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Evidentiary Hearings in Federal Habeas Corpus Cases

Charles D. Weisselberg*

Federal habeas corpus is filled with controversy. Courts and commentators are united in their praise of the "Great Writ."¹ After that, it seems, the consensus breaks down. There are debates on the function of the writ at common-law, the place of the writ within our Constitution, and the reach of the federal statutes which afford state prisoners access to the writ in federal court. Several recent commentators have suggested that federal habeas corpus serve as a federal appeal for state prisoners. This would eliminate federal evidentiary hearings in habeas corpus cases, for the essential difference between trial and appellate courts is the ability to hear testimony and make findings of fact. Other commentators argue that evidentiary hearings should only be conducted in federal habeas corpus cases if the state court proceedings were neither full nor fair. This article addresses these proposals for reform and examines the federal courts' role in reviewing state courts' factual findings and legal conclusions.

Problems arise, however, with such a narrow focus. A petition for writ of habeas corpus is simply a form of procedure. The federal writ is a mechanism for our citizens, including state prisoners, to implement their federal rights. "Federal rights," of course, have not remained constant over the last two hundred

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1. The "Great Writ" is habeas corpus *ad subjiciendum*. At common law, the writ was directed to the person detaining another. It commanded the custodian to produce the body of the prisoner, together with the reasons for his or her detention, and to "submit to, and receive, whatsoever the judge or court awarding such writ shall consider in that behalf." 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131 (1791). It has been noted that "[t]he rhetoric celebrating habeas corpus has changed little over the centuries." *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1040 (1970) (footnote omitted).

years. We have matured as a society and as a nation; as part of that process our notions of the rights due our citizens have changed. Given that, any study of habeas corpus necessarily becomes a study of our courts, our jurisprudence and our society. And, at some point, the process afforded federal habeas corpus petitioners becomes inextricably bound with the rights federal courts are willing to protect. Thus, the focus of this article is somewhat diffused.

The first portion of this article traces the development of the modern federal writ of habeas corpus. It acknowledges, but does not attempt to resolve, present-day debates on the ancient meaning of habeas corpus and the place of habeas corpus within our Constitution. The United States Constitution does not expressly provide for federal habeas corpus review of state criminal convictions; the suspension clause,² however, recognizes an existing writ, and limits the ability of the federal government to suspend the writ. The affirmative power of the federal courts to award writs of habeas corpus is rooted in acts of Congress.

In the Judiciary Act of 1789,³ Congress gave federal courts authority to issue writs of habeas corpus on behalf of federal prisoners. Several minor extensions of that power were granted in 1833 and 1842.⁴ During Reconstruction, Congress passed the Habeas Corpus Act of 1867,⁵ which for the first time gave federal courts jurisdiction of state prisoners' petitions for writs of habeas corpus. Between 1867 and 1953, the writ gradually became a general post-conviction remedy. A series of Supreme Court decisions in 1963,⁶ and amendments to the statute governing federal habeas corpus in 1966,⁷ assured the writ's place in our judicial system.

As the writ evolved, both the Supreme Court and Congress were faced with difficult questions, such as the appropriate measure of deference due to state courts' findings of fact and conclusions of law. The first section of this article briefly traces the constitutional provisions, legislative enactments and early cases which opened the federal courts to state prisoners. Particular at-

2. U.S. CONST. art. I, § 9, cl. 2.

3. 1 Stat. 73.

4. Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634; Act of August 29, 1842, 5 Stat. 539.

5. Act of February 5, 1867, ch. 28, 14 Stat. 385.

6. *Townsend v. Sain*, 372 U.S. 293 (1963); *Fay v. Noia*, 372 U.S. 391 (1963); *Sanders v. United States*, 373 U.S. 1 (1963).

7. Act of November 2, 1966, 80 Stat. 1104.

tention is given to those statutes and cases which strike a balance between federal and state court decisionmaking.⁸

The second section of this article examines cases decided after the 1963 decision in *Townsend v. Sain*.⁹ *Townsend* is the leading decision governing evidentiary hearings in habeas corpus cases. The article examines decisions which have "fine-tuned" the review process since *Townsend* and which discuss the measure of deference owed to state court decisions.

The third part of this article examines the growth of federal civil litigation and habeas corpus petitions. Federal civil litigation of all sorts has risen sharply over the last twenty-five years.¹⁰ Prisoners are not isolated from this phenomenon. But examining the number of habeas corpus petitions per hundred state inmates gives a different picture; the rate of filing has levelled and has, since 1970, declined.

In section three, the article also compares the frequency of evidentiary hearings in habeas corpus cases with the occurrence of trials in all other types of federal civil matters. As it turns out, most habeas corpus petitions are decided solely on written records. The district courts rarely convene evidentiary hearings in habeas corpus cases.

The fourth portion of the article examines some current proposals to reform federal habeas corpus. Two of the more persistent proposals are studied in detail.

The article concludes that none of the proposals for habeas corpus reform strikes a better balance than already exists between state and federal decisionmaking. Further, the article concludes that evidentiary hearings are essential to the federal writ of habeas corpus.

8. This paper is not a comprehensive treatise on the history of federal habeas corpus. Many scholars have traced the development of federal habeas corpus. For more detailed treatments, see W. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* (1980); Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965); L. YACKLE, *POSTCONVICTION REMEDIES* (1981); Rosenn, *The Great Writ — A Reflection of Societal Change*, 44 OHIO ST. L.J. 337 (1983); Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 581 (1982).

9. 372 U.S. 293 (1963).

10. See generally R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 59-77 (1985).

I. DEVELOPMENT OF THE MODERN WRIT: 1787—1966

A. *The United States Constitution*

The United States Constitution does not expressly grant jurisdiction to federal courts to issue writs of habeas corpus. The suspension clause provides, in its entirety, that “[t]he 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.”¹¹ While the clause admits the existence of the remedy of habeas corpus, the language prescribes neither the forum in which the “privilege” resides nor the persons to whom the “privilege” extends.

The Supreme Court has never decided whether the clause implicitly requires the federal courts to make available the remedy of habeas corpus. Individual justices have split on the issue¹² and disagreement prevails among commentators.¹³ Given the un-

11. U.S. CONST. art. I, § 9, cl. 2.

12. Compare, e.g., *Swain v. Pressley*, 430 U.S. 372, 384-86 (1977) (Burger, C.J., concurring) (suspension clause does not require the federal courts to make the “privilege” available) with *Johnson v. Eisentrager*, 339 U.S. 763, 798 (1950) (Black, J., dissenting) (the privilege cannot constitutionally be abridged).

13. Compare, e.g., W. DUKER, *supra* note 8, at 126-35, with Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605. Professor Paschal argues that the suspension clause requires courts to make available the remedy of habeas corpus. He points out that the delegates to the Philadelphia Convention had in mind the possibility that there would be no lower federal courts. *Id.* at 615-17. Furthermore, § 14 of the Judiciary Act of 1789 did not itself grant the power to the district courts to award the writ of habeas corpus *ad subjiciendum*, except as ancillary to the federal courts’ original jurisdiction, *id.* at 641, and that Chief Justice Marshall erred in broadly construing the Judiciary Act in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). Paschal contends that in *Bollman* Justice Marshall found no original jurisdiction in the Supreme Court to entertain habeas corpus petitions only because a contrary ruling would conflict with his prior decision in *Marbury v. Madison*. *Id.* at 649-51. He concludes that the suspension clause directs “all superior courts of record, state as well as federal, to make the habeas privilege available.” *Id.* at 607.

Duker, on the other hand, contends that the suspension clause was intended only to limit Congress’ power to suspend the ability of state courts to issue writs of habeas corpus on behalf of federal prisoners. W. DUKER, *supra* note 8, at 126-35. He examines the contemporary commentary on the suspension clause, and the statements made about the clause in the state ratifying conventions. *Id.* at 131-35. He also notes that, at the time of the constitutional convention, every state provided for writs of habeas corpus. *Id.* at 129. Indeed, until 1858, it was settled that a state court, as well as a federal court, could issue a writ of habeas corpus to examine the imprisonment of a federal prisoner within its jurisdiction. *Id.* at 149. (In 1858, the Supreme Court decided *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858), which held that a state court lacked jurisdiction to issue a writ of habeas corpus on behalf of a federal prisoner.) Duker then argues that the location of the suspension clause in section 9 of article I, which imposes a series of limitations upon the federal government vis-a-vis the states, together with the seeming avail-

settled reach of the suspension clause, litigants have long looked to acts of Congress as the source of the federal courts' power to issue writs of habeas corpus.

B. *The Judiciary Act of 1789*

The Judiciary Act of 1789, which structured the federal judiciary, gave Supreme Court justices and district court judges jurisdiction to grant writs of habeas corpus to enquire into the cause of a person's commitment.¹⁴ The Act expressly limited the federal courts' power to hear prisoner petitions to those petitions brought by persons in federal custody.

The Act was construed by the Supreme Court in *Ex parte Bollman*.¹⁵ Chief Justice Marshall wrote for the Court that the power of federal courts to issue writs of habeas corpus must be given by "written law"—meaning federal statutes.¹⁶ The Court held that section 14 of the Act gave that power to federal courts, and not just to the individual federal judges and justices (as the language of the Act might otherwise indicate).¹⁷

Although *Ex parte Bollman* established that federal courts could entertain petitions to enquire into the cause of a person's federal commitment, it was clear that "written law" did not yet permit examination of a state prisoner's confinement. In *Ex parte Dorr*,¹⁸ the Supreme Court held that it had neither origi-

ability of state habeas corpus, demonstrates that the suspension clause "was designed to restrict Congressional power to suspend state habeas for federal prisoners." *Id.* at 135.

14. Section 14 of the Judiciary Act of 1789, 1 Stat. 73, 81-82, provides:

Sec. 14. *And be it further enacted*, That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

15. 8 U.S. (4 Cranch) 75 (1807). Dr. Erick Bollman and Samuel Swartwout were charged with treason, as part of the conspiracy involving Colonel Burr. They were placed under military arrest in New Orleans and sent to Washington. They sought bail on a writ of habeas corpus. Chief Justice Marshall ordered that "the whole subject will be taken up *de novo*, without reference to precedents." *Id.*

16. *Id.* at 94.

17. *Id.* at 96.

18. 44 U.S. (3 How.) 103 (1845).

nal nor appellate jurisdiction to issue a writ of habeas corpus on behalf of a prisoner in state custody.

C. Initial Inroads In the Restrictions Against Federal Habeas Corpus For State Prisoners

In the first half of the nineteenth century, Congress made two inroads in the restrictions against federal habeas corpus for state prisoners. The Force Act of 1833¹⁹ allowed the President to employ land or naval forces to assist customs officers in collecting tariffs.²⁰ Section 7 of the Force Act was added to protect tariff collectors. The Force Act gave federal courts the power to grant writs of habeas corpus to examine the confinement of prisoners "committed for any act done . . . in pursuance of a law of the United States."²¹

The second inroad was the Act of August 29, 1842.²² It enabled federal courts to grant writs of habeas corpus on behalf of foreign citizens, held in either federal or state custody, for any act done under the order or sanction of a foreign state.²³ The Act was passed after a British citizen was tried in a state court for the destruction of an American-owned steamboat, and the federal government found itself powerless to intercede in the state proceeding.²⁴

D. The Habeas Corpus Act of 1867.

On February 5, 1867, the Habeas Corpus Act of 1867²⁵ became law. The Act extended federal habeas corpus to "any person . . . restrained of his or her liberty in violation of the consti-

19. Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634.

20. A convention of the "People of South Carolina" had declared certain federal tariffs unconstitutional. The President was unable to use loyal South Carolinians to enforce the tariffs, because they feared imprisonment under state law. The Force Act of 1833 was passed in response to this crisis. W. DUKER, *supra* note 8, at 187.

21. Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634-35.

22. 5 Stat. 539.

23. *Id.*

24. The British government called upon the federal government to intercede. The British subject, McLeod, had destroyed the steamboat in the service of his country. However, the United States government perceived that it could not interfere in a state prosecution. McLeod was acquitted. W. DUKER, *supra* note 8, at 188-89. The case attracted great attention at the time, and it was thought that Great Britain might invade the United States if McLeod was convicted. See *People v. McLeod*, 37 American Dec. 364 (N.Y. 1841) (editor's note).

25. Act of February 5, 1867, ch. 28, 14 Stat. 385.

tution, or of any treaty or law of the United States.”²⁶ “Any person” was not limited to petitioners in federal custody, making the Act the first general extension of federal habeas corpus to state prisoners.

The Act was passed by Congress without lengthy debate. The few statements which are in the record lend support to a broad interpretation of the Act. Representative Lawrence introduced the bill in the House and stated that it would “enlarge” habeas corpus “and make the jurisdiction of the [federal] courts . . . coextensive with all the powers that can be conferred upon them.” He then called it “a bill of the largest liberty”²⁷ Senator Trumbull, who introduced the bill in the Senate, stated that “a person might be held under a State law in violation of the Constitution . . . and he ought to have in such a case the benefit of the writ.”²⁸

Although the phrase “any person . . . restrained . . . in violation of the constitution” was not, by its own terms, limited, commentators have continued to debate the meaning of the phrase.²⁹ One view is that Congress intended to extend federal habeas corpus only to former slaves.³⁰ Another opinion, expressed in

26. *Id.* The first section of the Act provides, in part:

Be it enacted . . . that the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States;

27. CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866) (statement of Representative Lawrence).

28. CONG. GLOBE, 39th Cong., 1st Sess. 4229 (1866) (statement of Senator Trumbull).

29. See generally L. YACKLE, *supra* note 8, at 85-88.

30. See Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965). “Any person” only refers to freedmen, the argument goes, because the Act was introduced in response to an earlier Resolution calling for legislation “to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery.” See CONG. GLOBE, 39th Cong., 1st Sess. 87 (1865) (statement of Representative Shellabarger). Yet the Senate debate at the time the bill was finally introduced does *not* indicate that the Act was meant to apply only to former slaves. Two senators questioned whether the Act would apply to persons in military custody. The Act was amended so that it would not apply to military prisoners. CONG. GLOBE, 39th Cong., 1st Sess. 4229 (statements of Senators Davis and Nesmith). Senator Trumbull’s statement introducing the bill supports a broad interpretation. See *supra* note 28 and accompanying text. The Act was passed in the Senate on the basis of Senator Trumbull’s statement. See *Habeas Corpus Reform: Hearing Before the Comm. on the Judiciary, S. 238, 99th Cong., 1st Sess., 137-38* (supplemental statement of Professor Larry W. Yackle) (1985).

Professor Bator's oft-cited article,³¹ is that habeas corpus jurisdiction is historically limited, and that nothing in the Act or its legislative history indicates Congress intended to expand the classes of questions cognizable on habeas corpus.³² Others argue that Congress meant exactly what it wrote in enacting an expansive habeas corpus bill. Congress feared that southern states might imprison citizens loyal to the union. The Act was not limited to freedmen because a federal remedy was needed to help jailed loyalists.³³

Despite the present debate over Congress' intent in 1867, the Supreme Court soon made clear that the Act would be interpreted expansively. The earliest case arose after a newspaper editor, McCardle, was arrested by military authorities on charges stemming from anti-reconstructionist editorials he published in the *Vicksburg Times*.³⁴ The Federal Circuit Court of Appeals denied his application for habeas corpus, but released him on bond pending appeal to the Supreme Court. In *Ex parte McCardle*,³⁵ the Court held that under the 1867 Act, a military (federal) prisoner could appeal directly to the Supreme Court from a decision of a lower court, rather than proceed by writs of certiorari and habeas corpus.³⁶ The Court interpreted the Act expansively: "[The Act] is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."³⁷

Mayers also argues that Senator Trumbull's understanding of the bill was quite limited. The bill, after all, was drafted in the House of Representatives. Mayers, *supra* at 39. If Senator Trumbull did not know much about habeas corpus in 1866, he boned up on it later. Senator Trumbull argued on behalf of the government in *Ex parte McCardle*, the first Supreme Court case to interpret the 1867 Act. See *infra* notes 35-37 and accompanying text.

31. Bator, *Finality In Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 HARV. L. REV. 441 (1963).

32. *Id.* at 474-77.

33. See Amsterdam, *supra* note 8. Professor Amsterdam points out that Congress was well aware of the problems faced by loyalists. The problems surfaced during the debate over the Act of May 11, 1866, 14 Stat. 46 (which allowed removal of cases from state to federal court, even after final judgment in state court). *Id.* at 823-25.

34. See Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 ARIZ. L. REV. 229, 236 (1973).

35. 73 U.S. (6 Wall.) 318 (1867) (*McCardle I*).

36. *Id.* at 324-25.

37. *Id.* at 325-26. In *McCardle I*, the Court denied the government's motion to dismiss for lack of jurisdiction. *Id.* at 327. On March 9, 1868, argument on the merits of

The Act also established expedited procedures for adjudicating habeas corpus petitions, and required evidentiary hearings in certain cases.³⁸ After receiving the pleadings, the judge "shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested."³⁹ The Act did not prescribe more precise procedures.

E. Habeas Corpus in the Supreme Court, 1867-1948: Laying the Groundwork for the Modern Writ

Although the Supreme Court stated in *Ex parte McCardle* that the writ could remedy "every possible case of privation of liberty," subsequent habeas corpus cases were decided under the old notion that the writ could attack a judgment only if the original court somehow lacked jurisdiction.⁴⁰ Gradually, the Court

McCardle's appeal were concluded. Van Alstyne, *supra* note 34, at 239. Several days later, Congress passed an act which repealed "so much of the [Habeas Corpus Act of 1867] . . . as authorize[d] an appeal." Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44. President Johnson vetoed the measure, but his veto was overridden. Van Alstyne, *supra* note 34, at 239-40. Congress passed the repealer to prevent the Supreme Court from ruling on the constitutionality of the Military Reconstruction Act of March 2, 1867. *Id.* at 241. In *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869) (*McCardle II*), the Supreme Court ruled that it no longer had jurisdiction to consider McCardle's appeal. The Supreme Court's appellate jurisdiction was restored by the Act of March 3, 1885, ch. 353, 23 Stat. 437.

38. A person "restrained of his or her liberty" could apply for a writ of habeas corpus. 14 Stat. 385. After reviewing the application, the judge was required to award the writ, unless the petition showed that the person was not entitled to relief. The writ would direct the custodian to bring the petitioner before the court and "certify the true cause of [his] detention." The petitioner could deny any of the allegations in the return. *Id.* at 386.

39. *Id.* This provision was later codified at R.S. 761, 28 U.S.C. § 461 (1940 ed.).

40. See, e.g., *Ex parte Siebold*, 100 U.S. 371, 375 (1879) ("[Habeas corpus] cannot be used as a mere writ of error. . . . [T]he general rule is, that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by *habeas corpus*."). For discussions of the erosion of this principle, see Rosenn, *supra* note 8, at 344-45; Hart, *The Supreme Court, 1958 Term, Foreward: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 103-05 (1959); Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 754 (1987).

The source of the "jurisdiction" requirement is not clear. Judges and scholars continue to debate whether the "jurisdiction" requirement was part of the writ of habeas corpus at common law. One view of the writ is contained in *Fay v. Noia*, 372 U.S. 391 (1963), which traces the development of habeas corpus. There the Court noted that at common law the writ was not limited to simply enquiring into the jurisdiction of the committing court. *Id.* at 404. For example, in *Bushell's Case*, 124 Eng. Rep. 1006 (1670), the writ was used to free former jurors from custody. A judge had held the jurors in contempt after they returned not guilty verdicts in the trial of William Penn and William Mead. *Id.* at 1007. The jurors were discharged on a writ of habeas corpus because their imprisonment was without cause, not because of any lack of jurisdiction in the

“expanded” the concept of lack of jurisdiction. In early habeas corpus cases, jurisdiction was determined by examining the record in the trial court. As the original notion of jurisdiction was stretched—and, indeed, expressly abandoned—the Court became willing to examine evidence outside of the sentencing state court’s record. During this process, the Supreme Court struggled with both the measure of deference owed to findings of fact by state courts, and the hearing procedures to be followed in the federal district courts.

One of the first “jurisdiction” cases was *Ex parte Lange*.⁴¹ There, habeas corpus was used to secure the release of a prisoner who had been twice sentenced (and thus twice put in jeopardy) for the same offense. The Court held that the authority to punish the prisoner was gone; thus the court was without power to render any further judgment.⁴² Next, in *Ex parte Siebold*,⁴³ the Supreme Court determined that a lower court lacked jurisdiction to enter judgments of conviction, because the defendants were indicted under an unconstitutional statute. Under those circumstances, the convictions were “illegal and void.”⁴⁴ In *Ex parte Wilson*,⁴⁵ a writ of habeas corpus was issued on behalf of a prisoner sentenced to fifteen years of hard labor. The lower court “exceeded its jurisdiction” because Wilson was prosecuted by way of an information in violation of the fifth amendment.⁴⁶ These three cases tested the traditional concept of jurisdiction. Other developments would follow.

In *Frank v. Mangum*,⁴⁷ the Supreme Court first demonstrated a willingness to go beyond the sentencing court’s record

committing court. *Id.* at 1009, 1016. See also *Fay v. Noia*, 372 U.S. 391, 403-05 (1963).

A contrary view of the writ is expressed in Justice Powell’s concurring opinion in *Schneckloth v. Bustamonte*, 412 U.S. 218, 250-58 (1973). Justice Powell, relying upon the scholarship of Professors Bator and Oaks, argues that habeas corpus was only used at common law to verify the formal jurisdiction of the committing court. *Id.* at 253-54. Justice Powell’s opinion does not address *Bushell’s Case*.

41. 85 U.S. (18 Wall.) 163 (1873).

42. *Id.* at 176.

43. 100 U.S. 371 (1879).

44. *Id.* at 376.

45. 114 U.S. 417 (1885).

46. *Id.* at 429. The fifth amendment provides, in part, that “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .” Wilson’s offense was held to be an “infamous crime,” which therefore required prosecution by grand jury indictment. *Wilson*, 114 U.S. at 429. Because Wilson was prosecuted by way of an information, which is simply a charge signed by a prosecutor, his conviction was obtained in violation of the fifth amendment. *Id.*

47. 237 U.S. 309 (1915).

to determine whether the sentencing court had "jurisdiction." Frank was convicted of murder in a trial dominated by a mob.⁴⁸ The Georgia Supreme Court affirmed his conviction.⁴⁹ Frank then petitioned the federal district court for a writ of habeas corpus, alleging that the state court "lost jurisdiction" because of the mob's influence.⁵⁰ The district court denied relief⁵¹ and Frank appealed. The Supreme Court agreed that a trial dominated by a mob is a departure from due process of law.⁵² The Court went on to conclude that

[I]t is open to the courts of the United States upon an application for a writ of *habeas corpus* to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not⁵³

Despite this expansive language, the district court's ruling was affirmed. The Georgia Supreme Court had considered fully and rejected all of the facts regarding the claim of mob domination.⁵⁴ Georgia had supplied its own corrective process and the United States Supreme Court deferred uncritically to the state court's findings:

[W]e hold that such a determination of the facts as was thus made by the court of last resort of Georgia . . . cannot in this

48. The case is famous. Leo M. Frank, a Jewish factory superintendent, was convicted of murdering a young Atlanta girl, Mary Phagan. L. DINNERSTEIN, *THE LEO FRANK CASE* (1968). The case received immense media coverage. One of the newspapers of the time called it "the greatest news story in the history of the state." *Id.* at 13. The temper of the mob outside the courtroom frightened the editors of all three daily Atlanta papers. At the editors' suggestion, the trial judge let the case go to the jury on a Monday, rather than on a Saturday, to avoid a riot. *Id.* at 54. Because of the fear of violence, the defendant was not present when the jury's guilty verdict was returned. *Frank*, 237 U.S. at 312. Frank was sentenced to death. *Id.*

The mob kept an interest in the case long after the trial. On June 21, 1915, after the Supreme Court's decision (and one day before the scheduled execution), Georgia Governor John M. Slaton commuted Frank's sentence to life imprisonment. DINNERSTEIN, *supra* at 123, 126. Two months later, a band of twenty-five men abducted Frank from a prison farm and lynched him. *Id.* at 139-41. As for Governor Slaton, he was never again elected to public office. *Id.* at 159.

49. 237 U.S. at 335.

50. *Id.* at 324-25, 327.

51. *Id.* at 311.

52. *Id.* at 335.

53. *Id.* at 331.

54. *Id.* at 335-36.

collateral inquiry be treated as a nullity, but must be taken as setting forth the truth of the matter, certainly until some reasonable ground is shown for an inference that the court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction; and that the mere assertion by the prisoner that the facts of the matter are other than the state court upon full investigation determined them to be will not be deemed sufficient to raise an issue respecting the correctness of that determination⁵⁵

Because the state had provided an appeal, the Supreme Court held, Frank was not denied due process.⁵⁶

Not every member of the Supreme Court was willing to defer to the Georgia court. Justice Holmes, joined by Justice Hughes, dissented.⁵⁷ He would have required the United States district court to make its own findings of fact.⁵⁸ Justice Holmes' views would carry the Court just eight years later in *Moore v. Dempsey*.⁵⁹

The petitioners in *Moore v. Dempsey* were five black men convicted of capital murder.⁶⁰ They appealed to the Arkansas Supreme Court, which affirmed their convictions.⁶¹ They then filed federal petitions for writs of habeas corpus, alleging that the state proceedings were "only a form," containing no substance, and that they were convicted under mob pressure.⁶² The district court dismissed the petitions,⁶³ and the men appealed to the Supreme Court. Although the case was on all fours with

55. *Id.* Professor Peller argues that *Frank v. Mangum* contracted rather than expanded habeas corpus jurisdiction. "By allowing a procedurally adequate state appellate hearing to satisfy due process requirements, the Court reduced the constitutional claims available to a state prisoner." Peller, *supra* note 8, at 646 (emphasis in original).

56. *Frank* 237 U.S. at 338.

57. *Id.* at 345 (Holmes, J., dissenting).

58. *Id.* at 347 (Holmes, J., dissenting) ("When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal court must examine the facts.").

59. 261 U.S. 86 (1923).

60. *Id.* at 87.

61. *Id.* at 91.

62. *Id.* at 87. The petitioners were convicted of a killing that took place following a racial disturbance. A "Committee of Seven" was appointed by the governor to investigate an apparent "insurrection" in the county. After the petitioners were arrested, a mob marched to the jail to lynch them. The lynching was prevented by federal troops and by the promise of some members of the Committee of Seven that "they would execute those found guilty in the form of law." The trial was summary: defense counsel did not consult with his clients or call any witnesses. The trial lasted about three-quarters of an hour and the jury returned its verdict in less than five minutes. *Id.* at 86-89.

63. *Id.* at 87.

Frank v. Mangum, the majority refused to defer to the state court's findings. Instead, as Justice Holmes wrote for the Court,

We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void. . . . [I]t appears to us unavoidable that the District Judge should find whether the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed.⁶⁴

The petition was remanded for a hearing in the district court.⁶⁵

Although *Moore v. Dempsey* expanded federal habeas corpus for state prisoners in the sense that federal courts were required henceforth to reexamine state court proceedings, petitioners were still bound by the concept of jurisdiction. That concept was stretched to the limit in *Johnson v. Zerbst*, where it was held that a conviction obtained without counsel could be void for lack of jurisdiction.⁶⁶ Finally, in *Waley v. Johnston*, the Court expressly abandoned the limitation of jurisdiction.⁶⁷

64. *Id.* at 92.

65. *Id.*

66. 304 U.S. 458 (1938). The petitioner, Johnson, was convicted in federal court of counterfeiting. He was not represented by counsel. He sought a writ of habeas corpus, claiming that he was improperly denied counsel. The Supreme Court held that

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. . . . 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). The case was remanded for the district court to determine whether Johnson waived counsel. *Id.* at 469.

67. 316 U.S. 101 (1942) (per curiam). Waley was a federal prisoner. He alleged that he was coerced by federal agents into pleading guilty. *Id.* at 102. The Court noted that the facts supporting the petition were outside of the record and were therefore not open to review on direct appeal. The claim could only be tested in a collateral proceeding. Thus,

[i]n such circumstances 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. The case was remanded for a hearing on whether Waley's plea was in fact

As the Supreme Court stretched and then abandoned the concept of lack of jurisdiction affecting the grant of a writ of habeas corpus, the universe of claims which could be brought by state prisoners in federal court grew. Many of the claims, such as allegations that a defendant was improperly denied counsel, could not be tested on the basis of the committing court's records. The Habeas Corpus Act of 1867 required federal district courts to determine summarily the facts by hearing "testimony and arguments."⁶⁸ The Habeas Corpus Act, however, fell far short of prescribing precise procedures for district courts. The Supreme Court was forced to determine two issues: (a) the extent to which federal district courts should reexamine the decisions of state courts, and (b) whether evidentiary hearings should be conducted in federal district courts.

The first issue was guided by the early pronouncement in *Moore v. Dempsey*: the federal district judge "should find whether the facts alleged are true."⁶⁹ The Supreme Court did not retreat from this position. In 1945, the Court ruled that federal courts would entertain habeas corpus applications to redress federal rights when the state failed to provide corrective process.⁷⁰ However, the Court held that even when corrective process was provided, but error "cre[pt] in the record, [federal courts] have the responsibility to review the state proceedings."⁷¹

The second issue reached the Court in *Walker v. Johnston*.⁷² Walker, a federal inmate, filed a petition for writ of habeas corpus alleging essentially the same claims as in *Johnson v. Zerbst*. The district court adjudicated Walker's claims on the basis of the pleadings and affidavits. No testimony was taken.⁷³ The district judge dismissed Walker's petition.⁷⁴ The Supreme Court reversed. "[I]f an issue of fact is presented," the Court held, the district judge must "issue the writ, have the petitioner produced, and hold a hearing at which evidence is received. This

coerced. *Id.*

68. 28 U.S.C. § 461 (1940 ed.).

69. *Moore v. Dempsey*, 261 U.S. 86 (1923).

70. *Hawk v. Olson*, 326 U.S. 271, 276 (1945).

71. *Id.*

72. 312 U.S. 275 (1941).

73. *Id.* at 284-85.

74. *Id.* at 282.

is, we think, the only admissible procedure [under] the Habeas Corpus Act of 1867."⁷⁵

Walker was a federal inmate and the decision thus did not address the question whether to defer to the findings of a state tribunal. However, the Supreme Court's decision focused upon a particular statute, 28 U.S.C. section 461, which was applicable to all federal petitions for writs of habeas corpus, including those brought by state prisoners. Because the same statute applied to both federal and state prisoners, the Supreme Court also required the hearing described in *Walker v. Johnston* for habeas corpus petitions brought by state prisoners when the petitions raised any factual issues that district courts were required to resolve.⁷⁶

F. The 1948 Amendments

In 1943, a committee chaired by Judge John Parker submitted a report on federal habeas corpus to the Judicial Conference of the United States.⁷⁷ The Judicial Code and Judiciary Act of 1948 codified the federal habeas corpus statutes at 28 U.S.C. sections 2241 to 2255.⁷⁸ The amendments included some of the Parker Committee's proposals.⁷⁹

General provisions relating to federal habeas corpus, including the procedures for filing and responding to petitions, were included in sections 2241 to 2253. Section 2241 contained the basic grounds for awarding a federal writ of habeas corpus. State prisoners could apply for a writ if they were "in custody in viola-

75. *Id.* at 285 (footnote omitted).

76. The Supreme Court later indicated that the principles expressed in *Walker v. Johnston* might apply in the absence of 28 U.S.C. § 461. For example, in *Hawk v. Olson*, 326 U.S. 271 (1945), the Court reviewed the decision of Supreme Court of Nebraska, which had dismissed a state petition for writ of habeas corpus. The petitioner had been convicted of murder. *Id.* at 272. He alleged that his conviction was obtained in violation of his federally-protected right to examine the charge, subpoena witnesses, consult with counsel and prepare a defense. *Id.* at 274. The state court dismissed the petition without a hearing. The United States Supreme Court reversed, holding that Hawk had stated "a good cause of action." *Id.* at 278. Citing *Walker v. Johnston*, the Court held that Hawk was entitled to prove his allegations, and remanded for a hearing in state court. *Id.* at 278-89 & n.7.

77. *Report of the Committee on Habeas Corpus Procedure Submitted to the Judicial Conference of the United States* (June 7, 1943).

78. Ch. 153, 62 Stat. 869, 964-68.

79. See Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 908-09 (1984); United States v. Hayman, 342 U.S. 205, 214-19 (1952); Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1949).

tion of the Constitution or laws or treaties of the United States."⁸⁰ Section 2243 revamped former 28 U.S.C. section 461 (the statute construed in *Walker v. Johnston*), to require that the district court "summarily hear and determine the facts, and dispose of the matter as law and justice require."⁸¹ Additional provisions relating to state and federal prisoners' petitions for writs of habeas corpus were codified at 28 U.S.C. sections 2254 and 2255, respectively. Section 2254 contained an "exhaustion of state remedies" requirement.⁸² Section 2255 recast federal prisoners' habeas corpus petitions as motions to be brought in the court of conviction.⁸³

80. 28 U.S.C. § 2241(c)(3) (1982). The section provides, in its entirety:

SECTION 2241. POWER TO GRANT WRIT

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court and any justice thereof and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

- (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
- (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
- (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
- (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
- (5) It is necessary to bring him into court to testify or for trial.

81. The change was merely one of wording and not one of substance. *Townsend v. Sain*, 372 U.S. 293, 326 n.1 (1963).

82. The entire section read:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

83. The only purpose of the revision was to minimize the practical difficulties encountered in federal prisoners' habeas corpus cases. Most federal inmates were held in

The 1948 Act seemed a radical revision of federal habeas corpus. Yet, as Professor Yackle has written, the legislation "altered the basic form and function of federal habeas corpus very little. Indeed, most of the new provisions only wrote the specifics of Supreme Court decisions into the statute book."⁸⁴ Section 2254, for example, compelled state prisoners to exhaust their state remedies before filing in the federal court. The Supreme Court had required state prisoners to exhaust state remedies since 1886.⁸⁵

G. *Brown v. Allen: On the Edge of A New Era*

In 1953, the Supreme Court decided a trio of cases collectively called *Brown v. Allen*.⁸⁶ All three were brought by state prisoners to review lower federal courts' denials of petitions for writs of habeas corpus. The petitioners had alleged their state convictions were obtained in violation of their rights under the federal Constitution.⁸⁷ Before reaching the merits of their claims (and affirming the decisions below), the Supreme Court discussed the weight to be given state court adjudications, and whether federal district courts were required to afford the petitioners plenary hearings.

District judges *could* defer to state judges' findings, the Court held, though they were not required to do so. As Justice Reed wrote for the Court:

[W]here there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court *may* properly depend upon the state's resolution of the issue In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a

one of seven federal facilities. The districts in which the facilities were located received an inequitable number of habeas corpus petitions. By giving federal prisoners a remedy in the court of conviction akin to habeas corpus, Congress spread the load. Moreover, the court of conviction would generally be the most convenient forum for witnesses. See *Hayman*, 342 U.S. at 219 (footnote omitted); Resnik, *supra* note 79, at 907-14.

84. L. YACKLE, *supra* note 8, at 90.

85. See *Ex parte Royall*, 117 U.S. 241 (1886).

86. 344 U.S. 443 (1953). The three cases were *Brown v. Allen*, *Daniels v. Allen* and *Speller v. Allen*.

87. Brown claimed discrimination against blacks in the selection of the grand and petit juries. He also alleged that his conviction was obtained through the use of an involuntary confession. *Id.* at 466-67. Speller also alleged racial discrimination in the selection of his jury. *Id.* at 477-79. Daniels (and his co-defendant at trial) raised the same claims as Brown. *Id.* at 482-83.

court of last resort of another jurisdiction on federal constitutional issues. It is not *res judicata*.⁸⁸

A hearing in the district court was not required where the petition "affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances . . . are presented."⁸⁹ However, the district court would have discretion to hold a plenary hearing, even if the state had fully considered the claims, if a federal hearing would serve the ends of justice.⁹⁰

Many consider *Brown v. Allen* the beginning of modern habeas corpus practice.⁹¹ Professor Bator writes that the *Brown v. Allen* decision first opened final judgments to collateral attack by competent tribunals.⁹² But *Brown v. Allen* surely flowed from *Moore v. Dempsey* and *Hawk v. Olson*. In *Moore v. Dempsey*, the district judge was instructed to determine whether the facts found by the state court were true and whether the state proceedings should be left "undisturbed."⁹³ In *Hawk v. Olson*, the district judge was ordered to decide whether the state tribunal erred, even though the state already provided corrective process.⁹⁴ Both decisions required the lower courts to reexamine state court factual determinations, and perhaps retry the relevant facts. *Brown v. Allen* represented an addition to these holdings, rather than a departure from them.

88. *Id.* at 458 (emphasis added; citation omitted).

89. *Id.* at 463.

90. *Id.* at 463-64. Justice Frankfurter wrote separately, making many of the same points:

All that has gone before is not to be ignored as irrelevant. But the prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which Congress, by the Act of 1867, provided it should not have.

Id. at 500 (opinion of Frankfurter, J.) (citation omitted). A majority of the Court joined Justice Frankfurter's separate opinion on this issue. *Id.* at 488 (Burton and Clark, JJ.); *Id.* at 513 (Black and Douglas, JJ.).

91. See, e.g., L. YACKLE, *supra* note 8, at 90 (calling it "the genesis of modern practice"); Rosenn, *supra* note 8, at 349-50 (*Brown* "established a broad power in federal district courts to conduct evidentiary hearings"); Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 264-65 (1988) ("a shift of tremendous significance").

92. See Bator, *supra* note 31, at 463 ("Yet it is, as far as I know, a unique principle in our law that final judgments rendered by competent tribunals should be reopened on collateral attack. And it is most doubtful whether any such principle existed before *Brown v. Allen* established it in 1952.") (footnotes omitted). For a thorough critique of Bator's article and the cases upon which Bator's article depends, see Peller, *supra* note 8.

93. *Supra* notes 59-64 and accompanying text.

94. *Hawk v. Olson*, 326 U.S. 271 (1945). See also *supra* notes 70-72 and accompanying text.

To summarize the law at this stage, state prisoners could file petitions for writs of habeas corpus in federal district courts if their convictions were obtained in violation of any of their federal rights. Four principles seemed to direct federal district courts in resolving these petitions:

(1) district courts were required to scrutinize state courts' findings of fact and conclusions of law on matters involving federal rights;

(2) state courts' conclusions on questions of federal law would not bind the federal courts;

(3) district courts could rely upon state courts' findings of fact involving federal rights, but they also had discretion to hold evidentiary hearings and make new findings; and

(4) under section 2243 and *Walker v. Johnston*, evidentiary hearings were required to decide contested issues of fact not already resolved in the state courts (assuming, of course, that the claims were first presented in state fora).

H. *Townsend v. Sain: More Guidance for the Lower Courts*

These four principles were marked mostly by their omissions. They did little more than commit the decision whether to hold an evidentiary hearing to the discretion of district courts. Then, in 1963, the Supreme Court decided *Townsend v. Sain*.⁹⁵ The Court rewrote the last two principles and required district courts to conduct evidentiary hearings in certain enumerated instances.

The petitioner in *Townsend* was charged with murder.⁹⁶ He moved the state trial court to suppress his confession as involuntary.⁹⁷ While a number of the facts surrounding Townsend's confession were in dispute, the record clearly showed that a doctor administered medication to Townsend, after which Townsend confessed.⁹⁸ Unfortunately, the trial court did not learn that some of the medication had properties similar to a "truth serum."⁹⁹ Townsend's suppression motion was denied without any specific findings of fact, he was found guilty, and the state's

95. 372 U.S. 293 (1963). On the same day, March 18, 1963, the Court also decided *Fay v. Noia*, 372 U.S. 391 (1963).

96. 372 U.S. at 295.

97. *Id.* at 296.

98. *Id.* at 288-89.

99. *Id.* at 321-22.

highest court affirmed his conviction.¹⁰⁰ He then filed a federal petition for writ of habeas corpus. Initially, Townsend fared no better in federal court. His petition was dismissed without a hearing.¹⁰¹ The Seventh Circuit affirmed the district court's denial of the writ, holding that the district court properly examined only the "undisputed portions" of the record.¹⁰² However, the Supreme Court reversed.

The Court held that Townsend was entitled to an evidentiary hearing in federal court and that federal court review is not limited to the undisputed portions of the state record. Federal review was needed because the state court made no findings of fact and the state's doctor did not disclose that the medication he administered had properties similar to "truth serum."¹⁰³

In reaching its holding, the Court recognized that *Brown v. Allen* did not provide sufficient guidance for district judges to determine whether to conduct an evidentiary hearing.¹⁰⁴ Of course, federal courts always have the authority to conduct an evidentiary hearing; that power is "plenary."¹⁰⁵ However, the Court in *Townsend* detailed certain settings in which an evidentiary hearing must be held, focusing primarily on the fullness and fairness¹⁰⁶ of the evidentiary hearing in state court:

[A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.¹⁰⁷

Townsend was a significant step for the Court. It did not launch the Court in any new directions, but it made clear to district judges just how carefully they were to examine state court

100. *Id.* at 296.

101. *Id.* at 297. It was actually dismissed twice without a hearing.

102. *Id.* at 297.

103. *Id.* at 320-22.

104. *Id.* at 313.

105. *Id.* at 312.

106. *Id.*

107. *Id.* at 313.

decisions. District courts had long been instructed to review state court proceedings and determine whether state findings should be left undisturbed. For the first time, however, the lower courts were specifically told how to measure the adequacy of the state corrective process, and what to do if that process was not up to par.

I. *The Habeas Corpus Act of 1966*

Congress was not entirely quiet after 1948. There were at least four efforts between 1954 and 1964 to revise section 2254.¹⁰⁸ In 1966, Congress amended sections 2244 and 2254 to their present forms.¹⁰⁹ The Act was passed at the request of the Judicial Conference of the United States, which was concerned about the rising number of federal habeas corpus petitions filed by state prisoners.¹¹⁰ As noted in the Senate Report, the bill sought to ease the burden on federal courts by "introducing a greater degree of finality of judgments in habeas corpus proceedings."¹¹¹

The 1966 Act altered habeas corpus practice in two significant ways. The first provision of the Act amended section 2244 to make binding decisions on prior petitions for writs of habeas corpus and certiorari.¹¹² The second part of the Act added certain procedures to guide district courts in conducting evidentiary hearings.¹¹³ The heart of the second section of the Act is codified at 28 U.S.C. section 2254(d), which provides:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State of an officer or agent

108. See H.R. 5649, 84th Cong., 2d Sess., 102 CONG. REC. H935 (1956); H.R. 8361, 85th Cong., 2d Sess., 104 CONG. REC. H4674 (1958); H.R. 3216, 86th Cong., 1st Sess., 105 CONG. REC. H14631 (1959); H.R. 1835, 88th Cong., 2d Sess., 110 CONG. REC. H14683-84 (1964).

109. Act of November 2, 1966, 80 Stat. 1104.

110. See S. REP. NO. 1797, 89th Cong., 2d Sess., reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 3663, 3663-64.

111. *Id.* at 3664. A secondary purpose of the bill was to encourage the states to provide adequate postconviction remedies and to safeguard the federal rights of its criminal defendants. *Id.* at 3665.

112. Act of November 2, 1966, § 1, 80 Stat. 1104-05.

113. Act of November 2, 1966, § 2, 80 Stat. 1105-06.

thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions or paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.¹¹⁴

Most of the factors enumerated in *Townsend*, which prescribe the circumstances upon which an evidentiary hearing must be held, are replicated in section 2254(d).¹¹⁵ *Townsend* and

114. 28 U.S.C. § 2254(d) (1982).

115. *Townsend* factor (1) is reproduced in § 2254(d)(1); factor (2) appears in § 2254(d)(8); factor (3) is the same as § 2254(d)(2); factor (5) is identical to § 2254(d)(3);

section 2254(d), however, govern separate successive stages in a habeas corpus case: the six criteria of *Townsend* determine whether a petitioner is entitled to an evidentiary hearing, while the eight factors enumerated in section 2254(d) determine whether the state court's findings must be presumed correct if such a hearing is held. As discussed in part II of this article, each poses a distinct question for the district court.

The 1966 Act represents the last legislated amendment to section 2254.¹¹⁶ Subsequent court decisions have altered neither

and factor (6) is akin to § 2254(d)(6). Factor (4), requiring a hearing upon newly discovered evidence, is not expressly contained within § 2254(d), though arguably it can fall within §§ 2254(d)(1) and (3).

116. The 101st Congress has before it several measures which, if passed, might affect evidentiary hearings in habeas corpus cases. One bill introduced by Senator Thurmond, S. 1225, 101st Cong., 1st Sess. (1989), would radically restrict the reach of federal habeas corpus. That bill is discussed in more detail *infra*, at notes 197 and 199. As of March 5, 1990, two other bills, S. 1970 101st Cong., 1st Sess. (1989) and S. 1760, 101st Cong., 1st Sess. (1989) were awaiting action by the Senate Judiciary Committee. Those two measures pertain only to federal habeas corpus petitions which review state death judgments. S. 1970 and S. 1760 have a common theme and offer a common option for the states. States that are concerned with delay in federal habeas corpus litigation may elect to take advantage of a new procedure. If the states provide counsel to death row inmates to pursue their state and federal post-conviction remedies, the federal courts will require that those inmates file their habeas corpus petitions within a limited period of time. The sections pertaining to evidentiary hearings, contained in both bills, are part of this larger package. Both S. 1970 and S. 1760 would add a new section 2259 to Title 28 of United States Code, to govern evidentiary hearings.

The new section 2259 contained in each bill does not, however, contribute much. The version of proposed section 2259 contained within S. 1970, for example, provides:

SEC. 2259 EVIDENTIARY HEARINGS; SCOPE OF FEDERAL REVIEW; DISTRICT COURT ADJUDICATION

(a) Whenever a State prisoner under a capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall—

(1) determine the sufficiency of the evidentiary record for habeas corpus review; and

(2) conduct any requested evidentiary hearing necessary to complete the record for habeas corpus review.

(b) Upon the development of a complete evidentiary record, the district court shall rule on the merits of the claims properly before it.

S. 1970, Title II, section 202. The purpose of this provision is not entirely clear. Presumably, the federal courts already are required to determine the sufficiency of the evidentiary record. A hearing is mandatory under *Townsend* factor (5) if "the material facts were not adequately developed at the state court hearing." *Townsend*, 372 U.S. at 313. The version of section 2259 contained within S. 1760 is similar, though it makes clear that issues not raised in state court may not be raised for the first time in a federal evidentiary hearing, absent certain circumstances.

The variant of section 2259 contained in S. 1760 was proposed by a special committee of the Judicial Conference of the United States. The committee, chaired by former Associate Justice Lewis F. Powell, Jr., recommended a number of revisions to habeas corpus practice in death penalty cases. *See generally*, JUDICIAL CONFERENCE OF THE

the form of the writ nor the procedures which determine whether the writ should be awarded.

II. EVIDENTIARY HEARINGS: THE PRESENT STATE OF THE LAW

A. *The Right To An Evidentiary Hearing*

The six criteria of *Townsend*¹¹⁷ determine whether a habeas corpus petitioner is entitled to an evidentiary hearing. The eight factors in 28 U.S.C. section 2254(d) govern whether, at any hearing, the state courts' findings must be presumed correct. The Supreme Court has confused the two, indicating in some cases that the lower courts might rely upon section 2254(d), rather than *Townsend*, in ruling whether to afford a hearing at all. For example, in *Brewer v. Williams*,¹¹⁸ the majority notes that section 2254(d) "codifies"¹¹⁹ most of the *Townsend* criteria. The Court's per curiam opinion in *LaVallee v. Delle Rose*,¹²⁰ labels *Townsend* the "precursor" of section 2254(d).¹²¹ Section 2254(d),

UNITED STATES, AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, COMMITTEE REPORT AND PROPOSAL (August 23, 1989), reprinted in 135 CONG. REC. S. 13481-86 (October 16, 1989).

More far reaching changes have been proposed by the American Bar Association. In October 1989, the ABA Task Force on Death Penalty Habeas Corpus issued its majority report. Among other things, the Task Force recommended that in habeas corpus proceedings to review judgments of death, the state court findings of fact shall not be presumed correct if the state failed to appoint and adequately compensate defense counsel. See I. Robbins, Reporter, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES: RECOMMENDATIONS AND REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON DEATH PENALTY HABEAS CORPUS 20, 103 (1989). This specific recommendation was forwarded by the ABA Criminal Justice Section to the ABA House of Delegates in December 1989. See AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES 2, 16-17 (1989). On February 12, 1990, the ABA approved the recommendation. (Telephone conversation with Joanne Telliard, ABA Criminal Justice Section). As of March 5, 1990, however, no bill incorporating the ABA recommendation has been introduced in Congress. (Telephone conversation with Virginia Nourse, Senate Judiciary Committee).

117. *Townsend v. Sain*, 372 U.S. 293 (1963).

118. 430 U.S. 387 (1977).

119. *Id.* at 395. "Codifie[d]" could refer simply to the similar phrasing of portions of section 2254(d) and *Townsend*, which would make the statement correct, or to the impact of the section, which would make the statement incorrect.

120. 410 U.S. 690 (1973) (per curiam).

121. *Id.* at 694. Justice Marshall, writing separately, understood the difference between the two sets of criteria:

The Court, of course, does not hold that the District Court erred in holding a *de novo* evidentiary hearing. . . . That is a question distinct from the presumption of validity and the special burden of proof established by 28 U.S.C. section 2254(d). Section 2254(d) says nothing concerning when a district judge may hold an evidentiary hearing—as opposed to acting simply on the state

however, does not expressly govern *whether* a hearing should be held.¹²²

Most circuits have sorted through the confusion rather well. These courts hold that *Townsend* determines whether an evidentiary hearing should be conducted in a habeas corpus case. This is the view expressed by the United States Courts of Appeals for the Second,¹²³ Fifth,¹²⁴ Seventh,¹²⁵ Eighth,¹²⁶ Ninth,¹²⁷ Tenth,¹²⁸ and Eleventh¹²⁹ Circuits. One circuit, the Sixth, seems to combine the standards.¹³⁰

Although the language in parts of each standard are the same (and are thus subject to the same interpretations), it is important not to confuse the two. *Townsend* provides that federal courts always have the power to conduct an evidentiary hearing, and that in certain cases a hearing must be held; section 2254(d) merely requires that, at any such hearing, the state court's findings of fact be presumed correct (unless one of a number of cir-

court record. . . . [T]he question whether such a hearing is appropriate . . . continues to be controlled exclusively by our decision in *Townsend v. Sain* even after the enactment of section 2254(d).

Id. at 695, 701 n.2 (Marshall, J., dissenting).

122. If Congress disagreed (or agreed) with the holding in *Townsend*, and wished to prescribe a different (or the same) procedure for the district courts, surely the legislature would have passed a version of section 2254 which told the courts *whether* to hold an evidentiary hearing, as opposed to *how* to conduct a hearing. The federal courts also missed an opportunity to clarify the relationship between *Townsend* and section 2254(d). In 1977, a set of district court procedures were promulgated, under the Rules Enabling Act, to govern habeas corpus cases brought by state prisoners. Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts requires each district court to review the pleadings, state transcript and record, and expanded record, and then determine whether an evidentiary hearing is required. While Rule 8 tells the district court when to decide if a hearing is necessary, it does not set out any standard for determining whether to grant a hearing at all. The Advisory Committee Note to Rule 8 refers to both *Townsend* and section 2254(d).

123. *Maddox v. Lord*, 818 F.2d 1058, 1061 (2d Cir. 1987).

124. *Guice v. Fortenberry*, 661 F.2d 496, 500-01 (5th Cir. 1981) (*en banc*).

125. *United States ex rel. Gorham v. Franzen*, 675 F.2d 932, 937 (7th Cir. 1982), *cert. denied*, 474 U.S. 922 (1985).

126. *Hawkins v. Bennett*, 423 F.2d 948, 950 (8th Cir. 1970); *Warden v. Wyrick*, 770 F.2d 112, 117 (8th Cir.), *cert. denied*, 474 U.S. 1035 (1985).

127. *Richmond v. Ricketts*, 774 F.2d 957, 961-62 (9th Cir. 1985).

128. *Maxwell v. Turner*, 411 F.2d 805, 807 (10th Cir. 1969).

129. *Thomas v. Zant*, 697 F.2d 977, 979 (11th Cir. 1983), *vacated on other grounds following remand sub nom. Kemp v. Thomas*, 478 U.S. 1016 (1986).

130. See *Fowler v. Jago*, 683 F.2d 983, 988 (6th Cir. 1982) ("If one of the *Townsend* criteria is present, the district court must hold an evidentiary hearing and the presumption of correctness does not apply. Conversely, if the presumption is operative, an evidentiary hearing cannot be mandated."), *cert. denied sub nom. Marshall v. Fowler*, 460 U.S. 1098 (1983).

cumstances is proved). As Professor Liebman has written, section 2254(d) "does not convert *Townsend's* identification of those situations in which a district court *must* hold a hearing . . . into a limitation on when the court *may* hold a hearing."¹³¹ Collapsing the tests together may deprive a petitioner of an opportunity to prove his or her claim, for even if the "presumption of correctness" applies, section 2254(d) still permits a petitioner to introduce "convincing evidence" to overcome the presumption.¹³² Convincing evidence cannot be introduced at a hearing that does not take place.

The *Townsend* test is not always easy for district courts to apply. Often, the need for a hearing can be ascertained from the pleadings and records.¹³³ In other instances, however, the district court must hold an evidentiary hearing simply to resolve the threshold question whether to conduct an evidentiary hearing on the merits of the petition.¹³⁴

B. *The Scope of the Evidentiary Hearing*

Once a district court determines that a hearing is necessary, it must also decide whether to defer to any factual findings made by the state tribunal. Section 2254(d) provides that a "determination . . . of a factual issue" made by a state court shall be presumed correct, unless one of the eight enumerated exceptions applies.¹³⁵ State courts' conclusions of federal law are reviewed *de novo* by the district courts.¹³⁶ What constitutes a fac-

131. J. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 269 (1988) (emphasis in original).

132. See *United States ex rel. Oliver v. Vincent*, 498 F.2d 340, 344 (2d Cir. 1974); *United States ex rel. Clayton v. Mancusi*, 326 F. Supp. 1366, 1373 (E.D.N.Y. 1971).

133. See, e.g., *Williams v. Maggio*, 730 F.2d 1048 (5th Cir. 1984) (finding from the state court transcripts that the state proceedings were inadequate, as a matter of law, and remanding for a federal evidentiary hearing on the merits of the petition).

134. See, e.g., *Ross v. Kemp*, 785 F.2d 1467, 1476-79 (11th Cir. 1986) (petitioner alleged that a federal hearing was required under *Townsend* because the facts were not adequately developed at the state hearing. However, the petitioner had failed to present certain facts to the state court. The court of appeals reversed and remanded for an evidentiary hearing to determine whether petitioner's failure to present material to the state court could be excused). Cf. *Campas v. Zimmerman*, 876 F.2d 318, 326 (3d Cir. 1989) (evidentiary hearing required to resolve preliminary questions, such as whether petitioner fully exhausted state remedies and whether the petition should be dismissed due to delay).

135. 28 U.S.C. § 2254(d) (1982).

136. See *Brown v. Allen*, 344 U.S. 443, 458 (1953).

tual issue as opposed to a question of law is, however, not always clear.

Many habeas corpus petitions present mixed questions of law and fact. In those instances, the ultimate conclusions may present issues of federal law, but the district courts must presume correct the state courts' findings of subsidiary facts. *Miller v. Fenton*¹³⁷ is a good example. In that case, the petitioner alleged that the admission of his involuntary confession in his state criminal trial violated the due process clause.¹³⁸ The Supreme Court held that the ultimate issue of the voluntariness of a confession is a question of law, "subject to plenary federal review."¹³⁹ However, subsidiary factual questions, such as whether a drug has a certain property or whether the police engaged in the tactics alleged by the petitioner, must be presumed correct under section 2254(d) unless one of the enumerated exceptions obtains.¹⁴⁰ Other conclusions of law, subject to independent review by the federal courts, include: whether defense counsel labored under an impermissible conflict of interest,¹⁴¹ whether a guilty plea was voluntary,¹⁴² whether defense counsel rendered effective assistance,¹⁴³ whether pretrial identification procedures were constitutionally adequate,¹⁴⁴ and whether constitutional error was harmless.¹⁴⁵

The distinction between a factual finding and a legal conclusion may turn on which judicial actor is in the best position to decide the point.¹⁴⁶ The voluntariness of a confession is a question of law in part because of the "hybrid quality" of the inquiry.¹⁴⁷ Once underlying factual matters are resolved, the state court is in no better position than the reviewing court to decide whether the confession was obtained in a manner consistent with the Constitution.¹⁴⁸

A state court's findings of historical fact are ordinarily pre-

137. 474 U.S. 104 (1985).

138. *Id.* at 105, 109.

139. *Id.* at 110, 112.

140. *Id.*

141. *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980).

142. *Marshall v. Lonberger*, 459 U.S. 422, 431 (1983).

143. *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

144. *Sumner v. Mata*, 455 U.S. 591, 597 (1982) (*Sumner II*).

145. *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (per curiam). *See also Chapman v. California*, 386 U.S. 18, 24 (1967).

146. *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

147. *Id.* at 116.

148. *Id.* at 117.

sumed correct. Historical facts include, for example, the underlying events leading to the conclusion that a defendant is competent to stand trial.¹⁴⁹ Some essentially factual inquiries are whether a trial juror was properly excused based on his or her views on capital punishment,¹⁵⁰ whether trial jurors were impartial,¹⁵¹ and whether a defendant killed, attempted to kill, or intended to kill another human being.¹⁵²

Not all state court findings of historical fact will necessarily be presumed correct. At the heart of both *Townsend* and section 2254(d) is the notion that the facts must have been reliably found after a "full and fair" hearing. Section 2254(d) may be seen as representing the hallmarks of a "full and fair" hearing because that section contains the exceptions to the general presumption of correctness. Other hallmarks are illustrated by several recent decisions. For example, the Supreme Court has held that the state proceeding must be in a court of law; a decision by a state executive officer is not entitled to deference.¹⁵³ Further, the state court must be capable of resolving the disputed fact. Thus the fact at issue can be resolved by a state appellate court, even if the state trial court fails to do so¹⁵⁴—as long as the fact at issue is one which the appellate court is capable of settling.¹⁵⁵ Additionally, the petitioner must have been afforded a meaning-

149. See, e.g., *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (per curiam) (facts include the trial judge's observation of the defendant's conduct, and inferences drawn from the manner in which the criminal case was defended).

150. See *Wainwright v. Witt*, 469 U.S. 412, 429 (1985). *Witt* provides a good example of an issue characterized as factual primarily because the issue can best be resolved by the state trial judge. In *Witt*, the Court ruled that the decision whether to excuse a juror requires the trial judge to apply a legal standard to what she or he hears. However, the judge's "predominant function in determining juror bias involves credibility findings which cannot be easily discerned from an appellate record." *Id.*

151. *Patton v. Yount*, 467 U.S. 1025, 1036 (1984) (juror partiality was allegedly a product of pretrial publicity); *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (lack of impartiality allegedly due to juror's acquaintance with a victim in a related murder case).

152. *Cabana v. Bullock*, 474 U.S. 376, 390 (1986), disavowed on other grounds by *Pope v. Illinois*, 481 U.S. 497 (1987).

153. In *Ford v. Wainwright*, 477 U.S. 399 (1986), the petitioner was held to be entitled to a federal hearing on his competency to be executed. The state proceeding consisted solely of a competency determination by the governor. There were no state court findings which could be presumed correct under section 2254(d). *Id.* at 410 (Opinion of Marshall, J.) and 423-24 (Opinion of Powell, J.).

154. *Sumner v. Mata*, 449 U.S. 539, 547 (1981) (*Sumner I*).

155. See *Cabana v. Bullock*, 475 U.S. at 388-89 n.5 (noting that there might be instances where appellate fact finding procedures would be inadequate, such as where the fact turns on credibility determinations that cannot accurately be made by an appellate court).

ful opportunity to present his or her case in the state forum.¹⁵⁶ Finally, the state court must have squarely resolved the fact at issue.¹⁵⁷

Even when an evidentiary hearing is ordered and the presumption of correctness is ruled inapplicable, the hearing need not resemble a full trial. There are some intermediate fact finding procedures available.¹⁵⁸ For example, one of the Rules Governing Section 2254 Cases in the United States District Courts,¹⁵⁹ adopted in 1977, allows the district judge to "expand the record" to include written materials relevant to the petition.¹⁶⁰ This procedure permits the district court to make some findings of fact without hearing oral testimony.¹⁶¹ Where the

156. The governor's decision in *Ford v. Wainwright* was based on evaluations by state psychiatrists. The petitioner was not given the opportunity to present his side of the case to the governor. This was another reason why the state proceeding was not full and fair. *Ford*, 477 U.S. at 413 (Marshall, J.), 424 (Powell, J., concurring) and 427-8 (O'Connor, J., concurring and dissenting) (stating that petitioner has a liberty interest created by state law, and that the procedures afforded the petitioner failed to comply with the due process clause).

157. In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the Court held that a statement made at a bail hearing was not a finding entitled to the presumption of correctness. The issue presented in the federal petition was substantially different than that presented at the bail hearing. The state court did not squarely address and resolve the factual issue. *Id.* at 389-90.

158. See *Vincent v. Louisiana*, 469 U.S. 1166 (1985) (Brennan, J., dissenting from denial of *certiorari*).

159. See *supra* note 122.

160. It provides:

RULE 7. EXPANSION OF RECORD

(A) **DIRECTION FOR EXPANSION.** If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

(B) **MATERIALS TO BE ADDED.** The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(C) **SUBMISSION TO OPPOSING PARTY.** In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(D) **AUTHENTICATION.** The court may require the authentication of any material under subdivision (b) or (c).

161. The Advisory Committee Note to Rule 7 provides in part: "The purpose is to enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing. An expanded record may also be helpful when an evidentiary hearing is ordered." See also *Blackledge v. Allison*, 431 U.S. 63, 81-82 (1977) (quoting the Advisory Committee Note, and stating

fate of the petition hinges on witness credibility, however, there is no substitute for live testimony.¹⁶²

III. THE NUMBERS

No one doubts that the workload of federal district courts has increased. Whether that workload is unwieldy because of state prisoners' habeas corpus petitions is another matter. This section of the article looks at the number of federal habeas corpus petitions filed by state prisoners, and also examines the frequency of evidentiary hearings in habeas corpus cases in the district courts.

A. The Increase In Federal Litigation, Including Habeas Corpus Petitions

There has been a dramatic increase in the number of new civil cases (of all types) filed in the United States district courts during the last several decades.¹⁶³ New civil filings in the district courts increased 393 percent from 1945 to 1988, and 354 percent between 1965 and 1988 alone.¹⁶⁴

The estimated number of federal habeas corpus petitions filed by state prisoners has also increased sharply between 1945

that on remand a full evidentiary hearing might not be required).

162. See *Townsend v. Sain*, 372 U.S. 293, 322 (1963) ("Where an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility. And questions of credibility, of course, are basic to resolution of conflicts in testimony."). See also *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (where truth or veracity is at issue, "written submissions are a wholly unsatisfactory basis for decision"); *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (2d Cir. 1949) (demeanor is "wordless language The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." (footnote omitted)); *Flores v. Stock*, 715 F. Supp. 1468 (C.D. Cal. 1989) (a credibility determination made during a parole revocation hearing may not be overturned without rehearing the live testimony).

163. The data in this section of the article relating to case filings and terminated cases are from the *Annual Reports of the Director of the Administrative Office of the United States Courts* for successive fiscal years, reprinted in *Reports of the Proceedings of the Judicial Conference of the United States*. The serial data were obtained from individual annual reports [hereinafter 19xx Ann. Rep.].

164. In fiscal year 1945, 60,965 new civil cases were filed in the United States district courts. See 1945 Ann. Rep., Table C-2. Civil filings dropped to a low of 46,725 new cases in fiscal year 1948. See 1948 Ann. Rep., Table C-2. In 1965, 67,678 new civil cases were brought. See 1965 Ann. Rep., Table C-2. New civil filings increased dramatically shortly thereafter. The high point for the period 1945 to 1988 was reached in fiscal year 1985, when 273,670 new civil cases were filed. See 1985 Ann. Rep., Table C-2. The number of new civil cases declined slightly to 239,634 in fiscal year 1988. See 1988 Ann. Rep., Table C-2.

and 1988.¹⁶⁵ Although some commentators have characterized *Brown v. Allen*¹⁶⁶ as a radical expansion of traditional habeas corpus practice,¹⁶⁷ the news did not trickle down to state prisoners right away. *Brown v. Allen* was decided in 1953. Between fiscal years 1952 and 1960, the number of new filings grew slowly from 541¹⁶⁸ to 872.¹⁶⁹ New habeas corpus filings then increased sharply, beginning in the early 1960s.¹⁷⁰ Interestingly, this trend predates the trilogy of cases most often cited as revolutionizing

165. The data are "estimated" for several reasons. First, the source of the data is Table C-2 from the Annual Reports. The classifications contained in Table C-2 have changed over the years. From fiscal year 1945 to fiscal year 1962, the Administrative Office simply reported state prisoners' petitions under the category of "Habeas Corpus—Private Cases" or "Habeas Corpus—Federal Question," thus grouping all types of state prisoners' petitions together. In 1963, the Administrative Office added the category "Prison Officials—Mandamus—Federal Question." In fiscal year 1971, the Administrative Office added yet another category, "Civil Rights—Federal Question." Both of the new categories of cases are excluded from the data in the Appendices to this paper, in an effort to estimate only those habeas corpus which attack state criminal convictions. However, that those were added to Table C-2 means that the figures for "habeas corpus" may more accurately reflect § 2254 cases.

Second, the Administrative Office of the United States Courts (Administrative Office) collects data reported by the district courts. The district courts, in turn, generally rely upon the litigants' sometimes inaccurate characterization of the cause of action. The Administrative Office presently requires each district court to complete a statistical report (a JS-5 form) for every newly-filed case, and to forward the form to the Administrative Office. See *Statistics Manual Volume XI - Chapter V, Instructions For Completing District Court Report Forms* [hereinafter *Statistics Manual*] 3, 5. The clerk must enter a three-digit code representing the nature of the case filed. *Id.* at 9. The clerks are told that the three-digit code is available from the Civil Cover Sheet, completed by the attorney filing the case. *Id.* While the clerks are also instructed to "verify" the information, *id.*, doubtless there is slippage.

Third, as Professor Resnik has noted, some prisoners may raise several claims (such as both habeas corpus and civil rights causes of action) in a single lawsuit. Cases which are primarily civil rights may be counted as habeas corpus petitions, and vice-versa. See Resnik, *supra* note 76, at 948-49.

Finally, "local jurisdiction" cases (matters originating from the territories and the District of Columbia) are also excluded from the data. If the federal district courts are the courts of original jurisdiction in some of these cases, then any habeas corpus cases arising from the convictions are more akin to federal prisoners' § 2255 motions than state prisoners' habeas corpus petitions. In any event, the number of local jurisdiction habeas corpus cases are small compared to the number of state prisoners' petitions. For example, in fiscal year 1988 there were 13 such cases. In the same year, state prisoners filed 9,867 habeas corpus petitions. See 1988 Ann. Rep., Table C-2. Hopefully, exclusion of local jurisdiction cases does not significantly distort the data.

166. *Brown v. Allen*, 344 U.S. 443 (1953).

167. *Supra* notes 88-89, and accompanying text.

168. 1952 Ann. Rep., Table C-2.

169. 1960 Ann. Rep., Table C-2.

170. In fiscal year 1961, 984 new habeas corpus petitions were filed; 1249 in 1962; and 1904 in 1963. See 1961, 1962 and 1963 Ann. Rep., Table C-2.

habeas corpus—*Townsend v. Sain*, *Fay v. Noia*¹⁷¹ and *Sanders v. United States*¹⁷²—which were decided in March 1963. There was a steady rise in habeas corpus filings until fiscal year 1970, an overall decrease from fiscal year 1971 to fiscal year 1977, and then a steady increase to the most recent year.¹⁷³

State prisoners filed 537 federal habeas corpus petitions in fiscal year 1945.¹⁷⁴ The Administrative Office reported 9,867 new state prisoners' habeas corpus petitions in fiscal year 1988.¹⁷⁵ The rise is quite large. Yet, examining these isolated statistics reveals little about the proclivity of state prison inmates to engage in federal litigation, for our state prison populations have also increased dramatically. Between 1944 and 1987, the number of sentenced prisoners in state institutions grew 469 percent, from 114,317 to 536,135.¹⁷⁶

Appendix A, reprinted below, estimates the number of habeas corpus petitions filed in the district courts, per hundred state prisoners.¹⁷⁷ As the chart shows, habeas corpus filings per

171. 372 U.S. 391 (1963).

172. 373 U.S. 1 (1963).

173. In fiscal year 1970, 8,963 habeas corpus petitions were filed by state prisoners; 8,282 petitions were brought in fiscal year 1971; 6,862 in fiscal year 1977; and 9,867 in fiscal year 1988. See 1970, 1971, 1977 and 1988 Ann. Rep., Table C-2.

As explained in note 165, *supra*, the Administrative Office began to separate state prisoners' civil rights cases from habeas corpus petitions in 1971. The reported decrease in filings from 1971 to 1977 may reflect more accurate record-keeping. Indeed, for that reason, the figures for habeas corpus cases filed up to 1970 are also most likely overestimated.

174. 1945 Ann. Rep., Table C-2.

175. 1988 Ann. Rep., Table C-2.

176. The data reflect sentenced prisoners in state custody on December 31 of each year. The data were obtained from P. Langan, J. Fundis, L. Greenfeld & V. Schneider, *Historical Statistics on Prisoners in State and Federal Institutions Year-end 1925-86* (Bureau of Justice Statistics, May 1988) (Table 1) and *Bulletin: Prisoners in 1988* (Bureau of Justice Statistics, April 1989) (Table 2).

177. The figures were calculated by dividing the number of filings for each year by the state prison population for each year, and multiplying by 100. The figures are not entirely accurate. First of all, the prisoner statistics reflect prisoners in custody at the end of each year (i.e. on December 31). The data from the Administrative Office is calculated by fiscal year (i.e. fiscal year 1988 is the twelve-month period ending June 30, 1988). Appendix A attempts to adjust for the discrepancy by matching filings in fiscal year "x" to prisoners in custody at the end of year "x-1" (i.e. fiscal year 1988 and prisoners in custody at the end of 1987). Second, the prisoner statistics *underestimate* the state prison population. Inmates who enter custody after the first of any given year, but who complete the custody portions of their sentences by December 31, will not be counted. Assuming that some of these inmates file habeas corpus petitions, Appendix A *overestimates* the number of habeas corpus petitions per state prisoner.

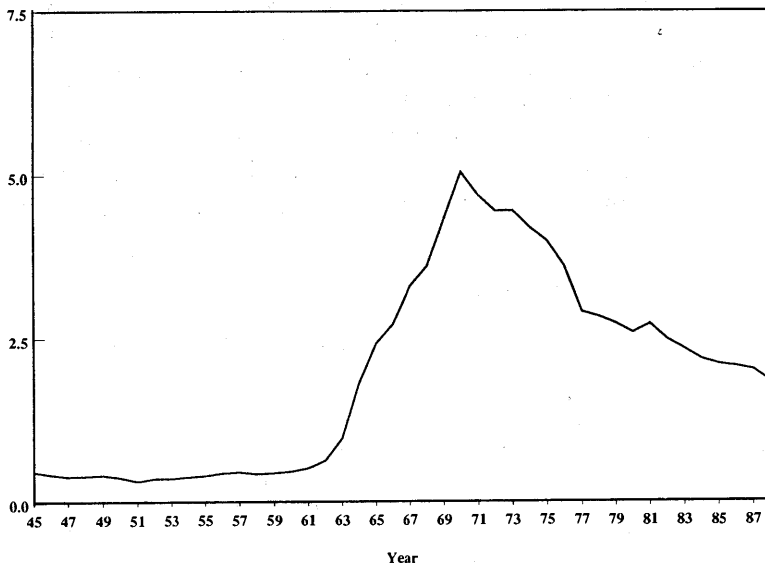
This analysis is similar to that performed by Professor Resnik in 1983. She analyzed categories of state and federal prisoners' filings per every hundred state and federal pris-

state prisoner remained fairly constant from 1945 to 1962, rose dramatically until 1970, and have steadily declined since. In fiscal year 1945, there were 0.47 federal habeas corpus petitions filed per every hundred state prisoners; in 1961, 0.52; in 1970, 5.05; and 1.85 in 1988.

APPENDIX A

Estimated Habeas Corpus Petitions Filed in the U. S. District Courts per Hundred State Prisoners (1945 - 1988)

Number of Petitions



There are several reasons for the increase in habeas corpus filings prior to 1970. First, during the last fifty years, the Supreme Court has interpreted the fourteenth amendment expansively. As the number of federal rights grows, so does the universe of claims cognizable on state prisoners' federal habeas corpus petitions (which, of course, redress violations of federal rights).¹⁷⁸

Second, the United States Supreme Court's own docket has increased over time. The Court can no longer review a signifi-

oners (combined). See Resnik, *supra* note 79, at 939-51 and 1031-35. This article looks more particularly at the state prison population and petitions filed by state prisoners.

178. See R. POSNER, *supra* note 10, at 51-53; Meador, *Straightening Out Federal Review of State Criminal Cases*, 44 OHIO ST. L.J. 273, 274 (1983).

cant proportion of state criminal convictions to ensure compliance with federal rights.¹⁷⁹ Because state prisoners cannot obtain review of their federal issues in the Supreme Court, the only federal path open to them is to seek review in the district courts.¹⁸⁰

Third, our society has become more litigious over the last half century.¹⁸¹ Diversity cases filed in the federal district courts increased from 5,282 in 1945¹⁸² to 68,224 in 1988.¹⁸³ In the same period, civil rights cases (not filed by prisoners) grew from 29¹⁸⁴ to 16,966.¹⁸⁵ Prisoners may be physically removed from our midst for a time, but they are not isolated from our society's values.

These may be reasons for the overall increase in filings. They do not, however, explain the steady decrease since 1970 in filings per state inmate. That trend can be explained in part by decisions of the Supreme Court, which narrow the substantive reach of habeas corpus¹⁸⁶ or which make relief procedurally more difficult to obtain.¹⁸⁷ It may also be that prisoners have

179. See, e.g., *Brown v. Allen*, 344 U.S. 443, 456-57 (1963) (discussing the subsequent effect of denial of *certiorari*).

Professor Yackle argues forcefully that the primary justification for federal habeas corpus is to provide a federal forum for state prisoners to seek the vindication of federal rights. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985). He points out that the Supreme Court cannot provide an adequate federal forum for litigation. *Id.* at 1022 n.137. Professor Friedman makes a similar point, arguing that federal habeas corpus is a surrogate for the direct review that the Supreme Court cannot provide. Friedman, *supra* note 88, at 331-40.

180. See Meador, *supra* note 180, at 274.

181. See generally, R. POSNER, *supra* note 10; Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975).

The increase in federal civil litigation is not completely explained by the increase in our adult population (unless, perhaps, one believes that litigation is a non-linear function of population). As of July 1, 1945, there were an estimated 96,832,000 people in the United States ages 15 and over. DEPARTMENT OF COMMERCE, BUREAU OF CENSUS, POPULATION REPORTS, series P-46, no. 2. By July 1, 1987, that figure increased 198% to 191,517,000. Bureau of Census, DEPARTMENT OF COMMERCE, CURRENT POPULATION REPORT, series P-25, nos. 948 and 1019. New federal civil district court filings increased 393% from fiscal year 1945 to fiscal year 1988. *Supra* note 164 and accompanying text.

182. 1945 Ann. Rep., Table C-2.

183. 1988 Ann. Rep., Table C-2.

184. 1945 Ann. Rep., Table C-2 ("Civil Rights Act").

185. 1988 Ann. Rep., Table C-2 ("Civil Rights, Total").

186. See, e.g., *Stone v. Powell*, 428 U.S. 465, 481-482 (1976) (removing certain fourth amendment issues from the scope of habeas corpus). *Teague v. Lane*, 109 S.Ct. 1060 (1989), and *Penry v. Lynaugh*, 109 S.Ct. 2934 (1989), will ensure that this trend continues. *Teague* and *Penry*, read together, limit the circumstances under which a habeas corpus petitioner may obtain the retroactive application of a new federal rule.

187. See, e.g., *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (district courts must dismiss

come to view the federal courts as generally hostile to their claims and as unlikely to grant them relief.

B. Evidentiary Hearings In Habeas Corpus Cases

Townsend describes the circumstances in which evidentiary hearings are required in criminal cases. Appendix B, reprinted below, demonstrates that federal district courts are not overburdened with the hearings. Appendix B compares the percent of state prisoners' habeas corpus petitions which receive evidentiary hearings with the percent of all other civil cases that go to trial.¹⁸⁸ The data are revealing on at least three levels.

petitions containing a mix of exhausted and unexhausted claims).

188. Appendix C, reprinted at the end of the article, contains the data points which are charted in Appendix B. The data were obtained from the Annual Reports, Table C-4. Table C-4 reports civil cases terminated in the district courts, categorized by type of disposition and basis of jurisdiction.

The district courts are required to complete a JS-6 Termination Report form for every civil case. See Statistics Manual, *supra* note 165, at 4-5. The present JS-6 form includes the categories of cases terminated "during court trial," "during jury trial," "after court trial," and "after jury trial." *Id.* at 16, 50-58. These categories give the numbers of cases terminated "during or after trial" that are reported in Table C-4.

Evidentiary hearings in habeas corpus cases are currently reported in the JS-6 forms as "court trials." The Statistics Manual contains the following definition of "trial:" "SPECIAL NOTE: For the purposes of this [JS-6] report, a trial is defined as "a contested proceeding where evidence is introduced." A trial is considered completed when a verdict is returned by a jury or a decision is rendered by the court." *Id.* at 15.

The Administrative Office's data-gathering techniques have been criticized. See Resnik, *supra* note 79, at 948 n.511 (citing articles criticizing Administrative Office's data gathering and record keeping techniques). But there is other evidence supporting the Administrative Office's data relating to evidentiary hearings. Several researchers examined habeas corpus petitions filed by state prisoners in six district courts for fiscal years 1976 and 1977. They found that the district courts held evidentiary hearings in 2.6% of the cases. Allen, Schachtman, & Wilson, *Federal Habeas Corpus and Its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675, 698 (1982) (Table 3) (using data first reported in P. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS (1979)). That percentage is in line with the data reported in Appendix C. According to the Administrative Office, evidentiary hearings were held in 2.71% and 3.06% of state prisoners' federal habeas corpus cases in fiscal years 1976 and 1977, respectively.

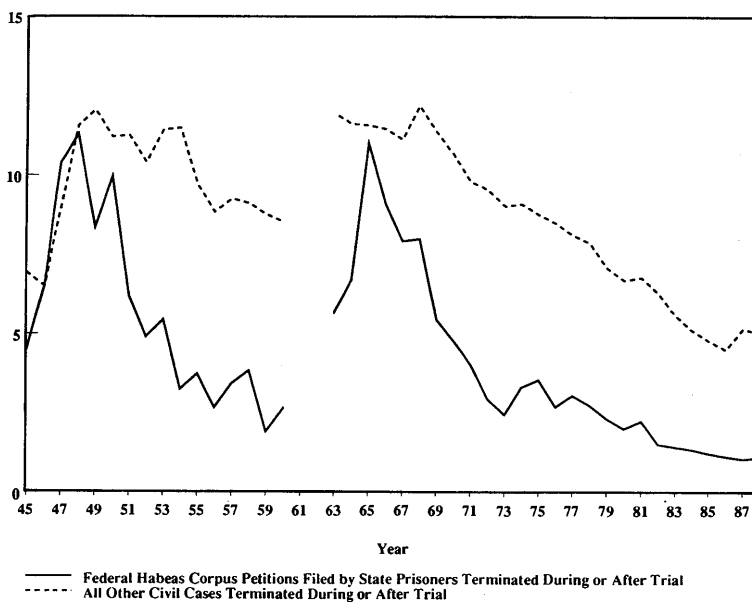
The statistics reported in Appendices B and C to this article were compiled from Table C-4 as follows:

(a) Entries for "federal habeas corpus petitions filed by state prisoners terminated during or after trial" were calculated two ways. From 1945 to 1960, they were obtained by summing the entries for "federal question—habeas corpus" cases terminated (1) "after court trial;" (2) "during court trial;" and (3) "on jury verdict" as a percentage of all "federal question—habeas corpus cases" terminated that year. No figures were available for 1961 and 1962. From 1963 onward, Table C-4 directly revealed "federal question—habeas corpus" cases decided by court action "during or after trial." Second, those cases were simply stated as a percentage of all such cases terminated during the same

APPENDIX B

Habeas Corpus Petitions Filed by State Prisoners vs All Other Civil Cases Terminated During or After Trial

Percent



First, comparing the two statistics, it appears that trends in the frequency of evidentiary hearings mirror trends in the frequency of trials. There is a sharp increase in both statistics until about 1949 and 1950, a general decline until the early 1960s,¹⁸⁹ an increase until the mid-1960s and a general decline thereafter. If one assumes that the frequency of trials is a function of such variables as the number of district judges, caseloads, and changes in procedural and evidentiary rules, it seems that these pressures affect both categories of cases in similar ways.

reporting period. As with data for cases commenced, local jurisdiction matters were excluded.

(b) The percent of trials in "all other civil cases terminated" was obtained by subtracting the number of "federal question—habeas corpus" cases terminated during or after trial from the figure for all civil cases so terminated, and stating the resulting number as a percentage of all other civil cases terminated during the same period. That latter figure was calculated by subtracting "federal question—habeas corpus" cases terminated from all civil cases terminated. Again, no figures were available for 1961 and 1962.

189. Data for fiscal years 1961 and 1962 are unavailable.

Second, since at least 1948, habeas corpus petitioners have received evidentiary hearings in a significantly smaller proportion of cases than other civil litigants.¹⁹⁰ For example, in fiscal year 1954, shortly after *Brown v. Allen*, only approximately 3.25 percent of state prisoners' habeas corpus cases were terminated during or after trial.¹⁹¹ That same year, approximately 11.50 percent of all other civil cases went to trial.¹⁹² In fiscal year 1965, in the immediate wake of *Townsend*, but before the amendments to section 2254(d), approximately 11.03 percent of state prisoners' habeas corpus cases received hearings.¹⁹³ About 11.60 percent of all other civil cases proceeded to trial.¹⁹⁴ In 1988, only 1.11 percent of the habeas corpus petitioners received evidentiary hearings, compared with 5.03 percent of all other civil cases.¹⁹⁵

Third, the 1966 amendments appear to have had a profound impact upon federal habeas corpus. The percentage of state prisoners' habeas corpus cases which received evidentiary hearings plummeted after fiscal year 1965. The decline in evidentiary hearings is both earlier and sharper than the general decline in the percentage of all other civil cases terminated during or after trial. Since about fiscal year 1971, the frequency of evidentiary hearings in habeas corpus cases has been about the same as in the years prior to *Townsend* and *Fay v. Noia*.

In sum, while the absolute number of habeas corpus peti-

190. It is not entirely clear why this must be. On the one hand, habeas corpus cases are more likely to be contested than other civil cases. The settlement possibilities are low: a prosecutor could probably confess error in a federal habeas corpus proceeding, but it is not certain that she or he would have the power to agree to vacate a final conviction from a state tribunal.

On the other hand, habeas corpus petitioners must overcome procedural obstacles (such as exhaustion of state remedies) not required of other litigants. The Administrative Office does not report the number of habeas corpus petitions dismissed on procedural grounds. In their study, Allen, Schachtman and Wilson found that 41.5% of the habeas corpus petitions filed in six district courts were dismissed on procedural grounds. Allen, Schachtman & Wilson, *supra* note 188, at 694 (Table 2) (summing categories for "Improper Form," "Failure to Exhaust," and "Procedural Defect"). However, after at least 1968, habeas corpus petitioners received evidentiary hearings less than half as frequently as other civil litigants received trials. See Appendix C. Thus, even if one assumes that half of all habeas corpus petitions filed in the district courts are dismissed on procedural grounds, these obstacles do not fully account for the differential treatment.

191. Appendix C, *infra*.

192. *Id.*

193. *Id.* This was by far the highest percentage of evidentiary hearings afforded habeas corpus petitions in the last 40 years.

194. *Id.*

195. *Id.*

tions filed by state prisoners continues to rise, the rate of filings per state prisoner continues to fall. The district courts afford evidentiary hearings to state prisoners in an exceedingly small proportion of cases. The "presumptions of correctness" contained in the 1966 amendments have sharply curtailed the incidence of evidentiary hearings.

IV. ALTERNATIVE ROLES FOR THE FEDERAL COURTS

There is no dearth of recommendations for reforming federal habeas corpus. This section of the article addresses two proposals which affect habeas corpus petitioners' abilities to litigate issues of fact in district courts.¹⁹⁶ The first proposal is one frequently heard: restrict the availability of federal evidentiary hearings to cases in which there was no full and fair hearing in state court.¹⁹⁷ A second proposed reform would convert federal

196. This article does not address proposed reforms which focus upon aspects of habeas corpus unrelated to evidentiary hearings. One suggested reform, for example, is to restrict the federal remedy to cases where the petitioner raises a colorable claim of innocence. See Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). This proposal has gained some currency as a test for whether a petitioner should be permitted to bring successive habeas corpus petitions. See *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) (Powell, J., joined by Chief Justice Burger and Justices Rehnquist and O'Connor).

Other suggested reforms, also outside the scope of this article, include stripping certain substantive claims from the scope of federal habeas corpus. In *Stone v. Powell*, 428 U.S. 865 (1976), the Supreme Court held that fourth amendment claims could not be litigated on federal habeas corpus unless the petitioner was denied a full and fair opportunity to raise the claim in the state courts. Justice O'Connor would similarly extend the holding of *Stone v. Powell* to alleged violations of *Miranda v. Arizona*, and remove those claims from the reach of federal habeas corpus as well. See *Duckworth v. Eagan*, 109 S.Ct. 2875, 2881 (1989) (O'Connor, J., concurring). Some members of the Department of Justice during the Reagan Administration proposed yet another revision, one which is, perhaps, even too radical to be termed a "reform:" abolish entirely federal habeas corpus for state prisoners. See OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS 56 (1988).

197. See, e.g., Bator, *supra* note 31, at 521-23; Deukmejian, *Justice Denied: Habeas Corpus Appeals Have Been Misused to Thwart the People's Will*, L.A. Daily J., June 21, 1989, at 6, col. 6 (urging "that a federal habeas corpus court accept state court findings of fact where a defendant was accorded a full and fair hearing on the factual issues"); *United States ex rel. Jones v. Franzen*, 676 F.2d 261, 267-70 (7th Cir. 1982) (Posner, J., concurring) ("If a criminal defendant has received a full and fair evidentiary hearing in state court on his federal constitutional claims, that is all he should be entitled to; the federal courts should not be required, and probably should not be allowed, to reweigh or rehear the facts.") Senator Thurmond has introduced a bill, S. 1225, 101st Cong., 1st Sess. (1989), to implement this change. Section 605 of S. 1225 would add the following provision to 28 U.S.C. section 2254: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in State

habeas corpus into a purely appellate device, thus entirely eliminating evidentiary hearings.¹⁹⁸

A. *The Federal Evidentiary Hearing as a substitute for a "Full and Fair" State Hearing*

The call is heard frequently these days: do not allow federal courts to relitigate issues when there has been a full and fair hearing already in the state courts.¹⁹⁹ According to Judge Posner, a rehearing of the facts "undermines the responsibility and morale of state judges, denies reasonable finality to criminal proceedings and thereby undermines the legitimacy of the criminal-justice system, imposes unduly on the time of our busy district judges, . . . and probably does not increase the overall accuracy

proceedings." As of March 5, 1990, S. 1225 was still awaiting action by the Senate Judiciary Committee. (Telephone conversation with Virginia Nourse, Senate Judiciary Committee).

198. See generally Meador, *supra* note 178; Friedman, *supra* note 91.

199. It is not always clear whether those who propose this reform would preclude relitigation of only issues of fact or of issues of both fact and law. Professor Bator suggests that the federal courts should not reexamine the state courts' resolution of federal "questions," unless there has been a failure of process or jurisdiction. See Bator, *supra* note 31, at 443, 462. Federal "questions" in this context seem to include questions of both fact and law. Senator Thurmond's bill, S. 1225, is similar. Other recent commentators seem concerned, instead, only with federal courts' relitigation of issues of fact; the commentators assume that federal courts are free to reexamine the resolution of questions of law. See, e.g., Deukmejian, *supra* note 197; United States *ex rel.* Jones v. Franzen, 676 F.2d 261 (7th Cir. 1982) (Posner, J., concurring).

Senator Thurmond's bill and Professor Bator's proposed reform are by far the most radical proposals. Professor Bator would have the district courts evaluate all claimed violations of federal law in much the same manner as fourth amendment violations are scrutinized after *Stone v. Powell*. For a critique of his process model, see Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1014-19 (1985) and Yackle, *The Misadventures of State Post-Conviction Remedies*, 16 N.Y.U. REV. L. & SOC. CHANGE 359, 390-93 (1988). The Supreme Court has refused to extend the holding in *Stone v. Powell* to other substantive claims brought on habeas corpus. See, e.g., Kimmelman v. Morrison, 477 U.S. 365 (1986) (*Stone v. Powell* does not bar sixth amendment claim based upon counsel's failure to move the state court to suppress illegally seized evidence). But see Duckworth v. Eagan, 109 S. Ct. 2875 (1989) (O'Connor, J., concurring). Senator Thurmond's bill is also quite radical. Section 605 of S. 1225 would prohibit federal courts from reviewing a state court's application of federal law so long as there has been a "full and fair hearing" in state court. This is really a revolutionary result. Section 2255(d) only presumes correct state court findings of fact. Apart from the restrictions set up in *Stone v. Powell*, it has always been held that the federal habeas courts have the power to reexamine state courts' constructions of federal law. Federal courts have always been the final arbiters of federal law.

This article considers only the more recent proposed reform relating to relitigation of issues of fact. Proposals aimed at slashing the jurisdiction of federal courts, such as Senator Thurmond's bill, are really attacks on the existence of the writ of habeas corpus itself. As discussed later in note 204, that is a matter for another day and another article.

of constitutional determinations.”²⁰⁰ None of these criticisms withstands close scrutiny.

The effect of a reversal on the morale of a state court judge should not enter into the calculus of whether to grant a federal hearing. We are a society governed by the rule of law. A judge's duties include the willingness to submit his or her decisions to scrutiny by others. Our judges are not infallible. That appellate courts exist at all is an explicit acknowledgment that things sometimes go awry in the trenches. We could protect the morale of our trial judges by abolishing all appellate courts. We could similarly guard against undermining the morale of our federal circuit judges and state appellate justices by supporting a constitutional amendment to abolish the Supreme Court. Nevertheless, it has long been felt that appellate review serves a useful purpose;²⁰¹ our appellate courts have never placed their imprimatur upon an erroneous decision simply because to reverse would undermine the morale of the judge below.

Another criticism is that rehearing facts “unduly burdens” the district courts. The statistics simply do not support this point. As we have seen, evidentiary hearings are convened in an exceedingly small number of cases. While the criticism may have had merit prior to 1966, the amendments to section 2254 have succeeded in reducing the number of hearings in habeas corpus cases.²⁰² Habeas corpus cases do impose a burden upon federal

200. *Jones*, 676 F.2d at 268 (Posner, J., concurring).

201. Professor Bator acknowledges the need for appellate review within a unitary system, and argues that direct review creates repose by assuring a correct decision. Bator, *supra* note 31, at 453-54. If we accept that there is to be appellate review (and thus that trial judges are bound to a system in which their decisions are reviewed by a higher court), it is difficult to see why revision of a trial judge's decision by a court on collateral review would have more of an impact upon the trial judge's morale than reversal by an appellate court on direct review.

It is sometimes said that it is offensive for state court decisions (which include those by state supreme courts) to be reviewed by a single federal judge. Habeas corpus petitions are initially decided by a single federal district court judge. But in the rare event that a petitioner wins his or her habeas corpus petition in the district court, the state authorities can always appeal to the court of appeals. The state does not need a certificate of probable cause to appeal, something which is, on the other hand, required of petitioners who seek review of decisions denying their petitions. See *FED. R. APP. P.* 22(b); 28 U.S.C. § 2253 (1982); *Barefoot v. Estelle*, 463 U.S. 880 (1983). Upon the state's appeal, the district court's decision will then be reviewed by a three-judge panel. See *Friedman, supra* note 91, at 336; *Habeas Corpus Reform supra* note 30, at 96-97 (statement of Phylis Skloot Bamberger on behalf of the American Bar Association).

202. *Supra* notes 190-95 and accompanying text. Furthermore, the statistics show the number of evidentiary hearings overall. The statistics do not show the number of hearings which would be held under the reform proposal, i.e., the number of federal

courts. The petitions increase the workload of our district judges, just like the filing of antitrust cases increases the judges' workloads and imposes additional burdens upon them. But because streamlined procedures are now in place for deciding habeas corpus cases, these cases do not "unduly" burden the district courts.

A third criticism is that rehearing facts denies "reasonable finality" to criminal proceedings. Of course, since habeas corpus is by definition a reexamination of what went before, the writ works against finality.²⁰³ Yet, given that evidentiary hearings are held in so very few cases, this is little more than a criticism of the writ itself, rather than of the occasional practice of rehearing facts.²⁰⁴

hearings which would be convened because the state courts failed to provide a full and fair opportunity to litigate the petitioners' federal claims. Because that is presently one ground for convening federal hearings, we can assume that a significant proportion of the federal hearings now convened would still be held under the proposed reform.

203. Habeas corpus is remedial. It is rarely pleasant for the courts to scrutinize a criminal proceeding that may have taken place years earlier. Regardless of outcome, every habeas corpus petition involves a failure of sorts. If the petition is successful, it is only because the state courts failed to afford the petitioner certain rights under the Constitution. If the petition is dismissed, the fact that it was filed in the federal court at all may be seen by some as a failure of our judicial system to accord reasonable finality to a state conviction. The imperfections inherent in the remedy of habeas corpus are illustrated in a recent decision:

Today, more than thirteen years after a state court levied an unconstitutional death sentence against Dewey Coleman, a federal court has invalidated that punishment . . . [T]he history of Montana's unrelenting effort to hang Dewey Coleman illustrates not only the failings of our legal system but also its saving graces. In a more perfect world, Dewey Coleman would not have lived under a death sentence for over a decade, and protracted litigation would not have sapped the limited resources of state and federal courts. In a less perfect world, a court system that had grown impatient with his numerous appeals would already have overseen Dewey Coleman's execution.

Coleman v. McCormick, 874 F.2d 1280, 1292 (9th Cir. 1989) (en banc) (Reinhard, J., concurring) (footnote omitted).

204. The justifications for the existence of federal courts and federal habeas corpus are beyond the scope of this article. Moreover, neither this article (nor perhaps any other) can *objectively* determine whether federal courts ought to hear petitions for writs of habeas corpus brought by state prisoners. In the end, the question comes down to one's own values, and it is impossible for any researcher to say that moral values are objectively "right" or "wrong." See Resnik, *supra* note 79, at 951-56, 1018.

The data establish that state courts err in enforcing federal rights in a significant number of instances. It has been estimated that approximately 70% of the appeals decided on the merits by the federal courts of appeals between 1976 and 1983 were in favor of the death-sentenced prisoner. *Barefoot v. Estelle*, 463 U.S. at 915 (Marshall, J., dissenting). See also I. ROBBINS, REPORTER, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES: RECOMMENDATIONS AND REPRINT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON DEATH PENALTY HABEAS CORPUS 156 (1989). Profes-

A fourth comment is that rehearing facts may not increase the accuracy of constitutional decisionmaking. A debate has long simmered over whether state court judges are less sensitive to federal rights than are federal judges.²⁰⁵ Setting aside this con-

sor Robbins notes that the earlier 70% figure may be misleading, since many systemic challenges to capital punishment were litigated in that period of time. Nevertheless, even now, after the systemic challenges have run their course, prisoners still succeed in a substantial number of cases. *Id.* at 31 n.9. Whether one believes that federal courts should entertain habeas corpus petitions brought by state prisoners depends upon how one values the vindication of federal rights. Economic analysis can illuminate the issue by demonstrating, for example, the resources expended upon each federal petition. That analysis cannot, however, tell us whether the allocation of resources is "good."

A recent debate illustrates the extent to which our own moral values color our conclusions in this area. In an article published in the *Stanford Law Review*, two researchers concluded that at least 350 factually innocent defendants have been convicted of capital or potentially capital crimes in the United States during this century. Of those 350 innocent defendants, 139 received sentences of death and 23 were actually executed. Bedau and Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 50 *STAN. L. REV.* 21, 36 (1987). The authors of the study argue from these data that the death penalty should be abolished. *Id.* at 75-90. Two attorneys from the Department of Justice replied to the Bedau and Radelet study. See Markman and Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 *STAN. L. REV.* 121 (1988). They argue, among other things, that even if 23 innocent persons have been executed, "the number of innocent persons whose lives have been saved through the penalty's incapacitative effects outweighs it." *Id.* at 152. There can be no objectively clear winner in this debate.

205. Detractors of federal habeas corpus may point out that state judges are sworn to uphold the law, just like federal judges, and can certainly be trusted to enforce federal rights. Yet even some state judges have acknowledged that they are not, or at least in the past were not, as attentive as they should have been to federal rights. See Remington, *State Prisoner Access to Postconviction Relief—A Lessening Role for Federal Courts; An Increasingly Important Role for State Courts*, 44 *OHIO ST. L.J.* 287, 290 (1983) (quoting Robert Sheran, the former Chief Justice of the Minnesota Supreme Court).

Judge Posner has recognized that state courts in the past were not always alert to violations of federal law. He has characterized *Townsend* as "a product of its time," stating that

The southern states' resistance to court-ordered desegregation had induced a widespread skepticism concerning the willingness of government in those states, including the courts, to protect the federal constitutional rights of their black citizens; and blacks were then as they are now disproportionately represented in the population of criminal defendants.

Jones, 676 F.2d at 268 (Posner, J., concurring). Judge Posner argues that "times have changed" and state courts are now more receptive to federal rights. *Id.* *Townsend*, he writes, is therefore "outmoded." *Id.* at 270.

There are at least two responses to Judge Posner's concurring opinion. First, it is true that in 1963 there was skepticism in the land about the willingness of the state courts to protect the federal rights of black citizens. Nevertheless, that concern was not present in *Townsend*. *Townsend* was prosecuted in Cook County, Illinois, not in a southern state. Moreover, the issue in *Townsend* was the admissibility of a coerced confession. Race was simply not a factor in the case. *Townsend* reflects far more than just a fear of discrimination in the enforcement of the federal rights of black citizens in southern states.

Another response is that state judges will always be subjected to different pressures

trover, it must be agreed that adding another layer of review increases the chance that constitutional error will be found. Professors Cover and Aleinikoff point out that, as a matter of pure probability, "redundancy fosters greater certainty that constitutional rights will not be erroneously denied."²⁰⁶ Moreover, federal habeas corpus "encourages successful vindication of federal rights by isolating them from other elements in the criminal

than federal judges. Despite the state judges' best intentions, these pressures will invariably affect their decisions. Many state judges are elected. Federal judges, on the other hand, are appointed for life. State judges who make unpopular decisions (decisions to enforce federal rights in favor of criminal defendants are uniformly unpopular) will suffer consequences. California provides a powerful example. Rose Bird served as Chief Justice of the California Supreme Court from 1977 to January, 1987. In that period, the California Supreme Court reviewed 68 capital convictions. The Bird court affirmed four death judgments, six percent of the cases. (Telephone conversation with Richard Neuhoff, California Appellate Project). In November, 1986, she and several other justices faced a retention election. Proponents of the death penalty mounted strong opposition. See Clifford and Balazar, *Two Groups Join Forces In Seeking Bird's Defeat*, L.A. Times, Jan. 29, 1986, at 20, col. 1; Shuit & Wolinsky, *Governor Accuses Bird of Ignoring Public's Will*, L.A. Times, June 6, 1986, at 3, col. 4. Chief Justice Bird and two associate justices were defeated in the election. In January, 1987, Governor Deukmejian appointed a new chief justice, Malcolm Lucas, and two new associate justices to the high court. Between January, 1987 and August 10, 1989, the court reviewed 84 capital convictions. The Lucas court affirmed 58 death judgments, 69% of the cases. (Telephone conversation with Richard Neuhoff, California Appellate Project).

The California experience shows that the process of judging is not value-neutral. It cannot be argued that intervening decisions by the United States Supreme Court and laws promulgated by the California legislature fully account for the difference in the rates of affirmance by the Bird and Lucas courts. This is not to say that decisions by the Lucas court are "wrong," or that the Bird court's decisions were "right." But the shift in outcomes demonstrates that state judges are not immune from social and political pressures. We can also assume that the lessons of the election have trickled down to the California trial and intermediate appellate courts.

206. Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1045 (1977). Assume, for example, that a state and a federal court each have a probability of .1 of acquiescing in upholding a conviction with a particular constitutional error. The probability that both courts, independently, will make the same error is the product of the two probabilities, or .01. *Id.* This rise is, however, accompanied by an increase in the chance that there will be an erroneous *failure* to convict. *Id.*

Perhaps it is the balance of these two probabilities which leads commentators to conclude that adding federal review may not increase the overall accuracy of constitutional decisionmaking. If so, Professors Cover and Aleinikoff provide a compelling rebuttal: "Redundancy could also spark a reduction of constitutional errors on the part of the states. If state courts knew that errors would be corrected by a federal court requiring a retrial, they might be more solicitous toward claims brought before them." *Id.* at 1046. Moreover, the bias against erroneous convictions is entirely in line with our own society's values. *Cf. id.* at 1046. We frequently say that we would rather acquit the guilty than convict the innocent.

process and making them the special concern of a special forum."²⁰⁷

Affirmative reasons exist for not limiting federal relitigation to only those cases where the state hearing was not "full and fair." In the first place, judicial economy may well be disserved by such a limitation. The question whether a state hearing was full and fair is itself a mixed question of law and fact. Occasionally, it can only be resolved after an evidentiary hearing.²⁰⁸ Surely it is simpler for a district court to hold a hearing on the merits of a petitioner's claim than to convene an evidentiary hearing on the threshold question of whether to hold an evidentiary hearing.

Furthermore, it is not always possible to discern between issues of fact and law. If the fact/law distinction was black and white, a district court could then simply apply its construction of federal law to the facts found by the state court. But since the distinction is not always clear, sometimes a federal court must hear testimony to provide meaningful review of a particular federal claim.

Finally, the proposal to limit federal relitigation only to instances where no full and fair hearing was provided in the state court is nothing more than a return to the views expressed by the majority in *Frank v. Mangum*.²⁰⁹ In that case, seven justices found that the Georgia Supreme Court had supplied its own "corrective process" and the federal court should, therefore, respect the state court's determination.²¹⁰ There is little appeal in returning to the rule of uncritical deference adopted by the majority in *Frank v. Mangum*. Ever since *Moore v. Dempsey*,²¹¹ the federal courts have had the power to reexamine state court findings of fact, when justice so requires.

The district courts need the safety valve established in *Moore v. Dempsey*. There must be a mechanism to correct obvious errors in the fact-finding process, even when a full and fair hearing was held in the state tribunal. Such a procedure exists in other types of federal cases. In civil cases, the district court

207. *Id.* at 1045 (citing Professor Abraham Sofaer's student note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U. L. REV. 78 (1964).

208. See *Campas v. Zimmerman*, 876 F.2d 318 (3d Cir. 1989); *Ross v. Kemp*, 785 F.2d 1467 (11th Cir. 1986); *Williams v. Maggio*, 730 F.2d 1048 (5th Cir. 1984).

209. 237 U.S. 309 (1915).

210. *Id.* at 335-36.

211. 261 U.S. 86 (1923).

has the power to direct a verdict in favor of a party²¹² or to enter judgment notwithstanding a jury's verdict.²¹³ In federal criminal cases, the district court may enter a judgment of acquittal if the evidence is insufficient to sustain a conviction.²¹⁴ Sometimes the finder of fact makes mistakes. There is no reason to allow the federal courts to review the state courts' conclusions of law but, at the same time, accord absolute finality to the state courts' findings of fact.

B. Habeas Corpus as an Appeal

Should federal habeas corpus be recast into strictly an appellate device? In ruling on habeas corpus petitions, district courts primarily examine state courts' alleged errors of law. Because state courts' findings of fact are usually presumed correct, district judges generally determine whether the state courts correctly applied federal law. Professor Friedman argues that the modern federal writ of habeas corpus is little more than a federal appeal. It is a surrogate for the direct review the Supreme Court cannot provide.²¹⁵ Recasting habeas corpus as an appeal, however, creates significant difficulties.

We cannot simply call district courts "appellate tribunals," and strip them of the authority to make findings of fact; this leads to an unacceptable result. Federal courts usually conduct evidentiary hearings only where the state records are insufficient to allow the district judges to resolve federal issues²¹⁶ or where the federal courts cannot rely upon the facts found by the state

212. See FED. R. CIV. P. 50(a).

213. See FED. R. CIV. P. 50(b).

214. See FED. R. CRIM. P. 29(a). A motion for judgment of acquittal may be granted even after a jury has returned a verdict of guilty. FED. R. CRIM. P. 29(b).

215. Friedman, *supra* note 91, at 331-40.

216. The state records may be insufficient, for example, where the merits of the factual dispute were not resolved by the state court (*Townsend* factor (1)); section 2254(d)(1) or where the state procedures were not adequate (*Townsend* factor (3)); section 2254(d)(3)). Sometimes federal courts conduct evidentiary hearings after determining that the state record, as a whole, does not support the state court's findings, and that additional facts are needed to resolve the federal issues. See, e.g., *Fisher v. Scafati*, 439 F.2d 307, 309 (1st Cir.), *cert. denied*, 403 U.S. 939 (1971); *Williams v. Duckworth*, 738 F.2d 828, 829 n.2 (7th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985); *Estock v. Lane*, 842 F.2d 184, 186-87 (7th Cir. 1988) (per curiam); *United States ex rel. Clayton v. Mancusi*, 326 F. Supp. 1366, 1373-74 (E.D.N.Y. 1971), *aff'd*, 454 F.2d 454 (2d Cir.), *cert. denied*, *sub nom. Montana v. Clayton*, 406 U.S. 977 (1972). See also *Thames v. Dugger*, 848 F.2d 149, 151 (11th Cir. 1988) (district court's denial of habeas corpus petition reversed, where state record was incomplete and district court did not conduct an evidentiary hearing).

courts.²¹⁷ If district courts cannot evaluate federal claims because of an inadequate state record, and if we remove from the federal courts the power to resolve the facts necessary to adjudicate those federal claims, then a host of federal claims would simply be unreviewable.

One alternative is to create a procedure for a limited "remand" to state courts, so that the facts necessary to the federal claim can be resolved, with the federal courts retaining ultimate jurisdiction.²¹⁸ This procedure, however, has its own problems. State courts have already had an opportunity to correct the alleged federal error.²¹⁹ Comity does not require that they be given a second opportunity. Moreover, in circumstances where the state courts are allegedly hostile to the enforcement of federal rights, remanding to the state courts may mean entirely giving up the opportunity for meaningful federal review. In addition, a remand means prolonging a process already criticized for destroying finality in the criminal justice system.

An entirely different procedure for appellate review has been proposed by Professor Meador. He has devised a mechanism for direct federal review of state criminal cases, which would replace federal habeas corpus. He suggests that state criminal defendants be permitted to file a federal "petition for review," to be heard by either one of the existing federal courts of appeals or by a federal appellate tribunal established especially for these cases.²²⁰ The petition must be filed within a limited period of time, such as ninety days, after the state conviction becomes final.²²¹ The federal appellate court would examine the conviction thoroughly, and could also send the case to a fed-

217. The federal court might not rely upon the state findings if the federal court determines, for any of the reasons enumerated in § 2254(d)(1)-(8), that the findings cannot be presumed correct. For example, in *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court held that the district court should not presume correct a governor's decision regarding the petitioner's competency to be executed. To receive a presumption of correctness, a state proceeding must be in a court of law. *Id.* at 410-11 (opinion of Marshall, J.) An evidentiary hearing was thus required in the federal district court. *Id.*; *id.* at 427 (opinion of Powell, J.).

218. The procedure would be new. Unlike trial and appellate courts in a unitary system, the federal district courts do not simply remand a case to the state trial courts for findings of fact on limited issues. The federal courts must generally issue the writ (or not) and order a new trial (or not).

219. The case cannot be brought in the district court unless the state remedies have been exhausted. 28 U.S.C. § 2254(b) (1982). See also *Rose v. Lundy*, 455 U.S. 509 (1982).

220. Meador, *supra* note 178.

221. *Id.* at 284.

eral district court if an evidentiary hearing was necessary.²²² These procedures, Professor Meador argues, would afford "federal judicial review on federal issues in state criminal cases in a way more sensible, orderly, and efficient than that now existing through the habeas corpus process. . . ."²²³

There is much to commend Professor Meador's proposal. It would provide prompt and timely federal review of the federal issues contained in the record of the direct appeal. A problem with the proposal, however, is that some violations of federal rights are difficult to demonstrate on direct review. Claims of ineffective assistance of counsel, for example, can often only be resolved in a collateral proceeding.²²⁴ Under Professor Meador's proposal, those claims would either be resolved by the federal tribunal without first being presented to the state courts,²²⁵ or the claims would simply not be subject to federal review.²²⁶ Neither result is particularly attractive.

In sum, federal habeas corpus may resemble an appeal. Real dangers exist, however, in carrying the analogy too far. District courts need the ability to resolve disputed issues of fact, when the federal claims turn on those issues.

V. CONCLUSION: THE PROPER ROLE OF THE FEDERAL COURTS

The scope of federal habeas corpus has expanded as we have developed as a nation. The Constitution did not expressly

222. *Id.* at 276.

223. *Id.* at 284.

224. *See, e.g.,* United States v. Rogers, 769 F.2d 1418, 1425 (9th Cir. 1985). One example is a case where the alleged sixth amendment violation is counsel's failure to investigate a viable defense. To resolve this claim, a court needs evidence of counsel's efforts to investigate the defense and facts which demonstrate whether the defense would be viable. Because the alleged federal violation is the failure to raise the defense, facts about the defense are generally not included in the trial record.

225. If defendants were required to file their petition for review within ninety days of the date their convictions became final, they would likely not have an opportunity to pursue any collateral state postconviction remedies.

226. There are several circumstances in which claims would not be reviewable. The facts supporting some federal claims may not surface until after trial. Under the present system, those claims are first brought in state postconviction procedures and, if denied, may be the subject of a federal petition for writ of habeas corpus. Under Professor Meador's proposal, if the federal appellate tribunal refused to consider unexhausted claims, and if the petition for review was required to be brought before defendants could pursue a state collateral postconviction remedy, then the federal courts simply could not review these claims. Moreover, even if the federal tribunal allowed unexhausted claims to be raised, there is no recourse under Professor Meador's proposal to resolve claims which arise after an initial petition for review is decided.

require article III courts to entertain petitions for writs of habeas corpus,²²⁷ so that power was included in the Judiciary Act of 1789.²²⁸ In the early nineteenth century, the federal government found itself unable to collect taxes in South Carolina and powerless to prevent a prosecution in New York, so Congress extended federal habeas corpus to certain state prisoners.²²⁹ During Reconstruction, there was great concern about southern states' recalcitrance,²³⁰ so the Habeas Corpus Act of 1867 was passed to give federal courts the authority to issue writs of habeas corpus on behalf of any person held in violation of the Constitution or federal laws.²³¹

In the twentieth century, the Supreme Court took the lead. As decisions established that the due process clause forbade coerced confessions, involuntary pleas, mob-dominated state trials and such, the Court made certain that those infirmities could be remedied by petitions for writs of habeas corpus. With the federal courts' new willingness to enforce federal rights came a fresh problem: how to balance properly state and federal decisionmaking?

Perhaps the first attempt to strike the balance was *Frank v. Mangum*.²³² In that case, the Supreme Court made a number of statements which *sounded* innovative; such as the federal court can "inquire into the very substance of the matter."²³³ The bottom line, however, was that the Court deferred uncritically to the "corrective process" afforded by the Georgia Supreme Court. The balance was redrawn in 1923 in *Moore v. Dempsey*.²³⁴ There the Supreme Court ruled that the district court must examine the facts and find whether they "are true and whether they can be explained so far as to leave the state proceedings undisturbed."²³⁵

The procedures in place today are essentially those established by *Moore v. Dempsey*. Petitions for writs of habeas corpus are not dismissed without close scrutiny by district courts. Evidentiary hearings are afforded petitioners if they have

227. *Supra* notes 11-13 and accompanying text.

228. *Supra* notes 14-17 and accompanying text.

229. *Supra* notes 19-24 and accompanying text.

230. *Supra* note 33 and accompanying text.

231. *Supra* notes 25-28 and accompanying text.

232. 237 U.S. 309 (1915).

233. *Id.* at 331.

234. 261 U.S. 86 (1923).

235. *Id.* at 92.

asserted facts which state causes of action, and if their claims cannot be proved without a hearing. *Townsend v. Sain* describes certain circumstances in which hearings are mandatory.²³⁶ Of course, there have been reforms, the most important of which was the amendment to 28 U.S.C. section 2254(d). But the modern federal writ of habeas corpus is the creature which evolved from Justice Holmes' opinion for the Court in *Moore v. Dempsey*. It is a product of neither the Warren Court nor Justice Brennan's jurisprudence.

Considerations of comity are not given short shrift under the modern writ. Petitioners must fully exhaust state remedies; this requirement is strictly enforced.²³⁷ The "presumptions of correctness" contained within section 2254(d), and the Supreme Court's decision in *Sumner v. Mata*,²³⁸ ensure that findings of fact by state courts are examined and generally respected.

The efficacy of the present scheme appears from the data relating to the frequency of evidentiary hearings on federal petitions for writs of habeas corpus. Those hearings are by far the exception, rather than the rule. Section 2254(d) has been extraordinarily effective in reducing the frequency of evidentiary hearings. It guarantees that in all but the most remarkable of circumstances, federal courts will defer to state courts' findings of fact.

Some may argue that section 2254(d) should be amended to remove the presumptions of correctness afforded state court decisionmaking. Whether such an amendment should be enacted depends upon how much one values the vindication of federal rights; for if we increase the extent of review, we can increase the accuracy of decisions affecting constitutional rights. What is clear, however, is that we cannot go in the other direction without severely compromising the federal courts' abilities to secure the enforcement of federal rights in state fora. We cannot, for example, treat habeas corpus as an appeal without entirely exempting certain categories of claims from federal review.²³⁹ Restricting federal evidentiary hearings only to circumstances in which states fail to provide "full and fair" hearings would remove the safety valve we have had since 1923, when the Su-

236. 372 U.S. 293 (1963). See *supra* notes 106-07 and accompanying text.

237. *Supra* notes 82 & 187 and accompanying text.

238. 449 U.S. 539 (1981).

239. *Supra* notes 216-226 and accompanying text.

preme Court decided *Moore v. Dempsey*.²⁴⁰ It would also mark a return to the views of the majority in *Frank v. Mangum*, not a comforting thought.

The federal courts must be permitted to conduct evidentiary hearings in habeas corpus cases; hearings are sometimes necessary to the writ. While it is rarely, if ever, *ideal* to relitigate issues that were contested once before in a state forum, that drawback is inherent in the remedy of habeas corpus itself. By definition, habeas corpus reexamines what went before. Although habeas corpus is not perfect, it is the only effective means to enforce federal rights in state criminal prosecutions. If we are to keep the remedy, we need to ensure that federal courts can review state decisions in a meaningful manner. The balance drawn by the Supreme Court in *Moore v. Dempsey*, as fine-tuned by Congress, is basically sound. That balance should be left alone.

240. 237 U.S. 309 (1915). See *supra* notes 209-11 and accompanying text.

APPENDIX C

Habeas Corpus Petitions Filed by State Prisoners vs All Other Civil Cases Terminated During or After Trial

YEAR	PERCENT OF FEDERAL HABEAS CORPUS PETITIONS FILED BY STATE PRISONERS TERMINATED DURING OR AFTER TRIAL	PERCENT OF ALL OTHER CIVIL CASES TERMINATED DURING OR AFTER TRIAL
1945	4.48	6.94
1946	6.53	6.50
1947	10.40	8.94
1948	11.29	11.57
1949	8.36	12.06
1950	9.97	11.21
1951	6.18	11.26
1952	4.90	10.42
1953	5.45	11.44
1954	3.25	11.50
1955	3.74	9.72
1956	2.68	8.85
1957	3.44	9.27
1958	3.85	9.13
1959	1.92	8.78
1960	2.65	8.54
1961		
1962		
1963	4.55	11.96
1964	6.71	11.63
1965	11.03	11.60
1966	9.12	11.47
1967	7.94	11.14
1968	8.01	12.21
1969	5.45	11.38
1970	4.78	10.66
1971	4.05	9.82
1972	2.95	9.57
1973	2.46	9.05
1974	3.33	9.11
1975	3.56	8.79
1976	2.71	8.51
1977	3.06	8.14
1978	2.76	7.89
1979	2.34	7.10
1980	2.02	6.71
1981	2.26	6.79
1982	1.53	6.30
1983	1.44	5.60
1984	1.36	5.12
1985	1.24	4.79
1986	1.14	4.52
1987	1.06	5.18
1988	1.11	5.03