

Sec. 8—Powers of Congress

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

application of the Articles to conduct essentially composed of speech necessitate a voiding of the conviction, as the speech was unprotected, and, even though it might reach protected speech, the officer here was unable to raise that issue.¹⁵⁶⁴

Military courts are not Article III courts, but are agencies established pursuant to Article I.¹⁵⁶⁵ In the 19th century, the Court established that the civil courts have no power to interfere with courts-martial and that court-martial decisions are not subject to civil court review.¹⁵⁶⁶ Until August 1, 1984, the Supreme Court had no jurisdiction to review by writ of certiorari the proceedings of a military commission, but as of that date Congress conferred appellate jurisdiction of decisions of the Court of Military Appeals.¹⁵⁶⁷ Prior to that time, civil court review of court-martial decisions was possible through *habeas corpus* jurisdiction,¹⁵⁶⁸ an avenue that continues to exist, but the Court severely limited the scope of such review, restricting it to the issue whether the court-martial has jurisdiction over the person tried and the offense charged.¹⁵⁶⁹ In *Burns v. Wilson*,¹⁵⁷⁰ however, at least seven Justices appeared to reject the traditional view and adopt the position that civil courts on *habeas corpus* could review claims of denials of due process rights to which the military had not given full and fair consideration. Since *Burns*, the Court has thrown little light on the range of issues cognizable by a federal court in such litigation¹⁵⁷¹ and the lower federal courts have divided several possible ways.¹⁵⁷²

Civilians and Dependents.—In recent years, the Court rejected the view of the drafters of the Code of Military Justice with regard to the persons Congress may constitutionally reach under

¹⁵⁶⁴ 417 U.S. at 757–61.

¹⁵⁶⁵ *Kurtz v. Moffitt*, 115 U.S. 487 (1885); *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858). Judges of Article I courts do not have the independence conferred by security of tenure and of compensation.

¹⁵⁶⁶ *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

¹⁵⁶⁷ Military Justice Act of 1983, Pub. L. 98–209, 97 Stat. 1393, 28 U.S.C. § 1259.

¹⁵⁶⁸ *Cf. Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869); *Ex parte Reed*, 100 U.S. 13 (1879). While federal courts have jurisdiction to intervene in military court proceedings prior to judgment, as a matter of equity, following the standards applicable to federal court intervention in state criminal proceedings, they should act when the petitioner has not exhausted his military remedies only in extraordinary circumstances. *Schlesinger v. Councilman*, 420 U.S. 738 (1975).

¹⁵⁶⁹ *Ex parte Reed*, 100 U.S. 13 (1879); *Swaim v. United States*, 165 U.S. 553 (1897); *Carter v. Roberts*, 177 U.S. 496 (1900); *Hiatt v. Brown*, 339 U.S. 103 (1950).
¹⁵⁷⁰ 346 U.S. 137 (1953).

¹⁵⁷¹ *Cf. Fowler v. Wilkinson*, 353 U.S. 583 (1957); *United States v. Augenblick*, 393 U.S. 348, 350 n.3, 351 (1969); *Parker v. Levy*, 417 U.S. 733 (1974); *Secretary of the Navy v. Avrech*, 418 U.S. 676 (1974).

¹⁵⁷² *E.g.*, *Calley v. Callaway*, 519 F.2d 184 (5th Cir., 1975) (en banc), cert. denied, 425 U.S. 911 (1976).