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Civilian Review of Military Habeas Corpus Petitions: Is Justice Being Served?

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NOTE

CIVILIAN REVIEW OF MILITARY HABEAS CORPUS PETITIONS: IS JUSTICE BEING SERVED?

I. INTRODUCTION

American society has historically tended to view military institutions and actions with a skeptical eye.[1] Despite this phenomenon, the military as an institution has grown and commanded a significant amount of the nation's wealth, both in human and material terms. Military institutions, though a necessary "organ of government," have created perplexing problems. While the maintenance of military power is a necessary element of national security, it is also a type of power and authority which is not easily assimilated into a democratic society.[2] At times the courts have been called upon to define the proper balance that must be struck between this power and the rights of individual members of the armed forces. This review, however, has had significant limitations, so that primary responsibility for control of the military must lie with the legislative and executive branches of government, and ultimately with the people themselves.[3]

This Note will examine the scope of review available to a civilian court when dealing with court-martial proceedings, both in an historical context, as well as in light of the recent Fifth Circuit decision in *Calley v. Callaway*.[4]

II. THE MILITARY JUSTICE SYSTEM

Before relief from a court-martial conviction can be sought by a serviceman in civilian courts, he must generally first exhaust the remedies provided for him by the military justice system.[5] This system provides for trial by

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1. See The Federalist No. 41, at 260 (P.L. Ford ed. 1898) (J. Madison) where it was stated: "A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and, whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties." Id. at 263. See also Warren, The Bill of Rights and the Military, 37 N.Y.U. L. Rev. 181, 183-85 (1962).

2. Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181, 182 (1962).

3. Id. at 183.

4. 519 F.2d 184 (5th Cir. 1975), cert. denied, 44 U.S.L.W. 3564 (U.S. April 6, 1976) (No. 75-773).

5. Gusik v. Schilder, 340 U.S. 128, 131-32 (1950). The "exhaustion doctrine" is a restriction, not on the existence of a federal power, but on its use. Fay v. Noia, 372 U.S. 391, 420 (1963); Bowen v. Johnston, 306 U.S. 19, 27 (1939); Hammond v. Lenfest, 398 F.2d 705, 714 (2d Cir. 1968). The doctrine is a flexible one, and its underlying principles must be assessed in light of the burdens which would be imposed if it were carried out. See McGee v. United States, 402 U.S.

courts-martial, which are tribunals convened on an ad hoc basis in accordance with military needs.[6] Courts-martial are not courts of general jurisdiction and can be either general,[7] special,[8] or summary,[9] with the power to convene them varying in accordance with the rank and command of the convening authority.[10] Besides having the power to convene the courts-martial, the convening authority has the power to select the court members from those members of the armed forces who are eligible to serve,[11] and it

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479, 485 (1971); McKart v. United States, 395 U.S. 185, 195 (1969). It is designed to provide for judicial efficiency and to ensure that military courts and agencies will have the first opportunity to review and decide controversial issues. See Schlesinger v. Councilman, 420 U.S. 738, 756-57 (1975); Dooley v. Ploger, 491 F.2d 608, 613 (4th Cir. 1974); Sohm v. Fowler, 365 F.2d 915, 917-18 (D.C. Cir. 1966). In addition, the doctrine is designed to eliminate interjudicial friction, and gives the military a chance to express its views. This is important because civilian judges are generally not familiar with military procedures and requirements. See Noyd v. Bond, 395 U.S. 683, 694 (1969); Bishop, Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions, 61 Colum. L. Rev. 40, 66 (1961); Sherman, Legal Inadequacies and Doctrinal Restraints in Controlling the Military, 49 Ind. L.J. 539, 541 (1974).

6. The constitutional basis for the military justice system is article I of the Constitution, which grants to Congress the power to make rules for the government and regulation of the land and naval forces. See, e.g., Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857); Ex parte Dickey, 204 F. 322, 325 (D. Me. 1913). The power to establish courts-martial is implicitly recognized in the fifth amendment: "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 . . . ." U.S. Const. amend V.

7. A general court-martial consists of a military judge and not less than five members, or, if the accused requests and the military judge approves, a military judge alone. Id. § 816(1). A general court-martial has jurisdiction to try all offenses, including those which violate the laws of war, and may adjudge any sentence not proscribed, including death. Id. § 818.

8. A special court-martial consists of not less than three members, or a military judge and not less than three members, or if the accused so requests, a military judge alone if one has been detailed to the court and the military judge approves. Id § 816(2). A special court-martial has jurisdiction to try any noncapital offense. It may also try capital offenses under regulations established by the President. A special court-martial can adjudge any sentence except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months. Id. § 819. A bad conduct discharge cannot be adjudged unless the accused was represented by qualified defense counsel and (except in unusual circumstances) a military judge presided. In addition, a verbatim record of the proceeding must be made. Id.

9. A summary court-matrial consists of one commissioned officer. Id. § 816(3). A summary court-martial has jurisdiction to try only enlisted personnel for any noncapital offense. Summary courts-martial may impose any sentence except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than forty-five days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay. Id. § 820. In addition, an individual who could be tried by a summary court-martial can be subjected to a special court-martial if he objects thereto. Id.

10. Id. §§ 822-24.

11. Id. § 825(d)(2).

has the power to perform the first review of the record of trial.[12] It is also given the preliminary power to approve or disapprove the findings of the court-martial.[13]

After the convening authority has completed the initial review of the court-martial findings and sentence, the case may be reviewed by a Court of Military Review, depending on the nature of the sentence.[14] Court-martial convictions without punitive discharges are referred to the Judge Advocate General of the respective service who may refer the case to a Court of Military Review.[15] The Court of Military Review occupies the intermediate level in the military justice system. In addition to reviewing the sentence, the court can review questions of law and fact, as well as judge the credibility of witnesses.[16]

After a decision in the Court of Military Review, the case may then be appealed to the United States Court of Military Appeals.[17] The court consists of three civilian judges appointed for fifteen year terms by the President.[18] It must review a case coming from the Court of Military Review if the sentence as affirmed is death, if it involves a general or flag officer, or if it is certified for review by the Judge Advocate General.[19] In other cases coming from the

12. Id. § 860. This written review is usually on the basis of a written opinion of the staff judge advocate to the convening authority. Id. § 861.

13. See id. §§ 862-64. The broad powers of the military commander are subject to abuse and have been the focus of much concern. See generally West, Command Influence, in J. Finn, Conscience and Command 73-135 (1971); Murphy, The Army Defense Counsel: Unusual Ethics for an Unusual Advocate, 61 Colum. L. Rev. 233, 237-40 (1961); West, A History of Command Influence on the Military Judicial System, 18 U.C.L.A.L. Rev. 1 (1970). See also R. Sherrill, Military Justice is to Justice as Military Music is to Music (1969), a hostile account of military legal proceedings against dissenters in the Vietnam conflict. It is a violation of 10 U.S.C. § 837 (1970) to attempt to unlawfully influence the actions of a court-martial.

14. 10 U.S.C. § 866 (1970). The Judge Advocate General reviews court-martial convictions which do not fall within the court-martial jurisdiction of the Court of Military Review. Id. § 869. He may vacate or modify in whole or in part the sentence or findings, or both, in any court-martial that has been finally reviewed, but has not been reviewed by a Court of Military Review. Id.

15. Court of Military Review jurisdiction is limited to cases where "the sentence, as approved, affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more." Id. § 866(b). Cases which lie outside of this jurisdictional base cannot generally be subject to review by any military appellate court. The Judge Advocate General may, however, certify the record of any general court-martial resulting in a conviction to the Court of Military Review regardless of the sentence. Id. § 869. However, there can then be no further review by the United States Court of Military Appeals unless the Judge Advocate General further certifies the case for review, id. § 867(b)(2), or, upon petition of the accused and good cause shown, the Court of Military Appeals grants a review, id. § 867(b)(3), or the sentence affects a general or flag officer or extends to death. Id. § 867(b)(1).

16. Id. § 866(c).

17. Although its members are civilians, the Court of Military Appeals is located for administrative purposes in the Department of Defense. Id. § 867(a)(1).

18. Id. § 867(a)(1).

19. Id. § 867(b)(1),(2).

Court of Military Review, the court can review in its discretion[20] if the accused has filed a petition for review within thirty days after the accused is notified of the decision of the Court of Military Review.[21] Once the Court of Military Appeals has taken jurisdiction of a case it can only review questions of law[22] and any decision it reaches is final.[23]

Although Congress has provided no direct appeal from the military court system to the Supreme Court,[24] review by civilian courts and ultimately by the Supreme Court may occur as a result of collateral attack. Historically, where confinement has been imposed,[25] the primary avenue for securing such

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20. One author has noted that the Courts of Military Review have acted in about six percent of courts-martial. The Court of Military Appeals, in turn, has acted in only about seventeen percent of the cases referred to the Court of Military Review. See Willis, The United States Court of Military Appeals: Its Origin, Operation and Future, 55 Mil. L. Rev. 39, 76 n.189 (1972). This is not surprising since many of the sanctions imposed by the military are "more akin to administrative or civil sanctions than to civilian criminal ones." Parker v. Levy, 417 U.S. 733, 751 (1974).

21. 10 U.S.C. § 867(c) (1970).

22. Id. § 867(d).

23. Id. § 876. This section has not, however, been construed as barring a collateral attack in federal courts, see Schlesinger v. Councilman, 420 U.S. 738, 749-53 (1975); United States v. Augenblick, 393 U.S. 348, 349-50 (1969); Gusik v. Schilder, 340 U.S. 128, 132-33 (1950), although it would bar the government from instituting a collateral attack if it lost its case within the military justice system. See Robb v. United States, 456 F.2d 768, 772 (Ct. Cl. 1972). Collateral relief can take many forms, including habeas corpus petitions, see Burns v. Wilson, 346 U.S. 137 (1953); mandamus, see Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965); Hoorwitz v. Resor, 329 F. Supp. 1050 (D. Conn. 1970), aff'd, 445 F.2d 1407 (2d Cir. 1971); declaratory relief, see Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971); and suit for back pay, see Augenblick v. United States, 377 F.2d 586 (Ct. Cl. 1967), rev'd, 393 U.S. 348 (1969). In addition to this collateral relief, the President must review and approve any court-martial sentence which involves death or affects a general or flag officer. 10 U.S.C. § 871(a) (1970). The secretary of each respective service must also approve the dismissal of a commissioned officer, other than a general or flag officer, cadet, or midshipman, id. § 871(b), and he has the power to "remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures other than a sentence approved by the President." Id. § 874(a). The Judge Advocate General, if the accused so petitions, may grant a new trial "[a]t any time within two years after approval by the convening authority of a court-martial sentence," on the grounds of fraud or newly discovered evidence. Id. § 873.

24. See Schlesinger v. Councilman, 420 U.S. 738, 746 (1975); In re Vidal, 179 U.S. 126 (1900); Gallagher v. Quinn, 363 F.2d 301, 304 (D.C. Cir.), cert. denied, 385 U.S. 881 (1966); Shaw v. United States, 209 F.2d 811 (D.C. Cir. 1954).

25. See, e.g., Wales v. Whitney, 114 U.S. 564, 571-72 (1885) (there must be actual confinement); United States ex rel. McKiever v. Jack, 351 F.2d 672, 673 (2d Cir. 1965) (per curiam) (normal restraint incident to service in armed forces not enough to justify issuance of a writ of habeas corpus). Some later cases have shown a willingness to relax the custody requirement. See, e.g., Kauffman v. Secretary of the Air Force, 415 F.2d 991, 994 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013 (1970); United States ex rel. Schonbrun v. Commanding Officer, 403 F.2d 371, 373 (2d Cir. 1968), cert. denied, 394 U.S. 929 (1969); Hammond v. Lenfest, 398 F.2d 705, 710-12 (2d Cir. 1968).

review has been through the writ of habeas corpus.[26] The first case to reach the Supreme Court concerning the question of habeas corpus review of military courts-martial was *Ex parte Reed.*[27] In *Reed,* a paymaster clerk in the United States Navy was charged and convicted of malfeasance in the line of duty. While in confinement he petitioned for a writ of habeas corpus before the Circuit Court of the United States for the District of Massachusetts.[28] After failing to secure the relief he desired, Reed petitioned the Supreme Court to have his conviction reviewed. In passing on the application, the Court noted:

> The [military] court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority.[29]

Reed thus limited habeas corpus review to questions of whether the military had jurisdiction over the person and subject matter, and whether it had the power to impose sentence on the accused.[30] In addition, for many years habeas corpus relief was limited to individuals actually held in confinement.[31]

From *Reed* until the early 1950s civilian courts reiterated that in a military habeas corpus proceeding they could only inquire whether the military had jurisdiction over the person, subject matter and offense.[32] In addition, such courts would examine whether the sentence was conformable to law[33] and whether the court-martial tribunal was legally convened and constituted.[34] However, because of developments in the civilian sphere, which gave federal courts the power to review constitutional errors in civilian habeas corpus cases,[35] many courts concluded that military habeas corpus proceedings

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26. Schlesinger v. Councilman, 420 U.S. 738, 747 (1975). See note 23 supra for alternative methods of collateral relief.

27. 100 U.S. 13 (1879).

28. Id. at 19-20.

29. Id. at 23; accord, Carter v. McClaughry, 183 U.S. 365, 380-81 (1902), quoting Carter v. Roberts, 177 U.S. 496, 497-98 (1900).

30. In addition to habeas corpus proceedings, there were other avenues for attacking court-martial convictions at the time of Reed. See, e.g., Dynes v. Hoover, 61 U.S. (20 How.) 65, 82-83 (1857) (action for assault and battery and for false imprisonment); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827) (replevin); Wise v. Withers, 7 U.S. (3 Cranch) 330 (1806) (trespass). The issues raised in these cases were limited to questions of jurisdiction.

31. See note 25 supra, and accompanying text.

32. See, e.g., Whelchel v. McDonald, 340 U.S. 122, 126 (1950); Humphrey v. Smith, 336 U.S. 695, 696 (1949); Mullan v. United States, 212 U.S. 516 (1909); McClaughry v. Deming, 186 U.S. 49, 69 (1902); Carter v. McClaughry, 183 U.S. 365, 381 (1902); Carter v. Roberts, 177 U.S. 496, 500 (1900); Swaim v. United States, 165 U.S. 553, 565-66 (1897); Johnson v. Sayre, 158 U.S. 109, 118 (1895); In re Grimley, 137 U.S. 147, 150 (1890).

33. Carter v. McClaughry, 183 U.S. 365, 381-82 (1902).

34. McClaughry v. Deming, 186 U.S. 49, 63 (1902).

35. Civilian habeas corpus petitions were historically limited to the same extent as military petitions. In Ex parte Siebold, 100 U.S. 371 (1879), decided the same year as Ex parte Reed, 100

should be similarly expanded.[36] The Supreme Court in *Hiatt v. Brown*[37] did not, however, accept such a broad view of jurisdiction. In rejecting an expansion of civilian court review of military court-martials, the Court stated:

> We think the [court of appeals] was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation, and the competence of the law member and defense counsel. . . . It is well settled that "by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court martial . . . . The single inquiry, the test, is jurisdiction. . . ." 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.[38]

Hiatt thus failed to allow an expansion of military habeas corpus proceedings to include questions cognizable in civilian habeas corpus proceedings.[39] Due

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U.S. 13 (1879), the Court held that a writ of habeas corpus could not be used as a writ of error. The Court stated: "Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ." 100 U.S. at 375. See also Knewel v. Egan, 268 U.S. 442, 445 (1925); In re Gregory, 219 U.S. 210, 213 (1911). In Johnson v. Zerbst, 304 U.S. 458 (1938) the Court expanded civilian habeas corpus review by holding: "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—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. A judge of the United States—to whom a petition for habeas corpus is addressed—should be alert to examine 'the facts for himself when if true as alleged they make the trial absolutely void.' " Id. at 468 (footnotes omitted). Civilian habeas corpus, although still speaking in terms of jurisdiction, had expanded to include questions of constitutional defects. In 1942, however, the Court abandoned the traditional jurisdictional terminology and held in Waley v. Johnston, 316 U.S. 101 (1942), that a writ of habeas corpus could be used to attack convictions obtained in violation of constitutional rights. According to the Court, "the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." Id. at 104-05.

36. See, e.g., Montalvo v. Hiatt, 174 F.2d 645, 646 (5th Cir.) (per curiam), cert. denied, 338 U.S. 874 (1949); Benjamin v. Hunter, 169 F.2d 512, 514 (10th Cir. 1948); United States ex rel. Weintraub v. Swenson, 165 F.2d 756, 757 (2d Cir. 1948).

37. 339 U.S. 103 (1950).

38. Id. at 110-11 (citations omitted).

39. One commentator outlined the following items as being within the scope of inquiry which a civil court could exercise in a military habeas corpus proceeding: (1) whether the court-martial had jurisdiction over the person; (2) whether the court-martial had jurisdiction over the offense; (3) whether the court-martial board and legal counsel were duly qualified; and (4) whether the sentence imposed was in conformity with law. Among the allegations that could not be reviewed,

process questions were proscribed and left to determination by the military.[40]

III. *Burns v. Wilson*

In 1953 the traditional approach to habeas corpus review in military cases was changed by the Supreme Court in *Burns v. Wilson.*[41] The petitioners were tried by the Air Force, found guilty of murder and rape, and sentenced to death. In their application for review, petitioners claimed that they had been denied due process in their court-martial, alleging that they had been detained illegally; that confessions had been forcibly extracted from them; that they had been denied effective representation; that evidence favorable to them had been suppressed; and that perjured testimony had been used against them.[42] Petitioners also alleged that the trial was conducted in an atmosphere of mob violence.[43] The district court, relying on *Hiatt,* dismissed the petitions, claiming that once it was determined that the military had jurisdiction over the person and the offense, it was not within the power of the district court to review the proceeding for irregularity.[44] The court of appeals[45] affirmed but noted in passing that *Hiatt* should not be read so as to bar civilian review of constitutional issues in a military context.[46]

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were the following: "(1) Failure to conduct a thorough and impartial pre-trial investigation prior to a trial by general court-martial. (2) Failure to provide counsel for the accused at the pre-trial investigation. (3) Absence of defense counsel and assumption of his own defense by the accused without objection. (4) Exclusion of civilian defense counsel during presentation of secret official documents, leaving appointed defense counsel present. (5) Absence of assistant defense counsel without objection by the accused. (6) Lack of Negro members of a court trying a Negro accused. (7) Erroneous admission into evidence of an extrajudicial confession. (8) Erroneous inferences made from the evidence. (9) Failure to furnish the accused with a copy of the opinion of the staff judge advocate or legal officer. (10) Lack of knowledge of a civilian subject to the Code that he was so subject. (11) Technical sufficiency of pleadings charging an offense cognizable by a court-martial. (12) Mistreatment while in custody awaiting trial. (13) Delay in completing investigation and trial where not substantially prejudicial to the accused's defense. (14) Illegal apprehension or arrest. (15) Movement of court from one place of convening to another during trial. (16) Insufficiency of the evidence, where there is not a complete lack of evidence supporting conviction. (17) Credibility of witnesses. (18) Bar of the statute of limitations." Snedeker, Habeas Corpus and Court-Martial Prisoners, 6 Vand. L. Rev. 288, 298-301 (1953) (footnotes omitted).

40. Shortly after Hiatt was decided, the Tenth Circuit in Kuykendall v. Hunter, 187 F.2d 545 (10th Cir. 1951) appeared to ignore Hiatt and considered a due process attack in a habeas corpus proceeding. The court noted that "[d]ue process of law must be observed in military trials the same as [in] trials in civil courts." Id. at 546.

41. 346 U.S. 137 (1953).

42. Id. at 138.

43. Id.

44. Dennis v. Lovett, 104 F. Supp. 310 (D.D.C.), aff'd, 202 F.2d 335 (D.C. Cir. 1952), aff'd sub nom. Burns v. Wilson, 346 U.S. 137 (1953); Burns v. Lovett, 104 F. Supp. 312 (D.D.C.), aff'd, 202 F.2d 335 (D.C. Cir. 1952), aff'd sub nom. Burns v. Wilson, 346 U.S. 137 (1953).

45. Burns v. Lovett, 202 F.2d 335 (D.C. Cir. 1952), aff'd sub nom. Burns v. Wilson, 346 U.S. 137 (1953).

46. Judge Prettyman, writing for the court, stated: "in the exceptional case when a denial of a constitutional right is so flagrant as to affect the 'jurisdiction' (i.e., the basic power) of the tribunal to render judgment, the courts will review upon petition for habeas corpus." Id. at 342.

On appeal to the Supreme Court, Chief Justice Vinson declared in a plurality opinion[47] that military habeas corpus review was traditionally narrower than analogous review in civilian cases.[48] Although it failed to adopt the broad civilian standard,[49] the Court nevertheless appeared to expand the scope of review in military cases beyond the "jurisdiction only" test. The Chief Justice declared that in a military habeas corpus proceeding a civilian court should look to see only if the military dealt "fully and fairly" with the allegations raised by the petitioners in their application,[50] and that habeas corpus relief could not be used to reevaluate evidence.[51] Justice Douglas dissented, arguing that a denial of due process should entitle the petitioners to relief by way of habeas corpus. Moreover, he would at least have allowed the civilian tribunal the power to determine whether the correct constitutional standard had been applied.[52]

Burns has caused much confusion.[53] Is a civilian court allowed to review the record only if the military failed to deal with the constitutional allegations? Or may the civilian court go further and analyze the military's treatment of these allegations? Soon after *Burns*, diverse approaches appeared

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47. At least one writer argues that this deprives the opinion of any precedential value. See Wiener, Courts-Martial and the Bill of Rights: The Original Practice II, 72 Harv. L. Rev. 266, 297 (1958).

48. 346 U.S. at 139.

49. See note 35 supra.

50. If the military did not fully and fairly deal with the issues raised, or if they manifestly refused to consider the claims, then civilian courts would be empowered to review the claims de novo. 346 U.S. at 142.

51. Id. In a separate opinion, Justice Frankfurter refused to accept any of the approaches proposed. He declared: "I cannot agree that the only inquiry that is open on an application for habeas corpus challenging a sentence of a military tribunal is whether that tribunal was legally constituted and had jurisdiction, technically speaking, over the person and the crime. Again, I cannot agree that the scope of inquiry is the same as that open to us on review of State convictions; the content of due process in civil trials does not control what is due process in military trials. Nor is the duty of the civil courts upon habeas corpus met simply when it is found that the military sentence has been reviewed by the military hierarchy, although in a debatable situation we should no doubt attach more weight to the conclusions reached on controversial facts by military appellate courts than to those reached by the highest court of a State." Id. at 149.

52. According to Justice Douglas, "If the military agency has fairly and conscientiously applied the standards of due process formulated by this Court, I would agree that a rehash of the same facts by a federal court would not advance the cause of justice. But where the military reviewing agency has not done that, a court should entertain the petition for habeas corpus. In the first place, the military tribunals in question are federal agencies subject to no other judicial supervision except what is afforded by the federal courts. In the second place, the rules of due process which they apply are constitutional rules which we, not they, formulate." Id. at 154 (dissenting opinion). Justice Black joined in this dissent.

53. See Sherman, Legal Inadequacies and Doctrinal Restraints in Controlling the Military, 49 Ind. L.J. 539, 567 (1974); Note, Procedural Deficiencies of Courts-Martial and Civilian Judicial Review: Lieutenant Calley's Case, 28 Rutgers L. Rev. 626, 671 (1975). One commentator has noted that as of 1961, in not one lower court case "did a soldier-petitioner succeed in obtaining his liberty." Bishop, Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions, 61 Colum. L. Rev. 40, 60 (1961).

with some courts reviewing the issues raised de novo,[54] while others seemingly side-stepped the review issue completely.[55] While some courts looked at least to see if the military had reached a correct determination on the issues raised,[56] a majority of the courts seemed amenable to the narrow *Burns* standard. These latter courts rejected further review once it was determined that the military had dealt fully and fairly with the issues raised.[57]

Despite the fact that lower courts have had great difficulty in applying the *Burns* standard, the Supreme Court has yet to clarify the proper scope of review that military habeas corpus proceedings should take, even though the Court has had at least two recent opportunities[58] to clear up some of the

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54. See, e.g., White v. Humphrey, 212 F.2d 503, 507-08 (3d Cir.), cert. denied, 348 U.S. 900 (1954); Harris v. Ciccone, 290 F. Supp. 729, 733 (W.D. Mo. 1968), aff'd, 417 F.2d 479 (8th Cir. 1969), cert. denied, 397 U.S. 1078 (1970).

55. See, e.g., Kasey v. Goodwyn, 291 F.2d 174, 178 (4th Cir. 1961), cert. denied, 368 U.S. 959 (1962); Bisson v. Howard, 224 F.2d 586, 589 (5th Cir.), cert. denied, 350 U.S. 916 (1955).

56. See, e.g., Sweet v. Taylor, 178 F. Supp. 456 (D. Kan. 1959): "It is sometimes stated that if the military reviewing authorities have considered and decided the constitutional questions sought to be raised in a habeas corpus case, then the matter is at an end, and the civil court is without jurisdiction. In the court's view, that statement is too broad. . . . [I]f a careful examination of the record compels a conclusion that there is no evidence to sustain the judgment or that in fact petitioner was not represented by an attorney, or that it must be said that basic constitutional rights were violated, it would seem that a civil court would have jurisdiction to grant relief because under such circumstances it cannot be said that the reviewing military authorities fairly considered these questions." Id. at 458 (citations omitted).

57. See Sunday v. Madigan, 301 F.2d 871, 873 (9th Cir. 1962); Crigler v. United States Army, 285 F.2d 260, 261 (10th Cir. 1961); McKinney v. Warden, 273 F.2d 643, 644 (10th Cir. 1959), cert. denied, 363 U.S. 816 (1960); Thomas v. Davis, 249 F.2d 232, 234 (10th Cir. 1957), cert. denied, 355 U.S. 927 (1958); Dickenson v. Davis, 245 F.2d 317, 320 (10th Cir. 1957), cert. denied, 355 U.S. 918 (1958); Mitchell v. Swope, 224 F.2d 365, 367 (9th Cir. 1955); Easley v. Hunter, 209 F.2d 483, 486 (10th Cir. 1953); Dennis v. Taylor, 150 F. Supp. 597 (M.D. Pa. 1957); Bokoros v. Kearney, 144 F. Supp. 221, 228 (E.D. Tex. 1956). In determining whether the military dealt fully and fairly with an issue, these courts did not look to see if correct constitutional standards were applied. Many of these courts, applying the Burns standard, merely looked to see if the military had dealt with the issue. In Easley v. Hunter, supra, for example, the court stated: "[A]s we understand the Burns decision, it does no more than hold that a military court must consider questions relating to the guarantees afforded an accused by the Constitution and when this is done, the civil courts will not review its action." 209 F.2d at 487. See Note, Procedural Deficiencies of Courts-Martial and Civilian Judicial Review: Lieutenant Calley's Case, 28 Rutgers L. Rev. 626, 671 (1975). More recent cases, some of them noting the confusion in the area, have apparently rejected the Burns holding. See, e.g., Levy v. Parker, 478 F.2d 772 (3d Cir. 1973), rev'd on other grounds, 417 U.S. 733 (1974); Allen v. Van Cantfort, 436 F.2d 625 (1st Cir.), cert. denied, 402 U.S. 1008 (1971); Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013 (1970).

58. Schlesinger v. Councilman, 420 U.S. 738 (1975), was a third possible case in which some of the confusion could have been cleared up. Although the case did not involve a collateral attack on a court martial conviction, the Court stated: "[I]mplicit in the congressional scheme embodied in the [Uniform] Code [of Military Justice] is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights." Id. at 758.

confusion. In *United States v. Augenblick*,[59] the Court refused to allow consideration of Jencks Act violations.[60] Even if it were assumed that the Court of Claims could review a defect in a constitutional decision, the Court felt that the Jencks Act claims were not of constitutional stature and thus were not subject to collateral review.[61] According to at least one commentator, *Augenblick* limits the *Burns* test to asserted violations of constitutional rights.[62] While this view has been generally accepted,[63] *Augenblick* failed to define the extent to which a civilian court should defer to the findings of a military court.

The Court again had a chance to clarify *Burns* in *Parker v. Levy*.[64] In *Parker* the Court alluded to *Burns* by noting that issues raised by the petitions which were not treated by the court of appeals could not be reviewed on appeal to the Supreme Court. The Court stated that such issues should be reviewed by the court of appeals in the first instance in order to meet the *Burns* requirements.[65] Despite this reference to *Burns*, the Court failed to address itself to the Third Circuit's rejection of "the contention that full presentation of the constitutional issues to a court-martial precludes subsequent consideration of those issues by a civilian court."[66] The Court's failure to address the Third Circuit position, coupled with its own review of the constitutional issues[67] raised can be pointed to as evidence of rejection of the

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59. 393 U.S. 348 (1969).

60. 18 U.S.C. § 3500 (1970). The Jencks Act provides that the United States must produce for the defense any prior statements made by a witness who was called by the government to testify, and which relates to the subject matter of the witness' testimony.

61. 393 U.S. at 351-52.

62. Note, Procedural Deficiencies of Courts-Martial and Civilian Judicial Review: Lieutenant Calley's Case, 28 Rutgers L. Rev. 626, 672-73 (1975).

63. E.g., Calley v. Callaway, 519 F.2d 184, 199 (5th Cir. 1975), cert. denied, 44 U.S.L.W. 3564 (U.S. April 6, 1976) (No. 75-773); Owings v. Secretary of the Air Force, 447 F.2d 1245, 1261 (D.C. Cir. 1971), cert. denied, 406 U.S. 926 (1972); Davies v. Resor, 445 F.2d 1331, 1332 (1st Cir. 1971).

64. 417 U.S. 733 (1974). This case involved a habeas corpus proceeding in which an Army captain sought relief from a general court-martial conviction obtained pursuant to 10 U.S.C. §§ 890, 933-34 (1970).

65. 417 U.S. at 762.

66. 478 F.2d at 783.

67. Captain Levy was charged under 10 U.S.C. § 890 (1970) which punishes one who "willfully disobeys a lawful command of his superior commissioned officer." As a result of handing out statements which were opposed to the Vietnam War, Captain Levy was also charged under id. § 933 with "conduct unbecoming an officer and a gentleman." In addition, he was charged with a violation of id. § 934 which forbids "all disorders and neglects to the prejudice of good order and discipline in the armed forces." 417 U.S. at 736-38. In addressing the principal issues raised, concerning the vagueness of the latter two statutes, the Court noted that "the military is, by necessity, a specialized society separate from civilian society." Id. at 743. The Court felt that there were two sources which imparted specific content to the statutes thereby eliminating the vagueness contentions. First, there were military customs and usages which servicemen may be expected to understand. Id. at 746-47. In addition, the Court pointed out that the language of the articles had been narrowly construed by the United States Court of Military Appeals. Id. at 754. The Court further declared that "[t]he fundamental necessity for obedience,

Burns approach.[68] The precedential value of this case appears to be minimal, however, in light of its deference to military needs,[69] and because of its failure to lay down any guidelines regarding civilian court review of military habeas corpus petitions.

IV. *Calley v. Callaway*

Concerned with the uncertainty regarding the proper scope of review in military habeas corpus proceedings, the Fifth Circuit in *Calley v. Callaway*[70] has attempted to clarify the boundary of such review. Following a court-martial conviction arising out of incidents in Vietnam,[71] Lieutenant William Calley sought habeas corpus relief in federal district court challenging his conviction. The district court granted the relief and the Army appealed, while Calley cross-appealed.[72] The Fifth Circuit held that it was erroneous for the district court to have issued a writ of habeas corpus to Calley. Calley raised four issues in his plea: (1) prejudicial pre-trial publicity; (2) failure to subpoena certain defense witnesses; (3) refusal of the United States House of Representatives to release essential evidence; and (4) inadequacy of notice in the bill of particulars.[73]

As to the first issue, the court declared that there were no special military considerations which would justify departing from current standards[74]

and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." Id. at 758.

68. At least one writer has argued that Parker could be construed as having abandoned the Burns approach. See Note, Procedural Deficiencies of Courts-Martial and Civilian Judicial Review: Lieutenant Calley's Case, 28 Rutgers L. Rev. 626, 673 (1975).

69. 417 U.S. at 758.

70. 519 F.2d 184 (5th Cir. 1975), cert. denied, 44 U.S.L.W. 3564 (U.S. April 6, 1976) (No. 75-773). The court noted that "[f]ederal courts have interpreted Burns with considerable disagreement." Id. at 198 (emphasis omitted).

71. On March 16, 1968 a number of unarmed and unresisting Vietnamese civilians were killed by American soldiers in the small village of My Lai, South Vietnam. Calley, a platoon leader, was found guilty of "the murder of not less than one human being" at a trail in the southern part of My Lai. Id. at 192. He was also found guilty of "the murder of not less than 20 persons" at a ditch in the eastern part of My Lai. Id. at 192. Calley was also found guilty of premeditated murder for the death of a forty- to fifty-year-old monk. Id. In addition, he was found guilty of "assault with intent to commit murder" because of shooting at a young child. Id. at 193. Calley admitted participating in the killings at the trail and at the ditch. He denied, however, killing either the monk or the young child. Calley claimed that he was "not legally responsible for the killings because there was an absence of malice on his part" and also because he was allegedly ordered by superior officers "to kill everyone in the village." Id. For an interesting discussion of the trial and surrounding events see R. Hammer, The Court-Martial of Lt. Calley (1971).

72. 519 F.2d at 191.

73. Id. at 194.

74. Id. at 203-04. The court cited Irvin v. Dowd, 366 U.S. 717 (1961), and Reynolds v. United States, 98 U.S. 145 (1878), to support its formulation of the general rule that "a defendant has the burden on appeal of proving actual jury prejudice if a conviction is to be reversed on grounds of prejudicial publicity." 519 F.2d at 204. In Irvin, an individual was tried and convicted of murder and sentenced to death. Numerous murders had been committed in the vicinity, and they were given detailed coverage by the local news media. Although the court argued that the burden of showing actual jury prejudice was on the "challenger," the court did

and that Calley's claim lacked merit.[75] With regard to the second issue raised, Calley argued that the failure of the military judge to subpoena certain witnesses[76] requested by him deprived him of due process and of the right to confront witnesses and to have compulsory process.[77] The court decreed that further review of this issue by civilian courts was barred since the military judge held that there was no *factual* basis for the allegations underlying Calley's request, and since the Court of Military Review dealt fully and fairly with the military judge's conclusion.[78]

As to Calley's argument that he was denied due process because the House of Representatives refused to release certain testimony concerning the My Lai massacre which it had obtained in executive session,[79] the Fifth Circuit held that there was no due process violation[80] and that Congressional failure to supply the testimony, even if it were assumed to be a violation of the Jencks Act,[81] did not rise to the level of a constitutional error.[82] Review of such an issue would thus not be proper in a civilian court.[83]

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note that " '[a] fair trial in a fair tribunal is a basic requirement of due process.' In the ultimate analysis, only the jury can strip a man of his liberty or his life." 366 U.S. at 722. (quoting In re Murchison, 349 U.S. 133, 136 (1955)). In Reynolds, the Court noted: "Unless [the challenger] shows the actual existence of such [a prejudicial] opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so." 98 U.S. at 157.

75. The court felt that Calley's claim lacked merit because much of the publicity was favorable to Calley; because of the long period of time between the height of the publicity and the trial; and because Calley sought as jury members individuals who were aware of the conditions in Vietnam. 519 F.2d at 205-13.

76. Calley requested that Secretary of Defense Laird, Secretary of the Army Resor, and Chief of Staff of the Army Westmoreland appear as witnesses in order that Calley could establish the defense that the charges brought against him were done so as a result of command influence. Id. at 213.

77. Id. at 194. The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. Const. amend. VI.

78. 519 F.2d at 217 (emphasis added).

79. Id. at 194. After national attention had been drawn to the case, the House Armed Services Committee appointed an investigating subcommittee to review the case. "[T]he subcommittee interviewed 152 witnesses, held 16 days of hearings, took 1,812 pages of sworn testimony, and examined hundreds of documents. In addition, the subcommittee took 3,045 pages of statements from witnesses, and conducted its own field investigation in Vietnam." Id. at 219.

80. The court stated that there was no due process violation because of "the vast amount of pretrial discovery afforded the petitioner, the fact that the defense possessed prior statements by all witnesses who testified both before the Hebert Subcommittee and the court-martial, [and because of] the noncritical nature of many of the witnesses' testimony . . . ." Id. at 223. In addition, the court noted that the prosecution was not responsible for the withholding of the evidence. Id.

81. The court did not reach the issue of whether congressional failure to provide the testimony was a violation of the Jencks Act. Id. at 225.

82. Id. at 226.

83. Id. at 199-200.

The last major issue raised by Calley, that he was not adequately notified of the charges against him, resulting in a risk of double jeopardy,[84] was easily disposed of. The Fifth Circuit pointed out that the military judge gave detailed instructions requiring the prosecution to prove its case in conformity with the allegations set out in the bill of particulars. Since Calley did not deny participating in the killings, the court found it difficult to comprehend how Calley was "deprived of fair notice of the charges against him when he confirms that the alleged incidents happened and that he participated in them."[85]

In its analysis of these issues, the Fifth Circuit utilized a standard of review that differs from the *Burns* test as it has been interpreted by many courts.[86] The court declared that the scope of civilian review should depend on the nature of the issues raised and that "four principal inquiries are necessary" in order to determine what the nature of the issues are.[87] According to the court, the first inquiry to be asked by a civilian judge is whether the asserted error committed by the military is of constitutional dimension, or is so fundamental as to have resulted in a gross miscarriage of justice.[88]

The second inquiry is whether the disputed issue is one of fact or of law. According to the court, "a conclusion that a military prisoner's claim is one of law and not intertwined with disputed facts previously determined by the military is one important factor which favors broader review."[89] Third, the court must inquire whether the disputed constitutional issue requires different treatment because of special military considerations. If the constitutional claim raised by the petitioner has been dealt with by the court-martial, and if the tribunal has determined that the petitioner's position on this claim would have an adverse effect on the military, then according to the court, civilian courts should not interfere.[90]

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84. Id. at 194.

85. Id. at 227.

86. The court declared that consideration of issues by the military would not preclude further review by civil courts. Id. at 203. In so holding, the court apparently rejected the contention raised by some earlier cases that once the military has reviewed an issue further review is barred by civil courts. See note 57 supra and accompanying text. There have been courts which have expressed a viewpoint similar to Calley. See, e.g., Kennedy v. Commandant, 377 F.2d 339, 342 (10th Cir. 1967); Shaw v. United States, 357 F.2d 949, 954 (Ct. Cl. 1966); Application of Stapley, 246 F. Supp. 316, 320 (D. Utah 1965).

87. 519 F.2d at 199.

88. Id. at 199-200. See also United States v. Augenblick, 393 U.S. 348 (1969); Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013 (1970); Stolte v. Laird, 353 F. Supp. 1392, 1395-96 (D.D.C. 1972).

89. 519 F.2d at 200.

90. Id. at 200-03. Deference to the military is shown by the fact that many civil courts will not review cases concerning military "orders, duty assignments, personnel status, and other non-discharge administrative determinations." Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 Va. L. Rev. 483, 493 (1969). Although civil courts have shown a reluctance to intrude into certain areas of military life, the Supreme Court in Harmon v. Brucker, 355 U.S. 579 (1958) (per curiam), held that civil courts have the power to review internal military affairs to determine if an official has acted outside the scope of his authority. Lower courts have held that review is available where the military has violated its

Finally, the court must determine whether the military has given adequate consideration to the issues involved, and whether the military has applied "a proper legal standard to disputed factual claims."[91]

In summary, the court stated:

> Military court-martial convictions are subject to collateral review by federal civil courts on petitions for writs of habeas corpus where it is asserted that the court-martial acted without jurisdiction, or that substantial constitutional rights have been violated, or that exceptional circumstances have been presented which are so fundamentally defective as to result in a miscarriage of justice. *Consideration by the military of such issues will not preclude judicial review for the military must accord to its personnel the protections of basic constitutional rights essential to a fair trial and the guarantee of due process of law.* The scope of review for violations of constitutional rights, however, is more narrow than in civil cases. Thus federal courts should differentiate between questions of fact and law and review only questions of law which present substantial constitutional issues. Accordingly, they may not retry the facts or reevaluate the evidence, their function in this regard being limited to determining whether the military has fully and fairly considered contested factual issues.[92]

By holding that the scope of review "depends on the *nature* of the issues raised,"[93] the *Calley* opinion has focused attention on the central point which should govern the direction of a military habeas corpus proceeding. In limiting civilian review to substantial constitutional issues[94] and by proscrib-

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own regulations. See, e.g., Feliciano v. Laird, 426 F.2d 424, 427 (2d Cir. 1970); Van Bourg v. Nitze, 388 F.2d 557, 564-65 (D.C. Cir. 1967). Civilian review has also extended to a determination of whether military statutes, executive orders, and regulations were constitutional. See United States v. Flower, 452 F.2d 80 (5th Cir. 1971), rev'd on other grounds, 407 U.S. 197 (1972); Goldstein v. Clifford, 290 F. Supp. 275 (D. N.J. 1968); Morse v. Boswell, 289 F. Supp. 812 (D. Md.), aff'd, 401 F.2d 544 (4th Cir. 1968), cert. denied, 393 U.S. 1052 (1969). But see Anderson v. Laird, 437 F.2d 912 (7th Cir.), cert. denied, 404 U.S. 865 (1971); Raderman v. Kaine, 411 F.2d 1102 (2d Cir.), petition for cert. dismissed, 396 U.S. 976 (1969).

91. 519 F.2d at 203. See also Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013 (1970), where the court stated that "the test of fairness [under Burns] 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." Id. at 997. See also Stolte v. Laird, 353 F. Supp. 1392, 1395-96 (D.D.C. 1972). In reviewing internal military affairs, the standard of review tends to vary with the nature of the issues raised. A challenge to a discretionary decision will be reviewed under an abuse of discretion standard. E.g., Bluth v. Laird, 435 F.2d 1065 (4th Cir. 1970); Nixon v. Secretary of the Navy, 422 F.2d 934 (2d Cir. 1970). Decisions dealing with conscientious objector applications are reviewed like draft cases, under the "any basis in fact" test. E.g., Pitcher v. Laird, 421 F.2d 1272 (5th Cir.), application for stay denied, 399 U.S. 902 (1970); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968). In reviewing allegations that the military failed to follow its own regulations, the courts will look to see if the regulations were in fact not followed and if there was a showing of prejudice to the petitioner. E.g., Friedberg v. Resor, 453 F.2d 935 (2d Cir. 1971). Claims that enlistment contracts have been breached or are invalid will be reviewed under traditional notions of contract law. E.g., Johnson v. Chafee, 469 F.2d 1216 (9th Cir. 1972), cert. denied, 411 U.S. 966 (1973); Shelton v. Brunson, 465 F.2d 144 (5th Cir. 1972); see Chalfant v. Laird, 420 F.2d 945 (9th Cir. 1969).

92. 519 F.2d at 203 (emphasis added).

93. Id. at 199 (emphasis added).

94. Id. at 199-200.

ing civilian review of factual claims unless the military has failed to fully and fairly consider them,[95] the *Calley* standard prevents unwarranted intrusion into military affairs.[96] Furthermore, *Calley* does recognize that under certain circumstances the needs of the military may require that constitutional claims be treated differently than they otherwise would be.[97] Such a standard accords to the individual serviceman the assurance that his constitutional rights will be upheld by the civilian courts if they have not already been upheld by the military. In addition, the military is assured that it will be accorded proper deference when the situation involved demands it.

By focusing on the nature of the issues raised, and not on the extent to which the military has reviewed the issues, the *Calley* standard avoids much of the inherent ambiguity which surrounded the *Burns* "fully and fairly" test. Deference to the military should be shown not by failing to review an issue, but by reviewing it in the light of an informed understanding of military needs and processes. While there are differences between military and civilian processes, such differences should not form the basis for rejecting the constitutional claims of servicemen.[98] This is not to suggest that the military justice system is unfair when it deals with the constitutional claims of servicemen.[99] Rather, it suggests that since constitutional standards are promulgated by civilian judges, those same judges should be able to review the constitutional claims of servicemen without worrying about the extent to which the military

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95. Id. at 203. Compare the court's treatment of factual claims with the treatment espoused by the Supreme Court for civilian situations in Townsend v. Sain, 372 U.S. 293 (1963). In Townsend the Court held that "[w]here the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court . . . ." Id. at 312. The Court also held that an evidentiary hearing must be held: "If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing. . . ." Id. at 313.

96. The scope of this review may not reach a resolution of the factual issues themselves, but may only determine whether a proper legal standard was used by the court. 519 F.2d at 203.

97. Id. at 200-03.

98. Distinctions between federal and state processes have been noted, Burns v. Wilson, 346 U.S. 137, 140 (1953), and yet they have not prevented the Court from allowing full review of constitutional issues in state habeas corpus proceedings. E.g., Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Brown v. Allen, 344 U.S. 443 (1953). The analogy between federal and state courts, however, is not completely similar to that which exists between federal and military courts. At least two distinctions can be drawn. First, military courts, unlike state courts, are article I courts. See note 6 supra. Secondly, unlike state court decisions, there is no direct appeal to the Supreme Court in military cases. See note 24 supra and accompanying text.

99. On the contrary, the military justice system provides an accused with many advantages which are not normally available to a civilian. For an interesting discussion and comparison of the military and civilian systems of justice see Nichols, The Justice of Military Justice, 12 Wm. & Mary L. Rev. 482 (1971). See also Kent, Practical Benefits for the Accused—A Case Comparison of the U.S. Civilian and Military Systems of Justice, 9 Duquesne L. Rev. 186 (1970).

has reviewed the issue.[100] Fear that an expanded scope of review would open the federal courts to a tide of unwarranted claims is ill founded since the "exhaustion of remedies"[101] requirement, in conjunction with the requirement that only substantial constitutional claims be reviewed, would effectively prevent minor claims from reaching the courts.[102]

The scope of review laid down in *Calley* is more closely analogous to that which governs civilian habeas corpus cases than to that which traditionally has governed military cases.[103] In analyzing the issues presented to it, the court carefully distinguished questions of law from questions of fact, with factual determinations receiving greater deference than pure issues of constitutional law. While such an approach differs from that taken by many post *Burns* cases,[104] it is completely consonant with *Burns* if one reads *Burns* as encompassing the rationale laid down in earlier civilian cases.[105] To the extent that one reads *Burns* as proscribing civilian review of constitutional issues once they have been fully and fairly dealt with by the military, *Calley* represents a significant departure from *Burns*.

Regardless of the perspective taken on the question of whether *Burns* forecloses civilian review once the military has fully and fairly litigated a contested constitutional issue, the *Calley* standard represents a workable approach[106] to military cases that has long been needed. Hopefully it will

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100. In Burns v. Wilson, 346 U.S. 137 (1953), Justice Douglas noted in dissent that "military tribunals . . . are federal agencies subject to no other judicial supervision except what is afforded by the federal courts. . . . [T]he rules of due process which they apply are constitutional rules which we, not they, formulate." Id. at 154.

101. See note 5 supra and accompanying text.

102. The notion that an expanded civilian habeas corpus caseload would put a significant strain on federal courts has been likewise rejected. See Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1041-42 (1970).

103. Compare the Calley statement that "[c]onsideration by the military of such [constitutional] issues will not preclude judicial review . . . ." 519 F.2d at 203, with the statement in Brown v. Allen, 344 U.S. 443 (1953), that "[t]he State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." Id. at 508. Contrast this attitude of the Court in civil cases with its deferential statement in Burns v. Wilson, 346 U.S. 137 (1953), that the federal civil courts should "take account of the prior proceedings—of the fair determinations of the military tribunals after all military remedies have been exhausted." Id. at 142. For a comparison which points out the similarity between the Calley standard in relation to factual allegations, and the Court's treatment of the issue in civil cases see note 95 supra and accompanying text.

104. See notes 54-57 supra and accompanying text.

105. In Brown v. Allen, 344 U.S. 443, 458 (1953), the Court held that a state court's determinations of constitutional law questions were reviewable in habeas corpus proceedings, while a state's factual determinations would only be upset if unusual circumstances existed. See also the separate opinion of Justice Frankfurter, id. at 506-07. See Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1052-62 (1970). Since the allegations in Burns centered for the most part on factual contentions, see notes 41-43 supra and accompanying text, the Court's decision could be viewed as following the rationale laid down in Brown.

106. Since Brown v. Allen, 344 U.S. 443 (1953), the federal courts have had to deal increasingly with requests for habeas corpus relief. See Note, Habeas Corpus v. Prison Regula-

receive the sanction of the Supreme Court and, until such sanction is forthcoming, will provide a basis for uniformity among the federal courts.

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tions: A Struggle in Constitutional Theory, 54 Marq. L. Rev. 50, 53 (1971). This experience in the civilian sphere could be used to suggest a workable standard of review which would allow civilian courts to review constitutional issues despite the fact that they were previously reviewed by the military.