Habeas Review of Courts-Martial: Revisiting the *Burns* Standard

Clara D. Crenshaw[*]

The 1953 Supreme Court decision Burns v. Wilson*, which articulated the standard of review for military habeas corpus petitions, has left the legal community unashamedly confused. While there was no majority opinion, the standard of review advanced by the plurality has largely been taken as the rule emanating from the Court. Accordingly, the test for determining if habeas review is appropriate is whether the military court has given "full and fair consideration" to the claims. Circuit courts of appeal have struggled ever since this decision to configure exactly what "full and fair consideration" means, resulting in many different approaches.*

This Note argues that, based on historical analyses and legal developments, a modified version of the Fifth Circuit's four-prong inquiry in Calley v. Callaway *would be a satisfactory solution to the current confusion. This new standard would open the door to many more successful military habeas petitions, while at the same time protecting the distinctive nature of military law. It would do this by properly differentiating between military factual and legal determinations. Factual determinations would be brought in line with civilian habeas, while the military's special policy needs would be considered in legal determinations. More importantly, however, it would provide a cohesive standard across jurisdictions. The strength of a military prisoner's habeas petition should not be based upon where he or she is incarcerated.*

---

* Associate Editor, Volume 99, *Texas Law Review*; J.D. Candidate, Class of 2021, The University of Texas School of Law. Special thanks to Professor Stephen I. Vladeck for sparking my interest in the subject matter and for providing invaluable guidance during the writing process. Further thanks to my family for continuously supporting me throughout my law school experience. Lastly, I would like to dedicate this Note to my grandfather who served twenty years in the Air Force.

Introduction

Habeas corpus is a fundamental mechanism used to protect the constitutional rights of accused persons. The Founders considered habeas corpus essential to guaranteeing our most basic rights and enshrined it in the U.S. Constitution.[1] Accordingly, Article I, Section Nine states, "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."[2] While the scope of review for state habeas corpus has continued to evolve over time, the scope of review for military habeas corpus has remained largely static and fractured since the Supreme Court decided *Burns v. Wilson*.[3] Ever since this decision, circuit courts of appeal have struggled to determine exactly what the plurality's "full and fair consideration" standard means, resulting in many different approaches.[4] This ultimately means that the likelihood of success of a military prisoner's habeas petition largely depends on where the prisoner is incarcerated.[5]

---

1. *See* THE FEDERALIST NO. 84 (Alexander Hamilton) ("The establishment of the writ of *habeas corpus* . . . [is] perhaps [a] greater securit[y] to liberty and republicanism than any [provision the Constitution] contains.").

2. U.S. CONST. art. I, § 9, cl. 2.

3. 346 U.S. 137 (1953); *see* John K. Chapman, Note, *Reforming Federal Habeas Review of Military Convictions: Why AEDPA Would Improve the Scope and Standard of Review*, 57 VAND. L. REV. 1387, 1396–1409 (2004) (discussing the historical development of military and state habeas).

4. *See, e.g.*, Thomas v. U.S. Disciplinary Barracks, 625 F.3d 667, 670 (10th Cir. 2010) (noting that "[t]he limited function of the civil court is to determine whether the military have given fair consideration to each of petitioner's claims"); Khan v. Hart, 943 F.2d 1261, 1262 (10th Cir. 1991) (stating that "habeas jurisdiction of a federal civil court does not extend to a reassessment of the facts and issues fully and fairly considered by a military court"); Calley v. Callaway, 519 F.2d 184, 199 (5th Cir. 1975) (adopting "four principal inquiries" to address "the nature of the issues raised" that "the power of federal courts to review military convictions of a habeas petition depends on"); Kauffman v. Sec'y of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1969) (expressing the opinion that the standard of review applied in *Burns* is not different from that of habeas corpus review of state convictions).

5. Chapman, *supra* note 3, at 1390; *see also* Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, MIL. L. REV., Spring 1994, at 1, 16 (noting that because of the diverse approaches, it can be difficult to predict the scope of review that a federal court will apply in habeas review of a court-martial).

Regardless of what scope of review one thinks is best, all can agree that the Supreme Court, having not clarified the standard in sixty-eight years, needs to address the issue. Accordingly, this Note will touch on the historical background and *Burns* decision, look at some of the current approaches that the circuit courts have utilized, reflect on legal developments since *Burns*, and end with the suggestion that the scope of review should be a refined, modified version of the Fifth Circuit's standard in *Calley v. Callaway*.[6]

I. *Burns v. Wilson*: Background, Decision, Aftermath, and Developments Since

A. Historical Background

Habeas corpus—the "Great Writ"—is the "most common form of collateral attack on a court-martial judgment."[7] It is largely regarded as one of the "primary safeguards against an arbitrary and overreaching government."[8] The historical backdrop of habeas review of courts-martial is important to analyze because courts and scholars commonly employ historical justifications to argue for what the standard should be.[9]

In *Ex parte Reed*,[10] the Supreme Court heard its first case involving a habeas petition from a military court-martial.[11] Although the Court noted that "[e]very act of a court beyond its jurisdiction is void," the Court found that the Navy court-martial in the case had jurisdiction over the defendant and the offense, and therefore, habeas review was improper.[12] Thus, the Supreme Court limited the scope of habeas relief to where the military lacked jurisdiction over the person or the offense.[13] Subsequent Supreme Court decisions "emphasized that the scope of inquiry for federal courts was limited to whether the court-martial was properly constituted, whether it had

6. 519 F.2d 184, 199–203 (5th Cir. 1975) (articulating "four principal inquiries" that are necessary for determining whether federal courts have the power to review military habeas petitions).

7. Donald T. Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, MIL. L. REV., Fall 1971, at 1, 15.

8. *Id.*

9. *See, e.g.*, Burns v. Wilson, 346 U.S. 137, 139 (1953) ("[I]n military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases."); Chapman, *supra* note 3, at 1398 (noting that the Court in *Burns* emphasized the separate evolution of military law that has taken place independent of the federal judiciary).

10. 100 U.S. 13 (1879).

11. *Calley*, 519 F.2d at 194; Weckstein, *supra* note 7, at 16.

12. *Ex parte Reed*, 100 U.S. at 23.

13. *See id.* (holding that "[i]f error was committed in the rightful exercise of [the court-martial's] authority, [the Court] cannot correct it").

jurisdiction over the person and the offense charged, and whether the sentence was authorized by law."[14]

When Congress passed the Habeas Corpus Act of 1867 and extended habeas to state prisoners after the Civil War, the federal courts limited their inquiry, in line with federal civil and military standards of review, to jurisdictional issues.[15] Thus, prior to World War II, habeas corpus was largely "a limited form of relief in both the civilian and the military areas, with the scope of inquiry limited to jurisdiction of the tribunal to hear a given case and render judgment."[16] Accordingly, "[p]rocedural considerations—rulings on challenges, pleas, admissibility of evidence—as well as more substantial due process questions were not reviewable on collateral attack."[17] However, in *Frank v. Mangum*,[18] a state petitioner argued that he was entitled to habeas relief because his state court proceedings became tainted by mob domination.[19] The Supreme Court recognized that he was in fact entitled to a hearing on his claim of denial of due process, but held that the state supreme court afforded him a fair hearing, and therefore, habeas review was improper.[20] A few years later, in *Moore v. Dempsey*,[21] the Court held it was "unavoidable that the District Judge should find whether the facts" alleging mob domination were true and whether they could "be explained so far as to leave the state proceeding undisturbed."[22] While the Court did not dispense with its jurisdictional inquiry for state habeas, it slowly began recognizing claims based on due process; however, despite being grounded in the Due Process Clause, these claims were framed as jurisdictional issues.[23] At the same time, the scope of review for habeas petitions of federal prisoners was also expanding.[24]

---

14. *Calley*, 519 F.2d at 194.

15. Chapman, *supra* note 3, at 1396; Weckstein, *supra* note 7, at 34.

16. *Calley*, 519 F.2d at 195 (quoting *Civilian Court Review of Court Martial Adjudications*, 69 COLUM. L. REV. 1259, 1259 (1969)).

17. *Id.* (quoting Note, *Civilian Court Review of Court Martial Adjudications*, 69 COLUM. L. REV. 1259, 1259 (1969)).

18. 237 U.S. 309 (1915).

19. *Id.* at 311–13; Weckstein, *supra* note 7, at 34–35.

20. *Frank*, 237 U.S. at 345.

21. 261 U.S. 86 (1923).

22. *Id.* at 92; *see also id.* at 91 (declaring that neither an "irresistible wave of public passion," "nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob" could bar the "Court from securing to the petitioners their constitutional rights").

23. Calley v. Callaway, 519 F.2d 184, 195 (5th Cir. 1975); *see also Civilian Court Review of Court Martial Adjudications*, *supra* note 17, at 1261 ("[T]he Court foreshadowed its ultimate formulation of the test to be employed in defining jurisdiction where an alleged denial of due process served as the basis for collateral attack.").

24. Weckstein, *supra* note 7, at 35.

In 1938, a landmark case for federal petitioners arose in *Johnson v. Zerbst*.[25] There, a serviceman convicted by a federal district court petitioned for a writ of habeas corpus alleging violation of his Sixth Amendment right to counsel.[26] The Supreme Court, in an opinion by Justice Black, stated that, "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty."[27] Accordingly, "[a] court's jurisdiction at the beginning of a trial may be lost 'in the course of the proceedings' due to failure to complete the court . . . by providing counsel."[28] The meaning of "jurisdiction" was thus explicitly expanded to include due process and other constitutional defects.[29]

Four years later, in *Waley v. Johnston*,[30] the Supreme Court finally dispensed with the strictly jurisdictional inquiry in federal habeas corpus cases.[31] The Court held that the writ of habeas corpus "extends . . . to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights."[32] In the 1945 case, *House v. Mayo*,[33] the Supreme Court applied the holding in *Waley*—that the writ shall extend to cases in which an accused's constitutional rights have been violated—to habeas review of state court convictions.[34] It follows then that with regard to state and federal habeas, the permissible inquiry was extended to not only include the question of jurisdiction, but also the question as to whether the conviction violated the constitutional rights of the accused.[35]

With regard to the military sphere, World War II—which saw harsh treatment of citizen soldiers in courts-martial—provided an important catalyst for federal courts to expand habeas corpus review in this domain.[36] As a result, "several circuit and district courts, as well as the Court of Claims,

25. 304 U.S. 458 (1938).

26. *Id.* at 459.

27. *Id.* at 467.

28. *Id.* at 468.

29. Calley v. Callaway, 519 F.2d 184, 195 (5th Cir. 1975).

30. 316 U.S. 101 (1942).

31. *See id.* at 104–05 ("[T]he use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it."); *see also Calley*, 519 F.2d at 195 (noting that in *Waley*, the Supreme Court "finally discarded the jurisdiction test").

32. *Waley*, 316 U.S. at 105; *see Calley*, 519 F.2d at 195 (noting that the *Waley* Court "explicitly stated that jurisdiction alone was no longer the sole consideration").

33. 324 U.S. 42 (1945).

34. *Id.* at 46.

35. *Calley*, 519 F.2d at 196.

36. Weckstein, *supra* note 7, at 36.

began collaterally reviewing alleged denials of constitutional rights in military courts-martial."[37] However, "any prospect of wholesale invalidation of military convictions was scotched in 1950 when the Supreme Court firmly foreclosed examination of military rights in *Hiatt*."[38]

In *Hiatt v. Brown*,[39] the Fifth Circuit affirmed the granting of a writ of habeas corpus to a soldier where the record evidenced that the petitioner was deprived of due process of law.[40] These serious errors included "erroneous interpretations and applications of military law, a grossly incompetent law member, an incompetent defense counsel who made only a token defense, and a total lack of a pre-trial investigation."[41] The Supreme Court reversed, reaffirming its view that the sole inquiry is jurisdiction.[42] The Court did not even touch on the civilian decisions that had transformed the habeas sphere but rather "reached all the way back to 1890 for military precedent, *In re Grimley*."[43]

Later in the term, in *Whelchel v. McDonald*,[44] the Court seemed to slightly transgress from its strict view in *Hiatt*.[45] Petitioner applied to the federal district court for a writ of habeas corpus alleging a denial of due process by a general court-martial.[46] He challenged the legality of the sentence imposed on the grounds that he was insane at the time of the offense.[47] After the district court denied the petition and the court of appeals affirmed, "[t]he Supreme Court, announcing a position midway between the traditional and expansive jurisdictional tests, held that there must be an opportunity to present the question of insanity,"[48] and that "[i]t is only a denial of that opportunity which goes to the question of jurisdiction."[49] And

37. *Id.*

38. Comment, *Servicemen in Civilian Courts*, 76 YALE L.J. 380, 384 (1966).

39. 339 U.S. 103 (1950).

40. *Id.* at 105; *see also Servicemen in Civilian Courts*, *supra* note 38, at 384–85 (noting that the court of appeals had found the record full of prejudicial errors which invalidated the conviction).

41. Weckstein, *supra* note 7, at 36.

42. *See Hiatt*, 339 U.S. at 111 ("In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision.").

43. *Servicemen in Civilian Courts*, *supra* note 38, at 385 (citing *In re Grimley*, 137 U.S. 147 (1890)).

44. 340 U.S. 122 (1950).

45. *See id.* at 124 (expanding the jurisdictional inquiry by arguing that the denial of an opportunity to tender the issue of insanity goes to the issue of jurisdiction); *Civilian Court Review of Court Martial Adjudications*, *supra* note 23, at 1261 (describing *Whelchel* as "a position midway between the traditional and expansive jurisdictional tests").

46. *Whelchel*, 340 U.S. at 123–24.

47. *Id.* at 123.

48. *Civilian Court Review of Court Martial Adjudications*, *supra* note 23, at 1261.

49. *Whelchel*, 340 U.S. at 124.

any error committed in evaluating the evidence—which would not go to jurisdiction—was held to be beyond the scope of review of civil courts.[50] Essentially, the Court concluded that a denial of the ability to present an insanity defense infringed upon the lower court's jurisdiction, and thus, the narrow definition of "jurisdiction" was ever so slightly expanded by this caveat.[51]

Importantly, this is the same year that Congress passed the Uniform Code of Military Justice (UCMJ).[52] The UCMJ "established uniform substantive and procedural law across all branches of military service and created centralized review panels within each service."[53] It seems plausible that the passage of the UCMJ influenced the Court to refrain from pulling military habeas exactly in line with state and federal civilian habeas. The Court likely did not want to risk intruding too far into the military realm, especially given that the UCMJ brought about more robust review procedures. Furthermore, the Court may have wanted to wait to see how the UCMJ would influence the military justice sphere and how the relevant actors would respond to its enactment before deciding how exactly to treat military habeas petitions.

Finally, in *Brown v. Allen*[54] (a state habeas case decided less than four months before *Burns*), the Court discarded the remains of the jurisdictional inquiry and affirmed the convictions of the prisoners by reaching the merits of the constitutional claims presented.[55] 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."[56] This set the stage for *Burns v. Wilson*.

B. The Burns *Decision*

The story begins with two military petitioners who were "[t]ried separately by Air Force courts-martial" and subsequently "found guilty of murder and rape and sentenced to death."[57] They exhausted all remedies

50. *Id.* at 126.

51. *Id.* at 124.

52. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C. §§ 801–946 (2018)).

53. Chapman, *supra* note 3, at 1392.

54. 344 U.S. 443 (1953).

55. *See id.* at 462–65, 487 (affirming the petitioners' convictions, but also concluding that a federal district court may hold a trial for an application for a writ of habeas corpus already considered by the highest state court).

56. Chapman, *supra* note 3, at 1403; *see also Brown*, 344 U.S. at 462–65 (holding that "a trial may be had in the discretion of the federal court or judge hearing the new application" so that "[a] way is left open to redress violations of the Constitution").

57. Burns v. Wilson, 346 U.S. 137, 138 (1953).

available before filing petitions for writs of habeas corpus in the United States District Court for the District of Columbia.[58] They alleged that they had been denied due process of law by the courts-martial and charged various claims, such as being subjected to coerced confessions, being denied counsel of their choice, and being denied effective representation.[59] The district court, rationally following the Supreme Court's strictly jurisdictional inquiry expressed in previous opinions, dismissed the petition, finding that the courts-martial had jurisdiction over the petitioners and the offenses, as well as jurisdiction to impose the sentences.[60] The court of appeals affirmed, but only after a full examination of the record; it gave "petitioners' allegations full consideration on their merits, reviewing in detail the mass of evidence to be found in the transcripts of the trial and other proceedings before the military court."[61] The Supreme Court granted certiorari, stating, "Petitioners' allegations are serious, and, as reflected by the divergent bases for decision in the two courts below, the case poses important problems concerning the proper administration of the power of a civil court to review the judgment of a court-martial in a habeas corpus proceeding."[62]

However, despite proclaiming the importance of determining the proper standard of review, the Court affirmed the dismissal without agreeing on the basis for such determination—importantly, neither an opinion nor a standard of review gathered a majority.[63] Justice Minton, concurring in the affirmance of the judgment, expressed a desire to return to the very limited jurisdictional inquiry of *In re Grimley* and *Hiatt v. Brown*.[64] He emphasized, "If error is made by the military courts, to which Congress has committed the protection of the rights of military personnel, that error must be corrected in the military hierarchy of courts provided by Congress."[65] Accordingly, the Court has "but one function, namely, to see that the military court has jurisdiction, not whether it has committed error in the exercise of that jurisdiction."[66]

Chief Justice Vinson, joined by Justice Reed, Justice Burton, and Justice Clark, constituted a plurality and voted to affirm on the grounds 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

58. *Id.*

59. *Id.*

60. *Id.* at 138–39.

61. *Id.* at 139.

62. *Id.*; *see also* Rudolph G. Kraft, Jr., *Collateral Review of Courts-Martial by Civilian Courts:* Burns v. Wilson *Revisited*, U.S. A.F. JAG BULL., Mar.–Apr. 1963, at 14, 15–17 (discussing the procedural history of *Burns* in greater detail).

63. *See generally Burns*, 346 U.S. at 137 (affirming the judgment without an opinion gathering the support of a majority of justices).

64. *Id.* at 146–48 (Minton, J., concurring in the affirmance of the judgment).

65. *Id.* at 147.

66. *Id.*

re-evaluate the evidence."[67] 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."[68] Vinson further stated that "[h]ad the military courts manifestly refused to consider those claims, the District Court was empowered to review them *de novo*."[69] In attempting to explain why the law that governs civilian habeas petitions could not be assimilated to military petitions, Vinson gave a cursory historical justification as well as a brief explanation of the special considerations of the military.[70] He merely stated that "in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases," and cited *Hiatt v. Brown* for that proposition.[71] Further, he emphasized the separate development of military law, stating that "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 the not the agencies which must determine the precise balance to be struck in this adjustment."[72] Thus, he drew from the special needs of the military to justify a distinctive standard from that of state habeas.

Vinson seems to consider the enactment of the UCMJ as evidence of those special needs. He mentions in his analysis that Congress established the UCMJ in response to criticisms of court-martial proceedings after WWII.[73] Importantly, the Court of Military Appeals was established in 1951 under Congress's Article I powers and provided a new appellate mechanism for military petitioners.[74] Vinson emphasized the establishment of a hierarchy of review implemented in the UCMJ that is able "to ferret out irregularities in the trial, and to enforce the procedural safeguards which Congress determined to guarantee to those in the Nation's armed services."[75]

This emphasis on the UCMJ seems to implicitly argue that military courts don't *need* a broad standard for habeas review because of the "rigorous provisions" in place that "guarantee a trial as free as possible from command influence, the right to prompt arraignment, the right to counsel of the accused's own choosing, and the right to secure witnesses and prepare an adequate defense," as well as the new "special post-conviction remedy . . . whereby one convicted by a court-martial may attack collaterally the

67. *Id.* at 142 (plurality opinion).

68. *Id.* at 144.

69. *Id.* at 142.

70. *See id.* at 139–41 (describing the traditional separation of military and civil courts and discussing the modernization of courts-martial to protect against "command influence").

71. *Id.* at 139 (citing Hiatt v. Brown, 339 U.S. 103 (1950)).

72. *Id.* at 140.

73. *Id.* at 140–41.

74. *See Civilian Court Review of Court Martial Adjudications*, *supra* note 17, at 1263 (describing the growth of the Court of Military Appeals after its establishment).

75. *Burns*, 346 U.S. at 141.

judgment under which he stands convicted."[76] The fear of encroachment into the special realm of military justice as well as the enactment of the UCMJ seem to have motivated Vinson to refrain from advocating for a broad standard of review or at least a standard of review in line with civilian habeas at that time.

In contrast, Justices Douglas and Black, dissenting, "saw no reason to narrow the scope of review because of military considerations, whatever effect they might have on the ultimate decision."[77] These justices argued that where "the military agency has fairly and conscientiously applied the standards of due process formulated by this Court" habeas would not be proper; however, where that is not the case, "a court should entertain the petition for habeas corpus."[78]

The most interesting opinion, however, comes from Justice Frankfurter, who voted for re-argument of *Burns*.[79] He first argued against the plurality's assertion that "in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases."[80] He emphasized that until 1938, when the Court decided *Johnson v. Zerbst*, "the scope of habeas corpus in both military and civil cases was equally narrow: in both classes of cases it was limited solely to questions going to the 'jurisdiction' of the sentencing court."[81] He went on to argue that while the "Court has never considered the applicability of *Johnson v. Zerbst* to military habeas cases," it would not make sense to say that a denial of due process deprives a civil body of "jurisdiction" but not a military body of "jurisdiction."[82]

While he pushed back on the statement that the scope of civilian habeas has *always* been broader than military habeas, he did touch on the increase in scope of civilian habeas after *Johnson v. Zerbst*.[83] This suggests that while *Hiatt v. Brown* is insufficient by itself to support the plurality's broad assertion, *Johnson v. Zerbst* could have been better suited to provide some support for a narrower standard of review. While expressing no opinion as to whether the allegations were sufficient to sustain a collateral attack on the conviction, he further stressed that "[t]he issue here is whether the rationale of *Johnson v. Zerbst* is now to be quietly discarded or whether it will be appropriately applied, as it has been by the lower courts, in the military

76. *Id.*
77. *Servicemen in Civilian Courts*, *supra* note 38, at 386.
78. *Burns*, 346 U.S. at 154 (Douglas, J., dissenting).
79. *Id.* at 844 (separate opinion by Frankfurter, J.).
80. *Id.* at 844 (quoting *Burns*, 346 U.S. at 139 (plurality opinion)).
81. *Id.* at 846.
82. *Id.* at 848.
83. *Id.* at 846–47.

sphere."[84] Thus, Justice Frankfurter seems to have been advocating for, or at least leaning towards, the application of *Zerbst* to military habeas cases. But, more importantly, he recognized the problems associated with implementing an unclear standard with little justification to support it.

In sum, while it emphasized the importance of the standard of review for military habeas, the *Burns* decision resulted in a plurality opinion that gave a vague standard of review and no direction to the lower courts on how to apply it. Justice Frankfurter, while rejecting the historical argument made by Chief Justice Vinson, asked the right question: whether the standard of review for military habeas should be the same as federal civil and state habeas; however, he partook in no opinion as to whether it should or should not be. As anticipated, the resulting standard subsequently gave little guidance to lower courts.

C. Approaches by Lower Courts Post-Burns

While there was no majority opinion in *Burns v. Wilson*, the standard articulated by the plurality has largely been taken as the rule emanating from the Court.[85] The Supreme Court has not revisited this standard since *Burns*, meaning that it has been sixty-eight years since the Supreme Court has addressed this issue. Lower courts "have . . . taken Vinson's opinion as that of the Court, and have been admittedly and unashamedly confused by it."[86] In response to the lack of clarity in applying the "full and fair consideration" test, "federal courts have taken 'diverse approaches to constitutional challenges to military convictions, ranging from strict refusal to review issues considered by the military courts to *de novo* review of constitutional claims.'"[87] The diversity of the approaches means that predicting the standard to be applied in habeas review of a particular court-martial is incredibly difficult.[88] Professor Bishop in 1961 stated that *Burns* "stands as the principal lighthouse in these trackless waters, however low its candlepower," and that statement remains an accurate description of the state of the law sixty years later.[89] What has resulted is truly a mess, with lower courts ultimately fashioning their own standards. Outlined below are some of the current approaches utilized by circuit courts.

The Third Circuit has abandoned attempting to apply the *Burns* full-and-fair-consideration standard after noting the difficulty in determining its

84. *Id.* at 851.

85. *Servicemen in Civilian Courts*, *supra* note 38, at 387.

86. *Id.*

87. Sullivan, *supra* note 5, at 16 (quoting Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, MIL. L. REV., Spring 1985, at 5, 7).

88. *Id.*

89. Joseph W. Bishop, Jr., *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 51 (1961).

application, and in *Brosius v. Warden*[90] the court applied the standard of review for state habeas articulated in the Antiterrorism and Effective Death Penalty Act (AEDPA) to the petitioner's claims.[91] Much earlier, the D.C. Circuit, in *Kauffman v. Secretary of the Air Force*,[92] had already determined that military cases should be treated like state cases.[93] The court stated that the plurality opinion in *Burns* did not apply a standard different from the one that was currently imposed in state habeas review.[94] The court held that "the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule."[95] The court further reasoned:

> The benefits of collateral review of military judgments are lost if civilian courts apply a vague and watered-down standard of full and fair consideration that fails . . . to protect the rights of servicemen, and . . . to articulate and defend the needs of the services as they affect those rights.[96]

The D.C. Circuit's analysis in this case essentially ignores much of the plurality's reasoning in *Burns* altogether, where Vinson expressly stated that the scope of review of military habeas was narrower than that of state habeas, and therefore, should be distinctive. Instead, the D.C. Circuit takes the approach that the *Burns* plurality articulated a test that was reflective of state habeas review, but with a caveat taking into account where conditions peculiar to military life might require a "different rule" (however, the court does not specify what that different rule would be). The D.C. Circuit seems to have fashioned a rule that it perceives as preferable, yet still related, to the full-and-fair-consideration test; but in reality, there seems to be but a strain of relation between the two.

---

90. 278 F.3d 239 (3d Cir. 2002).

91. *Id.* at 245 ("Thus, we will assume . . . that we may review determinations made by the military courts in this case as if they were determinations made by state courts. Accordingly, we will assume that 28 U.S.C. § 2254(e)(1) applies to findings of historical fact made by the military courts.").

92. 415 F.2d 991 (D.C. Cir. 1969).

93. *Id.* at 997.

94. The court considered the special needs of the military, but ultimately decided that they did not warrant a different standard of review in habeas cases:

> Deference to the peculiar needs of the military does not require denying servicemen the contemporary reach of the writ.
>
> . . . .
>
> . . . [T]he better view [is] that the principal opinion in *Burns* did not apply a standard of review different from that currently imposed in habeas corpus review of state convictions.

Id. at 996–97.

95. *Id.* at 997.

96. *Id.*

The Fifth Circuit and the Tenth Circuit, by contrast, interpret *Burns* as establishing a narrower scope of review for military habeas than that for state habeas.[97] In evaluating petitions for review, the Tenth Circuit adopted the four-prong test first announced by the Fifth Circuit in *Calley v. Callaway*.[98] The "four principal inquiries" are as follows:

1. "*The asserted error must be of substantial constitutional dimension*. The first inquiry is whether the claim or error is one of constitutional significance, or so fundamental as to have resulted in a miscarriage of justice."[99]
2. "*The issue must be one of law rather than of disputed fact already determined by the military tribunals.* The second inquiry is whether the issue raised is basically a legal question, or whether resolution of the issue hinges on disputed issues of fact."[100]
3. "*Military considerations may warrant different treatment of constitutional claims.* The third inquiry is whether factors peculiar to the military or important military considerations require a different constitutional standard."[101]
4. "*The military courts must give adequate consideration to the issues involved and apply proper legal standards.* The fourth and final inquiry is whether the military courts have given adequate consideration to the issue raised in the habeas corpus proceeding, applying the proper legal standard to the issue."[102]

In 1990, the Tenth Circuit expressly adopted this standard in *Dodson v. Zelez*,[103] and later, in 1991, restated the inquiry in *Khan v. Hart*.[104] In *Khan*, the circuit court applied the four-prong inquiry as a sort of balancing test in order to determine whether federal review was appropriate.[105] The court found that two of the "must" factors (the first and second inquiries) had been met, but that "the potential for a different constitutional norm on this nondelegation issue would counsel against review," and that "the formulary order of the Court of Military Appeals denying relief [did] not indicate the

97. Chapman, *supra* note 3, at 1400.

98. *Id.*; *see* Dodson v. Zelez, 917 F.2d 1250, 1252–53 (10th Cir. 1990) (adopting the Fifth Circuit's four-prong test); Calley v. Callaway, 519 F.2d 184, 199–203 (5th Cir. 1975) (articulating its four-prong test).

99. *Calley*, 519 F.2d at 199 (emphasis in original).

100. *Id.* at 200 (emphasis in original).

101. *Id.* (emphasis in original).

102. *Id.* at 203 (emphasis in original).

103. *Dodson*, 917 F.2d at 1252–53.

104. 943 F.2d 1261, 1262–63 (10th Cir. 1991).

105. *See id.* at 1263 (weighing the different factors and then determining whether they strike in favor of review).

consideration given to petitioner's claims or admit of review."[106] Despite finding that factors peculiar to the military were present, and despite lacking information regarding the level of consideration given to petitioner's claims, the court ended up striking in favor of review.[107] The court seems to have taken the stance that the presence of important military considerations does not preclude review. Similarly, while military courts must give adequate consideration to the issues raised, a finding that the court has done so (or a lack of information thereof), also does not seem to preclude review. The only factors precluding review are if the claim is not one of constitutional significance and if it is one of fact rather than law (the first two "musts").

However, in *Lips v. Commandant, U.S. Disciplinary Barracks*,[108] the Tenth Circuit cited the *Calley*/*Dodson* test, but put a twist on it, stating that "review by a federal district court of a military conviction is appropriate only if the . . . four conditions are met."[109] *Lips* appears to hold that, unlike the balancing approach employed in *Khan*, an issue is reviewable only if *all* of the factors support review. *Lips* essentially turns the inquiry into one of all "musts." This means that if the fourth prong—asking whether the military court has given adequate consideration to the issue—has been met (as when the military court *has* given adequate consideration, review is *precluded*). This drastically changed the four-prong test, "essentially reinstating the Tenth Circuit's strict adherence to the *Burns* full and fair consideration test."[110]

The negative implications that have resulted from the confusion in the Tenth Circuit are reflected in the fact that, "[i]n the Tenth Circuit, an issue that is raised before a military court is deemed 'fully and fairly' considered even if the military court rejects the claim without explanation."[111] This, paired with the fact that "a claim not raised before the military courts will not be reviewed," creates a "Catch-22" where the only escape is "if the military courts *expressly* refused to consider an issue."[112] This "Catch-22" problem is illustrated in *Thomas v. U.S. Disciplinary Barracks*,[113] where the Tenth Circuit held that full and fair consideration does not require a detailed opinion

106. *Id.*

107. *Id.*

108. 997 F.2d 808 (10th Cir. 1993).

109. *Id.* at 811; *see also* Sullivan, *supra* note 5, at 21 (contrasting the approach in *Lips* to that in *Khan*).

110. Sullivan, *supra* note 5, at 21.

111. *Id.*

112. *Id.* at 21–22 (citations omitted).

113. 625 F.3d 667 (10th Cir. 2010).

by the military court, but rather simply that the issue was briefed and argued.[114]

Lastly, the Eighth and Ninth Circuits, while similarly appearing to hold that the scope of review of military habeas is narrower than the scope of review for state habeas, instead apply an ad hoc approach.[115] In *Harris v. Ciccone*,[116] the Eighth Circuit held that, "where 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."[117] The court seems to open up the inquiry to factual issues, but affords them a full-and-fair-consideration standard. Thus, it 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."[118] However, the extent to which either court draws a distinction between factual and legal determinations and exactly how the full-and-fair-consideration test is applied is not exactly clear.[119]

The confusion among the various jurisdictions as well as the confusion *within* jurisdictions further emphasizes the need for the Supreme Court to provide clarity on the issue. Because standards significantly vary between and within jurisdictions, the chance that a military prisoner will be afforded habeas relief is largely dependent upon the circuit where the prisoner is incarcerated (or where the prisoner's "immediate" custodian is located).[120] This is especially troubling with regard to military death penalty cases heard in the Tenth Circuit, which as noted above, has conflicting precedent as to what standard should be employed.[121] Military prisoners should not be given different access to federal courts based upon their location. Regardless of what standard of review is applied, it should be the same across jurisdictions, otherwise the country will continue to treat people differently, with some receiving more justice than others. Why should a military prisoner raising a habeas petition in the D.C. Circuit have a better chance at challenging his conviction than a military prisoner raising a petition in the Tenth Circuit? While these approaches do not necessarily answer the question of what the

114. *See id.* at 671–72 (determining that "full and fair consideration does not require a detailed opinion or certain other indications that a military court diligently reviewed the parties' arguments").

115. Chapman, *supra* note 3, at 1401.

116. 417 F.2d 479 (8th Cir. 1969).

117. *Id.* at 481.

118. Chapman, *supra* note 3, at 1401.

119. *Id.*

120. Sullivan, *supra* note 5, at 16.

121. *See id.* at 22–23 (discussing a district court's observation that the "balancing test suggested in *Khan* and the adequate consideration only test suggested in *Lips* create an incongruence not easily resolved" (quoting *Travis v. Hart*, No. 92–3011–RDR, 1993 WL 302133, at *3 (D. Kan. July 13, 1993))).

standard should be, they set up the current landscape of the various jurisprudences. Relatedly, the landscape of the military justice system as a whole has vastly developed, similarly calling for a revisit of the appropriate standard.

D. Legal Developments Since Burns

Military justice today is incredibly different than it was sixty-eight years ago when the Supreme Court decided *Burns*. Some of the same considerations are still relevant, but the landscape is vastly distinctive. For example, in 1987, the Supreme Court decided *Solorio v. United States*.[122] In *Solorio*, the Court overruled *O'Callahan v. Parker*[123] and the service-connection test for determining the jurisdiction of courts-martial, and implemented a new status test.[124] Importantly, the Court held that the jurisdiction of a court-martial depends solely on the accused's status and not on whether the offense charged has some service connection.[125] This means that the scope of courts-martial jurisdiction expanded significantly in 1987. Servicemembers could now be tried by military courts for offenses completely unrelated to their military duties. For example, a servicemember would now be subject to the jurisdiction of a court-martial for a charge of possession of marijuana while off duty and off the base. This drastic expansion of jurisdiction meant that many more people, after this decision, became subject to courts-martial jurisdiction where they previously had not been. This legal development inevitably raised concerns about the adequacy of the justice system for the vast amount of people who are now subject to it. Therefore, the implementation of the status test is likely one justification that leads scholars to argue in favor of the Supreme Court implementing a broader standard of review for military habeas corpus petitions, perhaps a standard in line with its civilian counterparts.

On the other hand, the sophistication and protection afforded by new procedural mechanisms has increased significantly in the military justice realm. For example, the UCMJ originally established the Court of Military Appeals, a three-judge civilian court that was designated as the highest court in the military justice system.[126] Congress, discussing the Court of Military Appeals, emphasized that "the Court of Military Appeals renders vital decisions on the constitutional rights of servicemembers and the prerogatives

122. 483 U.S. 435 (1987).

123. 395 U.S. 258 (1969). In *O'Callahan*, the Court announced a new constitutional test that a military tribunal could only try a serviceman charged with an offense that had a service connection. *Id.* at 272–73.

124. *Solorio*, 483 U.S. at 441.

125. *Id.* at 450–51.

126. *Civilian Court Review of Court Martial Adjudications*, *supra* note 23, at 1263.

of commanders."[127] In the Military Justice Act of 1983 (the Act of 1983), Congress amended the UCMJ to permit "review of Court of Military Appeals decisions by the U.S. Supreme Court by discretionary writs of certiorari."[128] The Act of 1983 provided that "[d]ecisions of the United States Court of Military Appeals may be reviewed by the Supreme Court by writ of certiorari in [certain] cases."[129] Thus, Supreme Court review was finally incorporated into the military justice system.

In 1994, the court's name was changed to the United States Court of Appeals for the Armed Forces (CAAF).[130] Despite the name change, the scope of Supreme Court jurisdiction has continued to remain largely the same.[131] In the recent case *Ortiz v. United States*,[132] the Court held that it can constitutionally review CAAF decisions and further clarified the types of disputes over which the Court may exercise its direct appellate jurisdiction.[133] CAAF is currently composed of five civilian judges who are appointed by the President for fifteen-year terms.[134] CAAF "regularly interprets federal statutes, executive orders, and departmental regulations, and also determines the applicability of constitutional provisions to members of the armed forces."[135] The procedural protections offered by CAAF as well as the opportunity for Supreme Court review can be argued to cut in favor of retaining a narrower standard of review for military habeas petitions. Chief Justice Vinson's implicit argument in *Burns*, that procedural protections in place mean that federal courts don't *need* to infringe on the domain of military courts, may, to some, hold true today.

However, a counterargument to the idea that Supreme Court review has increased protections for members of the military is the fact that "[i]n the 35 years since Congress authorized direct appeals to the Supreme Court from

127. H.R. REP. NO. 98-549, at 16 (1983).

128. *Id.* at 20.

129. Military Justice Act of 1983, Pub. L. No. 98-209, § 1259, 97 Stat. 1393, 1406 (1983) (codified as amended at 28 U.S.C. § 1259 (2018)).

130. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831 (1994) (codified as amended at 10 U.S.C. § 941 (2018)).

131. 28 U.S.C. § 1259 (2018).

132. 138 S. Ct. 2165 (2018).

133. *Id.* at 2172–80; *see also* Stephen Vladeck, *The New Military Federalism*, HARV. L. REV. BLOG (June 29, 2018), https://blog.harvardlawreview.org/the-new-military-federalism/ [https://perma.cc/M2NZ-DTAB] (analyzing the *Ortiz* decision and arguing that "although *Ortiz* settles that the Supreme Court *can* directly supervise the military justice system, it leaves in its wake difficult—and unanswered—questions about what that supervision should look like").

134. 10 U.S.C. § 942(a), (b) (2018).

135. *United States Court of Appeals for the Armed Forces*, LIBR. OF CONG.: MIL. LEGAL RES. (Sept. 29, 2014), https://www.loc.gov/rr/frd/Military_Law/Court-of-Appeals-AF.html [https://perma.cc/HZV3-B2LQ]; *see also* ANNA C. HENNING, CONG. RES. SERV., RL34697, SUPREME COURT APPELLATE JURISDICTION OVER MILITARY COURT CASES 4 (2009), https://fas.org/sgp/crs/misc/RL34697.pdf [https://perma.cc/E6DN-52VE] (describing the circumstances in which the Supreme Court has jurisdiction to grant certiorari for appeals from CAAF).

CAAF, the Justices have only decided 10 such cases."[136] Additionally, almost all of these cases involved issues related either to "the powers of the military courts or the qualifications of military judges" rather than the procedural, evidentiary, or substantive questions that frequently arise in federal criminal trials.[137] The Court, in essence, has arguably applied "federalism-like" principles to its relationship with the military.[138] This in turn may lead further to the argument that civilian review of military convictions should actually be *less* deferential.

Finally, the National Defense Authorization Act for Fiscal Year 2006 has helped clarify various portions of the UCMJ that were inherently vague.[139] This has given military defendants more specificity on procedural questions such as issues related to statutes of limitations, and thus, is another example that emphasizes the evolving nature of the military justice system.[140] While these are just a couple of examples as to how military justice has evolved since *Burns*, they help to either back up or cut against the argument that today a narrower standard of habeas review is still sufficient and even desirable. So, this now leaves the remaining question: Exactly what standard should be employed?

II. Refinement of the *Calley* Standard

The *Calley* standard of review employed by the Fifth and Tenth Circuits strikes the proper balance between respecting the military justice sphere on the one hand and providing enough room for vindication of military petitioners' constitutional claims on the other hand. It also gives lower courts a clearer framework upon which to judge the appropriateness of review. Before discussing how some aspects of the standard should be modified, subpart II(A) first addresses why the standard of review for the states and the military should even differ at all. It then argues that the standard of review for military *legal* determinations should be different from the standard of review for state *legal* determinations (and thus counters circuit courts, such as the Third Circuit, that treat the standard of review for military habeas the same as state habeas under AEDPA) because of the special needs policy consideration of the military. However, subpart II(B) then suggests that the standard of review for military *factual* determinations should fall in line with

136. Vladeck, *supra* note 133.

137. *See id.* (arguing that although the Supreme Court established that it can supervise CAAF, "[t]here is a big difference, however, between *asserting* supervisory authority and actually *exercising* it").

138. *See id.* (describing the Supreme Court's relationship with the military as a kind of "de facto 'military-federalism'" because of its hands-off approach).

139. *See generally* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §§ 551–57, 119 Stat. 3136, 3256–66 (2006).

140. *Id.* § 553.

the standard of review for state *factual* determinations under AEDPA. Finally, subpart II(C) lays out a proposed modification of the current *Calley* standard.

A. The Special Needs Policy Consideration of the Military: Why Military Legal Determinations Should Differ

While the historical analysis in *Burns* has been criticized, it is true that since 1938, the standard of review for military habeas has been different than its civilian counterparts. While the exact standard that is desirable is not clear among differing courts, this Note argues that it is quite clear that the military is a distinctive system that cannot be so easily equated with the states. While "federalism-like" principles may be present in the military context and may create some of the same concerns inherent in the state civilian sphere, this argument goes more towards the stance that military and state *factual* determinations should be accorded the same standard of review.[141] However, with regard to *legal* determinations, this Note argues that the differences between the state and military spheres are much too distinctive to be completely equated.

Military law, unlike its civilian counterpart, must "meet certain overriding demands of discipline and duty."[142] As Chapman explains it, this "special needs policy consideration is the military's need to maintain discipline in order to operate effectively."[143] *Burns* demonstrates that the Supreme Court has repeatedly emphasized this justification when deciding cases from courts-martial.[144] The Supreme Court in *Parker v. Levy* noted:

> The differences . . . first between the military community and the civilian community, and second between military law and civilian law, continue in the present day under the Uniform Code of Military Justice. That Code cannot be equated to a civilian criminal code. It, and the various versions of the Articles of War which have preceded

141. *See* Chapman, *supra* note 3, at 1410–13 (arguing that although certain policy considerations are common to both military and state habeas regardless of whether the court is determining legal or factual issues, the special needs policy consideration unique to the military is not implicated when federal courts review military factual determinations, but rather only significant when the court is asked to review a legal issue).

142. Parker v. Levy, 417 U.S. 733, 744 (1974) (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953)).

143. Chapman, *supra* note 3, at 1413.

144. *See Burns*, 346 U.S. at 140 (arguing that the rights of men in the armed forces must be conditioned to meet the demands of duty); *see also* Solorio v. United States, 483 U.S. 435, 447–48 (1987) (noting that Congress has primary responsibility for balancing the rights of servicemen with the needs of the military); *Parker*, 417 U.S. at 744 (noting that the military has developed its own norms in order to operate effectively).

> it, regulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated.[145]

In *Solorio*, when overturning the service-connection test, the Supreme Court reiterated that "civil courts are 'ill equipped' to establish policies regarding matters of military concern" and "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."[146] The differences in military law as compared to its civilian counterpart have consistently remained a huge part of the Court's analysis when looking at how things should be applied in the military context.[147]

An example of the distinctive nature of military law is reflected in the fact that certain protections afforded by the Bill of Rights apply differently in the military context.[148] For instance, in *United States v. Matthews*, the U.S. Court of Military Appeals (today, CAAF), noted that, "in enacting Article 55, Congress 'intended to grant protection covering even wider limits' than 'that afforded in the Eighth Amendment.'"[149] Similarly, the Supreme Court, in *Parker v. Levy*, emphasized:

> While the members of the military are not excluded from . . . the First Amendment, the different character of the military . . . requires a different application of those protections. The fundamental necessity for obedience[] and . . . discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[150]

Finally, CAAF, in *United States v. Easton*,[151] noted that the right to double jeopardy attaches at different points in time in the military and civilian contexts.[152]

These unique constitutional standards applicable in the military context mean that the nature of constitutional issues raised in at least some state and

---

145. *Parker*, 417 U.S. at 749.

146. *Solorio*, 483 U.S. at 447–48.

147. *Id.*; *see also Parker*, 417 U.S. at 744–49 (describing the Court's tradition of deference to military practices and customs); *Burns*, 346 U.S. at 139, 139–40 (noting the "peculiar relationship between the civil and military law" that justifies treating the military sphere differently).

148. *See, e.g.*, *Parker*, 417 U.S. at 758 (noting that First Amendment protections are applied differently to members of the military); Bitterman v. Sec'y of Defense, 553 F. Supp. 719, 723 (D.D.C. 1982) (explaining that the protection of the free exercise of religious beliefs is given less weight in the military context); United States v. Matthews, 16 M.J. 354, 368 (C.M.A. 1983) (noting that the Eighth Amendment protection against cruel and unusual punishment applies differently with respect to capital punishment in the military).

149. *Matthews*, 16 M.J. at 368 (quoting United States v. Wappler, 9 C.M.R. 23, 26 (C.M.A. 1953)).

150. *Parker*, 417 U.S. at 758.

151. 71 M.J. 168 (C.A.A.F. 2012).

152. *Id.* at 170.

military habeas cases will differ, and "[u]nless 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."[153] Even where the nature of the issues raised do not necessarily constitutionally differ, military way of life is so infused in military law that federal judicial intervention should only be employed in extreme circumstances.[154] It is therefore important to employ a standard of review in military habeas that adequately takes into account the important differences present in "military constitutional law." This standard should give lower courts a fixed, easy-to-utilize framework that provides them with the relevant considerations and allows them to use discretion in reaching an ultimate conclusion.

While some argue that the current standard of review for state habeas legal determinations under AEDPA provides an adequate level of deference needed in the military context,[155] this Note argues that a different individualized standard should be in place in order to both fully account for, and emphasize, the special needs of the military. Congress passed AEDPA in 1996 in response to demands for habeas reform.[156] Under the current standard, with regard to state legal determinations, AEDPA provides that a writ of habeas corpus can only be granted where 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."[157] In order for a state court's decision to be "contrary to" clearly established law as determined by the Supreme Court, "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."[158] Additionally, an "unreasonable application" of Supreme Court precedent "occurs when the state identifies the correct governing legal rule but then unreasonably applies it to the facts of a prisoner's case."[159]

If this standard was to be applied to military legal determinations, there would be no specific direction for lower courts to take into account the special

153. Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, MIL. L. REV., Spring 1985, at 5, 86.

154. Chapman, *supra* note 3, at 1414.

155. *See id.* at 1426–27 (arguing that the current AEDPA standard of review for state legal determinations is "highly deferential" and as applied to military legal determinations, "a reviewing federal court would have to defer to the legal determination of the military courts in all but the most egregious circumstances").

156. *Id.* at 1405–06.

157. 28 U.S.C. § 2254(d)(1) (2018).

158. Chapman, *supra* note 3, 1408–09.

159. *Id.* at 1409.

needs of the military by giving deference to military legal conclusions as well as recognizing those claims that involve special military considerations. Therefore, there is a strong argument that the standard of review in military habeas for at least military *legal* determinations should explicitly take into account the special needs policy consideration that directs courts to consider, for example, where the UCMJ departs from the Bill of Rights.

B. The Argument for Evaluating Military Factual Determinations Under AEDPA

With regard to *factual* determinations, the argument that the standard of review for military and state habeas should be different is much weaker. When federal habeas courts allow relitigation of factual issues already determined by state and military courts, they undermine the independence of both court systems, and this in turn can have detrimental effects on state and military judges' fulfillment of their professional duties.[160] Both the military and the states have separate judicial systems that are entrusted with applying the appropriate law to the facts at issue. Determining questions of fact rarely requires specialized knowledge; therefore, federal courts should entrust more confidence and respect to those determinations in both spheres. The policy considerations of independence and finality are present in both systems, and second guessing state and military judges' determinations of fact presents concerns about infringement of federal courts into wholly individualized systems of justice.[161]

As Chapman points out, "[T]he special 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."[162] The arguments detailed above, then, for why military legal determinations should remain distinctive from state legal determinations, don't hold up when looking at factual determinations. And as Chapman further argues, "[W]hile 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."[163] Therefore, the same sort of arguments and considerations exist when considering the standard of review for military and state habeas factual determinations.

AEDPA provides that a writ of habeas corpus can 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

160. *Id.* at 1411–12.
161. *Id.*
162. *Id.* at 1419–20.
163. *Id.* at 1415.

the facts in light of the evidence presented in the State court proceeding."[164] It further specifies that a federal court must presume that a state court's determination of a factual issue was correct.[165] However, a petitioner can rebut that presumption by showing that the determination was wrong by "clear and convincing evidence."[166] The Sixth Circuit in *Coe v. Bell*,[167] explaining the standard, stated, "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."[168] Under this standard, the petitioner must still carry a substantial burden in providing "clear and convincing evidence."[169] Although this opens up the door to let in factual issues, this standard at the same time provides great deference to the fact-finding abilities of the state courts, and thus would similarly guard against undesirable intrusion into the independence of the military courts. This standard could easily be implemented into the current *Calley* standard, which will be discussed more below.

C. The New Standard: A Proposed Modification of the Calley *Standard*

The modification of the *Calley* standard that this Note proposes essentially draws military habeas in line with state habeas with regard to *factual* determinations but provides a different framework for *legal* determinations. As noted above, this is because the standard should be more individualized when the court is looking at legal issues that reflect the specialized nature of the military.[170] The new standard would look something like the following paragraph.

Where a petitioner asserts a *legal* error that is one of constitutional significance, or so fundamental as to have resulted in a miscarriage of justice and the military courts have *not* given adequate consideration to the issues involved and applied the proper legal standards, the habeas court *must* engage in *de novo* review; where a petitioner asserts a *legal* error that is one of constitutional significance, or so fundamental as to have resulted in a miscarriage of justice and the military courts *have* given adequate consideration to the issues involved and applied the proper legal standards, the habeas court must further inquire if military considerations warrant different treatment of constitutional claims, and where the court finds that this is the case, this strongly *suggests* that the habeas court should not grant

164. 28 U.S.C. § 2254(d)(2) (2018).
165. *Id.* § 2254(e)(1).
166. *Id.*
167. 209 F.3d 815 (6th Cir. 2000).
168. *Id.* at 823.
169. *Id.*
170. *See supra* subpart II(A).

review; where a petitioner asserts a *factual* error that is one of constitutional significance, or so fundamental as to have resulted in a miscarriage of justice, the inquiry is the same as state habeas factual determinations under AEDPA.

The modification of the standard in this respect opens the door to habeas review of military factual determinations under the same deferential scope of review as state factual determinations. This would broaden the category of claims that could be raised by military petitioners. Allowing more claims to survive habeas standard of review scrutiny would ease some anxieties related to the perceived lack of sufficient protections afforded to servicemembers, especially now that many more Americans are subject to courts-martial jurisdiction.

This standard, however, rejects a wholesale import of the standard of review for state legal determinations. Instead, this standard explicitly takes into account the special needs policy consideration of the military by asking whether military considerations warrant different treatment of constitutional claims. It then ultimately lets habeas courts decide—with an eye towards deference to the military courts—if the alleged errors, regardless of such considerations, should still be considered. It also gives the courts the discretion to determine whether the factor of adequate consideration by the military court, when weighed along with the other factors, cuts in favor of review or not; thus, it does not preclude review if the federal habeas court finds that the military court has adequately considered the issues. This explicitly rejects the approach taken by the Tenth Circuit in *Lips* and returns to the idea of a balancing approach.[171]

Although this allows for greater opportunity for military legal issues to rise to the necessary level for habeas review, the standard still affords a great deal of deference to military legal determinations. This deference can be argued to be desirable and appropriate because of the procedural protections that are now present in the military context, such as Supreme Court review of CAAF decisions.[172] Therefore, this "refinement" of *Calley* acknowledges the special needs policy consideration of the military, reflected in Chief Justice Vinson's argument in *Burns* for why military and state habeas standards should be different,[173] and also reacts to legal developments since that decision.

---

171. *See supra* subpart I(C); *see also* Lips v. Commandant, U.S. Disciplinary Barracks, 997 F.2d 808, 811 (10th Cir. 1993) (remarking that "[habeas] review by a federal district court of a military conviction is appropriate only if" the military court has not adequately considered the issues involved).

172. *See supra* subpart I(D).

173. *See supra* subpart I(B); *see also* Burns v. Wilson, 346 U.S. 137, 140–142 (1953) (plurality opinion) (discussing the unique requirements of the congressionally created military legal system and its needs to "meet certain overriding demands of discipline and duty," and noting that these considerations necessitate deference to military decisions "even more than in state habeas corpus cases").

In sum, this new standard would adequately take into account the Supreme Court's continued deference towards actors within the military sphere by emphasizing the distinctive and independent nature of military justice, while also opening the door to more substantial claims of constitutional violations. By not importing the standard of review for state habeas across the board, this refined *Calley* standard addresses some of the issues with the full-and-fair-consideration test but also recognizes the important differences between the states and the military. Not only would this standard alleviate many substantive concerns, but more importantly, the mere fact of having a unified standard would provide clarity for the lower federal courts as well as the millions of Americans subject to military jurisdiction.

Conclusion

The standard of review for military habeas corpus petitions has not been revisited by the Supreme Court since it issued its opinion in *Burns v. Wilson* in 1953. The history leading up to that decision shows that while state and military habeas were always roughly similar, state habeas began to develop a little faster than its military counterpart around 1915. And in *Burns*, the Court rejected the proposition that they had ever been the same. Chief Justice Vinson, writing for the plurality, provided a very vague full-and-fair-consideration standard with little explanation as to how it should be applied. Justice Frankfurter, in a separate opinion, argued that the Court should consider the issue on a rehearing, seemingly recognizing the undesirable implications that would result from such a broad and confusing standard of review articulated by the majority (with very little reasoning behind it).

Since *Burns*, lower courts have struggled with what full and fair consideration means, with some courts, specifically in the Tenth Circuit, outright refusing to entertain petitions where the issue has been briefed and argued in front of a military court. Other courts have attempted to develop frameworks based on the full-and-fair-consideration test, with those frameworks varying drastically from one jurisdiction to another (e.g., the Fifth Circuit's *Calley* test compared to the D.C. Circuit's approach in *Kauffman*). This means that the strength of any one military prisoner's habeas petition largely depends on which jurisdiction it is raised in. Additionally, various legal developments have reshaped the military justice sphere, including the expansion of military jurisdiction under *Solorio* and the establishment of Supreme Court review of CAAF decisions.

The confusion by the circuit courts combined with the legal developments in the military justice sphere calls for the Supreme Court to provide clarity on this issue. This Note argues that a refined version of the Fifth Circuit's approach in *Calley* should be utilized to provide a uniform standard across jurisdictions, while also appropriately responding to various

concerns about the scope of review. By pulling the standard of review for military factual determinations in line with the standard for state factual determinations, the refined standard would open the door for many more successful habeas petitions. In addition, by developing a distinct standard for military legal determinations, the special needs policy consideration would explicitly be taken into account, alleviating any concerns that the special nature of military law would not be adequately regarded. Regardless of what standard one thinks is best, it can largely be agreed that *some* sort of consensus should be reached on the matter. Hopefully, for the sake of military petitioners desiring habeas relief, this consensus can come soon.