

court below had erred in extending its review, for the purpose of determining compliance with the Due Process Clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain conviction, the adequacy of the pre-trial investigation, and the competence of the law member and defense counsel. In summary, Justice Clark wrote: "In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision."⁴⁸⁴ Similarly, in *Burns v. Wilson*,⁴⁸⁵ the Court denied a petition for the writ to review a conviction by a military tribunal on the Island of Guam in which the petitioners asserted that their imprisonment resulted from proceedings that violated their constitutional rights. Four Justices, with whom Justice Minton concurred, maintained that judicial review is limited to determining whether the military tribunal, or court-martial, had given fair consideration to each of petitioners' allegations, and does not embrace an opportunity "to prove de novo" what petitioners had "failed to prove in the military courts." According to Justice Minton, however, if the military court had jurisdiction, its action is not reviewable.

Substantive Due Process

Justice Harlan, dissenting in *Poe v. Ullman*,⁴⁸⁶ observed that one view of due process, "ably and insistently argued . . . , sought to limit the provision to a guarantee of procedural fairness." But, he continued, due process "in the consistent view of this Court has ever been a broader concept Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. . . . Thus the guaranties of due process, though having their roots in Magna Carta's '*per legem terrae*' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'"

Discrimination.— Literally speaking, the Fifth Amendment, unlike the Fourteenth Amendment, "contains no equal protection

⁴⁸⁴ 339 U.S. at 111.

⁴⁸⁵ 346 U.S. 137 (1953).

⁴⁸⁶ 367 U.S. 497, 540, 541 (1961). The internal quotation is from *Hurtado v. California*, 110 U.S. 516, 532 (1884). Development of substantive due process is briefly noted above under "Scope of the Guaranty" and is treated more extensively under the Fourteenth Amendment.