Reconsideration of Scope of Review for Habeas Corpus from Military Courts

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Comments

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INTRODUCTION

Until several years ago, most people, lawyers and laymen alike, had little concern for the nature of the military justice system and its relation to the state and federal systems of justice. Unless one were a career soldier, had served in the armed services, or lived near a military base, military law never captured his attention or touched his personal life. However, with the United States’ increased involvement in the Vietnam conflict and resulting governmental prosecutions of individuals for the commission of “battle-related crimes,” the military justice system has increasingly come to the attention of the American public. The widespread, intense, and pervasive coverage by the news media of the trial of Lieutenant William L. Calley caused his trial to become a frequent subject of conversation.¹

This article deals mainly with the relationship between the military justice system and the habeas corpus power of the federal district courts. Habeas corpus affords collateral, as opposed to direct relief; therefore, only those aspects of the military justice system are discussed which are relevant to this collateral remedy. A brief historical overview of habeas review of military decisions is given, culminating in a discussion and proposed interpretation of the decision rendered by the United States Supreme Court in Burns v. Wilson,² which remains the controlling judicial authority in this area. Lastly, the article criticizes those federal circuits which have narrowly interpreted the Burns decision when confronted with an argument based upon the equal protection clause of the fourteenth amendment.

HISTORICAL BACKGROUND

The habeas corpus power of the federal judiciary is not a creature of congressional largesse. As the United States Supreme Court noted

². 346 U.S. 137 (1953).
in *Fay v. Noia,* the power to inquire into the legality of a petitioner's confinement is an inherent faculty of a court in Anglo-American law. Anglo-American courts have employed this extraordinary writ to guarantee that no person shall be confined unless such confinement is consistent with fundamental fairness. For its noble connection with human liberty, it has been appropriately called the "Great Writ." The Framers of the United States Constitution expressly incorporated and guaranteed the preservation of the habeas corpus power. Congress has historically recognized and implemented the Framers' mandate. The present federal habeas corpus statute draws no distinction between persons confined pursuant to the decree of a civilian court, state or federal, and those confined under the order of a military court-martial. Nor is there any language in either the Constitution, or any statute, specifically limiting collateral, civilian court review of a court-martial conviction. Although the "finality clause" of the Uniform Code of Military Justice (UCMJ) purports to bar any civilian review of military decisions, both the legislative history of the UCMJ and judicial interpretation maintain the propriety of civilian collateral review.

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4. One of the earliest reported cases in which the writ of habeas corpus was employed was *Bushel's Case*, 124 Eng. Rep. 1006 (1670).
5. U.S. Const. art. I, § 9, cl. 2 provides: "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."
6. The first habeas corpus statute was part of the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81.
7. 28 U.S.C. § 2241(c)(1)-(2) (1970) grants to federal civil courts power to entertain the writ in cases where a prisoner is in custody of a state court or in custody "under or by color of the authority of the United States" or under "an order . . . [or] judgment . . . of a court or judge of the United States."
8. Lacking the power of direct appellate review over the determinations of military tribunals, the civilian courts are limited to relief of a collateral nature. Direct appellate review procedures for the military are provided for in the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1970) [hereinafter cited as UCMJ]. The decisions of general courts-martial are given three direct reviews by military appellate bodies. Review is given by the convening authority, pursuant to UCMJ art. 64, 10 U.S.C. § 864 (1970); the United States Army Court of Military Review, pursuant to UCMJ art. 66, 10 U.S.C. § 866 (1970); and the United States Court of Military Appeals, pursuant to UCMJ art. 76, 10 U.S.C. § 867 (1970).
9. UCMJ art. 76, 10 U.S.C. § 876 (1970) provides: "The appellate review of records of trial provided by this chapter, the proceedings, findings and sentences of courts-martial as approved, reviewed, or affirmed, as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review or affirmation as required by this chapter, are final and conclusive . . . ." (emphasis added).
10. Gusik v. Schilder, 340 U.S. 128 (1950). The reasoning of the Supreme Court was that the finality clause, in this case of the Articles of War, should not be read as a suspension of the writ. That clause was meant only to describe the terminal point in the military justice system. Congress never intended to deprive the civil courts of the power of collateral review, which existed long before the Articles of War.
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though the propriety of habeas review of military decisions seems beyond dispute, the scope of that review has been a subject of controversy.

In *Ex parte Reed*, the Supreme Court first considered the scope of habeas corpus review of courts-martial proceedings. The petitioner, a Naval paymaster's clerk, was found guilty of fraudulent misconduct by a general court-martial. According to military regulations in effect at that time, the sentence imposed by the court-martial board had to be approved by a commanding officer before it was considered final. Pursuant to those regulations, the sentence was submitted to an admiral for approval; however, the admiral refused to approve the sentence and remanded the case to the board so the sentence could be revised. The court re-sentenced the petitioner and imposed a longer confinement. While confined under sentence, the petitioner sought release through habeas corpus and was accorded a full hearing in the Massachusetts federal district court. The petitioner raised the following issues at the habeas proceeding: (1) the general court-martial had no jurisdiction to try a paymaster's clerk; and (2) the court was without statutory authority to revise its former sentence.

The United States Supreme Court held the military court had jurisdiction to try the petitioner and had been granted authority by the appropriate regulations issued by the Secretary of the Navy to revise its former sentence. The Court indicated the revision of sentence was a matter of discretion for the court-martial and as long as it was exercised within authorized limits, it could not be made the subject of habeas review. According to the Supreme Court, the writ was limited to a determination of whether the court-martial had jurisdiction over the subject matter, and power to impose the sentence. Hence, the judgment of a court-martial could not be collaterally attacked on a habeas corpus petition for mere errors or irregularities. It should be noted the Court said nothing in regards to "constitutional error or irregularity" since no constitutional issue was raised on appeal.

During this period, the same standard was applied by district courts to petitions from federal civilian courts. In *Ex parte Parks*, the Supreme Court refused to review petitioner's allegation that the document, which he had forged, was not that type of instrument specified by the statute under which he was convicted. The Court noted this was

11. 100 U.S. 13 (1879).
12. Id.
13. 93 U.S. 18 (1876).
a question of statutory interpretation for the military court, suitably raised below by a demurrer and "[i]f . . . the court had jurisdiction and power to convict and sentence, the writ cannot issue to correct a mere error."\(^{14}\)

At the outset of the twentieth century, the number of issues reviewable on habeas corpus from the military and civilian courts began to expand. Within the military sphere, the writ was extended to include those issues in which the court-martial violated the governing statutes. In *McCloughry v. Deming*,\(^{15}\) the petitioner, a volunteer soldier, argued that he had been tried by an improperly constituted court-martial board, since it was composed solely of officers of the Regular Army. The Court agreed and held that the composition of the board violated the seventy-seventh article of war.\(^{16}\) The Court indicated that since the board lacked statutory authority for its existence, there was jurisdictional error which was no mere question of statutory interpretation. This decision extended the jurisdiction concept and the Court was then able to inquire into matters heretofore not cognizable on a habeas appeal.

Habeas corpus from federal, civilian custody also expanded in the early part of this century. In *Johnson v. Zerbst*,\(^{17}\) the Court began to re-define jurisdictional error to include collateral review of substantial constitutional deprivations, not only certain statutory violations. In that case the petitioner had been convicted of possession and distribution of counterfeit Federal Reserve notes. He contended at the habeas hearing that he had been denied the assistance of counsel in the military proceeding and, hence, his sixth amendment rights had been violated. The district court held the petitioner could not obtain relief by habeas corpus even if his sixth amendment rights to counsel had been violated since the only issue to be reviewed is whether the lower court had jurisdiction. The Supreme Court rejected this view and reversed the district court's decision. It held an unwarranted deprivation of counsel causes a court to lose its jurisdiction and such a constitutional violation is a reviewable jurisdictional error. The Court noted:

_true habeas corpus cannot be used as a means of reviewing errors_

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14. *Id.* at 23.
15. 186 U.S. 49 (1902).
16. Specifically, the claim was brought on an interpretation of the Act of April 22, 1898, 30 Stat. 361, and the Act of March 2, 1899, 30 Stat. 977, as well as the seventy-seventh article of war.
17. 304 U.S. 458 (1938).
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of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial. . . . These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. 18

The Court went on to add:

Since the Sixth Amendment constitutionally entitles one charged with a crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional pre-requisite to a federal court’s authority to deprive an accused of his life or liberty. . . . A court’s jurisdiction at the beginning of trial may be lost ‘in the course of the proceedings’ due to failure to complete the court . . . by (not) providing counsel, for an accused . . . . 19

Just as the concept of jurisdictional error was expanded to include certain statutory violations by military courts, the Court could now review constitutional deficiencies in civilian courts on the basis of their constituting jurisdictional error. At the same time the Supreme Court maintained the Great Writ was not being utilized as a “writ of error.”

Several years later in Waley v. Johnston 20 and White v. Ragan, 21 the Court announced that jurisdictional error was not the only issue which could be examined on a habeas writ from a petitioner confined in a federal or state prison. Constitutional violations without any jurisdictional basis also fell within the purview of habeas review. The Court noted in Waley:

The use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused. . . . 22

and remarked in White:

[The allegations of fact in the petitions [for habeas corpus] are sufficient to make out prima facie cases of violation of these constitutional rights of petitioners sufficient to invoke corrective process in some court, and in the federal district court if none is afforded by the state. 23

18. Id. at 465.
19. Id. at 467-68.
22. 316 U.S. at 104-05.
23. 324 U.S. at 764.
It is suggested the "legal fiction" of jurisdictional error was discarded by the Court as a tool for expanding the scope of habeas review to include constitutional claims. The Court realized it would be difficult in the future to find a jurisdictional basis or ground for reviewing many constitutional violations. For example, although the absence of counsel may cause the court to "lose jurisdiction," it is hard to foresee how a coerced guilty plea or unreasonably seized evidence could cause the court to "lose its jurisdiction" during the proceeding.

During this time, the Supreme Court was silent as to whether the scope of habeas corpus review of military convictions also included a review of alleged constitutional infirmities. The McClaughry standard proved somewhat unsatisfactory in that statutory violations could deprive a court-martial of jurisdiction, whereas, an uncodified constitutional right would not receive the protection of civilian federal court review. As a result, the lower federal courts reached incredibly variant positions on the permissible scope of review—ranging from a denial of jurisdiction over a properly constituted court-martial, to almost total review.  

A possible solution to the problems raised by McClaughry was offered in White. However, the Supreme Court remained silent on the question. After White, five courts of appeals held military personnel could raise due process issues on habeas corpus. In one of these cases, Innes v. Hiatt, the Third Circuit Court of Appeals stated:

We think that this basic guarantee of fairness afforded by the due process clause of the fifth amendment applies to a defendant in criminal proceedings in a federal military court as well as in a federal civil court. An individual does not cease to be a person within the protection of the fifth amendment . . . because he has joined the nation's armed forces and has taken the oath to support that constitution with his life, if need be.

Finally in 1950, Hiatt v. Brown came before the Court. The petitioner was convicted by a general court-martial of murder and was sentenced to life imprisonment. On petition for writ of habeas corpus

24. Compare Arnold v. Cozart, 75 F. Supp. 47 (N.D. Tex. 1948), with Anthony v. Hunter, 71 F. Supp. 823 (D. Kan. 1947), where the habeas corpus petition of one defendant was granted in Kansas while his co-defendant was denied the same relief in Texas.

25. Montalvo v. Hiatt, 174 F.2d 645 (5th Cir.), cert. denied, 338 U.S. 874 (1949); Benjamin v. Hunter, 169 F.2d 512 (10th Cir. 1948); United States ex rel. Weintraub v. Swanson, 165 F.2d 756 (2d Cir. 1948); United States ex rel. Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944); Schita v. King, 133 F.2d 283 (8th Cir. 1943).

26. 141 F.2d 664 (3d Cir. 1944).

27. Id. at 666.

the district court concluded that the military tribunal which convicted the petitioner was improperly constituted and lacked jurisdiction over the offense. The Court of Appeals for the Fifth Circuit affirmed this holding and additionally held the petitioner was deprived of due process of law under the fifth amendment. After holding the court-martial had jurisdiction over the offense, the Supreme Court summarily rejected the view of the court of appeals that the military petitioner's due process claims were cognizable by a district court in a habeas corpus proceeding. Without discussing the validity of those claims, the Court stated:

The correction of any errors it [court-martial] may have committed is for the military authorities which are alone authorized to review its decision. The Court clearly indicated the court of appeals erred in extending its review to determine whether there had been compliance by the military court with the due process clause and stated, "the single inquiry, the test, is jurisdiction." The Supreme Court reversed the decision after finding there were no jurisdictional defects.

It should be apparent from this brief, historical overview that the scope of issues cognizable under the writ had been basically the same for military and civilian actions. The Hiatt opinion marked the first occasion that the Supreme Court sought to distinguish between habeas corpus writs from the military and civilian courts. It is suggested this decision was clearly untenable in view of the expanding concept of the Great Writ. Three years later in Burns v. Wilson, the Court sought to clarify the confusion arising from the Hiatt opinion. The Court attempted to delineate the appropriate scope of federal court review of habeas corpus petitions filed by military prisoners. Burns, however, did not alleviate the confusion of the lower federal courts, but rather added to it. Since Burns remains the leading decision on the scope of habeas

30. 175 F.2d 273 (5th Cir. 1949).
31. 339 U.S. at 111.
32. The petitioner argued his due process rights were violated since (1) the staff judge advocate's report included erroneous propositions of law; (2) the evidence was insufficient to sustain the conviction; (3) the pre-trial investigation was inadequate; and (4) his counsel was ineffective.
33. 339 U.S. at 111.
36. The Burns decision held a federal district court could not review on habeas corpus petitions any claims by defendants which had been "fully and fairly considered." This standard of review proved to be less than self-explanatory. See Sweet v. Taylor, 178 F. Supp. 456 (D. Kan. 1959), where a violation of constitutional rights at a court-martial
corpus review of military decisions, it is essential this decision be clarified and interpreted in a meaningful fashion.

A PROPOSED INTERPRETATION OF THE BURNS DECISION

In Burns, two servicemen were tried separately by Air Force courts-martial and were found guilty of murder and rape. After exhausting all of their military remedies, they filed petitions for writs of habeas corpus in the United States District Court for the District of Columbia. The petitioners alleged they had been denied due process of law in the courts-martial proceedings. They charged they had been illegally detained; coerced confessions were admitted at trial; they had been denied effective assistance of counsel; military authorities interfered with the preparation of their defenses; and their trials were conducted in an atmosphere of terror and vengeance.

The district court dismissed the applications without reviewing any evidence after concluding the military court had jurisdiction. The court of appeals affirmed the decision but only after reviewing the entire record. In a plurality opinion written by Mr. Justice Vinson the Supreme Court affirmed the judgment of the court of appeals and quoted Welchel v. McDonald:

[W]hen a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal court to grant the writ simply to re-evaluate the evidence.

The problem is twofold: first, what kind of allegations may be reviewed; and second, what type of allegation is not to be subject to close scrutiny by the district court if that court finds the military court has "fully and fairly" considered it?

It is suggested the Court announced in Burns that men in the armed forces are entitled to the protection of the due process clause of the fifth amendment in courts-martial proceedings and that allegations of a

compelled the conclusion that fair consideration was not given to the defendant's claims; In re Stapley, 246 F. Supp. 316 (D. Utah 1965), where a federal district court granted a writ of habeas corpus to a military prisoner who had been unconstitutionally denied the assistance of counsel. But see Le Ballister v. Warden, 247 F. Supp. 349 (D. Kan. 1965), where on similar facts a federal district court denied the writ.

40. 346 U.S. at 142 (emphasis added).
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denial of due process in the military court may be reviewed in a habeas corpus proceeding. The Court stated:

The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. 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. . . .

It should be noted that in United States v. Tempia, the United States Court of Military Appeals held military personnel are entitled to those protections of the Bill of Rights that are not expressly or by necessary implication made inapplicable by the Constitution. The Court of Military Appeals based its decision exclusively on Burns when it said:

The impact of Burns v. Wilson, then, is of an unequivocal holding by the Supreme Court that the protections of the Constitution are available to servicemen in military trials.

Chief Justice Warren, speaking unofficially, described the opinion in Burns as constituting "a recognition of the proposition that our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." Hence, the proposition that Burns expanded the review powers of the federal courts in regard to military decisions seems to be indisputable.

Assuming that in response to the first necessary inquiry, a federal district court must review allegations of constitutional infirmity in military proceedings, are those allegations to be dismissed if the federal court finds that they were "fully and fairly considered" in the military court? If the answer is affirmative, the scope of habeas corpus review of military decisions is much narrower than the review accorded the constitutional claims of civilian prisoners which involve purely a question of law or a mixed question of law and fact. In reviewing such constitu-

41. Id.
43. U.S. CONST. amend. V provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces. . . ."
44. The Supreme Court has repeatedly held a defendant who is subject to military jurisdiction, by implication, has no right to a trial by an impartial jury and, therefore, cannot claim sixth amendment protection. See Whelchel v. McDonald, 340 U.S. 122 (1950); Kahn v. Anderson, 255 U.S. 1 (1920).
47. Easley v. Hunter, 209 F.2d 483 (10th Cir. 1953).
tional claims of civilian prisoners, the district court does not consider whether the state court gave full and fair consideration to those claims but only considers whether the petitioner's constitutional rights have been violated.48

Most early cases in the federal circuit courts did adopt a narrow view of the Burns opinion—constitutional issues could not be reviewed if the military courts had fully considered and fairly decided the questions presented.49 Many circuits still adhere to this view. Those courts which have adopted this interpretation of Burns, however, have generally failed to explicitly state what standard of fairness they have applied. This interpretation of Burns would lead one to logically conclude that so long as the manner in which the military tribunal decides the constitutional issues before it is "full and fair," the nature of their decision is irrelevant. Certainly, this conclusion was not intended by the Burns Court.50 It is suggested there can be only one "fair" determination of a constitutional claim—one that is in accordance with standards of constitutional sufficiency established by the Supreme Court. Military courts must not be permitted to abort constitutional safeguards under the guise of full and fair decision-making processes.

It is suggested a proper reading of Burns would be where the constitutional issue involves a question of law or a mixed question of law and fact it should be given an exhaustive, de novo review by the district court at a full independent hearing. Where the constitutional issue involves purely a factual question the federal court's inquiry should be limited to determining whether the military court gave full and fair consideration to the constitutional issues, e.g., whether the finding was reasonably supported by the record and was the result of a full and

48. The Supreme Court in Townsend v. Sain, 372 U.S. 293 (1963), held a federal evidentiary hearing was mandatory under certain circumstances. One of these circumstances is when the petitioner alleges he was "otherwise denied due process of law in the state court proceeding." The "full and fair" language was not used by the Townsend court to refer to allegations of due process denials involving questions of law or mixed questions of law and fact; however, that court indicated the petitioner must allege he did not receive "a full and fair hearing" in order to receive a federal evidentiary hearing if he is claiming he was denied due process of law because the fact-finding procedure employed by the state court was not adequate. These "circumstances" were codified in the habeas corpus statute. 28 U.S.C. §§ 2241, 2254(d) (1970).
49. Mitchell v. Swope, 224 F.2d 365 (9th Cir. 1955); Shaw v. United States, 209 F.2d 811 (D.C. Cir. 1954); Easley v. Hunter, 203 F.2d 483 (10th Cir. 1953).
50. If this is the case, it would be possible for the military courts to find a defendant's statement, which was taken at the point of a gun by military authorities, was not violative of the fifth amendment and for the federal district court to refuse to issue the writ because it decided the military court "fully and fairly" considered the petitioners claim—the military court examined every aspect of the claim and decided it without any preconceived notions of guilt.
fair evidentiary hearing. The plurality opinion in *Burns* stated the “evidence of the occurrence of events which tend to prove or disprove one of the allegations” will not be reviewed.\(^5\) All petitioner’s claims in *Burns* were factually disputed by the military and decided by the military courts against the defendants. The Court said the petitioners failed to establish the authenticity of their allegations and would not be granted the “opportunity to make a new record, to prove *de novo* in the District Court precisely the case which they failed to prove in the military courts.”\(^5\) Four months prior to the *Burns* decision the six justices who concurred in *Burns* also concurred in *Brown v. Allen*.\(^5\)

In that case the Supreme Court emphasized factual allegations decided by the state courts could be accepted by the federal judge as true unless there had been a “vital flaw” in the state fact-finding process. However, the federal judge had to *decide for himself* mixed questions of law and fact as well as the application of constitutional principles to the facts as found.\(^5\) After two opinions of the Court by the same justices, it is inconceivable that the full and fair consideration test in *Burns* would mean something different from the explanation of review powers given in *Brown*. Without doubt, the Court applied the standard of review adopted in that case to the case presented by the petitioners in *Burns*.\(^5\)

After 1965 at least four federal circuits, in determining the proper review of military decisions, have recognized and applied the distinction between constitutional issues resting solely upon factual allegations and constitutional issues which are not totally dependent upon those allegations.\(^5\) This distinction is a legally viable one—it recognizes the need for a review of alleged constitutional infirmities in the military by a civilian court which is particularly adept “in dealing with the nice

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\(^5\) *346 U.S.* at 144.
\(^5\) Id. at 146.
\(^5\) *344 U.S.* 443 (1953).
\(^5\) Id. at 506-07.
\(^5\) Although the *Brown* decision has been overruled by the court in *Townsend v. Sain*, 372 U.S. 293 (1963), it did so only in regard to when a district court must indulge in independent fact-finding at an evidentiary hearing; it did not affect the holding that independent *de novo* review must be given when the state petitioner alleged due process violations involving questions of law and mixed questions of law and fact. In fact, the *Townsend* rule is consistent with this writer’s interpretation of *Burns* since the Court in that case speaks of a necessity to have a full evidentiary hearing; when facts are in dispute, only if the petitioner did not receive a “full and fair” evidentiary hearing in the state court.

subtleties of constitutional law" but at the same time does not transfer the ultimate fact-finding function from the military to the federal district courts. Federal courts should not be forced to have a full evidentiary hearing or to exhaustively explore the transcript of the trial of every military, state, or federal habeas corpus petitioner to be certain that factual determinations made by the lower court were correct even though those factual disputes have “constitutional overtones.” The federal court, in such a case, should only examine the record to determine if those factual determinations are reasonably supported by the record and were found after a full and fair evidentiary hearing in the military court. If it finds they were reasonably supported by the record and were found after a full and fair evidentiary hearing in the military court, it should be said that the military court “fully and fairly” considered the defendant’s constitutional claim and the writ should not be issued. This proposition is in accord with the “any evidence rule” which has been historically applied by district courts in habeas proceedings to determine whether a state or federal prisoner has been convicted beyond a reasonable doubt. The court’s only inquiries are whether there was any evidence of record to sustain the conviction and whether the reasonable doubt standard necessary for conviction was applied on the face of the record. Whether a defendant has been convicted beyond a reasonable doubt is a constitutional issue and dependent upon factual determinations.

Several illustrations can best demonstrate the operation of this proposed distinction. Assume a military defendant alleged in his habeas petition that his privilege against self-incrimination had been violated but the validity of his claim rested upon whether he was beaten during interrogation by military authorities. The military court found, as a question of fact, that he was not beaten. Since the validity of this constitutional claim is dependent upon the military court erring in its

59. The Court held the reasonable doubt standard is constitutionally required in In re Winship, 397 U.S. 358 (1970). It should be noted the federal courts which have dealt with this issue of review since the Winship decision have applied the long established “any evidence rule,” holding that Winship did not grant any additional mandate to the federal courts regarding a review of the facts. See Holloway v. Cox, 437 F.2d 412 (4th Cir. 1971); Dickerson v. Cox, 316 F. Supp. 865 (W.D. Va. 1970).
60. In Davis v. United States, 160 U.S. 469, 484 (1895), the court stated the jury must be convinced the evidence presented is “sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.”
factual determination, the district court should only examine the evidence introduced at trial to determine if that finding was reasonably sustained by the record and the petitioner received a full and fair evidentiary hearing in the military court. If it finds those requirements were fulfilled after examining the record, the petition should be dismissed. However, assume a military defendant alleged his privilege against self-incrimination had been violated because he was told by military authorities that "he had better talk" immediately after he had been advised of his constitutional right to remain silent. The fact that he had been told "he had better talk" and the fact that he was advised of his rights immediately beforehand were not in dispute during the court-martial. The military court found these procedures did not violate his privilege against self-incrimination and his confession was admissible. Since the petitioner's constitutional claim raises a mixed question of law and fact, the district court should review this decision de novo at an independent hearing in the federal court. 61

PUBLIC POLICY AND EQUAL PROTECTION

District courts, which have interpreted Burns to hold that military defendants are entitled to a narrower review on habeas corpus than civilian defendants, have historically based their interpretation upon several public policy considerations. They are fearful an extension of full civil review to military, constitutional claims will disrupt military discipline, grant review powers to courts which are not sensitive to military needs, and render Congressional enactments meaningless.

It is suggested these predicted effects are based upon mere uncertainty. They lose the element of persuasiveness upon close scrutiny. There is no doubt military law is a system of articles and regulations for the government of the armed forces established by Congress under Article I powers. 62 It deals specifically and intentionally with the maintenance of discipline in the armed services. 63 Because ordinary rules of law do not seek to cope with problems peculiar to the government of the military establishment, a special set of rules may well be indispensable in prosecuting military offenses. However, the prosecu-

61. See Leyra v. Denno, 347 U.S. 556 (1954), where the distinction is applied to similar facts.
62. U.S. Const. art. I, § 8, cl. 14 provides Congress shall have the power: "To make Rules for the government and Regulation of the land and naval forces. . . ."
63. See Ex parte Reed, 100 U.S. 13 (1879).
tion of offenses and review of convictions are separate and distinct functions; Congress has recognized these functional differences and has enacted the UCMJ and the federal habeas corpus statute. It is conceded the military must be free to operate in such a manner as to insure the effective performance of its mission; yet collateral review would not require any additional procedures which would detract from the military's primary mission. Although some existing military procedures might need to be altered to conform to due process standards, the same statement can be made about procedures utilized by state courts. If these possible alterations are not sufficient to exempt state convictions from the purview of collateral supervision, there is no reason why the military should be excluded from the review powers of the federal courts.

It cannot be said review per se interferes with the maintenance of discipline in the armed services since the direct review of military convictions occurs within the military judicial system provided by Congress. How can it then be said that civilian review interferes with the maintenance of discipline in the armed services? It is preposterous to assume the reviewing judge wearing black robes rather than gold braid will cause "restlessness among the troops." On the contrary, it is contended that respect for military law and the general morale of servicemen would be enhanced by the civil courts ensuring the protection of servicemen's constitutional rights. Discipline will only improve if the citizen-soldier is made to feel he is not forgotten by the civilian establishment and that by donning a uniform his fundamental rights have not been gravely diminished in the eyes of the federal judiciary. Dissatisfaction with military justice can only be quieted when that legal system is placed in perspective in the democratic society which maintains it.

The fear that an extension of full civil review to military constitutional claims will grant review powers to courts which are not sensitive to military needs is unfounded. A real basis for fear exists when the federal courts allow the military courts to become the final arbiters of a defendant's constitutional rights. When a federal court refuses to consider de novo any constitutional claim raised by a military defendant, the military courts are left to balance the delicate and competing interests of fundamental fairness and military order and discipline. The military courts are recognizably inadequate to perform this awesome task. Military courts are courts of inferior and limited jurisdiction and

64. Harris v. Ciccone, 417 F.2d 479, 481 (8th Cir. 1969).
a recent opinion of the Eighth Circuit Court of Appeals has reminded us that courts-martial are singularly inept in dealing with the nice subtleties of constitutional law. As the Supreme Court stated in O'Callahan v. Parker:

[A] civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.

In addition, the continuing diminution of jurisdiction of military tribunals resulting from the Court's decisions has been motivated, at least in part, by the Court's recognition that military courts are not designed to protect a defendant's constitutional rights. However, the federal courts are competent to balance the demands of military discipline and the importance of individual liberty. The district court's review of the applicability and interpretation of certain provisions of the Bill of Rights will be tempered by the demands of military order and discipline in appropriate cases. Historically, the federal district courts have utilized this balancing process to resolve constitutional issues in all areas of the law. Constitutional issues raised by military defendants should be no exception. An absence of acute expertise on military discipline and order should not be the basis for exempting military decisions from constitutional scrutiny by the federal court in habeas proceedings. Such expertise is not necessary for a court to safeguard the rights and personal liberties of the defendant. All that is required is for the federal court to consider every factor relevant to the defendant's peculiar status, the needs and characteristics of the organization to which he belongs and from which he derives his status, and the purpose, history, and effect of the constitutional mandate. It is suggested when the supposed "grounds for fear" are placed opposite the apparent

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68. Cf. In re Gault, 387 U.S. 1 (1967). Such factors are always utilized by district courts when dealing with the application of due process safeguards to defendants who possess a special or peculiar "status." An example of this situation in an area other than the military is the application of due process safeguards to juvenile delinquency proceedings.
strengths of civilian review and considered in light of the military court's countervailing inadequacies, those "fears" quickly dissipate.

If these feigned and artificial policy considerations are the sole grounds utilized by district courts to sustain their view that the holding in *Burns* accords military defendants a narrower scope of habeas review than civilian defendants, it is suggested such an interpretation would be violative of the military defendant's right to equal protection of the law. Since this concept is embodied in the fifth amendment due process guarantees, it should be applicable to military defendants. A defendant convicted in a state court, having exhausted all state remedies, would be afforded a habeas corpus remedy whereby the federal courts would review *de novo* his constitutional allegations which do not raise purely factual issues. The state proceeding becomes an object of intense review designed to seek out and correct any constitutional infirmity. However, should that defendant have suffered the misfortune of conviction for the same crime in a military tribunal, the review given by the federal court would be of the military court's *mode of decision* and not whether the military's decision was violative of the defendant's constitutional rights. Quite possibly, one prisoner could be freed and the other punished without just cause.

This variance in treatment would appear to be the antithesis of the command of equal protection since it is based on an unjust classification of criminal defendants. Such a variance in treatment can only be sustained if the classification upon which it is based is just. As the Court stated in *Walters v. City of St. Louis*:

[The classification must] rest on real and not feigned differences; that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary.

The Supreme Court has held in several cases that a state which grants appellate review can only do so in a way which does not dis-

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criminate against indigent convicted defendants. As the Court noted in *Griffin v. Illinois*: 74

[A] state is not required by the Federal Constitution to provide appellate courts or a right to an appellate review at all. . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. 75

In all of these cases, the defendants were not able to exercise their rights of appeal because they were financially unable to furnish the appellate court with a transcript of the trial below. The Supreme Court held that in such cases the state must furnish these defendants with transcripts without cost so all defendants would have the same opportunity to process their appeals, regardless of one's impoverished status.

Just as a defendant's right to appeal should not be dependent upon his financial status, neither should it be determined by a defendant's military status when there is no compelling public policy reason to warrant such distinct and different treatment. Any individual, regardless of his status, has a federally guaranteed constitutional right to seek the Great Writ. Although the military defendant is not totally denied access to this remedy by a narrow interpretation of the *Burns* decision, this interpretation can clearly be determinative in many cases, of whether the petitioner is freed or confined. 77 Additionally, the Court in *Griffin* indicated clearly that an arbitrary classification scheme need not deny a defendant's appeal entirely in order to violate the defendant's right to equal protection of the law. 78 If the appellate rights of the

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75. *Id.* at 18.
77. Although the United States Court of Military Appeals in United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967), made certain provisions of the Bill of Rights applicable to military proceedings, this does not diminish the need for military decisions to receive the same scope of habeas review that civilian decisions receive; for there would still be absent any substantial collateral, civilian check of military decisions, leaving the Court of Military Appeals as the final arbiter of a military defendant's constitutional rights. As a result, different gradations and applications of the same constitutional standard applied by two separate court systems could result in a military defendant being confined while a civilian prisoner goes free, without just cause, under identical facts.
78. In this case, the defendant was able to seek relief by writ of error but was financially unable to seek full, direct appellate review because he could not afford the cost of a transcript of the trial. According to the state procedural rules, the defendant could only raise federal or state constitutional violations on appeal by writ of error; non-constitutionally related issues could only be raised on direct appeal. The Court held such a limitation of review without valid cause violated his right to equal protection of the law.
defendant differ or if he receives a different degree or scope of appellate review than other defendants because of some unwarranted reason, he has not received equal protection of the law under the fifth and fourteenth amendments. In regards to the review of military cases, it is irrelevant that the determinative status of the defendant is "soldier" rather than "indigent" and the appellate review is "collateral" rather than "direct," for the same constitutional deprivation exists—different types of review exist without any compelling justification for their coexistence.

CONCLUSION

The citizen-soldier being held on military authority under sentence pursuant to a court-martial conviction has the right to attack that conviction on writ of habeas corpus on the ground that the military authorities violated his constitutional right of due process and denied him the substance of a fair trial. It is proposed that since the Supreme Court decided Burns v. Wilson the federal courts have jurisdiction to determine whether fundamental constitutional rights have been violated by military courts, and federal courts should review them de novo when those claims do not raise purely factual issues. When the constitutional claims advanced by military prisoners are dependent upon disputed facts, the federal court's review should entail only a determination of whether the military court's findings were reasonably sustained by the record and whether the petitioner received a full and fair factual hearing below. This interpretation of Burns makes the federal court's scope of review of military decisions consistent with that utilized in their review of state and federal convictions and does not transfer the ultimate fact-finding mission to the district court.

Although historically, the military justice system has evolved independently through "congressional fiat," it has never been supposed that the military was to be excluded from the review powers granted to the federal courts by the habeas corpus statute. The fact that Congress is vested with the responsibility of making military laws should not deny the serviceman the protection of his constitutional rights afforded by the collateral review powers of the federal courts. The historical separateness of the military legal system is irrelevant where constitutional claims are at issue. The dual standard of habeas review which

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had arisen between military and civil convictions is an historical aber-
ration which the equal protection clause demands must be re-evaluated.
If the military justice system is to be placed in perspective with the
democratic society which maintains it, the scope of habeas corpus re-
view of military decisions must be based upon a rational examination
of all the relevant factors and not merely upon procedural or jurisdic-
tion talismans.

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