"FINALITY" UNDER ARTICLE 76, UCMJ.

[29 July 2020, amendments in this font]

I. LEGISLATIVE HISTORY OF ARTICLE 76, UCMJ:[1]

U.S. Army JAGC, *Legal and Legislative Basis: Manual for Courts-Martial United States* (1951)

Page	Quotation
9	In the last subparagraph the provisions of Article 76 with respect to finality of court-martial judgments are restated. . This is comparable to the language of Article of War 50h - and the last provision in Article of War 53.
9	The Army and Air Force have never taken the view that the finality of court-martial judgments as provided in the Articles of War operates to preclude collateral attack on jurisdictional grounds. [Citation omitted].

81st Congress, 1st Session, House Report No. 491, *Uniform Code of Military Justice* (1949):[2]

35 ***Article 76. Finality of court-martial judgments***

This article is derived from AW 50 (h) and is modified to conform to terminology used in this code. Subject only to a petition for a writ of *habeas corpus* in Federal court, it provides for the finality of court-martial proceedings and judgments.

81st Congress, 1st Session, Senate Hearings, *Uniform Code of Military Justice* (1949):[3]

102 Commentary submitted to Committee by Senator McCarran, chairman of the Committee on the Judiciary:

119 Discussing, but not resolving, whether or not Congress "desires to completely foreclose review by Federal constitutional courts." [footnote omitted].

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[1] Article 76, UCMJ, itself provides for exceptions to the so-called "finality rule:"

> . . . subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74) and the authority of the President.

[2] Available at: http://www.loc.gov/rr/frd/Military_Law/pdf/report_01.pdf

[3] Available at: http://www.loc.gov/rr/frd/Military_Law/pdf/hearings_02.pdf

81st Congress, 1st Session, Senate Report No. 486, *Establishing a Uniform Code of Military Justice* (1949):[4]

32 Same as House Report, *supra.*

81st Congress, 2nd Session, Conference Report, *Uniform Code of Military Justice* (1950);[5]

Not discussed because no differences of opinion.

II. CASE LAW:

Sanders v. United States, 373 U.S. 1 (1963):

8 Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.

Fay v. Noia, 372 U.S. 391 (1963), *overruled on other grounds, Wainwright v. Sykes,* 433 U.S. 72 (1977):

424 But conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.

United States v. Frischholz, 36 C.M.R. 306 (CMA 1966):

307 Discussing Article 76's "finality" provision.[6]

307 This provision [Art. 76] does not insulate a conviction from subsequent attack in an appropriate forum. At best it provides finality only as to interpretations of military law by this Court. [citation omitted] It has never been held to bar review of a court-martial, when fundamental questions of jurisdiction are involved.

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

** My Lai massacre case. *Habeas corpus* case and good discussion of the "scope of review" of courts-martial convictions.

194 Historical analysis.

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[4] Available at: http://www.loc.gov/rr/frd/Military_Law/pdf/report_02.pdf

[5] Available at: http://www.loc.gov/rr/frd/Military_Law/pdf/conference_report.pdf

[6] This was a *Petition for Reconsideration,* "In substance, the accused is really asking for reconsideration of our 1960 decision denying his petition . . . ." 36 C.M.R. at 309.

197 Detailed discussion and criticism of *Burns v. Wilson.*

199 [T]he power of federal courts to review military convictions of a habeas petition depends on the nature of the issues raised, and in this determination, four principal inquiries are necessary.

199 1. The asserted error must be of substantial constitutional dimension.
200 2. The issue must be one of law rather than of disputed fact already determined by the military tribunals.
200 3. Military considerations may warrant different treatment of constitutional claims.
203 4. The military courts must give adequate consideration to the issues involved *and apply proper legal standards*. [Emphasis added].

Schlesinger v. Councilman, 420 U.S. 738 (1975):

745 Petitioners rely on the legislative history of Art. 76 as demonstrating that Congress intended to limit collateral attack in civilian courts on court-martial convictions to proceedings for writs of habeas corpus under 28 U.S.C. s 2241.

Id. We now conclude that although the article is highly relevant to the proper scope of collateral attack on court-martial convictions and to the propriety of equitable intervention into pending court-martial proceedings, it does not have the jurisdictional consequences petitioners ascribe to it.

746 Collateral attack seeks . . . a declaration that a judgment is void. ... it means only that for purposes of the matter at hand the judgment must be deemed without res judicata effect: because of lack of jurisdiction or some other equally fundamental defect, the judgment neither justifies nor bars relief from its consequences.

747 These settled principles of the law of judgments have been held from the start fully applicable to court-martial determinations. *Habeas corpus* proceedings have been and remain by far the most common form of collateral attack on court-martial judgments; but historically they have not been the exclusive means of collateral attack. [footnote omitted].

749 Article 76, however, does not expressly effect any change in the subject-matter jurisdiction of Art. III courts. Its language only defines the point at which military court judgments become final and requires that they be given res judicata effect. But, as the Court has recognized in the past, there is no necessary inconsistency between this and the standard rule that void judgments, although final for purposes of direct review, may be impeached collaterally in suits otherwise within a court's subject-matter jurisdiction.

750 Petitioners agree with *Gusik [v. Schilder,* 340 U.S. 128 (1950)] insofar as it

holds that *habeas corpus remains available despite the mandate of Art. 76.* [Emphasis added].

751 [n. 24] H.R.Rep.No. 491, *supra*, at 7. See also 95 Cong.Rec. 5721 (1949) (remarks of Rep. Brooks). It had been suggested in committee hearings that any restriction on the availability of *habeas corpus* would involve constitutional problems. Hearings on H.R. 2498 before a Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess., 799 (1949). Senator Kefauver, in discussing Art. 76, stated that 'Congress, through its enactment, did not, and could not, . . . intend to take away the jurisdiction of the Supreme Court or of other courts in *habeas corpus* matters.' 96 Cong.Rec. 1414 (1950).

Brosius v. Warden, 278 F.3d 239 (3rd Cir.), *cert. denied,* 537 U.S. 947 (2002):

242 [Discussing *Burns v. Wilson, supra*] The degree to which a federal *habeas* court may consider claims of errors committed in a military trial has long been the subject of controversy and remains unclear.

244 Lower courts have had difficulty applying the Burns "full and fair" test. [citations omitted].

III. OTHER AUTHORITIES:

Bator, *Finality in Criminal Law and Federal* Habeas Corpus *for State Prisoners*, 76 Harv. L. Rev. 441 (1963); [Perhaps the seminal article on "finality."]

Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions,* 61 Columbia L. Rev. 40 (1961);

49 [I]t is clear that Article 76 has no greater effect, as is demonstrated by the numerous cases subsequent to its enactment in which the Court has sanctioned the granting of the writ to persons convicted by court-martial. [footnote omitted].

51 [Good discussion of *Burns v. Wilson, supra*.]

59 [Discussion of "full and fair" consideration principle.]

61 Habeas corpus, though by far the commonest, is not the only method of collateral review.

62 At the outset, failure to assert a claim of unfairness in the original proceeding, including its appellate phases, is likely to be a worse stumbling block for the military than for the civilian petitioner, if only because it is hard to say that the military authorities "refused to consider," or did not fully and fairly consider, a point that was never urged upon them.

Brief of Law Professors as *Amici Curiae* in Support of Respondent. *United States v. Denedo:*[7]

> 18 This Court in *Councilman* emphasized, however, that finality under Article 76 is a prudential—rather than jurisdictional—constraint. *See* 420 U.S. at 749.

Everett, *Collateral Attack on Court-Martial Convictions,* XI JAG L. Rev. 399 (1969):[8]

> 399 Discussing "that court-martial findings and sentences may be subject to collateral attack in several ways.

Katz & Nelson, *The Need for Clarification in Military* Habeas Corpus, 27 Ohio St. L. J. 193 (1966):[9]

> 193 During the last twenty-five years the law of federal habeas corpus has undergone rapid and significant development. This development has been undergirded by the basic assumption that finality in criminal justice is to be valued less highly than the interest in assuring that no person is imprisoned or deprived of his life in violation of the Constitution. To that end the Supreme Court has steadily chipped away at the obstacles to adjudication of constitutional claims in federal habeas corpus proceedings.

Friedman, *A Tale of Two Habeas,* 73 Minnesota L. Rev. 247 (1988):[10]

> Lengthy analysis of "finality" issues from both sides.

Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial,* 108 Mil. L. Rev. 5 (1985):

> 58 [n. 341] One issue raised in *Ashe*, which was the source of controversy until *Schlesinger v. Councilman*, 420 U.S. 738 (1975), was the effect of Article 76, UCMJ, 10 U.S.C. a 876, on non-habeas challenges to military convictions. The Government argued in a number of cases that Article 76-the finality provision of the Code-barred all but *habeas* attacks on courts-martial. In 1950, the Supreme Court decided that Article 76's predecessor, Article of War 53, did not bar habeas proceedings. [citing *Gusik, supra*]. And the federal courts generally rejected the contention that Article 76 barred other kinds of collateral relief. [citations omitted]. In *Councilman*, the Supreme Court settled the issue by holding that Article 76 does not bar non-habeas forms of collateral review. *Schlesinger v.*

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[7] Available at: https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1004&context=pub_disc_briefs

[8] Available at: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1588&context=faculty_scholarship

[9] Available at: https://kb.osu.edu/bitstream/handle/1811/68800/OSLJ_V27N2_0193.pdf?sequence=1

[10] Available at: https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1879&context=mlr

Councilman, 420 U.S. at 752-53.

Strassburg, *Civilian Judicial Review of Military Criminal Justice,* 66 Mil. L. Rev. 1 (1974):

> 55 With regard to post-conviction remedies, it is clear that the finality provision of the Uniform Code of Military Justice and its predecessor were not intended to preclude federal court habeas corpus review. [footnote omitted].