal determinations.[19] If military habeas is supposed to be a less-intrusive version of state habeas, then it seems rather odd, as a doctrinal matter, to accord more deference to the legal findings of the state courts than to those of the military courts. At least one Circuit has conformed its interpretation of *Burns* to address this problem.[20]

To address all of the problems of *Burns*, and to improve the overall state of military habeas, this Note suggests that military habeas and state habeas should be the same. More specifically, courts should apply the standard and scope of review for state habeas, as it is laid out in AEDPA, to military habeas. Applying AEDPA to military habeas would change it in two ways. First, application of AEDPA would expand the scope of review for military habeas to include review of military factual determinations, though this review would be subject to AEDPA's deferential standard of review for factual determinations. Second, application of AEDPA would subject federal review of military legal determinations to AEDPA's deferential standard of review.[21] Both of these changes would improve the current state of military habeas.

Part II of this Note provides a brief overview of the military criminal justice system and discusses the development of both military and state habeas. Part III identifies the competing policy considerations that go into determining the proper scope and standard of review. Part III.A. identifies the individual and institutional policy considerations common to both military and state habeas. Part III.B. identifies the special needs policy consideration, which is unique to military habeas, and concludes that this consideration is furthered by deference to determinations that are products of military expertise. This Note argues that legal determinations by the military criminal justice system are products of military expertise and that factual determinations are not. Part IV explains how application of AEDPA would improve military habeas.

---

18. 529 U.S. 362 (2000).

19. *See infra* Part II.B.2.

20. *See* Brosius v. Warden, 278 F.3d 239, 245 (3d Cir. 2002).

21. Currently, under the *Calley* standard, federal courts may review only claims that allege a violation of the federal Constitution. Calley v. Callaway, 519 F.2d 184, 199 (5th Cir. 1995).

II. BACKGROUND

A. A Brief Overview of the Military Justice System

Military law is a body of jurisprudence that exists independently of the law that governs the federal judicial branch.[22] Article I, Section 8 of the United States Constitution vests Congress with power to "make rules for the . . . regulation of land and naval [f]orces."[23] Congress established the modern military criminal justice system when it passed, in 1950, the Uniform Code of Military Justice (UCMJ).[24] After World War II, there was an outcry against the then-existing military justice system because it was perceived as unjust and arbitrary.[25] The UCMJ, among other things, established uniform substantive and procedural law across all branches of military service and created centralized review panels within each service.[26]

Courts-martial are the military equivalent of civilian trial courts. While civilian trial courts are primarily concerned with dispensing justice, courts-martial serve the dual purpose of dispensing justice and maintaining discipline within the armed services.[27] The subject matter jurisdiction of courts-martial is limited to violations of the UCMJ.[28] In order for a court-martial to have subject matter jurisdiction, the offense need not be "service-connected," that is, the offense need not be committed on military property or while on duty for the military.[29] The accused need only be a member of the armed services at the time the offense was committed.[30] In order for jurisdiction to be proper, the court-martial must also be properly

22. MICHAEL J. DAVIDSON, A GUIDE TO MILITARY CRIMINAL LAW: A PRACTICAL GUIDE FOR ALL THE SERVICES 2 (1999).

23. U.S. CONST. art. I, § 8, cl. 14. One of the reasons for vesting Congress with this power was to avoid the "political-military power struggle" that was so common with the British court-martial system. Major Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 19 (1985).

24. Nicole E. Jaeger, *Supreme Court Review: Maybe Soldiers Have Rights After All*, 87 J. CRIM. L. & CRIMINOLOGY 895, 900 (1997).

25. *Id.*

26. *Id.* at 901.

27. *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1-1 (5th ed. 1999).

28. DAVIDSON, *supra* note 22, at 1.

29. *See* Solorio v. United States, 483 U.S. 435, 436-37, 451 (1987) (affirming court-martial conviction of service member for sexual abuse of two young girls that occurred off base).

30. *Id.* at 439.

composed[31] and properly convened.[32] Furthermore, the charges must be properly referred.[33]

Depending on severity of an offense, one of three categories of court-martial will try an accused service member.[34] The lowest-level court-martial, a summary court-martial, is presided over by a single commissioned officer who does not have to be a lawyer.[35] The summary court-martial is a streamlined proceeding used for trying only enlisted service members, not officers.[36] An accused must give his consent to be tried by a summary court-martial, and a summary court-martial may impose no punishment greater than confinement with hard labor for one month or confinement without hard labor for forty-five days.[37]

The next level of court-martial is the special court-martial, which is presided over by (1) a military judge, (2) three members (the equivalent of jurors) sitting without a judge, or (3) a military judge and three members.[38] The procedures used in a special court-martial are more formal than those used in a summary court-martial, and the maximum sentence that a special court-martial can impose is one year confinement with hard labor.[39]

The highest level of court-martial is the general court-martial, which can only be convened after a pretrial investigation has occurred and the convening authority has received a disposition of the charges.[40] A general court-martial may impose the death penalty and

---

31. The three participants in a court-martial (the military judge, counsel and the court members) must meet certain requirements. *See* DAVIDSON, *supra* note 22, at 8-9. For example, a military judge must "be a commissioned officer, a member of a bar for a federal or state court, and certified to be a military judge." *Id.* at 8.

32. Generally, a commanding officer orders a court-martial to be convened. DAVIDSON, *supra* note 22, at 9 (citing UNIF. CODE OF MILITARY JUSTICE arts. 22-24) "A convening authority will 'refer' or order the charges prosecuted at a specified level of court-martial once having personally determined, or having been advised by a military lawyer, that reasonable grounds exist to believe that the accused committed the charged offense. . . ." *Id.* at 55 (citing Rules for Courts-Martial (R.C.M.) 406, 601(a), (d)(1)). A convening authority cannot exceed its authority by ordering a higher level court-martial than it is authorized to convene. *See id.* at 9.

33. A referral is "the order of a convening authority that charges against an accused will be tried by a specified court-martial." *Id.* at 9 (quoting R.C.M. 601(a)). While minor changes from the convening authority's order will be tolerated, if there are major changes made by the government and the accused objects, or if the government substantially amends the order without the convening autbority's permission, then jurisdiction will be nullified. *Id.* at 10.

34. *See* SCHLUETER, *supra* note 27, § 1-8(D).

35. *Id.* § 1-8(D)(1) (citing UNIF. CODE OF MILITARY JUSTICE art. 16).

36. *Id.*

37. *Id.* (citing UNIF. CODE OF MILITARY JUSTICE art. 20). Other punishments include forfeiture of two-thirds of one month's pay or restriction for two months. *Id.*

38. *Id.* § 1-8(D)(2).

39. *Id.*

40. *Id.* § 1-8(D)(3) (citing UNIF. CODE OF MILITARY JUSTICE art. 32, 34).

is presided over by either a military judge or a combination of a military judge and at least five panel members.[41]

Because the military criminal justice system serves to administer discipline as well as justice, its entire process focuses on the commander of a military unit and the chain of command.[42] The authority to convene a specific level of court-martial is not related to rank but rather to the level of command that an officer possesses. [43] The court-martial usually begins with a decision by the immediate commander of a military unit that a violation of the UCMJ has occurred.[44] If the immediate commander decides to use the judicial process as a means of discipline, rather than using some form of nonjudicial punishment, he swears out charges and forwards them up through the chain of command along with any documentary evidence and recommendations as to the type of court-martial that should be convened.[45]

The next commander in rank above the immediate commander normally has the power to convene the summary court-martial and is accordingly referred to as a summary court-martial convening authority.[46] A summary court-martial convening authority has several options. He can dismiss the charges, refer the charges to a summary court-martial, return the charges to the immediate commander with an order as to how to dispose of the charges, forward the charges, along with his recommendations, to the special court-martial convening authority, or order an Article 32 investigation[47] if he believes that the charge will ultimately warrant a general court-martial.[48] Depending on the severity of the charge, ultimately, an officer with the proper level of authority will order that a court-martial be convened at one of the three levels.

---

41. *Id.* (citing UNIF. CODE OF MILITARY JUSTICE art. 16(1)).

42. *Id.* § 1-1, 1-8.

43. *Id.* § 4-14(A)(1). "A 'military commander' is the commanding officer of certain military units, including posts or bases, Army brigades, Air Force wings, and Naval vessels." Note, *Military Justice and Article III*, 103 HARV. L. REV. 1909, 1911 n.8 (1990) (citing 10 U.S.C. § 822 (1988)). With only a few exceptions, the authority to convene a court-martial is vested in commanding officers, as opposed to specifically ranked officers in the military. DAVIDSON, supra note 22, at 9.

44. SCHLUETER, *supra* note 27, § 1-8(A).

45. It is typically the accused's immediate commanding officer "who after conducting a preliminary inquiry, directs that that charges be drafted." *See id.* § 6-1.

46. *Id.* § 6-2(A).

47. This investigation has been noted as being equivalent to the grand jury in the civilian sector. Charles W. Schiesser & Daniel H. Benson, *A Proposal to Make Courts-Martial Courts: The Removal of Commanders from Military Justice*, 7 TEX. TECH L. REV. 559, 571 (1976).

48. SCHLUETER, *supra* note 27, § 6-2(B).

The convening authority selects the members of the court-martial panel.[49] Unlike civilian juries, panel members do not have to be randomly selected.[50] Further, the members are not required to resemble a "representative cross-section of the military community", as is required for civilian jurors.[51] The process of selecting members usually involves selecting potential members from a list compiled by the personnel office.[52]

If a service member is convicted by a court-martial, he first appeals to the convening authority, which can overrule or affirm the finding of guilt, reduce the sentence, or order a rehearing.[53] Then, depending on the severity of his sentence, a service member can appeal his conviction to either a court of criminal appeals within his branch, which has the authority to review the factual and legal basis for the conviction, or to the Office of the Judge Advocate General, which has the authority to reduce or throw out the findings and/or sentence.[54] If he is unsuccessful at this level, he can next appeal to the United States Court of Appeals for the Armed Forces (CAAF), which is composed of five civilian judges.[55] The CAAF will accept review of a case only if two judges vote to do so, but certain cases, such as death penalty cases must be accepted for review.[56] Importantly, the CAAF has only the authority to review legal findings.[57] A convicted service member's final option is to seek review by the United States Supreme Court. As in civilian cases, however, the Supreme Court rarely grants a petition for certiorari.[58]

---

49. *Id.* § 8-2.

50. *Id.* § 8-3(C)(4).

51. *Id.*

52. *Id.*

53. DAVIDSON, *supra* note 22, at 62 (citing R.C.M. 1107).

54. If the sentence involves death, dismissal, dishonorable discharge, or confinement of at least one year then the conviction will automatically be submitted for review to a court of criminal appeals. *Id.* at 62 (citing R.C.M. 1201(a)). These courts have the authority to review both factual and legal findings of the court-martial. *Id.* Lesser offenses are heard by the Office of the Judge Advocate General. *Id.* (citing R.C.M. 1201(b)).

55. *Id.* at 62-63.

56. *Id.* at 63.

57. *Id.*

58. *Id.*

B. The Development of Military Habeas

1. Pre-*Burns* Military Habeas and the *Burns* Decision

Though Congress established a separate criminal justice system for the military by generally failing to provide for direct review of military court decisions by federal courts, prisoners convicted by military courts can still seek collateral review, in the form of habeas review, of their convictions.[59] Even though the UCMJ provides that decisions by courts-martial are binding and conclusive on all courts, collateral review remains a viable remedy because the independence of the military criminal justice system relies on the assumption that the courts act within their jurisdiction and duties.[60]

The authority to grant a writ of habeas corpus was originally conferred upon the federal courts in the Judiciary Act of 1789, which was the first grant of federal court jurisdiction.[61] The writ was available to federal prisoners and military prisoners but was not available to state prisoners. Since the statute did not define the scope of issues cognizable on review, the Supreme Court defined the scope in accordance with the common law and limited it to determining whether the jurisdiction of the sentencing court was proper.[62] With the passage of the Habeas Corpus Act of 1867,[63] Congress extended availability of the writ of habeas corpus to state prisoners.[64]

Prior to 1867, there were very few collateral attacks on military convictions. In fact, it was not until 1879 that the Supreme Court reviewed its first petition for habeas corpus from a court-martial conviction.[65] From 1867 to 1953, the inquiry in military habeas cases broadened in application beyond the inquiry into whether a court-martial had jurisdiction over the person and subject matter. The Court

---

59. John E. Theuman, Annotation, *Review by Federal Civil Courts of Court-Martial Convictions—Modern Status*, 95 A.L.R. FED. 472, 481 (1989).

60. *Id.*

61. The act allowed federal courts to issue the writ to petitioners "in custody, under or by colour of the authority of the United States . . . ." Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

62. Stone v. Powell, 428 U.S 465, 475 (1976) (citing *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830) (Marshall, C.J.)). The Supreme Court limited the scope of review to the jurisdictional inquiry in 1879. *Ex parte* Reed, 100 U.S 13 (1879). If a court-martial had jurisdiction, "its proceeding cannot be collaterally impeached for any mere error or irregularity." *Id.* at 23.

63. Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385 (codified at 28 U.S.C. § 2241(c)(3) (2000)).

64. The writ of habeas corpus was extended to state prisoners to prevent the South from undermining the Thirteenth Amendment after the Civil War. Rosen, *supra* note 23, at 41 n.223.

65. *Id.* at 20 (citing *Reed*, 100 U.S. 13).

still framed the issue as part of a jurisdictional inquiry, but it began to look at the sentence to ensure that it was within the scope of the lawful powers of the court-martial.[66] The Court also entertained constitutional attacks leveled at court-martial proceedings.[67] The Court continued to insist, however, that it was only inquiring into the jurisdiction of the court-martial.[68]

Finally, in the landmark case *Burns v. Wilson*,[69] the Court explicitly broadened the scope of review for courts-martial by acknowledging that a federal court could assert jurisdiction over petitions in which a prisoner asserted that his conviction or sentencing occurred in violation of the United States Constitution. The Court stated that a federal court reviewing constitutional claims of error must recognize that "when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence."[70] Rather, "[i]t is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims."[71] If the military courts refuse to consider a convicted service member's constitutional claims, then a reviewing federal court may engage in de novo review of the claims.[72] The Court then applied this new "rule" to the case at hand and found that the military courts had given "fair consideration" to each of the prisoner's claims.[73]

The Court advanced several rationales for its decision to expand the scope of review for military habeas. All of these rationales,

---

66. The inquiry was "[d]id the court martial which tried and condemned the prisoner have jurisdiction, of his person, and of the offense charged, *and was the sentence imposed within the scope of its lawful powers*?" Collins v. McDonald, 258 U.S. 416, 418 (1922) (emphasis added).

67. In *Wade v. Hunter*, 336 U.S. 684 (1949), the Court assessed a claim by a service member that he had been placed in jeopardy twice for the same offense in violation of the Fifth Amendment. In doing so, the Court acknowledged that it sidestepped the important issue, "To what extent a court-martial's overruling of a plea of former jeopardy is subject to collateral attack in habeas corpus proceedings." *Id.* at 688 n.4. Throughout the opinion, there was no mention of how the Court's assessment of the Fifth Amendment claim fit within the jurisdictional inquiry. One could argue that the court-martial would lose its jurisdiction when it placed the defendant in double jeopardy, but as one commentator noted, "[o]nce the concept of 'jurisdiction' is taken beyond the question of the court's competence to deal with the class of offenses charged and the person of the prisoner, it becomes a less than luminous beacon." Bator, *supra* note 11 at 470.

68. *See, e.g.*, Hiatt v. Brown, 339 U.S. 103, 111 (1950) ("The single inquiry, the test, is jurisdiction .... The correction of any errors it may have committed is for the military authorities alone authorized to review its decision.")

69. 346 U.S. 137 (1953).

70. *Id.* at 142.

71. *Id.* at 144.

72. *Id.* at 142.

73. *Id.* at 144.

however, explained why the Court had not expanded military habeas review as far as it had recently expanded state habeas review. First, the Court began with the proposition that the statute that granted jurisdiction to the federal courts to issue writs of habeas corpus is the same for both military and state habeas.[74] The scope of the matters open for review, however, has always been narrower for military cases than for civil cases.[75] The Court then went on to point out that the evolution of military law, like the evolution of state law, has taken place independently of the federal judiciary, and that the Court has been highly deferential to such evolution.[76] The Court has played no role in its development nor has it exerted a supervisory role because the "rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment."[77]

Finally, the Court recognized that the framers of the Constitution had entrusted to Congress the task of balancing the rights of men in the armed forces against the need for discipline and duty.[78] Congress exercised this power by enacting the UCMJ, which creates a complete system of review to protect the individual rights of service members and provides that determinations of the military courts are "final" and "binding."[79] Because such determinations are supposed to be final and binding, "in military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings—of the fair determinations of the military tribunals."[80]

The Court used these policy rationales to justify its decision that military habeas could not extend as far as state habeas. In explicitly contrasting state and military habeas, however, the Court cast military habeas not as a separate body of law, but as a narrower version of state habeas. More importantly, because, as discussed

74. *Id.* at 139.

75. *Id.*

76. *Id.* at 140.

77. *Id.*

78. *Id.*

79. *Id.* Indeed, the Court recognized that Congress, after receiving a large number of complaints and objections about the court-martial proceedings after World War II, had gone to great effort to modernize the entire military system of justice. *Id.* at 140-41. World War II provided the necessary catalyst for broadening the scope of habeas review because millions of Americans had suddenly become subject to military justice. Calley v. Callaway, 519 F.2d 184, 196 (5th Cir. 1975).

80. *Burns*, 346 U.S. at 142.

below, the "rule" that emerges from *Burns* is so unclear, subsequent interpretations of *Burns* by the Circuit Courts of Appeal have relied on these various policy rationales to figure out how to apply *Burns*. Relying on these policy rationales has led to conflicting interpretations as courts have struggled to keep military habeas as a less intrusive version of state habeas.

2. The Various Interpretations of *Burns* by the Circuit Courts.

Since *Burns*, lower courts have been unable to reach a consensus regarding the proper interpretation of the case.[81] Under *Burns*, a reviewing federal court is not permitted to review claims that have been dealt fully and fairly with by the military criminal justice system. Uncertainty arises because the "fair" aspect of the test seems to imply some sort of substantive review of the military's decision. It is unclear, however, how much review of a constitutional claim a military court must engage in before collateral review by a federal court is prohibited. Must the military court come to the correct decision, or is it enough that the court merely rules on the claim? It is also unclear whether military courts may summarily dismiss such a claim or whether they must produce a record that shows that the decision was supported by reasoned deliberation. While all courts essentially agree that a federal court cannot simply reweigh the evidence, the courts are split on what determinations of the military they can review.

The D.C. Circuit essentially treats military cases like state cases. In determining whether a military court has given "fair" consideration to a prisoner's constitutional claim, the court inquires into the substantive decision of the military court.[82] In order for a claim to be "fairly" determined, the military court's decision must either conform to the prevailing standards of the Supreme Court or the military courts must show that conditions peculiar to military life

81. One commentator has suggested that the "full and fair" consideration test is not difficult to decipher because it is similar to the language used by the Court in *Frank v. Magnum*, 237 U.S. 309 (1915) and *Moore v. Dempsey*, 261 U.S. 86 (1923). *See* Rosen, *supra* note 23, at 56-57. "It is a test that focuses initially on the adequacy of the military's 'corrective processes,' rather than upon the merits of a habeas petitioner's constitutional claims." *Id.* at 54. While this interpretation, which focuses exclusively on the procedural aspects of the military courts, is plausible, it appears that no Circuit court has ever adopted this interpretation. Perhaps this is because when the vague language in *Burns* is considered in light of the then-recent decision *of Brown v. Allen*, it appeared that the Supreme Court intended for some substantive review of the military courts' decisions.

82. Kauffman v. Sec'y of the Air Force, 415 F.2d 991 (D.C. Cir. 1969).

require a different rule.[83] In so holding, the court in, *Kauffmann v. Secretary of the Air Force*, rejected the notion that *Burns* had established a different scope of review for military habeas than for state habeas.[84]

The Fifth Circuit and the Tenth Circuit, which has the most experience with habeas review of court-martial convictions due to the location of the Disciplinary Barrack at Fort Leavenworth, interpret *Burns* as establishing a scope of review that is narrower than the scope of review for state habeas. In *Dodson v. Zelez*,[85] the Tenth Circuit, unable to interpret its own conflicting precedent, officially adopted the four-prong test first announced by the Fifth Circuit in *Calley v. Callaway*.[86]

Under the *Calley* standard, in order for a claim to be reviewable, a federal court must consider four factors.[87] The reviewing court must examine (1) whether the asserted error is of substantial constitutional dimension, (2) whether the issue is one of law rather than of disputed fact already determined by the military tribunals, (3) whether factors peculiar to the military or important military considerations require a different standard, and (4) whether the military courts have given adequate consideration to the issue raised in the habeas proceeding.[88] Because of the second factor, one explicit result of this test is that many, if not all, claims which involve a mixture of law and fact are precluded from review.[89] This refusal to engage in factual review makes the scope of review narrower for military habeas than for state habeas, as factual review is currently available under state habeas.[90] In developing this standard, the Fifth Circuit recognized that *Burns* had announced a scope of review that was broader than the old jurisdictional test but narrower than the scope of review for state habeas.[91] The court then went on to rely on

83. *Id.* at 997. The court reasoned that "[t]he military establishment is not a foreign jurisdiction; it is a specialized one." *Id.* To provide a perfunctory review of constitutional claims by servicemembers is to deny servicemembers the benefits of habeas review. *Id.* Also, there is no rational need unique to the military that justifies such minimal review. *Id.*

84. *Id.*

85. 917 F.2d 1250, 1252 (10th Cir. 1990).

86. 519 F.2d 184 (5th Cir. 1975).

87. *Id.* at 199.

88. *Calley*, 519 F.2d at 199-203.

89. *See id.* at 200 (quoting Shaw v. United States, 357 F.2d 949, 953-54 (Ct. Cl. 1966)) ("[A]bstinence from reviewing court-martial proceedings need not necessarily be practiced 'where the serviceman presents pure issues of constitutional law, unentangled with an appraisal of a special set of facts.'").

90. *See Infra* Part II.C.1.

91. *Id.* at 198.

the same policy rationales in *Burns* to justify the narrow scope of review that results from this four-prong test.[92]

Some Circuits simply ignore the inherent ambiguity of *Burns* and use an ad hoc approach. The Eighth and Ninth Circuits have never tried to articulate a test as to what constitutes "full and fair" consideration of a constitutional claim by the military courts. Though case law is sparse, both Circuits appear to hold that the scope of review for military habeas is narrower than the scope of review for state habeas.[93] The Eighth Circuit appears to draw a law/fact distinction, like the Tenth and Fifth Circuits, but it applies the *Burns* "full and fair" consideration requirement only to military factual determinations.[94] Under the Eighth's Circuit's jurisprudence, pure issues of constitutional law may always be reviewed by a federal court.[95] The Ninth Circuit, in contrast, does not make this distinction between factual and legal determinations, and is even less clear in its application of *Burns*.[96]

The Third Circuit's standard for determining the scope of review is unique. In *Brosius v. Warden*, the Third Circuit recently

---

92. *Id.* at 199-203.

93. *See, e.g.*, Harris v. Ciccone, 417 F.2d 479, 481 (8th Cir. 1969) (citing Swisher v. United States, 354 F.2d 472, 475 (8th Cir. 1966)); Sunday v. Madigan, 301 F.2d 871, 873 (9th Cir. 1962) ("[O]nce it has been concluded by the civil courts that the military had jurisdiction and dealt fully and fairly with all such claims, it is not open to such courts to grant the writ simply to re-evaluate the evidence." (citation omitted); Mitchell v. Swope, 224 F.2d 365, 367 (9th Cir. 1955) (dismissing habeas petition without even reaching the merits of the claim because the Military Board of Review had "fully and carefully examined" the claim).

94. Harris, 417 F.2d at 481 ("[W]here the constitutional issue involves a factual determination, the court's inquiry is limited to determining whether the military court gave full and fair consideration to the constitutional issues."). It should also be noted that the Eight Circuit has never articulated a standard for what constitutes "full and fair consideration." In *Schlomann v. Ralston*, the court affirmed a district court's dismissal of a habeas petition even though the district court did not examine the transcript from the court-martial. 691 F.2d 401, 403 (8th Cir. 1982). A military court of appeals had previously reviewed the transcript and "thoroughly discussed" the issue being raised. *Id.* The Eighth Circuit affirmed the district court's decision that this constituted a "full and fair" opportunity for litigation, at least absent a showing of substantial doubt that the military court was incorrect. *Id.* at 403-04.

95. In *Harris*, after determining that factual determinations are subject to the "full and fair consideration" requirement of *Burns*, the court went on to note that military "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law." *Harris*, 417 F.2d at 481 (citing O'Callahan v. Parker, 395 U.S. 258, 265 (1969)). The implication is that federal courts should be more scrutinizing when it comes to pure issues of law, and are therefore not precluded from reviewing them. Concededly, however, there is very little case law in the Eighth Circuit to support this law/fact distinction and the Eighth Circuit has not revisited the issue since *Harris*.

96. *See, e.g.*, Broussard v. Patton, 466 F.2d 816, 818-19 (9th Cir. 1972); Mitchell, 224 F.2d at 367. In both of these cases, the court cited the rule from *Burns* and then summarily concluded that the military courts had given full and fair consideration to the issues being raised. *See also* Sunday, 301 F.2d at 873 (reiterating the rule from *Burns* without providing any guidance on how to apply it).

abandoned any attempt to apply the *Burns* standard in particular cases.[97] Rather, the court began its analysis with the proposition that "our inquiry in a military case may not go further than our inquiry in a state habeas case."[98] The court then proceeded to assess the military courts' decision, for argument's sake, as if it were a final decision from a state court.[99] Applying AEDPA's standard and scope of review to the petitioner's *Miranda* claims, the court found that the petitioner had failed to establish that the military court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."[100] The Third Circuit's decision to abandon any hope of extracting a rule from *Burns* illustrates the level of frustration that lower courts have experienced in interpreting the case.[101]

C. The Development of State Habeas

The development of state habeas followed much the same pattern as did the development of military habeas. Prior to the Supreme Court's decision in *Brown v. Allen*, decided just four months before *Burns*, the scope of review for military and state habeas was exactly the same. Both state and military habeas started with a jurisdictional inquiry, which was gradually loosened through general application. Eventually, the Supreme Court broadened the scope of inquiry to allow for review of claims of constitutional error.

Prior to 1953, the Supreme Court had a fairly strict interpretation of what could be reviewed on a habeas petition from a state conviction. Limited to the jurisdictional inquiry, the Court repeatedly refused to look for substantive error on the part of the state courts.[102] Just as with military habeas, however, two exceptions to the jurisdictional inquiry developed. Federal courts could review the

97. Brosius v. Warden, 278 F.3d 239, 245 (3rd Cir. 2002).

98. *Id.* (citing Burns v. Wilson, , 346 U.S. 137, 142 (1953)).

99. *Id.* at 245-48.

100. *Id.* at 246.

101. The First Circuit has also acknowledged a great deal of frustration in interpreting *Burns*. In *Allen v. VanCantfort*, the court examined the *Burns* decision and noted that there was great confusion among courts and commentators as to when a reviewing court was precluded from reviewing a military conviction because the military court had fully and fairly considered the constitutional issues. 436 F.2d 625, 629-30 (1st Cir. 1971). Because of the disagreement as to what constitutes full and fair consideration, the court opted to "review briefly petitioner's claims on the merits", which included a claim of ineffective assistance of counsel. *Id.* at 630.

102. *See, e.g.*, *Ex parte* Watkins, 28 U.S. 193 (1830) (refusing to reach merits of a petitioner's claim that the petitioner was convicted pursuant to an indictment that failed to state a crime); *Ex parte* Kearney, 20 U.S. 38 (1822) (declining to examine whether petitioner's refusal to testify was privileged under the Fifth Amendment).

alleged illegality of a sentence[103] and facial constitutionality of a state statute.[104] In addition to these two exceptions, in 1915 the Court signaled a shift in its view of the proper role of federal courts by interpreting the Act of 1867 to explicitly allow the courts to undertake more than a "bare legal review" to determine if jurisdiction was proper.[105] The Court, in *Frank v. Magnum,* held that a state court had to afford proper process with respect to the full and fair litigation of federal questions in order for jurisdiction to be proper.[106] If there was no "corrective process" with respect to the full and fair litigation of federal questions, then the federal court could go to the merits of the federal question.[107]

In *Brown v. Allen,*[108] the Court finally shed the restrictions of the jurisdictional inquiry and broadened the scope of review for state habeas. The Court decided *Brown* less than four months before its decision in *Burns*, in which it broadened the scope of review for military habeas. In what was a combination of three habeas proceedings, the Court in *Brown* affirmed the convictions of three prisoners. However, it did so by reaching the merits of the constitutional claims of the prisoners without any mention of jurisdiction.[109] In doing so, the Court adopted the rule that federal courts are not barred by the principle of res judicata from reconsidering federal constitutional claims previously considered by state courts. Federal courts were essentially allowed to engage in de novo review of these claims.[110]

1. The Development of Federal Review of State Factual Determinations.

After *Brown*, federal review of state factual determinations was relatively unconstrained. The federal courts were free to examine the state-court record to make sure that there was fair consideration of constitutional issues and that the offered evidence and proceedings

103. *See Ex parte* Lange, 85 U.S. 163 (1873).

104. *See Ex parte* Siebold, 100 U.S. 371 (1879).

105. Frank v. Magnum, 237 U.S. 309, 331 (1915).

106. *Id.* at 326-27.

107. Though the Court in *Frank* did find that the prisoner had been afforded a full and fair litigation as to the particular federal question, tbe lower courts were now left with a new line of inquiry in addition to the traditional jurisdictional inquiry. *Id.* at 335.

108. 344 U.S. 443 (1953).

109. For example, in *Brown v. Allen,* the Court evaluated the petitioners' claim that discrimination against blacks in the selection of grand jurors violated the Fourteenth Amendment. *Id.* at 474.

110. *See* Bator, *supra* note 11, at 500.

resulted in a "satisfactory conclusion."[111] A federal court had wide discretion in deciding whether to hold an evidentiary hearing, and it was basically up to a federal judge to decide whether he felt that the issue raised by the defendant was worthy of reconsideration.[112]

Federal review of state factual determinations became even more unconstrained after the case of *Townsend v. Sain.*[113] In *Townsend,* the Court identified six scenarios in which a federal court was *required* to grant an evidentiary hearing:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.[114]

The effect of this holding was to compel a district court to relitigate state factual determinations at the slightest indication that the state court had not dealt with the constitutional issues in a complete and fair manner.[115] In 1966, Congress attempted to codify the holding in *Townsend* by adding subsection (d) to 28 U.S.C. § 2254.[116]

The Court further strengthened the power of the federal courts to review state court decisions in *Fay v. Noia,*[117] a decision that loosened the requirement that a prisoner exhaust all appellate remedies before he could seek collateral review in the federal system. The Court held that the exhaustion requirement "refers only to a failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus in the federal court."[118] After *Fay,* federal courts were not only free to review constitutional claims raised by prisoners but were required in some circumstances to review factual claims that had not even been fully litigated in the state court system.

Inevitably, friction arose between the state courts and the federal courts because of the intensive review of state convictions by

---

111. Brown, 344 U.S. at 463.

112. *Id.* at 463-64.

113. 372 U.S. 293 (1963).

114. *Id.* at 313.

115. Rosen, *supra* note 23, at 66.

116. *See* 28 U.S.C. § 2254(d) (1994) (superseded)).

117. 372 U.S. 391 (1963); *see also* Rosen, *supra* note 23, at 66 (discussing the implications of both cases).

118. Noia, 372 U.S. at 399. In *Noia,* the habeas petitioner had failed to timely appeal to a state appellate court a claim that this confession had been obtained in violation of the Fourteenth Amendment. *Id.* at 395.

federal courts. The Supreme Court responded by limiting the use of habeas as means of appellate review.[119] *Stone v. Powell*[120] is perhaps the best example of the court's desire to curb federal review of state convictions. That decision limited the scope of review for state habeas by holding that a federal court could not grant habeas relief when a state court had provided "an opportunity for full and fair litigation" of a Fourth Amendment claim and the claim of error was that evidence obtained in an unconstitutional search and seizure had been introduced during the state-court trial.[121] The Court further restricted state habeas by strengthening the requirement that a petitioner's claims must be thoroughly exhausted in the state system before a federal court could review the claim.[122] Ironically, however, the Court most effectively accomplished its restriction of state habeas by according more deference to state fact-finding through a strict construction of 28 U.S.C. § 2254(d), a statute that was supposed to roughly codify the liberal standard for reviewing factual determinations announced in *Townsend*.[123]

In 1996, Congress once again stepped in. Prompted by outcries for habeas reform, Congress passed AEDPA, which amended both procedural and substantive aspects of federal habeas corpus review. Congress was driven to make this change because of the endless litigation that had resulted from *Brown*'s removal of any meaningful restrictions on federal review of state convictions.[124] AEDPA provides

---

119. *See* Sumner v. Mata, 449 U.S. 539, 550 (1981).

120. 428 U.S. 465 (1976).

121. *Id.* at 494.

122. *See* Anderson v. Harless, 459 U.S. 4, 6 (1982) (holding that a state court must have a "fair opportunity" to rule on a constitutional claim and that "it is not enough that all of facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made." (citation omitted)); Rose v. Lundy, 455 U.S. 509, 522 (1982) (holding that a federal court "must dismiss habeas petitions containing both unexhausted and exhausted claims").

123. The Court's strongest reform came through a stringent requirement that the federal courts must presume that a state court's factual determination is correct. *See* Sumner v. Mata, 449 U.S. 539, 547-52 (1981) (holding that a reviewing federal court must give a "presumption of correctness" to state factual determinations under § 2254(d) and that "a habeas court should include in its opinion granting the writ the reasoning" for its decision).

124. *See, e.g., Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. (1995).

> "As of January 1, 1995, there were approximately 2,976 inmates on death row in this country. Yet the States have executed only 263 criminal since 1973, and only 38 last year. Federal haheas proceeding have become, in effect, a second round of appeals in which convicted criminals are afforded the opportunity to relitigate claims already considered and rejected by the State courts."

Id. at 2 (Statement of Sen. Orrin G. Hatch). The delays caused by endless federal review were very real, particularly in capital cases. Between 1977 and 1993, in cases involving capital punishment, the average delay was about 94 months, almost eight years. *Id.* at 105 (Prepared

that a writ of habeas corpus must now be granted to review state court factual determinations only if the state court's adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[125] AEDPA also provides that a federal court must presume that a state court's decision was correct.[126] However, a petitioner can rebut that presumption by showing that the decision was wrong by "clear and convincing evidence."[127] In enacting AEDPA, Congress also deleted the eight possible scenarios[128] capable of rebutting the presumption of correctness under the previous version of § 2254(d). Because the scenarios no longer act as proxies of unfairness, capable of sweeping aside any presumption of correctness, the petitioner now must carry a greater burden to prove procedural and substantive fact-finding errors.[129] Importantly, though, AEDPA still

---

statement of Kevin DiGregory, Deputy Assistant Attorney General, Criminal Division United States Department of Justice). In 1992 and 1993 the average delay was around 113 months, over nine years. *Id.*

To address these problems AEDPA, in addition to restricting substantive federal review, also added several procedural requirements to prevent prisoners from abusing the writ of habeas as an endless appellate device. First, AEDPA makes it much more difficult for a petitioner to re-raise issues that have been decided in a previous habeas petition. *See* 28 U.S.C. § 2244 (2000). AEDPA also makes it very difficult to raise different claims in a second habeas petition when the claims were not originally brought in the first petition. *See* § 2244(b). Finally, in an effort to force prisoners to bring their claims in a timely manner, AEDPA has a one-year statute of limitations for filing a petition that starts tolling in most cases when the prisoner's conviction and sentence becomes final. § 2244(d).

125. § 2254(d)(2). If the petitioner failed to develop at the state court level the factual basis for a claim, the district court may not hold an evidentiary hearing unless:

> (A). the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B)the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

§ 2254(e)(2)(A)-(B).

126. § 2254(e)(1).

127. *Id.*

128. There were seven specific factors listed that could rebut the presumption of correctness or the presumption could be rebutted if the reviewing federal court concluded that the state court's determination was not "fairly supported by the record." *See* 28 U.S.C. 2254(d) (1994) (superseded).

129. *See, e.g.*, Valdez v. Cockrell, 274 F.3d 941, 948-51 (5th Cir. 2001) (rejecting the argument that a "full and fair hearing" is a prerequisite for the § 2254(e)(1)'s presumption of correctness to apply).

It should also be noted that there is some disagreement as to the precise interaction between § 2254(d)(2) and § 2254(e)(1). *See, e.g.*, RANDY HERTZ & JAMES LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 826-31 (4th ed. 2001) (arguing that the exceptions,

allows greater habeas review of state factual determinations than of military factual determinations. This is so because some Circuits do not permit review of military factual determinations at all.

2. The Development of Federal Review of State Legal Determinations.

After *Brown*, the standard of review applied to state legal determinations unquestionably remained de novo until the Supreme Court's decision in *Teague v. Lane*.[130] *Teague* called into question the de novo standard with language that suggested a more deferential standard of review,[131] but it was unclear from that opinion whether it overruled *Brown*'s de novo standard of review. In later cases the Court

particularly procedural exceptions, to the presumption of correctness survived under § 2254(d)(2) and (e)(1), and that federal courts should undertake an analysis very similar to the pre-AEDPA § 2254(d)); Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868, 1874-76 (1997) (discussing two plausible interpretations of the relationship between § 2254(d)(2) and (e)(1)). The majority of Circuits, however, ignore any kind of conflict and appear to view § 2254(d)(2) and (e)(1) as fairly straightforward in application. *See, e.g.*, Harding v. Walls, 300 F.3d 824, 828 (7th Cir. 2002) ("Under section 2254(d)(2), relief may be had where the petitioner can show by clear and convincing evidence that the state court's factual determinations were unreasonable."); *Valdez*, 274 F.3d at 951 n.17 ("Whereas § 2254(d)(2) sets out a general standard by which the district court evaluates a state court's specific findings of fact, § 2254(e)(1) states what an applicant will have to show for the district court to reject a state court's determination of factual issues."); Coe v. Bell, 209 F.3d 815, 823 (6th Cir. 2000) ("If competency to be executed is a question of fact, under § 2254(e)(1) the state courts' competency determination is entitled to a presumption of correctness that may be rebutted only by clear and convincing evidence. In addition, for questions of fact a federal court may grant habeas relief 'only if the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" (citation omitted)); *see also* Hunterson v. Disbato, 308 F.3d 236, 245-46 (3d Cir. 2002); Fulwood v. Lee, 290 F.3d 663, 689 (4th Cir. 2002); Sallahdin v. Gibson, 275 F.3d 1211 (10th Cir. 2002); Mastracchio v. Vose, 274 F.3d 590, 597-98 (1st Cir. 2001); Kinder v. Bowersox, 272 F.3d 532, 541 (8th Cir. 2001); Mobley v. Head, 267 F.3d 1312, 1316 (11th Cir. 2001). *But cf.* Channer v. Brooks, 320 F.3d 188, 194 (2d Cir. 2003) (noting that it is still an open question within the Circuit as to whether the a petitioner must prevail on both the § 2254(d)(2) and the § 2254(e)(1) inquiries in order to obtain habeas relief, or whether prevailing under either inquiry is sufficient to obtain relief); Green v. White, 232 F.3d 671, 672 n.3 (9th Cir. 2000) (noting that "as an analytical matter, the relationship between 2254(d)(2) and 2254(e)(1) is not entirely clear . . . . [but that] we need not define the precise relationship, however, as the standard of review appears to be clear error under both statutory provisions.").

130. 489 U.S. 288 (1989).

131. In *Teague*, the Court rejected a state prisoner's contention that he should be able invoke a rule of constitutional law which was first decided after his conviction had become final. *Id.* at 310. Though framed in the context of retroactivity, numerous commentators pointed out that the case was susceptible to an interpretation in which "federal relief would be unavailable if a state court applying federal law existing at the time of the prisoner's conviction could reasonably conclude that the prisoner was not entitled to relief." Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate After* Williams v. Taylor*?*, 2001 WIS. L. REV. 1493, 1499. Under this interpretation, a federal court would be precluded from granting relief even if it came to a different result in interpreting and applying federal precedent. *Id.*

struggled to clarify *Teague* and articulate whether it had in fact overruled *Brown*, but the Court was unable to come to any consensus.[132]

Ultimately, Congress weighed in with AEDPA and statutorily amended the standard of review applied to state legal determinations. AEDPA provides that a writ of habeas corpus cannot be granted unless the state court's decision "was contrary to, or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States."[133] Unfortunately, even after the passage of AEDPA, courts were uncertain as to how to evaluate state legal determinations. Though the language of the statute suggests that federal courts should afford deference to state legal determinations, so long as those determinations are reasonable, many still argued that the statute upheld independent federal review of state legal determinations.[134]

In 2000, the Supreme Court finally resolved the question in *Williams v. Taylor*,[135] in which it interpreted the standard of review required by AEDPA.[136] The Court began its analysis by recognizing that Congress, in passing AEDPA, "wished to curb delays, prevent retrials on federal habeas and give effect to convictions to the extent possible under law."[137] The Court gave effect to these goals by strictly construing the statutory phrase, "clearly established Federal law, as determined by the Supreme Court."[138] The Court determined that the

---

132. *See, e.g.*, Wright v. West, 505 U.S. 277 (1992); Saffle v. Parks, 494 U.S. 484 (1990); Butler v. McKellar, 494 U.S. 407 (1990).

133. 28 U.S.C. § 2254(d)(1) (2000).

134. Steinman, *supra* note 131, at 1503-04 n.40 (citing to authorities who contended that federal review was left unchanged with the passage of AEDPA).

135. 529 U.S. 362 (2000). In writing the opinion, Justice O'Connor wrote the majority opinion for the proper interpretation of § 2254(d). *Id.* at 402-13 (O'Connor, J.). Justice Stevens wrote the majority for the proper application of § 2254(d) to the particular case at hand. *Id.* at 391-98 (Stevens, J.).

136. It should he noted that many commentators have criticized the decision in *Williams* for failing to address numerous constitutional issues. *See* Steinman, *supra* note 131, at 1509. The Court, in restricting its analysis to statutory interpretation, did not analyze the constitutionality of Congress's ability to impose a deferential standard of review, nor did it analyze any of the Article III implications of forcing lower courts to adhere to the deferential standard of review. Some commentators have contended that federal courts must be able to review de novo state legal determinations because Article III vests them with "judicial power [over] . . . cases . . . arising under this constitution [and] the laws of the United States." *Id.* (*quoting* U.S. CONST. art. III, § 2). Others have argued that AEDPA forces lower courts to "violate their obligation under Article III to follow their own precedents" because, if an issue of federal constitutional law has not been decided by the Supreme Court, federal courts must defer to a state court's decision on a federal issue, even if the state court's decision is completely inconsistent with precedent in the Circuit in which the state court sits. *Id.*

137. *Id.* at 404.

138. *Id.* at 412.

phrase referred to the holdings of the Court's decisions "as of the time of the relevant state-court decision."[139] In so holding, the Court upheld *Teague's* antiretroactivity rule, which stated that novel constitutional standards that were not in existence at the time of the state court's determination and that imposed new obligations on the states could not be grounds for habeas relief.[140]

Under AEDPA, the Court stated, a federal court may grant habeas relief if the state court's decision is "contrary to" or involves "an unreasonable application of" Supreme Court precedent.[141] In order for a state court's decision to be "contrary to" Supreme Court precedent, the state court must either apply a rule that contradicts governing law set forth in Supreme Court precedent or the state court must confront a set of facts that are "materially indistinguishable" from a decision of the Supreme Court and arrive at a different result from the precedent.[142] If a federal court finds either of these two scenarios present, the court may engage in de novo review.[143]

The Court went on to further hold that an "unreasonable application" of federal law occurs when the state identifies the correct governing legal rule but then unreasonably applies it to the facts of a prisoner's case.[144] In recognizing the difficulty inherent in defining the term "unreasonable," the Court held that an "unreasonable" application of federal law is different from an "incorrect" application of law.[145] It is now insufficient grounds for a federal court to grant a writ of habeas corpus because the court concludes that the state court "incorrectly or erroneously" applied federal precedent. "Rather, that application must also be unreasonable."[146]

---

139. *Id.*

140. *Id.*

141. *Id.* at 404-05.

142. *Id.* at 405-06.

143. *Id.* at 406.

144. *Id.* at 407-08.

145. *Id.* at 410.

146. *Id.* at 411.

In *Williams*, the Court found an unreasonable application of law for two reasons. First, the Virginia Supreme Court had relied on an "inapplicable exception" to the constitutional rule for determining whether a Sixth Amendment claim of ineffective counsel had occurred. *Id.* at 397. The two-prong test for ineffective counsel requires that the defendant show 1) the counsel's performance was deficient and 2) that this deficient performance prejudiced the defendant such that it deprived the defendant of a fair trial. *Id.* at 390 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). The Virginia Supreme Court had misinterpreted two decisions after *Strickland* as requiring a separate inquiry into whether the result of the state-court proceeding was fundamentally unfair, even when the defendant was able to prove deficient performance and prejudice as to the ultimate decision. *Id.* at 393.

Second, the Virginia Supreme Court also unreasonably applied the law because "it failed to evaluate the totality of the available mitigation evidence" in order to determine if prejudice had

III. POLICY CONSIDERATIONS OF STATE AND MILITARY HABEAS

Before proceeding, it is first necessary to identify the policy considerations involved in determining the proper scope and standard of review for habeas petitions. The standard and scope of review for both state and military habeas attempt to strike a balance between individual policy considerations and institutional policy considerations. For the most part, these policy considerations are the same for military and state habeas. Part III.A. will identify the individual policy considerations that are common to both military and state habeas and that justify increased federal review of both state and military convictions. It will then identify the countervailing, institutional policy considerations that are common to both state and military habeas and that support less federal review. Part III.B. will identify and attempt to flesh out the "special needs" policy consideration that is unique to military habeas and that was invoked by the *Burns* court to justify less federal review of military convictions than of state convictions.

A. Policy Considerations Common to both State and Military Habeas

There are two individual policy considerations that support federal review of military and state convictions. First, federal habeas review vindicates constitutional liberties by protecting individuals from government activity that violates their constitutional rights. It is well established that both the States and the military must respect federal constitutional liberties.[147] Having a federal court, which is completely independent of the judicial systems of the States or the military, engage in relatively unconstrained review of state or military judicial determinations arguably ensures that fewer constitutional violations will "slip through the cracks."

Second, habeas review deters state and military courts from ignoring federally created constitutional rights.[148] "[T]he threat of

occurred. *Id.* at 397-98. To determine if the outcome of the sentencing might have changed had Williams' counsel not been so deficient in presenting mitigating factors to the jury, the Virginia Supreme Court was required to balance the aggravating factors to the crime that had been presented at trial against the mitigating factors that had been introduced at trial and that had come to light in post-conviction proceedings. *See id.* at 397-98 ("Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility.") The Virginia Supreme Court had failed to even mention any of the mitigating factors when it performed its prejudice analysis. *Id.* at 398.

147. *See* SCHLUETER, *supra* note 27, § 1-1(B) (citation omitted).

148. *See* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 668 (1982).

habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."[149]

If individual policy considerations were the only relevant policy considerations for determining the standard and scope of review, then there would be no problem with unrestricted federal review of state and military convictions. However, there are countervailing, institutional policy considerations that support restraint on the part of a reviewing federal court. The first institutional policy consideration is the interest of both the state courts and the military courts in finality. The States and the military have an interest in the finality of their judgments for two reasons. First, protracted litigation wastes precious State and military economic resources.[150] Additionally, litigation expends "intellectual, moral, and political resources . . . [of the] legal system."[151] Because no criminal justice system is completely free of the possibility of error, either factual or legal, "[i]f one set of institutions is as capable of performing the task at hand as another, we should not ask both to do it."[152] Second, the effectiveness of substantive criminal law depends on a certainty of judgment.[153] "A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands."[154] To the extent habeas review allows for extended litigation, there is greater potential for the subversion of the deterrent effect of the criminal law.

Another institutional policy consideration that supports less federal review is the fact that federal review undermines the independence of both the state and military courts. Federal habeas review of state convictions is inherently in tension with the notion that the federal judicial system and the state judicial systems are "coequal parts of our national judicial system."[155] Like state law,

149. Desist v. United States, 394 U.S. 244, 262-63 (1968) (Harlan, J., dissenting).

150. Bator, *supra* note 11, at 451.

151. *Id.*

152. *Id.* "[I]f a proceeding is held to determine the facts and law in a case, and the processes used in that proceeding are fitted to the task in a manner not inferior to those which would be used in a second proceeding, so that one cannot demonstrate that relitigation would not merely consist of repetition and second-guessing, why should not the first proceeding 'count'?" *Id.*

153. Bator, supra note 11, at 451-52.

154. *Id.* at 452.

155. Sawyer v. Smith, 497 U.S. 227, 241 (1990).

When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government. But those powers that were not surrendered were retained by the States and unless a State was restrained by "the supreme Law of the Land" as

military law exists "separate and apart from the law which governs in our federal judicial establishment."[156] The Constitution entrusts Congress with the task of balancing the rights of service members, and Congress has done so by creating the UCMJ and a "complete system of review" in the military courts to protect those rights.[157] To the extent federal courts review and allow the relitigation of claims decided by state and military courts, they undermine the independence of those courts.

A final institutional policy consideration that warrants less federal review is the fact that the "second-guessing" of state and military court decisions can undermine the state and military judges' own conception of their roles. It is possible that there is "nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else."[158] Extensive and intrusive federal habeas review may have detrimental, intangible effects on state and military judges' conceptions of, and fulfillment of, their professional and institutional roles.

It should be pointed out that all of the policy considerations that are common to both military and state habeas are implicated regardless of the nature of the determination made by the original state or military judicial system. Regardless of whether a federal court is reviewing a legal determination, a factual determination, or a

---

expressed in the Constitution, laws, or treaties of the United States, it was free to exercise those retained powers as it saw fit. One of the reserved powers was the maintenance of state judicial systems for the decision of legal controversies. Many of the Framers of the Constitution felt that separate federal courts were unnecessary and that the state courts could be entrusted to protect both state and federal rights. Others felt that a complete system of federal courts to take care of federal legal problems should be provided for in the Constitution itself. This dispute resulted in compromise. One "supreme Court" was created by the Constitution, and Congress was given the power to create other federal courts. In the first Congress this power was exercised and a system of federal trial and appellate courts with limited jurisdiction was created by the Judiciary Act of 1789, 1 Stat 73.

> While the lower federal courts were given certain powers in the 1789 Act, they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. . . .Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system.

Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 285-86 (1970).

156. Burns v. Wilson, 346 U.S. 137, 140 (1953); *see also* Calley v. Callaway, 519 F.2d 184, 219 (5th Cir. 1975) ("Congress has a substantial role to play in defining the rights of military personnel . . . and by enactment of the Uniform Code of Military Justice . . . it has assumed that responsibility.").

157. Burns, 346 U.S. at 140.

158. Bator, *supra* note 11, at 451.

determination involving a mixed question of law and fact, federal habeas review implicates the individual and institutional policy considerations mentioned above. As discussed below, the same is not true for the special needs policy consideration of the military, which is not implicated when federal courts review military factual determinations.

B. The Special Needs Policy Consideration of the Military

There are many policy considerations common to both military and state habeas that go into determining the proper standard and scope of review. If these were the only policy considerations, then there would be very little room to argue that state and military habeas review should be different, since the same policy considerations would justify the same treatment.

The *Burns* decision, however, justified less federal habeas review of military convictions than of state convictions because the "rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment."[159] The *Burns* Court recognized that the military justice system, by virtue of its knowledge and expertise, is generally the proper institution for determining the substantive constitutional rights of service members.[160] At the same time, however, by expanding military habeas corpus review beyond its historical boundaries, the Court indicated that it was not willing to give the military near absolute decisional authority over the constitutional claims of service members. In order to justify less federal review of military convictions than of state convictions, the Court in *Burns* relied on the special needs policy consideration.

Simply stated, the special needs policy consideration is the military's need to maintain discipline in order to operate effectively. The military criminal justice system, like all state criminal justice systems, exists to provide justice.[161] Unlike the state criminal justice systems, however, the military criminal justice system also exists to maintain discipline.[162] With large numbers of personnel deployed worldwide, the military judicial system needs to be flexible enough so

159. Burns, 346 U.S. at 140.

160. *See* Developments in the Law—Federal Habeas Corpus, 83 HARV. L. REV. 1038, 1224 (1970).

161. *See* SCHLUETER, *supra* note 27, § 1-1.

162. *See id.*

that it can function in times of peace or conflict.[163] The military requires "certainty of punishment, especially when extreme circumstances necessitate disregard for civilian notions of individual rights, and on the peculiar nature of the military environment."[164]

The best way for the military criminal justice system to effectuate its dual goals of justice and discipline is to allow the military to determine for itself the constitutional rights of service members and only allow federal judicial intervention in extreme circumstances.[165] The military must be able to determine the constitutional rights of its service members in order to avoid overly burdensome constitutional standards that would interfere with the military's operational effectiveness. This fundamental need to maintain discipline "may render permissible within the military that which would be constitutionally impermissible outside it."[166]

Federal review of military convictions is distinct from federal review of state convictions because military judges possess an expertise with regard to the exigencies of military life. In order to qualify as a military judge who may preside over a court-martial, an individual, in addition to being a member of a bar of a federal court or of the highest court of a state, must also be both a commissioned officer and certified as qualified for duty as a military judge by the Judge Advocate General of the branch of the armed forces in which the individual serves.[167] The judges who sit on the Court of Criminal Appeals for each military branch are usually senior judge advocates, although civilians are sometimes appointed.[168] "Unless a federal judge has more than just a passing familiarity with the military, it is difficult to appreciate how he or she can properly apply constitutional standards to unique military circumstances."[169] Even in the heyday of *Brown v. Allen*, there was a general recognition that de novo review of military determinations was impermissible due to the "unfamiliarity of civilian judges with the distinctive purposes and problems of the military law."[170]

Having identified the special needs policy consideration of the military, the question then becomes, under what circumstances is the special needs policy consideration implicated? When does federal

163. *Id.*

164. Developments in the Law, *supra* note 160, at 1224.

165. *Id.*

166. Parker v. Levy, 417 U.S. 733, 758 (1974).

167. SCHLUETER, *supra* note 27, § 4-15(A).

168. *Id.* § 17-15.

169. Rosen, *supra* note 23, at 86.

170. Note, *Servicemen in Civilian Courts*, 76 YALE L.J. 380, 396 (1966).

review of a determination by the military criminal justice system have the potential to interfere with the operations of the military? The answer is that the potential for interference exists when the challenged determination is a product of military expertise not possessed by civilian judges. The determinations that implicate the expertise of the military, this Note submits, involve questions of law but not questions of fact.

When a court-martial sits as a fact-finder, it functions no differently than a civilian court.[171] The purpose of reviewing factual determinations is to determine whether the military reached a reasonable conclusion about what occurred in a given case. It is difficult to conceive of a way in which the unique experience of a military judge or a court-martial panel would somehow make them more adept at assessing factual issues than civilian judges or juries. In addition, while findings of fact have legal significance, the actual overturning of a factual finding does not impose any new constitutional obligations on the military. The potential for significant interference with military operations does not exist when federal courts review factual determinations.

In contrast to determinations of fact, determinations of law do implicate the expertise of the military. Whether crafting a new constitutional standard or applying an existing one, the military courts are institutionally better suited to properly balance the rights of service members against the special needs of the military.[172] For example, one court has recognized that "[t]he great difference of military life makes exceedingly difficult the attempts by federal courts to perceive the proper contours of due process necessary in court-martial proceedings."[173] Military experience also provides a unique perspective in the area of the Fourth Amendment because an active service member's expectation of privacy might be different than that of a civilian.[174]

Some have argued that military expertise is implicated only when a determination deals with military matters and that not all questions of law implicate the expertise of the military.[175] This Note

171. *Id.* at 400 ("The court-martial, for example, functions basically as a jury in deciding questions of fact . . . .").

172. Even the Court of Appeals for the Armed Forces, which is composed of civilian judges, is institutionally in a better position to assess military questions of law, as it is a specialized court that focuses exclusively on military matters.

173. Calley v. Callaway, 519 F.2d 184, 201 n.25 (5th Cir. 1975).

174. Rosen, *supra* note 23, at 86.

175. *See* Note, *Civilian Court Review of Court Martial Adjudications*, 69 COLUM. L. REV. 1259, 1278 (1969) ("The distinction must be made between 'military determinations relating to demands of a tactical situation' and 'problems that lack any distinctive military flavor' . . . .

contends that all questions of law facing military courts implicate the expertise of the military to some degree, because the military way of life so pervades military law. The military criminal justice system is separate and distinct from the federal judicial system, and it has a separate jurisprudence crafted to deal with unique military circumstances.

To sum up, the special needs policy consideration, which is unique to military habeas, justifies less federal review of military convictions than of state convictions. The special needs policy consideration is implicated when federal habeas review has the potential to interfere with the operations of the military. This potential for interference exists when the military determination is a product of military expertise, and the expertise of the military is implicated as to questions of law, but not as to questions of fact. Accordingly, the existence of the special needs policy consideration leads to the conclusion that federal courts should be more deferential when reviewing military legal determinations than they are when reviewing state legal determinations. However, as this Note will discuss in Part IV.C., with the recent enactment of AEDPA's highly deferential standard of review for questions of law, there is no reason for federal courts to be more deferential in reviewing military legal determinations. Because the special needs policy consideration is not implicated when a federal court reviews military factual determinations, federal courts need not be more deferential when reviewing military factual determinations than they are when reviewing state factual determinations. For questions of fact, the policy considerations are the same for state and military habeas.

IV. MILITARY AND STATE HABEAS SHOULD BE THE SAME

The Court did not base its decision in *Burns* on constitutional or statutory requirements.[176] Rather, the Court's decision to limit the scope of review of military convictions was solely a policy decision, since authority to issue the writs of habeas corpus from state and military convictions is derived from the same statute.[177] This Note suggests that the standard and scope of review for state habeas, as

---

While deference ought to be given to military determinations of the former kind, neither legal nor policy considerations should bar civilian court review of determinations of the latter sort." (quoting Joseph W. Bishop, Jr., *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 67 (1961)).

176. Developments in the Law, *supra* note 160, at 1220.

177. *See id.* (citing 28 U.S.C. § 2241 (1964)).

laid out in AEDPA, should be applied to military habeas.[178] For the purposes of this section, it is presumed that the standard and scope of review for military habeas is governed by the four-factor *Calley* test adopted in the Tenth Circuit because it is this Circuit that hears the most military habeas cases.

Applying AEDPA to military habeas would change military habeas in two ways. First, application of AEDPA would expand the scope of military habeas to include review of factual determinations, though this review would be subject to the deferential standard of review for factual questions contained in AEDPA. Second, application of AEDPA would subject federal review of military legal determinations to AEDPA's deferential standard of review.[179] Both of these changes would improve the current state of military habeas.

A. Prior to Burns, the Scope of Review of Military Habeas Was Approximately the Same as that of State Habeas.

Before proceeding to argue that military and state habeas should be the same, it should be noted that there is nothing inherently illegitimate in having the same standard of review and scope of review

178. Some commentators have even gone as far as arguing that there are compelling reasons for why military decisions should be accorded less deference than state decisions. See *id.* at 1218-20. "First, since the military is a federal creation, the federal courts when reviewing a court-martial conviction need not feel restrained by notions of comity based on federalism." *Id.* at 1218. Second, Military courts are statutorily created entities which, though authorized by the Constitution, are not listed as part of the constitutional scheme. *Id.* at 1218-19. States, in contrast, are part of the constitutional scheme and are supposed to aid in the in the interpretation of constitutional standards. *Id.* at 1218-19. Therefore, their decisions should be accorded more deference. *See id.* Finally, there is an argument that state courts require less supervision in interpreting and applying constitutional standards because, in general, state trials are "held in an atmosphere conducive to the protection of individual rights, while the military trial is marked by the age-old manifest destiny of retributive justice." *Id.* at 1220 (quoting O'Callahan v. Parker, 395 U.S. 258, 266 (1969) (footnote omitted)).

179. This Note does not argue that the application of AEDPA should broaden the types of legal issues that a federal court may review under military habeas. Currently, under the *Calley* standard, federal courts may review only claims that allege a violation of the federal Constitution. Calley v. Callaway, 519 F.2d 184, 199 (5th Cir. 1995). In contrast, under state habeas, federal courts may review some important federal statutory claims as challenges to convictions insofar as the conviction violates "federal treaties." HERTZ & LIEBMAN, *supra* note 129, at 439 ("[T]he Supreme Court has interpreted 28 U.S.C. §§ 2241(c)(3) and 2254(a) to mean that important, but not other, federal statutory claims also are cognizable in federal habeas corpus proceedings.") These very "limited" set of federal statutes and treaties "bear on the propriety and condition of criminal confinement by the States and . . . implicate important principles of national law or important individual liberty interests." *Id.* at 450. Whether the scope of review for military habeas should be broadened beyond only claims alleging constitutional error is beyond the scope of this Note. Rather, this Note argues that AEDPA's standard of review for legal determinations should be applied to military legal determinations that are already reviewable.

for both military and state habeas. The Supreme Court's express comparison of state and military habeas in *Burns* has led the lower courts to view military habeas as requiring less federal review than would be required for state habeas.[180] The problem is that the comparison established a baseline relationship between military habeas and state habeas that is not even historically accurate. The Court in *Burns* was incorrect when it stated that the scope of review has always been narrower for military convictions than for state convictions.[181]

First, the authority that the *Burns* Court cited, *Hiatt v. Brown*,[182] does not support the proposition that the scope of review for military convictions has always been narrower. *Hiatt* merely held that the proper test was the jurisdictional inquiry.[183] Until three months prior to *Burns*, before the Court's decision in *Brown*, the state test, too, was merely to inquire into whether jurisdiction was proper.[184] As one commentator pointed out, "it was only in 1950—the year in which [Justice] Vinson's historical survey began and ended—that the range of issues cognizable on civilian habeas corpus became significantly broader than the range on military habeas."[185]

Second, in the pre-*Burns* era, the jurisdictional test for military habeas was functionally the same as the jurisdictional test for state habeas. On the state side, prior to *Brown*, federal courts were permitted to go beyond the jurisdictional inquiry and inquire into whether the sentence imposed was illegal.[186] With military habeas, this same exception to the jurisdictional inquiry was also recognized.[187] Furthermore, as it had done in cases involving state habeas cases, the Court assessed the merits of constitutional claims in military habeas cases by stretching the definition of "jurisdiction."[188]

Finally, prior to 1867, the scope of review for military habeas was actually broader than the scope of review for state habeas because

---

180. *See supra* Part II.B.2.

181. Burns v. Wilson, 346 U.S. 137, 139 (1953).

182. 339 U.S. 103 (1950).

183. *Id.* at 111.

184. *See supra* notes 103-107 and accompanying text.

185. Developments in the Law, *supra* note 160, at 1221.

186. *See supra* notes 66-67, 103 and accompanying text.

187. *See, e.g.*, Powers v. Hunter, 178 F.2d 141 (10th Cir. 1949). In *Powers*, the court identified jurisdictional issues as 1) whether the court martial was properly constituted 2) whether it had jurisdiction over person and subject matter, and 3) whether sentence was one authorized by law. *Id.* at 145. The court also found that it had jurisdiction to examine the sentence of the petitioner to see if it was so severe as to violate the due process clause. *Id.*

188. *See, e.g.*, Wade v. Hunter, 336 U.S. 684, 688 (1949) (entertaining a claim of double jeopardy as a ground for voiding jurisdiction and actually ruling on the merits of the federal question raised in the military habeas claim)

no issues were cognizable on review for state convictions. While federal habeas corpus has been available to service members convicted by a court-martial since 1789, it has been a viable remedy for state prisoners only since 1867.[189]

B. The Benefits of Broadening the Scope of Review for Military Habeas to Include Review of Factual Determinations

Military habeas would benefit from AEDPA's standard and scope of review because AEDPA would broaden the scope of review to include review of factual determinations. This broadened scope of review, however, would be tempered by a deferential standard of review, the "clear and convincing evidence" standard.[190] As mentioned in Part II.B.2., the Tenth Circuit, which hears more habeas petitions than any other Circuit, and the Fifth Circuit preclude any type of review of factual determinations made by the military because of the Supreme Court's decision in *Burns*.[191] These interpretations of *Burns* have relied on the notion that the scope of review must be narrower for military habeas than for state habeas.[192] Lower courts have felt compelled to keep the scope narrower for military habeas because of the single phrase from *Burns*, "[I]n military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases."[193]

Extending the scope of review to include review of military factual determinations would not undermine the special needs of the military and would provide more meaningful protection of the constitutional liberties of service members. The narrow scope of review for military habeas resulted from the *Burns* argument that the military has special needs (i.e., the special needs policy consideration).[194] However, as discussed in Part III.B., the special

189. *See supra* notes 61-64 and accompanying text; *see also* Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 932 (1998) ("The First Congress had no problem deciding what to do about federal habeas for state prisoners. They simply, flatly prohibited it." (citation omitted)).

190. 28 U.S.C. § 2254(d)(2).

191. The Tenth Circuit is particularly sensitive to the law/fact distinction and will manifestly refuse to consider constitutional claims that contain questions of fact. *See, e.g.*, Monk v. Zelez, 901 F.2d 885, 888 (10th Cir. 1990); *see also* Calley v. Callaway, 519 F.2d 184, 200 (5th Cir. 1975) ("Thus, a conclusion that a military prisoner's claim is one of law and not intertwined with disputed facts previously determined by the military is one important factor which favors broader review.").

192. *See supra* Part II.B.2.

193. Burns v. Wilson, 346 U.S. 137, 139 (1953) (citing Hiatt v. Brown, 339 U.S. 103 (1950)).

194. As mentioned in Part III.B., *supra*, the special needs policy consideration, which is unique to the military, is basically the need of the military to maintain discipline and effective

needs policy consideration is not even implicated when a federal court reviews a military factual determination because factual determinations are not products of military expertise. Because the special needs policy consideration is the only policy consideration that is unique to military habeas, the policy considerations are the same for state and military habeas when a federal court reviews a factual determination. As a result, there is very little room to argue that federal review of military factual determinations should be different from federal review of state factual determinations.

In addition to the fact that the special needs of the military are not implicated when a federal court reviews factual determinations, there are a number of independent reasons why federal courts should be permitted to review military factual determinations. By broadening the scope of military habeas review to include review of military factual determinations, the federal courts would be able to provide more meaningful protection to service members. A scope of review that precludes review of factual determinations also precludes review of many constitutional claims that are mixed questions of law and fact. It undermines meaningful review of constitutional claims because constitutional claims are affected by determinations of fact, just as they are by determinations of law. As commentators and the Supreme Court have pointed out, the unconstitutionality of a petitioner's detention often turns on questions of fact.[195] The potential exists for military courts to tailor their factual findings so that existing constitutional standards do not apply, thus leaving the petitioner with no remedy on collateral review. Even Congress and the Supreme Court have never absolutely precluded review of state factual determinations. If AEDPA applied to a federal court's review of a military factual determination, the decision would be presumed to be correct, but that presumption could be rebutted by a showing of clear and convincing evidence that the decision was incorrect.[196]

Expanding the scope of review for military habeas also finds support from state habeas. For example, on the state side, evidentiary hearings by federal courts occur in only a small percentage of habeas

operations. Increased federal review through habeas petitions has the potential to interfere with the operations of the military.

195. HERTZ & LIEBMAN, *supra* note129, at 799. Professors Hertz and Liebman cite to numerous Supreme Court cases supporting this proposition. *Id.* at 800. "More often than not, claims of unconstitutional detention turn upon the resolution of contested issues of fact." Wingo v. Wedding, 418 U.S. 461, 468 (1974). "It is the typical, not the rare, [habeas corpus] case in which constitutional claims turn upon the resolution of contested factual issues." Townsend v. Sain, 372 U.S. 293, 312 (1963).

196. § 2254(e)(1).

cases.[197] However, in a large percentage of cases in which there is more than a summary dismissal, an evidentiary hearing takes place.[198] Federal courts have the power to grant habeas corpus relief without holding a hearing, but they are disinclined to do so.[199] "Taken together, the paucity of grants of the writ absent a hearing and the statutory requirement that federal courts defer to fairly derived state court factfindings suggest that in most cases in which the state courts fail to vindicate the rights of the accused, they do so because of faulty fact-development procedures."[200] The indication is that factual mistakes due to procedural defects, rather than pure legal mistakes, are the most likely basis for granting habeas relief from a state conviction.[201]

Further, within the military criminal justice system, judicial review of court-martial factual determinations is insufficient to justify precluding federal habeas review of military factual determinations. First, at the trial level, there are general fairness concerns with the impartiality of the court-martial and the major recurring problem in the military criminal justice system of unlawful command influence.[202] Though Article 37(a) of the UCMJ prohibits coercion or improper influence of the participants in a court martial, the problem still exists.[203] Command influence is at least arguably a problem with respect to military judges since they lack guarantees of life tenure and salary protection.[204] Members of the court-martial panel are susceptible to command influence due to the varied forms of contact that they often have with the convening authority outside of the proceeding.[205]

---

197. HERTZ & LIEBMAN, *supra* note 129, at 799 (citing REPORT ON THE SUBCOMMITTEE ON THE ROLE OF THE FEDERAL COURTS (Richard A. Posner, Chair), *in* FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 468-515 (July 1, 1990) (finding that district courts hold hearings in only 1.17% of all habeas corpus cases)).

198. *Id.* at 799 (citations omitted).

199. *Id.*

200. *Id.* at 800.

201. *Id.*

202. Because of the role that the commander plays in the military criminal justice system, there exists the potential for the commander or his or her representatives to improperly influence the court-martial proceedings. SCHLUETER, *supra* note 27, § 6-3(A). "In essence, unlawful command influence results from impermissible command control where a superior substitutes (or attempts to substitute) his or her judgment for that of a subordinate who should be allowed to exercise independent judgment." *Id.* § 6-3(B).

203. *See id.* § 6-5(A) (discussing numerous cases where command influence was found to be unlawful); *see also* Schiesser & Benson, *supra* note 47 (proposing the removal of the convening authority to eliminate unlawful command influence).

204. Developments in the Law, *supra* note 160, at 1224.

205. *See* SCHLUETER, *supra* note 27, § 6-5(A).

After conviction by a court-martial, a service member's first avenue of appeal is to the convening authority, the person who decided to initiate the court-martial and who selected all of the participants in the court-martial.[206] Unfortunately, this is the service member's best opportunity for relief because of the broad powers conferred on the convening authority to act on a case.[207] In fact, the only civilian appellate review of a court-martial conviction,[208] within the military criminal justice system, is by the United States Court of Appeals for the Armed Forces (the CAAF), and this review is not even guaranteed.[209] Further, the CAAF is expressly authorized to review only questions of law.[210] The result is that there is no civilian review of court-martial fact finding incorporated into the military appellate process. Civilian review is important because, at the very least, it allows for review of court-martial findings by individuals who are not ultimately accountable to the military.

C. The Benefits AEDPA Would Bring to Federal Review of Military Legal Determinations.

1. The Tension with State Habeas.

For most of the last five decades, federal review of military legal determinations has mirrored federal review of state legal determinations. For military habeas, under most Circuits' interpretations of *Burns*, if the constitutional claim of the petitioner is largely free of factual issues, there is little constraint on a federal

206. *See id.* § 17-7.

207. *Id.* § 17-9(A). The convening authority has almost sole discretion to overturn a court-martial's findings. *Id.* The convening authority is permitted to disregard both the findings and the sentence and may suspend, mitigate, or commute a sentence. *Id.*

208. The next level of appellate review, after the convening authority, usually occurs in the Court of Criminal Appeals within the branch in which the service member is a member. *Id.* § 17-15. The Court of Criminal Appeals is typically composed of senior judge advocates, although the judgeships can be filled by civilians.

209. The CAAF will accept review of a case only if two judges vote to do so, but certain cases, such as death penalty cases must be accepted for review. DAVIDSON, *supra* note 22, at 62-63. The CAAF provides more assurances of neutrality because the five civilian judges who compose the bench are appointed by the president for fifteen-year terms. SCHLUETER, *supra* note 27, § 17-16(A).

210. Admittedly, the line between law and fact becomes blurry and the CAAF has in the past reviewed questions of fact by classifying them as questions of law. *See id.* § 17-16(C) (citations omitted). Also, though the CAAF's authority is limited to questions of law, it does engage in one form of factual review in that it looks at the trial record to determine if the evidence is sufficient to support the conviction. *Id.*

court in reviewing the claim.[211] The same was true for state habeas up until the mid-1990s. In the last few years, however, federal review of state legal determinations has changed dramatically while federal review of military legal determinations has remained the same. With the recent enactment of AEDPA and the Court's decision in *Williams*, federal courts must now accord significant deference to the legal determinations of the States.[212] The result is that now federal review of state legal determinations is more deferential than federal review of military legal determinations. This has created an anomaly of sorts because federal courts have always tried to be less intrusive with military habeas.

An excellent example of the tension that has arisen with federal habeas review of military legal determinations can be seen in the Third Circuit case, *Brosius v. Warden,*[213] in which the court examined a petition for habeas corpus from a court-martial conviction as though it were a petition for habeas corpus from a state conviction.[214] The court in *Brosius* first noted that *Burns*, at the very least, held that federal courts may not exercise de novo review over questions of law or mixed questions of law and fact, and "may not go beyond considering whether the military courts 'dealt fully and fairly' with the claim."[215] The court then noted that this baseline provides very little guidance, but that *Burns* also established that "our inquiry in a military habeas case may not go further than our inquiry in a state habeas case."[216] The court then assumed, "solely for the sake of argument," that it could review the determinations of the military as though they were determinations of a state. Because the court was reviewing only military legal determinations, the court applied AEDPA's standard of review for legal determinations to the petitioner's claims and ended up rejecting the petitioner's claims.[217]

Most likely, the Third Circuit's interpretation of *Burns* was influenced by recent developments in the standard of review applied to state legal determinations. With the passage of AEDPA and the Supreme Court's interpretation of it in *William v. Taylor*, the method of restricting federal courts acting through petitions for habeas has been to require a more deferential standard of review as to both

211. *See* supra Part II.B.2.
212. *See supra* Part II.C.2.
213. 278 F.3d, 239 (3d Cir. 2002).
214. *Id.* at 245.
215. *Id.* at 243.
216. *Id.* at 245.
217. *Id.* at 245-46.

factual and legal determinations by a state.[218] While the focus of most Circuits that have attempted to articulate a rule of law from *Burns* has been to interpret *Burns* as limiting the scope of review of military habeas,[219] little has been said as to the standard of review to be applied to those constitutional claims that are subject to review. In most cases, the courts are unconstrained in their review if the issue is one of pure federal law.[220] It seems odd now for a federal court to engage in essentially de novo review of a military legal determination when a federal court reviewing a state-court determination on the same claim would be bound by the AEDPA's deferential standard of review.

2. Problems with the *Calley* Standard.

As mentioned above, the *Calley* test is used by the Tenth Circuit, which hears the most military habeas petitions, and the Fifth Circuit. The *Calley* test attempts to effectuate deference to military determinations of law by constricting the scope of legal issues cognizable on review. Under *Calley*, in order for a federal court to review allegations of constitutional error, the reviewing court must consider four factors: 1) whether the asserted error is of substantial constitutional dimension, 2) whether the issue is one of law rather than of disputed fact already determined by the military tribunals, 3) whether factors peculiar to the military or important military considerations require a different standard, and 4) whether the military courts have given adequate consideration to the issues raised in the habeas proceeding.[221]

The first problem with this test for determining the scope of review is that it provides little, if any, guidance to a reviewing federal court as to which legal issues it should review. The first two factors—whether the error is of substantial constitutional dimension and whether the issue is one of law—simply tell a federal court that it may review only legal issues that allege a violation of the federal Constitution and that it may not review mere errors of law (e.g. a violation of a statute).[222] These two factors are all the guidance that *Calley* provides, since the last two factors go to the actual merits of the claim.

218. *See supra* Part II.C.

219. *See supra* Part II.B.2.

220. *See* Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975).

221. *Id.* at 199-203.

222. *Id.* at 199-200.

The last two factors provide a federal court with some guidance on how to go about reviewing a military legal determination, but they do not aid in the determination of what military legal determinations should be reviewed. The third factor—whether factors peculiar to the military or important military considerations require a different standard—requires that a reviewing federal court review a military court's determinations to make sure the "military courts appl[ied] a proper legal standard to disputed factual claims."[223] The fourth factor—whether the military courts have given adequate consideration to the issues raised in the habeas proceeding-- also is not merely limited to determining whether the military actually reviewed the petitioner's claim. The court was quite clear that "consideration of such issues will not preclude judicial review."[224] These last two factors require a reviewing federal court to evaluate the merits of a petitioner's claim in order to determine whether it is even permissible for the court to review the claim. These two factors, quite simply, put the cart before the horse. If the purpose of the *Calley* standard is to effectuate deference to the military by restricting the types of claims subject to review, reviewing a claim to determine if it is reviewable would completely undermine the effectiveness of the standard.

The second problem with the *Calley* standard is that a federal court, in reviewing legal determinations of the military (in order to determine whether the issue is even reviewable), will have difficulty ascertaining how much deference should be accorded to the military's legal determinations. As mentioned in the previous paragraph, a federal court, under the last two factors of the *Calley* test, assesses the claims of the petitioner. In making this assessment the only guidance that the court has is that military legal determinations should be given a "healthy respect, particularly where the issue involves a determination of disputed issues of fact."[225] However, in order to get this healthy respect, the federal court needs to make sure that the military court applied the "proper" legal standard.[226] In addition, a federal court should be "reluctant" to set aside a decision when the military courts have "determined that factors peculiar to the military require a different application of constitutional standards."[227] Because there is no articulated standard of review under *Calley*, but rather some vague lip service about giving deference to the military's legal determinations, there is the potential for a federal court to overcome

223. *Id.* at 203.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*

its "reluctance" to intervene and become unconstrained in its review of pure legal determinations of the military. Unconstrained federal review of military legal determinations is problematic because, as mentioned in Part III.B., military judges have expertise in crafting and applying constitutional standards due to their experience and familiarity with the military. As military courts are institutionally better suited to evaluate the impact of their legal determinations than are the federal courts, their legal determinations should be accorded deference.

3. Improvements that AEDPA Would Bring

Under AEDPA, a federal court cannot grant habeas relief unless a state court's decision is "contrary to" Supreme Court precedent or involves an "unreasonable application" of Supreme Court precedent.[228] The most important improvement to military habeas that the standard of review of AEDPA would provide is that it would protect the special needs of the military, and by extension, the effective operations of the military. By applying this highly deferential standard of review to military legal determinations, a reviewing federal court would have to defer to the legal determinations of the military courts in all but the most egregious circumstances. Unlike the *Calley* standard, AEDPA is not vague. It clearly identifies which legal and factual issues are cognizable on review: all of them. AEDPA furthers deference through its standards of review, rather than through a constricted scope of review. As the *Calley* standard illustrates, it is difficult, and perhaps even impossible, to effectuate deference through a restricted scope of review. Inevitably a federal court ends up reviewing the merits of the claim to determine if it is reviewable. If a federal court is going to review the claims anyway, there should be an articulated standard of review that provides guidance to a federal court. Rather than overcoming "reluctance" in order to overrule a military court's legal determination, a federal court must characterize the military court's decision as either an "unreasonable application of" or "contrary to" Supreme Court precedent. This deferential standard of review insulates the military's legal determinations from overreaching by the federal courts.

AEPDA would also be appropriate for military habeas cases because Congress has already determined that for state habeas cases this deferential standard of review strikes an appropriate balance between individual policy considerations and institutional policy

228. 28 U.S.C. § 2254(d)(1)-(2) (2000).

considerations. As discussed in Part III.A., there are numerous policy considerations, common to both military and state habeas, that must be considered in assessing the proper level of federal review. All of these policy considerations are incorporated into AEDPA's standard of review and scope of review, and there is thus very little room to argue that military habeas should be different from state habeas, given all of their common considerations. The only policy consideration unique to the military that would justify a different standard and/or scope of review is the special needs policy consideration. However, given the extreme deference that would be accorded to the legal determinations of the military, this Note submits that the special needs of the military would not be undermined by applying AEDPA because in most cases the military's legal determinations, which are products of its expertise, would withstand scrutiny.

A final benefit that AEDPA would provide is that it would narrow the universe of precedent that a federal court could consider when reviewing a military legal determination. Under AEDPA, a federal court, in assessing whether a military legal determination is "contrary to" or involves an "unreasonable application of" federal law, is limited to considering only Supreme Court precedent that is "clearly established."[229]

> The military courts, both trial and appellate, provide an important function not fully realized under prior codes [of military justice]. The current courts generally view themselves as having an important responsibility for filling gaps otherwise not addressed by the Code, the Manual, or regulations. Thus, they do more than simply interpret the meaning of the applicable rules. In many instances, they are called upon to address, in some cases in the first instance, the constitutionality of a procedure or rule not found in any of those main sources.[230]

AEDPA's limit of only clearly established Supreme Court precedent means that the military's resolution of these gray areas of the law, which is a product of expertise, would withstand scrutiny when reviewed by a federal court.

V. CONCLUSION

There can be no doubt that military habeas is in need of reform. Circuits are split on what issues they can review and the level of deference to apply to military determinations. To improve the current state of military habeas, this Note suggests that AEDPA's scope of review and standard of review should be applied to

229. § 2254(d)(1).

230. SCHLUETER, *supra* note 27, §1-1(B).

determinations made by the military. This would make federal habeas review of military convictions the same as federal habeas review of state convictions.

Applying AEDPA to military habeas would cause two changes to military habeas: 1) the scope of issues cognizable on review would expand to include review of factual determinations, though this review would be subject to a deferential standard of review, and 2) federal review of military legal determinations would be subject to AEDPA's deferential standard of review. By broadening the scope of military review to include review of military factual determinations, protection of the individual liberties of service members would be bolstered, while at the same time, the special needs of the military would not be undermined. AEDPA's standard of review for legal determinations would also benefit military habeas by providing guidance to federal courts and by requiring more deference to military legal determinations, which are products of military expertise.

John K. Chapman*

* I wish to dedicate this Note to my extremely supportive wife, Brenda, and to our son, Kenneth.