

Sec. 8—Powers of Congress

Cls. 11, 12, 13, and 14—War; Military Establishment

val forces” from its grand jury provision, and there is an implication that these cases are also excepted from the Sixth Amendment.¹⁵⁵⁶ The double jeopardy provision of the Fifth Amendment appears to apply.¹⁵⁵⁷ The Court of Military Appeals now holds that servicemen are entitled to all constitutional rights except those expressly or by implication inapplicable to the military.¹⁵⁵⁸ The Uniform Code of Military Justice, supplemented by the *Manual for Courts-Martial*, affirmatively grants due process rights roughly comparable to civilian procedures, so it is unlikely that many issues necessitating constitutional will arise.¹⁵⁵⁹ However, the Code leaves intact much of the criticized traditional structure of courts-martial, including the pervasive possibilities of command influence,¹⁵⁶⁰ and the Court of Military Appeals is limited on the scope of its review,¹⁵⁶¹ thus creating areas in which constitutional challenges are likely.

Upholding Articles 133 and 134 of the Uniform Code of Military Justice, the Court stressed the special status of military society.¹⁵⁶² This difference has resulted in a military Code regulating aspects of the conduct of members of the military that in the civilian sphere would go unregulated, but on the other hand the penalties imposed range from the severe to well below the threshold of that possible in civilian life. Because of these factors, the Court, while agreeing that constitutional limitations applied to military justice, was of the view that the standards of constitutional guarantees were significantly different in the military than in civilian life. Thus, the vagueness challenge to the Articles was held to be governed by the standard applied to criminal statutes regulating economic affairs, the most lenient of vagueness standards.¹⁵⁶³ Nor did

¹⁵⁵⁶ *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123, 138–39 (1866); *Ex parte* Quirin, 317 U.S. 1, 40 (1942). The matter was raised but left unresolved in *Middendorf v. Henry*, 425 U.S. 25 (1976).

¹⁵⁵⁷ See *Wade v. Hunter*, 336 U.S. 684 (1949). Cf. *Grafton v. United States*, 206 U.S. 333 (1907).

¹⁵⁵⁸ *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). This conclusion by the Court of Military Appeals is at least questioned and perhaps disapproved in *Middendorf v. Henry*, 425 U.S. 25, 43–48 (1976), in the course of overturning a CMA rule that counsel was required in summary court-martial. For the CMA's response to the holding, see *United States v. Booker*, 5 M. J. 238 (C.M.A. 1977), *rev'd in part on reh.*, 5 M. J. 246 (C.M.A. 1978).

¹⁵⁵⁹ The UCMJ guarantees counsel, protection from self-incrimination and double jeopardy, and warnings of rights prior to interrogation, to name a few.

¹⁵⁶⁰ Cf. *O'Callahan v. Parker*, 395 U.S. 258, 263–64 (1969).

¹⁵⁶¹ 10 U.S.C. § 867.

¹⁵⁶² *Parker v. Levy*, 417 U.S. 733 (1974). Article 133 punishes a commissioned officer for “conduct unbecoming an officer and gentleman,” and Article 134 punishes any person subject to the Code for “all disorders and neglects to the prejudice of good order and discipline in the armed forces.”

¹⁵⁶³ 417 U.S. at 756.