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# Supreme Court of the United States

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JOHN F. DAVIS, CLERK

In the Matter of:

Docket No. 45

UNITED STATES

Petitioner

vs.

RICHARD G. AUGENBLICK et al.

Respondent

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Place Washington, D. C.

Date November 21, 1968

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C O N T E N T S

ARGUMENTS OF:

P A G E

Edwin L. Weisl, Jr., on behalf of Petitioner

3

Joseph H. Sharlitt, on behalf of Respondent

28

Francis J. Steiner, Jr., on behalf of Respondent

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October

3 [REDACTED], 1968

4 United States

5 Petitioner

6 vs.

7 Richard G. Augenblick et al.

8 Respondent

9 Washington, D. C.

10 Thursday, November 21, 1968

11 The above-entitled matter came on for argument at  
12 11:40 a.m.

13 BEFORE:

14 EARL WARREN, Chief Justice  
15 HUGO L. BLACK, Associate Justice  
16 WILLIAM O. DOUGLAS, Associate Justice  
17 JOHN M. HARLAN, Associate Justice  
18 WILLIAM J. BRENNAN, JR., Associate Justice  
19 POTTER STEWART, Associate Justice  
20 BYRON R. WHITE, Associate Justice  
21 ABE FORTAS, Associate Justice  
22 THURGOOD MARSHALL, Associate Justice  
23  
24  
25

1 APPEARANCES;

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P R O C E E D I N G S

CHIEF JUSTICE WARREN: No. 45, United States v ersus  
Richard G. Augenblick et al.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Weisl, you may proceed  
with your argument.

ORAL ARGUMENT OF EDWIN L. WEISL, JR.

MR. WEISL: Thank you, Mr. Chief Justice, may it please  
the court. These two cases are here on writs of Certiorari to  
the United States Court of Claims.

In each of them the United States seeks reversal of  
judgments of that court granting back pay to former service-  
men each of whom had been discharged from the service pursuant  
to judgments of conviction of Court-Martial.

In each of these cases the United States urges that  
the Court of Claims lacks power to, in effect, constitute itself  
an additional appellate tribunal to review Courts-Martial for  
errors of law and therefore their judgment should be reversed.

Beyond the common question of law neither of these  
cases has anything in common.

In Augenblick we have a conviction of a naval officer  
for the commission of an "indecent, lewd and lascivious act",  
in Juhl, the conviction of black market activities.

In Augenblick the Court of Claims in effect reversed  
the Court-Martial conviction and granted back pay because of a

1 purported Jencks Act question. In Juhl the Court of Claims  
2 purported to reverse a Court-Martial conviction and award back  
3 pay because of a question of a conviction of Juhl on what the  
4 Court of Claims said was "self-contradictory, uncorroborated  
5 accomplice testimony" -- in other words a mere evidentiary  
6 question.

7 The state says that the Court of Claims lacks power  
8 to do this, that the finality provisions of the Uniform Code of  
9 Military Justice providing for review of Courts-Martial  
10 ultimately by the Court of Military Appeals bars the Court of  
11 Claims from reviewing once again these judgments of conviction  
12 for factual Jencks Act questions and the like, but that even if  
13 this Court finds the Court of Claims has some measure of power  
14 to review Courts-Martial, no matter whether that power be broad  
15 or narrow, the Court of Claims was in error here.

16 Q Does the Court of Claims judgment, assuming it has  
17 jurisdiction, intend to reinstate this man?

18 A No, sir; I believe their only power is to award back  
19 pay, but I think that clearly the effect is to reverse the  
20 conviction. I am not certain whether or not a board for the  
21 review of records, military records, would then re-instate the  
22 man and wipe out the conviction utterly.

23 Q He was dismissed?

24 A They were both dismissed, sir.

25 Q How would he go about getting re-instated?

1 A I believe that each service now has a board for the  
2 correction of records and they would apply to that board citing  
3 the decision of the Court of Claims.

4 Q You do not know if that has happened to either of  
5 them?

6 A I do not, sir, and I really do not know if this is  
7 grounds ---

8 Q The Court of Military Appeals denied review in the  
9 Augenblick case. Was there an effort to get Juhl a review?

10 A Juhl was not entitled to such review because his  
11 conviction was for less than six months, or was for six months.

12 Q Was the jurisdiction by the Court of Military Appeals  
13 completely discretionary?

14 A It was discretionary except that first of all it can  
15 only review convictions in which sentences of a year or more  
16 have been awarded. I believe it has mandatory review of  
17 convictions of officers of flag rank.

18 Q Was Augenblick's conviction one that was within the ---

19 A Yes, it was.

20 Q It could have been reviewed. But it is discretionary  
21 whether or not it was --

22 A It was discretionary. They have a Certiorari type  
23 jurisdiction.

24 Q Even though he was not sentenced to jail?

25 A That is correct.

1 Q He is finished.

2 A Yes. We feel that he was finished when his conviction  
3 was upheld by the Court of Military Appeals.

4 Q That is what I asked you. What do you mean, in effect,  
5 upheld recently? We do not uphold things here when we deny  
6 cert.

7 A I think that perhaps I have failed to point out that  
8 Courts-Martial are reviewed even if they do not reach the  
9 Court of Military Appeals.

10 Q Within the services?

11 A Within the services, indeed. There are constituted  
12 within each service boards of review that by statute, recent  
13 statutes have been elevated to the title of Courts of Military  
14 Review or Appeal, consisting of Judge Advocate General officers  
15 and or civilians, which have a very large degree of independence  
16 and freedom from influence by the command.

17 Certainly when you think that the purpose of  
18 Courts-Martial are disciplinary ---

19 Q Did these two cases go to such boards?

20 A Juhl case, again, because of the shortness of the  
21 conviction, did not reach such a board, but it was reviewed by  
22 the convening authority of the court and somewhat up through  
23 the chain of command.

24 Each of them has staff Judge Advocates to advise them  
25 on questions of law and fact. It may be irrelevant, but I think



1 there has been a high degree of scrupulousness to protect  
2 rights of defendants in the Courts-Martial. I think this Court  
3 can well take into account the fact that none of these Judge  
4 Advocates are young lawyers --

5 Q If actually there has been a serious defect in this  
6 Court-Martial, even a constitutional one, in Augenblick, since  
7 he could not go to habeas, I gather, and the Court of Military  
8 Appeals as here had denied it, even though there is a serious  
9 constitutional defect in his Court-Martial conviction, no  
10 court can do anything about it.

11 A I would say that is my position and in Augenblick I  
12 say this is not a harsh one because the Court of Military  
13 Appeals could have presented to it any constitutional issue  
14 and if there were a substantial one I submit --

15 Q We might think it substantial and they might not and  
16 refuse to review. Is that not so?

17 A I am sure it is possible that this Court and --

18 Q They might refuse to review.

19 A Yes.

20 Q And we could not reach them.

21 A That is correct.

22 Q Let us assume, Mr. Weisl, that all of the proceedings  
23 were had in the Courts of Military Justice and there were no  
24 questions about them, your position has to be that when the  
25 defendant in the criminal case before the Military Courts files

1 an action for back pay in the Court of Claims, a separate  
2 jurisprudential system, that that court cannot then go into any  
3 questions at all?

4 A. I believe this is the sounder conclusion. We suggest  
5 in our brief, and I am prepared to argue that at times a  
6 broader scope of review has been considered by this Court and  
7 at other times the Court of Claims has assumed that power  
8 without having an appeal taken to this Court.

9 Q Let us suppose that the Court of Claims discovers or  
10 concludes that the Military Courts had no jurisdiction over the  
11 offense charged and that therefore the soldier was wrongly  
12 separated from the service, on a jurisdictional ground. Would  
13 that be open to the Court of Claims?

14 A. I suggest that there is no need for that. The  
15 question is really before this Court for the first time here  
16 and I suggest that the Court of Claims need not, in fairness to  
17 persons accused, have that jurisdiction now. I will say that  
18 they have exercised it though.

19 Q I am asking you about your theory, the theory of the  
20 United States. Is it the theory of the United States that in  
21 a subsequent suit for back pay the Court of Claims should be  
22 precluded from inquiring into the jurisdiction of the Military  
23 Courts with respect to the person and the offense charged?

24 A. It is our theory, it is. We concede, however, that  
25 the Court of Claims has in the past assumed the power to look

1 at the jurisdiction and cite in poin2 of our brief a couple of  
2 cases where they did that very thing. They realized that the  
3 court was improperly constituted, did not have the proper  
4 officers sitting on it, and they granted back pay.

5 I submit that what Congress has done to protect the  
6 accused, providing, I think a very elaborate and adequate  
7 system of review, there is no need for the Court of Claims to -

8 Q It seems to me that is a different question. Suppose  
9 that accused says, "I accept this. I am not interested in  
10 getting set aside the conclusion that I am to be separated from  
11 the service or whatever it may be. I want to exhaust my  
12 remedies provided by law. I want to resort to my remedies  
13 provided by law for the recovery of back pay."

14 Then he files an action in the Court of Claims.

15 I take it now that your position is that regardless  
16 of the alleged defect, even if it is a jurisdictional defect in  
17 the military tribunal, the position of the United States is that  
18 the Court of Claims is precluded from going into that?

19 A We really feel, Mr. Justice Fortas, that there is a  
20 statute, a Congressional act, which was embodied in Article 76  
21 of the SCMJ that has made the review within the Court-Martial  
22 military system final and conclusive.

23 We think that it is adequate to protect defendants  
24 against improperly constituted tribunals. Therefore, the  
25 Court of Claims is precluded from doing this.

1 I understand the Court's difficulty and the problem  
2 with it, but I am not sure one is really tilting at windmills  
3 these days when there is a true, adequate and largely civilian  
4 review of Court-Martial. Most of the Judge Advocate officers  
5 in the service today, as I think this Court well knows, are  
6 civilian-oriented people who are serving a brief time in the  
7 military service in order to satisfy their obligation.

8 They are jealous guardians of the rights of defendants.  
9 The Court of Military Appeals record of reversal of convictions  
10 is astoundingly high. I think it is probably higher than any  
11 civilian court that reviews criminal cases anywhere.

12 Q If one convicted by military Court-Martial really has  
13 this substantial constitutional claim, he could just beg that  
14 he be sentenced to prison so he can go into habeas corpus,  
15 could he not?

16 A I think that is an important distinction that we have  
17 habeas preserve where really --

18 Q Well, you have it preserved only when he is sent to  
19 prison. Otherwise, if I understand your answer to Justice  
20 Fortas, no matter how defective the Court-Martial proceedings,  
21 if the Court of Military Appeals does not review it, he can  
22 never get any court to review it.

23 A One court. Being deprived of one's liberty or one's  
24 life to which habeas also attaches is a far more injurious  
25 thing than --



1 Q Than dismissal from the service as Augenblick was?

2 A I absolutely do not equate the two. Secondly, the

3 Constitution prohibits any suspension of the writ of habeas

4 corpus except at time of war where as it is silent as to

5 suspension of the right of inaction for back pay one way or

6 the other. I do not think you can really equate the two.

7 And I think you must also realize that at some point a

8 conviction of Court-Martial must be final. And I think it

9 reasonable to say that when Congress again, I think, is

10 jealously considering the rights of defendants in setting up an

11 elaborate system of review has considered the question and has

12 enacted the finality clause --

13 Q Why has Article 76 never been passed? Would it have

14 been your position that the Court of Claims had no jurisdiction?

15 A I think at all times there has been a form of --

16 Q They purported to exercise it for eighty years without

17 any question.

18 A There are various questions, Justice Harlan. There

19 were a couple at the turn of the century, and there was one

20 involving a World War 11 conviction where the man was denied

21 right to counsel. That was not taken to this Court.

22 Q The really important thing, I suppose, is what is the

23 effect, what is the purpose of Article 76?

24 A I also think, however, that the possibility of

25 jurisdictional defects in military courts is far less than we

1 may be talking about here today.

2 I can conceive of a civilian being improperly tried.  
3 Of course, that may happen, but I think that court has laid  
4 those questions to rest in many of its decisions.

5 I think it is virtually impossible, if not utterly  
6 impossible to have an improperly constituted court, because  
7 it is all laid out very clearly for the use of commanding  
8 officers who were generally advised by Judge Advocates, and  
9 certainly a legal review of a patent defect of that character  
10 would ultimately reach a trained lawyer who would be able to  
11 advise his superior that such a Court-Martial cannot stand.

12 I think if you look at what the Court of Claims did  
13 here, you can see at least the evils in giving them a very  
14 broad scope of review.

15 I would like to turn to the facts of these cases  
16 briefly to show that these are cases in which this Court has  
17 injected itself into the appellate proceedings unnecessarily,  
18 and I think even under the broadest review, improperly.

19 In Augenblick, for example, as I said, we have a  
20 purported Jencks Act question. Augenblick was accused of  
21 committing an unnatural sex act with one Airman Hodges and  
22 Airman Hodges was interrogated by Naval Intelligence Officers  
23 and purportedly a tape recording of his conversation was made.

24 When it came for trial this tape recording had  
25 disappeared. Contrary to what I think respondent Augenblick's

1 brief says, a very full and adequate hearing was afforded  
2 at the Court-Martial to try to find out what had happened to  
3 that tape.

4 The government voluntarily produced eight witnesses,  
5 each of whom testified before the Court-Martial as to what  
6 precisely he knew about the tape, leading to the conclusion  
7 that if one had been made, and it probably was that:

8 1. The tape recording device might have failed  
9 because at another time a partially garbled transcript was  
10 obtained, but at worst the tape had reached an officer of Naval  
11 Intelligence Investigator who, by accident, allowed the tape to  
12 be erased when it was used to record someone else.

13 The reason that this tape was sought, supposedly,  
14 was to investigate whether an alleged promise had been made to  
15 Airman Hodges that if he testified against Augenblick he would  
16 receive an honorable discharge. But at his Court-Martial his  
17 own defense counsel had conceded that this could not have  
18 happened because, after all, Hodges was in the Air Force and he  
19 was being interrogated by Naval Intelligence Civilian Inspectors  
20 and even an airman would not expect that a navy man could  
21 promise him an honorable discharge from his own service. So,  
22 this had been conceded away.

23 Moreover, we had a case of harmless error, because  
24 while Hodges had testified the indecent act took place, two  
25 police officers had not seen the act, but had seen something

1 related to it which was, while not the act, "indecent and  
2 lascivious conduct."

3 The court convicted him only of the indecent and  
4 lascivious conduct, not of actually committing the unnatural  
5 act. He did not even believe --

6 Q You are assuming all of this comes under Article 76  
7 and that this is an appellate review, are you not, of a record  
8 of a trial provided by Article 76. Therefore, if it is not  
9 appellate review within the sense that phrase is used in  
10 Article 76, it is an original proceeding in the Court of Claims  
11 and as an original proceeding in the Court of Claims, I suppose  
12 there are different standards that follow, but certainly  
13 Article 76 does not govern, is that right?

14 If you assumed that this was an original proceeding  
15 and not appellate review in the Court of Claims, does Article 76  
16 apply?

17 A I think it purports to foreclose a study of the  
18 further review of the issues raised in the Court-Martial,  
19 Article 76 does, so whether you deem the Court of Claims Act  
20 original review --

21 Q To me that is the issue here, and it is an issue that  
22 turns upon the precise language of Article 76.

23 MR. CHIEF JUSTICE WARREN: We will recess now.

24 (Whereupon, at 12:00 noon, a recess was taken.)



1 AFTERNOON SESSION

2 12:30 p.m.

3 MR. CHIEF JUSTICE WARREN: Mr. Weisl, you may  
4 continue your argument.

5 ORAL ARGUMENT OF EDWIN L. WEISL, JR. (resumed)

6 MR. WEISL: Thank you, Mr. Chief Justice. Answering  
7 the question that Mr. Justice Fortas posed just before the  
8 lunch recess which I understand to be whether Article 76 applies  
9 to an original proceeding in the Court of Claims as opposed to  
10 a mere appellate review, I think it is my position that I  
11 believe Article 76 was designed to accomplish the foreclosure  
12 of further proceedings even in the Court of Claims by way of  
13 original suit.

14 The second sentence of Article 76, which I would like  
15 to read to the court, reads as follows: "orders publishing  
16 the proceedings of Courts-Martial and all action taken pursuant  
17 to those proceedings are binding upon all departments, courts,  
18 agencies and officers of the United States subject only to  
19 action upon petition for a new trial as provided in Article 73."

20 But I do believe that in --

21 Q What were you reading?

22 A I was reading the second sentence of Article 76. It  
23 is on page 2 of our brief.

24 I would like to correct a misstatement that I made  
25 and for which I apologize --

1           Q     What does that mean; "orders publishing the  
2 proceedings of Court-Martial and all action taken pursuant to  
3 those proceedings." The second does not help me because,  
4 "action taken pursuant to the proceedings" was a discharge of  
5 these men, but what does this first part mean, "orders  
6 publishing the proceedings of Courts-Martial?"

7           A     It seems to me it means the decisions and the language  
8 of these decisions binds the courts and they must follow them.  
9 I admit it is confusing and I do not believe the legislative  
10 history enlightens us further on this particular point, except  
11 that I would like to invite the Court's attention to one  
12 statement.

13                 In both the House and the Senate purports on Article  
14 76 itself, in which they say this of Article 76; "that subject  
15 only to a petition for writ of habeas corpus in federal court,  
16 Article 76 provides for the finality of Court-Martial pro-  
17 ceedings and judgments."

18                 So I think that the legislative history, at least,  
19 supports the construction that I have placed upon this second  
20 sentence.

21           Q     Mr. Weisl, I will ask a question. Perhaps I should  
22 know but in some instances the defendant comes directly to this  
23 Court from the Court of Military Appeals. I am just wondering  
24 if that is so, is it?

25           A     No, Mr. Chief Justice --

1 Q How did we get the Pulver case? Did that come from  
2 habeas corpus?

3 A Yes, sir --

4 Q I beg your pardon, then I do not need to ask the  
5 question.

6 A I think I made one misstatement that I would like to  
7 correct, and then I believe I have left the Court in confusion  
8 somewhat as to the scope of the Military Appeals powers of  
9 review.

10 First, after the Juhl case, I stated to the Court  
11 that he had been discharged from the service. This, in fact,  
12 is not the case. He had been reduced in rank and deprived of  
13 pay. He is still, as I understand, a member of the military  
14 service. Juhl is the man who was convicted in the second case  
15 of black marketing.

16 Q The commander is still in the service?

17 A No, Commander Augenblick is the sexual offense. He  
18 has been dismissed. Juhl, who is the enlisted man who was found  
19 guilty of black marketeering was merely reduced in rank, and  
20 fined. This, of course, brings before us a question of the  
21 scope of military appeals powers of review.

22 It has the power to review Courts-Martial when there  
23 is a sentence in excess of one year or when there is, as in the  
24 case of an officer dismissal from the service, which is how  
25 Augenblick got at least to the point where they decided not to

1 hear it, and in the case of an enlisted man, if he gets a bad  
2 conduct or dishonorable discharge, he then can have a review  
3 by the Court of Military Appeals.

4 Furthermore, I analogize their review powers as to  
5 Certiorari in this Court. I believe, when they deny review  
6 they are, in effect, doing a bit more than the mere denial of  
7 a writ of Certiorari, because if they fail to find good cause  
8 they can decline to review it.

9 They at least have to look at a record and determine  
10 whether there is good cause shown for review, which I believe  
11 tends to be a stronger action than the mere denial of the writ  
12 of Certiorari by this Court.

13 I was at the close of my argument reviewing briefly  
14 the facts in Augenblick to show you what the Court of Claims is  
15 really doing here.

16 I stated that they had heard eight witnesses to  
17 determine what had happened to these tape recordings, and at  
18 most, what was found was that the tape had been inadvertently  
19 re-used, that the witness Hodges' testimony was not that upon  
20 which Augenblick was convicted.

21 It was, rather, that of police officers so, even if  
22 the defense did not have this statement of Hodges, and even if  
23 the statement that he made was wholly inconsistent with his  
24 testimony at trial, the error would have been harmless.

25 Further, a board of review heard the Augenblick case



1 on the Jencks Act question, studied it thoroughly and issued  
2 a rather lengthy opinion, a dissenting opinion on the Jencks  
3 Act question.

4 Yet the Court of Claims elevated this whole question  
5 into one of constitutionality. This is how they justified  
6 their taking the case at all.

7 I think this is one of the evils of giving the Court  
8 of Claims a broad scope of review of Court-Martial because they  
9 just let it go into these facts they are going to look at, do  
10 something which in effect the defendant and the Court-Martial  
11 already has done for him by Congressional mandate, to wit, a  
12 fair chance of having his conviction reversed for errors of  
13 the type that are present in Augenblick.

14 Juhl is an even more striking example of why the  
15 Court of Claims should be kept out of this area, I believe. In  
16 Juhl the question was whether his accomplice was the sole reason  
17 he was convicted and if so, whether that accomplice's testimony  
18 was self-contradictory.

19 And this question, the court acclaimed in its own  
20 opinion, elevated to one of jurisdiction the Court-Martial.  
21 If you have accomplished testimony, and use it improperly, this  
22 deprives the Court-Martial of jurisdiction. This is the way  
23 the Court of Claims justified its action in Juhl.

24 Here is what happened. Hughes was the accomplice of  
25 Mr. Juhl and he testified that together; "Mr. Juhl and I have

1 engaged in black market activities by buying goods from a PX,  
2 as we were privileged in doing in England and selling them to  
3 civilians at considerable profit to ourselves."

4 Other witnesses, which I would think any civilian  
5 court would conclude corroborative, testified that at one point  
6 Mr. Juhl had gone into the PX and had bought a lot of extra  
7 cigarettes and cigars.

8 Another witness placed Mr. Juhl at the scene where an  
9 admitted sale by Hughes of black market cigars to civilians in  
10 which civilians had taken place. He did not show Juhl actually  
11 participating, but he was at least there, which certainly, I  
12 suggest is corroboration.

13 The wife of Hughes, the accomplice, saw defendant  
14 Juhl at one point coming out of a building with a large roll of  
15 English currency after a black market had apparently taken place.

16 The Court of Claims not only looked at the accomplice  
17 testimony and said it was self-contradictory and uncorroborative,  
18 but they said it was jurisdictional.

19 Why was it jurisdictional? Because someone had seen  
20 fit to have a separate chapter in the rules relating to  
21 accomplice testimony.

22 From this they concluded that they thought it was so  
23 important, the accomplice testimony, that if you do not  
24 properly charge it, you cannot face a conviction on it, and it  
25 is jurisdictional, a bootstrap argument if I ever heard one.

1 I might add, also, that in Juhl we had an actual  
2 waiver on an instruction on accomplice testimony, which was  
3 offered to the defense, because the defense counsel, when the  
4 law officer on the general Court-Martial said - do you want an  
5 instruction on accomplice testimony replied, "No, I do not.  
6 It is not important to our defense. It is not the theory of  
7 our defense."

8 That is why I submit to this Court that our position,  
9 which may seem a harsh one, even for lack of jurisdiction in  
10 the Court-Martial the Court of Claims is foreclosed from review,  
11 is not as harsh as it may sound.

12 Because of the provisions for a separate review of  
13 these Court-Martials, when anything really damaging to a  
14 defendant takes place, a lengthy imprisonment, dismissal,  
15 dishonorable discharge, bad conduct discharge, he is protected,  
16 I submit. Congress has seen to it that he is protected.

17 Secondly, if the Court of Claims is going to assume  
18 jurisdiction of these cases that elevate the very close, I do  
19 not even think it is close, Jencks Act question in Augenblick  
20 to a constitutional question of the first magnitude, or take  
21 accomplice testimony of a simple question where I think the  
22 Court of Claims was clearly wrong, it was even waived by the  
23 defendant, and say this is a jurisdiction defect in the  
24 Court-Martial, you are going to have every single Court-Martial  
25 that results in affirmance by any point in the line brought to

1 the Court of Claims in one final effort for one final reversal.

2 This is something that is contrary to good sense, I  
3 think. It is contrary to discipline in the services, and it  
4 is not necessary for the protection of accused persons.

5 Habeas corpus exists in the really serious  
6 situations --

7 Q No question about the composition in this court?

8 A None, whatsoever, Mr. Chief Justice.

9 Q No question about the charge in which the Court-Martial  
10 could discipline a service man?

11 A No question, Mr. Chief Justice.

12 Q No question about the procedures, except the value  
13 of this evidence and how it shall affect guilt or innocence?

14 A No, Mr. Chief Justice.

15 Now I say that if this Court were to find that there  
16 is a limited scope of review on the part of the Court of Claims,  
17 it should find at most that there is a right to review in  
18 respect to whether the Court-Martial had a jurisdiction of the  
19 person or the subject matter.

20 Answering an earlier question of Justice Harlan, as  
21 to whether Article 76 did not exist, would we be taking this  
22 position here in the Court, the answer is no.

23 The Court of Claims had purported to exercise the  
24 power to review Courts-Martial for lack of jurisdiction in the  
25 past, and I would concede it is absent from Article 76 today.

1           Once again, I believe this would be a very limited  
2 effect, because of the rarity of properly constituted Courts-  
3 Martial. For any type of offense today, legal advice is  
4 available to the convening authority, composing the court and  
5 its rules for constituting Court-Martial, which are very  
6 clearly laid out. Indeed, having dealt with them in my  
7 military career before I had gone to law school even so that a  
8 layman can understand them.

9           I do not believe there is any need for this Court to  
10 expand the jurisdiction of the Court of Claims even to areas  
11 where, on habeas corpus, the District Court can review a Court-  
12 Martial, that is, for additional jurisdiction for constitutional  
13 defects.

14           Once again, in order to bootstrap itself into giving  
15 Augenblick and Juhl back pay, the Court of Claims elevated these  
16 rather elementary and questions certainly not of constitutional  
17 law into constitutional questions, for reasons of its own, to  
18 grant pay to these men.

19           Q     Mr. Weisl, can this plaintiff go anywhere else, besides  
20 the Court of Claims to sue for back pay?

21           A     To sue for back pay, no, sir. He could, however, go  
22 to these boards of the correction of records to try to have his  
23 conviction expunged, which would give him --

24           Q     Could he go to the Court of Claims on this claim?

25           A     Why?



1 Q What kind of suit is it?

2 A An action for back pay.

3 Q Back pay, and that is within the jurisdiction of the  
4 Court of Claims, and no other court?

5 A That is correct.

6 Q That is not the case of Shapiro?

7 A The Tucker case, Mr. Justice White.

8 Q You do not, then, just say that there is anything  
9 distinctive about the Court of Claims as compared with a  
10 District Court?

11 A No, sir, except that I would say in the sense that it  
12 reviews convictions and to my mind lacks the expertise of a  
13 District Court in looking into these matters. I think the  
14 decisions in both these cases illustrates that lack of  
15 expertise very well. As I say in--

16 Q Do you place your finality argument on the fact that  
17 this is the Court of Claims --

18 A No, I would say this is final as to any court except  
19 in habeas corpus situations.

20 Q And you say, at least it is your primary argument,  
21 that even jurisdictional questions are not reviewable in a pay  
22 claim in a Court of Claims?

23 A We have taken that position, Mr. Justice Stewart.  
24 I would say this, that one of the reasons that leads me to  
25 make this argument here is that it is not as harsh as it seems,

1 and I think I have pointed out why it is not.

2 To the extent that this Court feels that my position  
3 is harsh and is unfair to people, I would certainly not walk  
4 out of this courtroom feeling that the government has been done  
5 a disservice, if the Court were to hold otherwise.

6 I do feel that it is not necessary to the Court of  
7 Claims to give this kind of power in order to protect  
8 defendants of military Court-Martial.

9 Q Even if given its old traditional power that it used  
10 to exercise around the turn of the century and perhaps later,  
11 prior to the recent wholesale amendments of the military justice  
12 system, these two cases certainly do not come close to  
13 approaching that power, is that right?

14 A Let me add one warning note to the assumption by the  
15 Court of Claims of the power to decide questions of jurisdiction.  
16 Remember that in each of these cases it did try to elevate these  
17 questions into jurisdictional ones or constitutional ones.

18 The only review of the Court of Claims is in this  
19 Court. Does that mean that the government cases, such as these,  
20 where they were clearly wrong, will have to come into the  
21 Supreme Court on rather simple, elementary criminal law questions  
22 that the Court of Claims has demonstrated it lacks expertise on  
23 and the decision in this case clearly shows it.

24 Q I just want to follow that up with one more question;  
25 that is the Shapiro case, which did go considerably further

1 than this earlier jurisdictional case in the Court of Claims,  
2 and which was on the books at the time when Congress enacted  
3 the new legislation with respect to military justice and  
4 therefore Congress can be presumed to have known about that  
5 case. What do you do with that?

6 A I think that the language of Article 76 together with  
7 the statement from the House and Senate reports that I read to  
8 the Court about finality, indicates that they did not consider  
9 Shapiro or intended to overrule it. They did, at one point,  
10 say that Article 76 as a whole was a codification.

11 I do not agree that Shapiro was written into the law.  
12 It may have been, but I just do not feel that that was the case.

13 Q What were the facts in that case?

14 A The Shapiro case was amusing enough to recite at  
15 length, I think. Shapiro defended a man at a Court-Martial.  
16 The way he had done it was by substituting one Mexican-American  
17 for another and the rape victim and everyone else identified  
18 the imposter as the actual defendant.

19 The defendant in that case was acquitted and so  
20 enraged Shapiro's superiors that they had him tried for ob-  
21 structing justice, and they gave him a half-hour to prepare.

22 He asked for counsel, counsel asked for time to  
23 prepare and they denied it. They held, in effect, he had been  
24 denied his right to counsel. Under Johnson and Zerbtz, in  
25 effect, not having counsel at the trial deprived the court of

1 jurisdiction, and therefore they gave him his pay.

2 Obviously, the government did not choose to take  
3 Shapiro to this Court, so I do not think that failure to appeal  
4 that case can be used as inference that we acquiesced in that -

5 Q Then your position here is that the Court of Claims  
6 has no function with respect to the assertion of claims for  
7 back pay where the person has been separated from military  
8 service by Court-Martial. You would just carve that out of the  
9 clear state's jurisdiction of the Court of Claims, would you not?

10 A Yes, sir.

11 Q Were there any similar situations that would arise  
12 outside of the Courts-Martial? For example with respect to  
13 civil servants, is there procedure for a dismissal from a  
14 statutory provision that the dismissal shall be final and  
15 conclusive?

16 A I know of none, Mr. Justice Fortas. On the other hand,  
17 where the dismissals have been reviewed in the appellate courts,  
18 I do not know any case where they have then gone to the Court of  
19 Claims and sought back pay. But again I am not able to  
20 adequately answer your question.

21 Q There are claims for back pay by civilian employees  
22 who claim that they have been unjustly dismissed.

23 A I know of no statute that would prevent them from  
24 going to the Court of Claims, despite the fact that their  
25 dismissal had been reviewed by the Courts of Appeal, or even

1 this Court.

2 Q The Court of Claims still has jurisdiction over  
3 Commander Augenblick's claim. They just deny it, and they  
4 sue and there is the defense that he has been in the service,  
5 and they grant some re-judgment.

6 A That is correct.

7 Q They would have jurisdiction, but they cannot, under  
8 your theory, they cannot pass on constitutional, jurisdictional,  
9 evidentiary issues, so I do not think you will have a very hard  
10 time.

11 A Yes, but as stated by you, Mr. Justice Fortas, I think  
12 the consequences to these defendats are much harsher than they  
13 really are. I agree with you, though.

14 That is our position. I would like to reserve the  
15 balance of my time which I trust I will not have to use.

16 Thank you.

17 MR. CHIEF JUSTICE WARREN: Mr. Sharlitt.

18 ORAL ARGUMENT OF MR. JOSEPH H. SHARLITT

19 FOR RESPONDENTS

20 MR. SHARLITT: Mr. Chief Justice, may it please the  
21 Court. Let us get right to the heart of the matter.

22 There is an issue of law before this Court, an issue  
23 of law as posed by the government's position in this case.

24 The government is proposing that all servicemen who  
25 have been subjected to unconstitutional abuse in their Court-



1 Martial and have been dismissed and disgraced cannot go to any  
2 civilian court, cannot come to this Court for protection of their  
3 constitutional rights.

4 The government would have this Court believe that  
5 the Congress did this, this sweeping reform, not by any  
6 statutory language or by any manifestation intent, but did this  
7 by silence.

8 Mr. Weisl has said this is not a harsh result.  
9 The case I am talking about, which is completely within the  
10 government's position as was articulated here today, is that  
11 if the defendant is denied counsel, is tortured into a confession,  
12 is ordered convicted by a kangaroo court and is given trial by  
13 fire or ordeal by order of his commanding officer, then dis-  
14 missed and disgraced rather than be put in jail, he can go  
15 nowhere.

16 Q He can go to the Court of Military Appeals.

17 A He can go to the Court of Military Appeals. That is  
18 correct. And we have a perfect example of what happened in the  
19 Court of Military Appeals here in this case.

20 The Court of Military Appeals denied this case without  
21 any reason for it, without any statement, denied the review.

22 Q If they had taken it and affirmed it, you could not  
23 have come here anyway, could you?

24 A No. There is no jurisdiction between the Court of  
25 Military Appeals and this Court.

1 Q What is the difference between that and our  
2 Certiorari?

3 A There is no Certiorari jurisdiction in the Court of  
4 Military Appeals from this Court.

5 Q No, I am talking about the procedure that they have  
6 as between the Court-Martial and themselves. In these cases  
7 where it is optional with them.

8 A Contrary to what Mr. Weisl said, as far as I read  
9 the Uniform Code of Military Justice, their jurisdiction over  
10 matters such as this is discretionary above the limit that Mr.  
11 Weisl posed; that is to say, if there is a fine of a certain  
12 amount or dismissal, then they have discretionary jurisdiction.  
13 They do not have to take the case. And in this case they did  
14 not.

15 Q They had discretion here.

16 A They had discretion here and they deigned not to  
17 exercise their discretion. The real key to this, Mr. Chief  
18 Justice is not whether you can go to the Court of Military  
19 Appeals, but whether constitutional rights of servicemen or the  
20 final arbitor of these constitutional rights is this Court.

21 Q What constitutional right are you asserting?

22 A In this case?

23 Q Yes.

24 A Mr. Justice Marshall, we are talking about the  
25 constitutional right to prepare an adequate defense against

1   impropriety that is spread throughout this record,

2           This record on the face of it involves four --

3           Q    What constitutional section are you relying on?

4           A    Due Process clause of the Fifth Amendment, sir.

5           Q    What is the denial of due process here?

6           A    The denial of due process here is the deprivation of  
7   the right of the defense through statutory rights that he has  
8   been granted to prepare a defense against impropriety that is  
9   rife on this record. And if I can recite the facts -- after  
10   all, due process is a visceral reaction to facts.

11           And the facts of this case are as follows:

12           In this case you had first a sex offense, which is  
13   a private offense in which the word of the participants are  
14   the only things that can give the lie to the accusation.

15           2. You had the chief accuser, the accuser whose  
16   evidence was the controlling evidence in the conviction here,  
17   interviewed immediately after the arrest by agents of the  
18   office of Naval Intelligence.

19           Prior to this interview, this chief and controlling  
20   witness, this partner in this alleged crime, had denied any  
21   participation by him and by the defendant. After the interview  
22   he changed his story and claimed that there was a sex act, and  
23   that he participated --

24           Q    The client had a right to go to the Court of Appeals  
25   as one conferred by the Congress, is that right?

1 A Court of Military Appeals?

2 Q Court of Claims.

3 A That is correct, sir.

4 Q Possibly Congress can circumscribe that right in  
5 various ways, and I suspect the first test was made to ascertain  
6 if Congress intended to circumscribe a jurisdiction on the  
7 Court of Claims in a way that Mr. Weisl is arguing.

8 Then, if you conclude that Congress did intend to  
9 circumscribe the jurisdiction of the Court of Claims, maybe you  
10 turn next to what it meant as a constitutional point.

11 A I think that is correct, sir. If I may deal with  
12 them in just that order and get back to Mr. Justice Marshall's  
13 question, because I think it is important to deal with the  
14 facts as they really were in this case.

15 Q On the use of that witness that you just mentioned,  
16 do the facts that you have related go to the credibility of  
17 the witness rather than to the right to testify?

18 A No, sir. He does not go to credibility. What is does  
19 is go to the question of impropriety on the part of the  
20 prosecution in arranging for the testimony of this key witness.

21 The one fact that I did not add which is quite  
22 compelling in this case, is that after this change of story  
23 which took place during this interview, this airman was  
24 promised an honorable discharge and is so stated in the record.  
25 But he was not given this discharge. This discharge was kept

1 hanging over his head through nine months and through two  
2 trials, and only after he testified against the commander  
3 with the testimony that he had changed during this interview  
4 was he then granted this honorable discharge.

5 He was not punished at all; although under the laws  
6 of the military he was placed in peril delicto with the  
7 defendant here.

8 Q Would not that sill go to credibility?

9 A No, Mr. Chief Justice, I think it goes to a point  
10 beyond credibility. It goes to the question of impropriety.  
11 It goes to the question of the ability of the defendant to  
12 raise a defense against the chief witness against him.

13 The violations here, against which all the facts  
14 which I have just recited must be ranged, as a backdrop, the  
15 violations here were violations of the Jencks Act. A tape was  
16 taken of this key interview, two hours afterward, during which  
17 time this witness changes his story - this sole witness - in  
18 this very grave crime.

19 It was this tape that was admittedly taken that was  
20 denied to the defendant and it was notes taken by the interroga-  
21 tor --

22 Q Was it denied or was it in dispute as to whether it  
23 was then in existence?

24 A It was never denied that it was in existence at the  
25 time it was made, Mr. Justice Marshall.



1 Q I am talking about the time it was asked for.

2 A You are quite correct. There was a dispute as --

3 Q There was a dispute as to whether it was in  
4 existence.

5 A That is quite correct. There was a dispute --

6 Q That is a question of fact.

7 A That question of fact was ---

8 Q Is it a question of fact?

9 A That is a question of fact, clearly.

10 Q It is not then a constitutional question?

11 A It is in this case, for the following reasons.

12 Q The facts are not constitutional.

13 A No, sir, facts can very often and most often not be.

14 In this case the resolution by the navy was to put the burden  
15 of proof of bad faith on the government, in losing this tape,  
16 or in destroying it, on the defendant.

17 This obligation for production is the government's  
18 obligation --

19 Q What constitutional section does that deal with?

20 A By itself, sir, it does not deal with any constitutional  
21 section at all. That is a violation of the Jencks Act --

22 Q It is all a question of fact, is it not?

23 A No, sir, these are questions of law, every one of  
24 them. They are questions of law in the administration of the  
25 Jencks Act under the circumstances of this case.

1 Judge Davis, speaking for the court below, said,  
2 "It is obvious that in all cases Jencks Act violations are not  
3 violations of the constitution." And we adhere to that position.

4 In the circumstances of this case, with the navy  
5 dealing with the absence of these key Jencks materials by  
6 placing the burden on the defendant to prove bad faith of the  
7 government, a defendant who is powerless to prove any bad faith  
8 on the part of the government, when the government has the  
9 obligation to produce. That rule of law, sir, is the rule of  
10 law that is reviewable in constitutional terms ---

11 Q I have not gotten to that, so I do not know, as of  
12 right now, whether those tapes were in existence at the time  
13 you are talking about. I just do not know.

14 A That is quite true, sir --

15 Q And you do not know.

16 A That is quite true, sir.

17 Q Maybe nobody knows.

18 A That is quite true, but the navy's exoneration of  
19 the government's obligation to produce these tapes, which were  
20 obviously in the navy's hands ---

21 Q At that time? In the navy's hands at that time?

22 A The navy, the individual who took the tapes was the  
23 last one who the record shows had the tapes, and he was the one  
24 in whose hands the tape disappeared.

25 Q You say there was evidence that the tapes could very

1 well have been destroyed when they could not find them?

2 A. There is certainly evidence to that effect, sir.  
3 But there is also evidence that this was in violation of the  
4 navy's own policies and regulations in regard to Jencks  
5 material.

6 There is further testimony that the last person who  
7 had this tape was the same person that was in this interview,  
8 that denied for at least twelve pages of testimony that this  
9 tape ever had been taken.

10 Then it is given into his hands by a superior officer,  
11 and in his hands it disappears. The navy justifies this  
12 conduct by saying if the burden of proof is on the defendant  
13 it shows the navy's bad faith.

14 That, sir, is a rule of law. That, sir, raises on  
15 the factual pattern of this case a constitutional question;  
16 not as to the Jencks Act, but as the right of the defendant  
17 to raise a defense as impropriety on the facts of this case  
18 and no further.

19 If I may go back to the facts that were raised by  
20 Mr. Justice Fortas.

21 I think we have to look at the background of the  
22 enactment of Article 76. Article 76 is word for word of  
23 Article of War 50(h), enacted in 1948. This, as we set forth  
24 in our brief at page 61, came as a result of post-war reforms  
25 of the articles of war.

1 Contrary to any attempt at trying to eliminate rights  
2 of servicemen, the Vanderbilt Report which gave rise to the  
3 Kem-Elston Amendments in 1948, had as a point the enlargement  
4 and protection of servicemen.

5 The Vanderbilt Report indicated that the point of the  
6 Van Article 50(h) which became word for word Article 76 is to  
7 indicate at what point inside the military establishment these  
8 judgments become final.

9 That is to say that they are impervious to command  
10 control; they cannot be set aside by commanding officers  
11 deciding they do not like the result of this Court-Martial and  
12 trying them by another court.

13 That was the point of Article 76, and it was a point  
14 articulated by Judge Vanderbilt in the Vanderbilt Report.  
15 There was not a word said about the Court of Claims There was  
16 not a word said about civilian review, in all of the delibera-  
17 tions that gave rise to the Kem-Elston Amendments.

18 Q Was that true the second time?

19 A That --

20 Q Binding upon all the parts of the court decisions?

21 A Yes, sir I think that is because --

22 Q I mean, does it have that limitation? It certainly  
23 does not, on the fact of it, does it?

24 A The point of that, insofar as I can see is that --  
25 there are very many muddy things about the legislative history

1 in this, but the point of that, as I can see it, is the  
2 elimination of command control, in the first place, to indicate  
3 where the cutting off point of military procedures are as it  
4 was --

5 Q Not necessarily. On the face, the language is all  
6 fact, taken pursuant to those proceedings and binding upon all  
7 the parties, courts -

8 What did the courts have to do with the change of  
9 command control?

10 A I believe that had to do with that, in a situation  
11 such as this where you had a Court-Martial determination, that  
12 the federal civilian courts which is all that could be ruled  
13 upon here, could not, under those circumstances try the  
14 serviceman for the same crime. I think it had that effect,  
15 which is wholly apart from anything we are talking about here.

16 There is some legislative history to that effect,  
17 Mr. Justice Brennan, but that has nothing to do with collateral  
18 review of these matters for constitutional errors.

19 Now, to point out, when I say that everything that  
20 the government says today here is based on silence, I mean  
21 silence, because I think that Article 58 aimed at the elimina-  
22 tion of command control, aimed at picking a point of time at  
23 which military remedies were exhausted, so that you could then  
24 go to the civilian remedies, and in 1948 when the Kem-Elston  
25 Amendments came into being, which became Article 76 two years



1 later, there is not a single word about the elimination of the  
2 traditional Court of Claims remedy for back pay -- not one  
3 word anywhere in the legislative history.

4 Q Would you agree that the Court of Claims could not  
5 properly re-evaluate the evidence?

6 A I think that is clear that the Court of Claims could  
7 not properly do that as it is not an ordinary appellate review  
8 of Court-Martials --

9 Q Unless it is a constitutional claim, the Court of  
10 Claims could not arrive at a different objection.

11 A I would heartily agree with that, Mr. Justice.  
12 Unless you have rules of law that come to this Court as rules  
13 of law and do not involve any re-shifting of the evidence,  
14 which this Court very specifically proscribed in Burns versus  
15 Wilson, then you do not have any jurisdiction in the Court of  
16 Claims.

17 You do have jurisdiction in the Court of Claims where  
18 you have rules of law such as you have in this case; the putting  
19 of the burden for showing bad faith in the destruction of Jencks  
20 materials, or the negligent loss of bad materials on the  
21 defendant, such as the failure to conduct an in camera examina-  
22 tion of the notes taken during this key interview; such as the  
23 failure to call the key witness as to what happened.

24 The witness who denied ever taking this tape and the  
25 witness in whose hands this tape disappeared; the failure to

1 call him; these are rules of law. They have nothing to do with  
2 facts, they do not require any sifting of the evidence by the  
3 Court of Claims, or by any court.

4 Q Is not every mistake as a rule of law permitted in  
5 the trial of a case that amounts to constitutional law?

6 A Absolutely not. Our position is ---

7 Q What you are saying here is that so many mistakes were  
8 made that in the aggregate they amount to constitutional error.  
9 Is that your point?

10 A What we are saying here in this case is that, exactly  
11 that; that the Jencks deprivation, the right that this Court has  
12 enunciated in all of the cases of Johnson versus Zerbst, through  
13 Alcorta, through Pyle, through the most recent one, the Giles  
14 case, and all the cases right down the line, that a defendant  
15 is entitled to a trial free from impropriety, is meaningless to  
16 him unless the rights guaranteed him by statute exist to him to  
17 inquire into that impropriety.

18 The right to inquire into that impropriety where the  
19 impropriety is on the record, as it is in this case, is co-  
20 extensive in dignity, with his right to a trial free from that  
21 impropriety.

22 I would like to point out to the Court that on the  
23 very next day, June 25, 1948, that the Kem-Elston Act passed  
24 Article 50(h), which is haec verba with Article 76, exactly the  
25 same, the Tucker Act was re-enacted by the Congress.

1 In fact, that is the best jurisdiction of the Court  
2 of Claims to do just what it did in the Augenblick case, and  
3 was re-enacted with considerable legislative history, and  
4 there is not one word about a major excision of one of the  
5 functions of the Court of Claims in that history, although  
6 five years later, when the Tucker Act was again re-enacted,  
7 and a portion of its jurisdiction excised, it was done in  
8 unmistakable terms.

9 In 1953 the Court of Claims Act --

10 Q I gather, listening to your argument, that you do  
11 not take the position that Congress could not have barred  
12 the Court of Claims from making this inquiry, do you?

13 A The Congress --

14 Q Could not Congress constitutionally have barred the  
15 Court of Claims from making this inquiry?

16 A Mr. Justice Brennan, that raises one of the grave,  
17 grave questions of constitutional law, which I think is  
18 presently unresolved. I think there is grave doubt that  
19 Congress could have told servicemen who have --

20 Q That was not my question. My question was whether  
21 Congress could have said that the Court of Claims could not  
22 have jurisdiction, if you please, or whatever language you want  
23 to use -- bar the Court of Claims from making the inquiry into  
24 this Court-Martial that it did make.

25 A I think that there is some large question of

1 constitutional as to whether Congress can do that. I said  
2 so in my brief.

3 Q Not if they abolish it - Congress could abolish the  
4 Court of Claims, could it not? It created it.

5 A Yes, they could do that. The question is whether  
6 Congress could take servicemen who have acknowledged  
7 Constitutional rights, and this Court has articulated them in  
8 Burns versus Wilson --

9 Q We are talking about a particular tribunal --

10 A Yes, sir, and my answer has to involve a question of  
11 constitutional rights of servicemen. The Congress could  
12 certainly do that, sir.

13 But Congress, I do not think, can take a group of  
14 American citizens --

15 Q Let me ask you this: then you are saying that if we  
16 were to construe 76 as barring the Court of Claims from making  
17 this inquiry, then your position is that Article 76 is un-  
18 constitutional?

19 A We say this in our brief and we stand by it; the  
20 reason being that here you have constitutional rights of  
21 servicemen, so articulated by this Court in Burns v. Wilson  
22 with no Article 3 court to go to protect those rights.

23 Q Burns did not involve salary.

24 A No, sir. Burns was habeas corpus, but Burns articulated  
25 constitutional rights, Mr. Justice Marshall, and my point is

1 that if there are constitutional rights, then they are  
2 meaningless unless there is a court to protect them.

3 And an Article 1 court, such as the Court of Military  
4 Appeals has none of these attributes of an Article 3 court.

5 I think that the sum and substance is that the  
6 Supreme Court is and should remain the final arbitor of the  
7 constitutional rights of servicemen.

8 Q You want us to declare Article 76 unconstitutional?

9 A No, sir, I do not. I want this Court simply to view  
10 the legislative history which I believe it is properly viewing,  
11 and that is not in any way --

12 Q Let us see how far this goes, Mr. Sharlitt. Suppose  
13 this had been taken to the Court of Military Appeals and had  
14 been a constitutional question and resolved against your position  
15 by the Court of Military Appeals. Are you saying we then would  
16 have had jurisdiction to review the judgment of the Court of  
17 Military Appeals?

18 A No, sir. I am saying --

19 Q Then I do not follow your argument, that this Court  
20 should be the tribunal of last resort on the constitutional  
21 rights of servicemen.

22 A Yes. The only way Commander Augenblick can get to  
23 this Court is through the Court of Claims.

24 Q No, that was not my question to you. Suppose his  
25 application to the Court of Military Appeals had been granted.



1 They had considered his claim on the merits, and had affirmed  
2 the dismissal, finding no merit in his constitutional claims,  
3 the ones you are now asserting and did assert in the Court of  
4 Claims. Could this Court ever review the Court of Military  
5 Claims?

6 A No, sir; not by direct review at all.

7 Q There are exceptions to the general proposition that  
8 this Court should remain the Court of last resort for the - -

9 A No, sir, there are none. Because I am saying that in  
10 order to accept the government's position you have to state that  
11 the commander did go to - the Court of Claims is denied him.

12 The reason he would have no review would be that he  
13 was cut off from the Court of Claims review. That is his only  
14 avenue - to come here.

15 Q He had an opportunity for review and it was denied  
16 him in the Court of Military Appeals, was it not? On these  
17 very same claims?

18 A My point was that our final arbitor of the con-  
19 stitutionality of servicemen should be the Supreme Court ---

20 Q Why is that? Where do you find that in the  
21 constitution?

22 A I do not, sir.

23 Q Or anywhere else?

24 A But I do believe ---

25 Q What if the Congress said that in no event shall the

1 Supreme Court review any instances of Court-Martial judgments?

2 A. If they had said that, the question would have been  
3 posed squarely, and it has not said that, and until it does, I  
4 think --

5 Q You cannot find any grant by the Congress of any  
6 jurisdiction to this Court to review Court-Martial.

7 A. No, sir, but I can give you a long line of cases  
8 where this Court has strained in every circumstance to find  
9 judicial review in a situation where Congress has purported to  
10 grant finality to an administrative agency, starting with  
11 McCardle back after the Civil War and going right through to  
12 Yakus, through all these cases where this Court, looking at  
13 ambiguous Congressional enactments, has always attempted to  
14 find some review.

15 It is turned the other way around in this case.

16 Q Mr. Sharlitt, suppose the serviceman was found guilty  
17 of some minor charge and given six months without salary. And  
18 he is still in the army. Is it your position that he could  
19 still go to the Court of Appeals and say I did not get my Jencks  
20 Act material, so I want my salary.

21 A. He then could not --

22 Q He is out - he has served his six months in the  
23 stockade. But he is still in the army.

24 A. Under those circumstances --

25 Q He could go to the Court of Claims and litigate his

1 back pay for that six months --

2 A No. If he had been denied back pay, I believe it  
3 falls within the jurisdiction limits; I would say that he would  
4 be entitled to back pay--

5 Q No, my point is that he just alleges that he was  
6 denied Jencks Act material.

7 A No, sir, because --

8 Q What else would he have to do?

9 A He would have to show exactly what Judge Davis and  
10 the unanimous court found below. The record supported a finding  
11 of unconstitutionality in --

12 Q All right, he sends a record which shows that, and he  
13 is still over in Germany, but the Court of Claims will give  
14 him his back pay.

15 A I believe, under those circumstances, that the Court  
16 of Claims jurisdiction for back pay still exists, and in that  
17 case --

18 Q What happens to the army discipline in the meantime?

19 A Army discipline, sir is --

20 Q What happens to army discipline in that regiment in  
21 the meantime, when the Court of Claims moves in and upsets the  
22 army discipline.

23 A Army discipline is always involved in these matters,  
24 when army prosecutions are conducted irregularly.

25 Q I do not think army discipline, as of now, is

1 involved with your commander, because he is out. I am talking  
2 about this man who is still in.

3 A I do not think constitutionality of a Court-Martial  
4 turns on whether a man is in or out, sir.

5 Q Discipline does.

6 A Discipline and unconstitutionality are two different  
7 things, and this Court has said so.

8 Q So that under your theory, no judgment of a Court-  
9 Martial would be final until passed on by the Court of Claims.

10 A Absolutely not, sir.

11 Q Close.

12 A No, sir, not even close - miles apart. Because I  
13 might point out that twice in seventeen years the Court of  
14 Claims has exercised its jurisdiction and in the Augenblick  
15 case --

16 Q That was before this case, and I am looking to the  
17 future.

18 A I might point out that there has been no flood in  
19 the Court of Claims and there will not be, sir.

20 Q Could it not be that they read Article 76 to say  
21 that no court has the jurisdiction. Could it be that these  
22 people who did not go to the Court of Claims read that  
23 literally - that the Court did not have jurisdiction, so why  
24 waste their time?

25 A I think there were at least seven or eight times,

1 Mr. Justice Marshall, where these cases were taken to the  
2 Court of Claims, where the Court of Claims went through the  
3 exercise that the government now says was forbidden to them,  
4 looking at the merits assumed jurisdiction, looked at the  
5 merits and denied the relief on the grounds that there was no  
6 constitutional exercise.

7 So if there were any clubhouse or barracks lawyers,  
8 and they have always existed, it has not been the language of  
9 Article 76 that has inhibited this review, it has been the  
10 restraint of the Court of Claims.

11 The Court of Claims was waiting until it was faced  
12 with a proper record. It did not act until it was faced with  
13 a proper record. If this man is denied review by the Court of  
14 Claims, then, among the various consequences the Jencks Act  
15 can be forgotten in the military, because the rule of law that  
16 will apply in the military is that any time a prosecution has  
17 a Jencks material that he does not want to turn over to the  
18 defendant, then he just does not turn it over and hopes that  
19 the defendant cannot prove that he did not destroy it.

20 Q That is not the case law of the Court of Military  
21 Appeals, is it? Isn't that the tribunal trusted basically with  
22 the development in case law for Courts-Martial in this area?

23 A That is correct, sir.

24 Q They can be counted on to do so, based on their past  
25 record, can they not?



1       A       As Mr. Weisl pointed out, there is additional  
2 quantum of rejection that is involved in the CMA turning down  
3 a case much more than this Court turning down a case.

4               And I would point out that in the Board of Review's  
5 opinion which deals with this case, that the law now is the  
6 law for the military since this went to the Court of Military  
7 Appeals, and there was no review of this determination on  
8 Jencks, is that the clear burden, and it could not be clearer,  
9 it is in the record here, the clear burden falls on the  
10 defendant to prove bad faith.

11              That has never been ruled on. That point has never  
12 before been ruled on by the CMA, so apparently that is the law  
13 of the military unless this Court does something about it.

14              This Court is not sitting in a supervisory role over  
15 the CMA. I am not pointing that out. What I am pointing out  
16 is that one of the necessary consequences with this Court's  
17 dealing with what is a clear constitutional question in terms of  
18 this man's right to defend himself, would be that a therapeutic  
19 effect on the military of this complete misconception of Jencks  
20 rights. And it went not only to one point but to four points.

21              It went to the burden of proof being put on the wrong  
22 party, when the Jencks material is not produced, failure to  
23 conduct an in camera examination of admitted notes, admitted  
24 Jencks material, failure to incorporate those notes into the  
25 records so that anybody, the Court of Military Appeals or

1 anybody else could view it, and the failure to call a key  
2 witness to determine what happened to these tapes, the witness  
3 who denied it was taken, and the witness into whose hands it  
4 disappeared, under circumstances that are most incriminating.

5 Q Mr. Sharlitt, suppose the Court of Military Appeals  
6 had taken this case instead of having refused to review it,  
7 had heard all of your arguments along this line, and had  
8 affirmed the conviction of this man. Would the Court of Claims  
9 then be available to you?

10 A Yes, sir, it would, because the reason that the sole  
11 way to come again, the sole way to determine the constitutionality  
12 of this action would be in this Court, and the only way the  
13 commander could come to this Court would be through the Court  
14 of Claims.

15 Under those circumstances, the rule, the scope of  
16 civilian review as enunciated in Burns versus Wilson is whether  
17 fair consideration has been given.

18 Now some consideration is not fair consideration, and  
19 when rules of law are completely misstated, I do not believe  
20 that any court would determine that this is fair consideration.

21 I would say that on the facts of this case, the  
22 constitutional issue had been raised, and these Jencks Act  
23 violations and the legislative history indicate that the Court  
24 of Claims, neither in 1948 or in 1950 was excised of this  
25 jurisdiction.

1           Nothing was said about them, in point of fact the  
2 only thing that was said was to the effect that in a report  
3 that was filed in the Congressional record that the Court of  
4 Claims jurisdiction remained, and under those circumstances  
5 this Court cannot deprive servicemen of the right to come to  
6 this Court by silence and by implication.

7           Thank you.

8           MR. CHIEF JUSTICE WARREN: Mr. Steiner.

9           ORAL ARGUMENT OF FRANCIS J. STEINER, JR.

10           MR. STEINER: Mr. Chief Justice, and may it please  
11 the court. The Court-Martial of Kenneth N. Juhl was  
12 fundamentally unfair.

13           The testimony against him was by a man named Hughes,  
14 who was an accomplice. Hughes' testimony was an admitted  
15 perjury.

16           He had engaged in black marketing for years. He was  
17 tried himself, sentenced, and convicted. Then he was approached  
18 and told that unless you testify, implicate Juhl, we are going  
19 to re-try you on other charges and you will get five years in  
20 prison and a dishonorable discharge.

21           He had a foreign wife, and this would have prevented  
22 him from bringing his wife back to this country.

23           Q       Where in the record does it say just that?

24           A       Appendix 3, pages 362 and 363 is an affidavit of an  
25 air policeman who had custody --

1 Q He was not witnessed?

2 A No, this is an affidavit in the Board of Corrections  
3 proceedings, Your Honor. This affidavit of this technical  
4 sergeant, who was an air policeman, who had custody of Juhl,  
5 and he stated these facts were told him. This is uncontroverted.

6 Q This was a part of the record of the trial?

7 A Not of the Court-Martial, Your Honor. It was an  
8 affidavit submitted to the Correction Board, but it is part of  
9 this trial and part of this record, Your Honor.

10 The other facts which are a part of this trial show  
11 that after he agreed to implicate Juhl, he was given special  
12 privileges. He was given easy work. He typed. He was given  
13 permission at night to go to movies with his wife and to watch  
14 television with his wife. And he was given Christmas leave,  
15 while he was serving a sentence.

16 He never left the base --

17 Q Let me revert just a moment. I want to know if you  
18 are telling us precisely what he said. I am looking at this  
19 affidavit and it says "subsequent to Airman Hughes' trial and  
20 prior to Sergeant Juhl's Court-Martial, this airman was advised  
21 that unless he agreed to appear as a prosecution witness and  
22 testify, he would be tried by a general Court-Martial" and so  
23 forth.

24 You just told us that unless he testified and im-  
25 plicated this man - now, he did not say that, according to this

1 affidavit.

2 A. Your Honor, that he testified against Juhl is what  
3 I mean ---

4 Q It says he went in and testified for the prosecution -

5 A As a prosecution witness ---

6 Q Does that imply that he was to tell anything but the  
7 truth?

8 A Not that alone, Your Honor, but when you combine with  
9 all of the facts of this case, his testimony was replete with  
10 inconsistencies. It was self-contradiction --

11 Q I am not quarreling with that. I just bring your  
12 attention to what you said and what the affidavit says.

13 A Yes, Your HOnor. I interpreted that as prosecution  
14 witness - it may be a little more of an interpretation of it.  
15 But combined with all of these facts, and the inconsistencies  
16 and self-contradictions under oath in his testimony, it was  
17 totally unreliable.

18 I think these facts alone were sufficient to raise a  
19 constitutional question of whether he had a fair trial. And I  
20 do not believe he had a fair trial, with unhampered witnesses,  
21 when this type pressure was put on a man of Hughes' character,  
22 that would ---

23 Q Is there anything to show that he did perjure himself  
24 in this area?

25 A Your Honor, the closest to it is that he had denied



1 all these things under oath. But in this hearing you could  
2 say "this time he is telling the truth." But in the Article  
3 32 proceedings which is also part of this record, the discovery  
4 records, they ask him - would you lie under oath, and he said  
5 "Yes." That is part of the record, whether he is telling the  
6 truth this time or not.

7 But the inconsistencies and improbabilities in his  
8 testimony make it look like all the badges of fraud. He said --

9 Q That goes to credibility, does it not?

10 A Yes, Your Honor, but when you get so many of them I  
11 think --

12 Q Credibility is a law of constitutional question, is  
13 it not?

14 A Yes, Your Honor, just on credibility, but you also  
15 get a statistical impossibility when there are so many of these  
16 inconsistencies, so many of the things he could use to implicate  
17 Juhl --

18 Q It is still one witness' credibility.

19 A It is still the fact that he has also testified on  
20 these very same facts under oath.

21 Q Normally, in an ordinary criminal trial, credibility  
22 is left to the trial of facts, usually --

23 A But, Your Honor, we have a provision here which covers  
24 under the manual itself. I think that alone is enough, regard-  
25 less of Section 76, but if it is not, the manual for Court-

1 Martial provides in section 153(a), and this is an instruction  
2 to the Court-Martial panel, "You cannot base a conviction upon  
3 the uncorroborated testimony of an accomplice, if that testimony  
4 is self-contradictory, uncertain or improbable."

5 Q Who is to be the judge of that?

6 A I think, not that court, necessarily, Your Honor.  
7 If the record shows that no other court conclusion can be  
8 reached, if you have jury trial --

9 Q Do you have anything in your case other than  
10 credibility of the witnesses?

11 A Yes, Your Honor. It is not just the credibility of  
12 the witness. It is a question of all of these facts showing  
13 that no other conclusion can be reach. Then --

14 Q Is this man still in the army?

15 A Yes, Your HOnor, he is.

16 Q He is still serving --

17 A In the Air Force.

18 Q In the Air Force.

19 A Yes, Your Honor.

20 Q And you want us to approve paying his back pay while  
21 he is still in the Air Force?

22 A Yes, sir.

23 Q And you do not see a disciplinary problem, either,  
24 do you?

25 A No, Your Honor, not when it conflicts with the con-

1   stitutional rights to a fair trial, and I do not think he got  
2   this here. I think that they violated section 153(a) which  
3   tells them, the Court-Martial panel itself, that you cannot  
4   base a conviction upon the uncorroborated testimony of an  
5   accomplice where that testimony is uncertain or improbable.

6           Q     It is more like an instruction, is it not?

7           A     No, I do not believe it is, Your Honor, not at all.  
8   This is the statement to the Court-Martial panel. This was in  
9   the manual for Court-Martial which was by executive order and  
10  referred back to Congress for approval.

11           This is what the Court-Martial can do and where it  
12  cannot convict.

13           Q     Do they not, as a daily matter, find in enforcement  
14  of the narcotic laws that the government uses narvotic addicts  
15  who are notoriously irresponsible and untruthful, and who have  
16  a string of convictions, maybe a block long, does not the  
17  government use those people as the principal witnesses in  
18  their cases?

19           A     Yes, Your Honor, but when --

20           Q     Does that deprive the court of jurisdiction?

21           A     Your Honor, if the facts were the same as this I  
22  would say yes. I would say with all of the self-contradictions  
23  and the improbabilities in his testimony, if that was the only  
24  evidence it would not be sufficient to convict.

25           Based upon the facts of this case, with the contra-

1 dictions that we have in his own testimony, you cannot read  
2 this record from back to front and not conclude that this  
3 man was lying. I do not believe it.

4 There can be no reasonable doubt about it.

5 Q Is there any other evidence besides him in this case?

6 A None that would tie him - there is other testimony --

7 Q Nothing that would corroborate him?

8 A Nothing that would corroborate him, Your Honor, I do  
9 not believe. This may be a judgment also. Again, I believe,  
10 reading the record, this is not controverted fact, but the only  
11 conclusion you can reach - that it is not corroborated.

12 For example, they have the sales girls. He said the  
13 government stated, it was corroborated by them, that he purchased  
14 unusual amounts. The sales girls said he did not purchase  
15 excessive amounts. He purchased what was normal, never in  
16 excess of his rights.

17 Q Did they not also testify that they punctured twice  
18 in the same hole on his ration card?

19 A No, Your Honor. I do not think she testified to that.  
20 She did not say she did that to Juhl.

21 Q How did that get in the record?

22 A Oh, yes, Your Honor, there are --

23 Q That would look like he was getting more than the  
24 usual amount --

25 A No, Your Honor, she said --

1 Q She made holes for two cartons --

2 A She did this for some people. This is really the key  
3 to this whole case. This is the reason the Air Force convicted  
4 him. This is the reason they seized this ration card illegally  
5 from him, which obviously has marks where he purchased more  
6 than the normal amount.

7 This was seized illegally and was not used at the  
8 Court-Martial. But the government has used it in every step,  
9 including the reply to this brief.

10 I asked my client about this and he said that - these  
11 things were old on his card. What they did was call him in and  
12 order him to produce it. He said, "They were old" and I  
13 wondered about that. "When I went to prison I took my other  
14 card that I had up there and I had it stamped, cut" - and sure  
15 enough, he sent me his card, which is in evidence, and it showed  
16 where they cut it and they did not cut it out altogether.

17 In other words, it was necessary to do it twice.  
18 Is that true? I do not know. But the thing is, it was seized  
19 illegally, it was not part of that trial, there was no way for  
20 him to defend it, but that is the very reason that this man has  
21 been convicted and put where he is now and they have refused to  
22 do anything about it.

23 It was illegally seized. It is something that should  
24 never have been brought up, and if it should have been, it  
25 should have been taken properly, he should have had a right to



1 explain it for which he did have an explanation.

2 There is no question about it being seized illegally.  
3 The government admits that, and it was not used at the Court-  
4 Martial. Even that is nowhere comparable with what they  
5 charged him with and what they tried him with - he was not  
6 guilty. It was clear fabrication.

7 The government argues on habeas corpus that it is  
8 more limited than what the court has defined habeas corpus to be.

9 This man is still in the service. Every time his file  
10 jacket is opened, this conviction is part of that. Every time  
11 he comes up for promotion, every time he is considered for any  
12 job, this is all part of it. And under the recent case  
13 Carafas versus LaVallee, the court defined habeas corpus in the  
14 government's initial brief that he was not in confinement. But  
15 this man was in confinement and he was out, and it is a  
16 restraint that still follows.

17 Q That was not a habeas corpus case, was it?

18 A Your Honor, the same rule would apply --

19 Q But this is not a habeas corpus case, is it?

20 A We are not seeking the relief, but I believe the same  
21 principle applies. He is seeking something that is due him.  
22 And the same theory of habeas corpus should apply.

23 This is a man who was confined. These are restraints  
24 that still followed him. This perfectly qualifies as a habeas  
25 corpus action. He still has a restraint on him because of his

1 conviction.

2 Q My great difficult is that none of that is in the  
3 purview of the Court of Claims; all the Court of Claims can do  
4 is give him his back pay, period.

5 A He has the right to his back pay under the Court of  
6 Claims jurisdiction.

7 Q Period.

8 A Under the constitution --

9 Q But can the Court of Claims issue a writ of habeas  
10 corpus?

11 A No, Your Honor, they cannot.

12 Q Of course not.

13 A But as a practical matter --

14 Q Why are you trying to put the two together? The Court  
15 of Claims is a court of limited justice --

16 A No, Your Honor, he has been constitutionally deprived  
17 of his property. And even if it is a smaller amount, he still  
18 has been deprived of it. And the Court of Claims has  
19 jurisdiction to rule on that.

20 Q Rule upon what?

21 A Rule on his constitutional deprivation of salary --

22 Q To rule on whether or not he gets his back pay, period.

23 A Your Honor, I do not believe it is the equivalent of  
24 that. In the first place --

25 Q Are you going to extend the Court of Claims jurisdic-

1 tion?

2 A No, Your Honor, but when this happens, and I know of  
3 no case otherwise, the correction board, when this decision  
4 becomes final, in effect, corrects the record upon application,  
5 based on that decision, and I have not heard of any decision  
6 where it was otherwise.

7 Q You want to get us to pass on it, so you can go to  
8 the Correction of Records Board in the Air Force. Is that what  
9 you want?

10 A Yes, Your Honor, I will do that, as soon as this  
11 decision is final --

12 Q Have you applied there yet?

13 A Yes, Your Honor --

14 Q And is it being held?

15 A No, Your Honor, the state denied it, and this is  
16 another basis for --

17 Q They denied it, so you are really appealing from  
18 that denial, are you not?

19 A No, Your Honor --

20 Q Are you not?

21 A No, Your Honor. Yes, I am questioning that opinion.  
22 In my brief I say this is another basis for jurisdiction.

23 In the first place, under the correction statute, the  
24 secretary can attack a Court-Martial. In other words, section 76,  
25 the finality clause says that this decision of the Court-Martial

1 shall be final on all officers.

2 Then they come along with the correction statute  
3 where the secretary wants to correct them, to save Congress  
4 from making private bills, so the Attorney General rules, and  
5 the government agrees, the secretary can then collaterally  
6 attack the Court-Martial. The secretary can do that.

7 The decision of the secretary is just final on  
8 officers, it is not final on courts. All the decisions of the  
9 secretary under the correction board can be reviewed by the  
10 Court of Claims. There is no basis in the legislative history  
11 or any other thing to show that they could not review a Court-  
12 Martial. Nowhere does it say that.

13 The government admits that the secretary can  
14 collaterally attack it. That is an exception to section 76,  
15 and the statute on which he does it is only final on officers,  
16 not final on courts.

17 So under the correction statute he has a right to be  
18 reviewed in the Court of Claims. Nowhere does it say otherwise.

19 But even this section 76 is final, I believe, under  
20 the decisions of this Court in Estep versus United States and  
21 the Harmon versus Brucker case. We had other statutes that had  
22 finality provisions in them, where there was a finality provision  
23 in the law. The court looked at this, in effect, as a final  
24 legal order. They can make a final, legal order. They do not  
25 consider all orders final, just the final legal order.

1 Q Did you go to the Court of Military Appeals?

2 A No, Your Honor. This was another thing.

3 Q Why not?

4 A He had no appeal. He could not take it there. He  
5 could not even ask them to review it. There was no appeal,  
6 whatsoever. The one man who reviewed it was in the convening  
7 authority, a Staff Judge Advocate. He was a military lawyer.  
8 He is also the same man who reviewed the specifications,  
9 advised suit to be filed and advised on the wording of it. In  
10 other words, the only review was by the prosecutor, in effect.

11 In just this Court-Martial itself, there was nowhere  
12 he could go.

13 Q You mean that the Court of Military Appeals had no  
14 jurisdiction?

15 A That is right, not even to consider whether they would  
16 review it. There was nothing he could do, nowhere to go. This  
17 was the only Court that could possibly consider his constitu-  
18 tional claims.

19 Q That was because of the minor penalty that was put on  
20 his operation. Does that mean that every penalty in the  
21 armed forces that is so minor that it cannot get to the Court  
22 of Military Appeals has a right to go directly to the Court of  
23 Claims?

24 A Yes, Your Honor, if there is a constitutional depriva-  
25 tion. I believe under Thompson versus the City of Louisville



1 where we had a \$20.00 fine - that this was constitutional.

2 This was taken away from him.

3 Q I see.

4 A And here there was no way, no review at all. This  
5 is not a question of corroboration.

6 For example, any controverted fact, the record has  
7 to be read, shows this constitutional deprivation, that it was  
8 not corroborated. It also was not weighed. It is jurisdictional,  
9 I believe, under 153(a).

10 Q Is there some sort of collateral relief in sight?

11 A The Board for the Correction of Military Records is  
12 the only thing, Your Honor.

13 Q Is that under 67?

14 A 1552(a), 22 USCA, 10 USCA, pardon me.

15 Q What does that involved?

16 A Your Honor, there the secretary is given the  
17 authority to correct any record point in justice.

18 Q Is that about a hearing, is it on the record, or how  
19 is it done?

20 A He gathers all the records, he will accept any evidence  
21 you have, affidavits, or he can also hold a hearing. Many times  
22 this is decided on the record.

23 Q What does he do, appoint a board for that purpose?  
24 Is there a permanent board, an ad hoc board, or what?

25 A I am not sure of the exact procedure. They do have

1 someone over here who does this work, who reviews it, and says  
2 this is what can be done.

3 The statute reads, "The secretary of a military  
4 department under procedure established by him and approved by  
5 the Secretary of Defense, and acting through boards of  
6 civilians of the executive" --

7 Q That indicates that there is a board, then --

8 A Yes, Your Honor, "through the executive part of that  
9 military department, may correct any military record of that  
10 department when he considers it necessary to correct an error  
11 or remove an injustice."

12 That is then reviewable in the Court of Claims. They  
13 considered in this correction statute the question of making it  
14 final on the courts, in the legislative history, and they did  
15 not. They struck that out --

16 Q Are there some jurisdictional limits on what the  
17 board can do , in considering your case?

18 A Yes, Your Honor. They did consider it and denied  
19 it. I believe there are no limits, whatsoever. I believe --

20 Q You say you could have had your review in the  
21 Court of Claims from that?

22 A No, Your Honor. I could review the Board of Military  
23 Corrections in the Court of Claims --

24 Q How? By filing a suit for back pay?

25 A Yes, Your Honor.

1 Q Which is what you have done?

2 A Yes, Your Honor. Now the government admits you can -

3 Q If you are going to do this - you say you have a de  
4 novo for review here or not?

5 A No, Your Honor --

6 Q Would it be on the record?

7 A Yes, Your Honor. The measurement is whether it is  
8 arbitrary and capricious and not supported by substantial  
9 evidence.

10 Q I suppose following up the question I asked you, we  
11 would have to say, if we agreed with you that in every military  
12 conviction where the punishment was so small that it could not  
13 be reviewed by the Court of Military Appeals, that this Court  
14 would have the responsibility of eventually reviewing these  
15 cases just on the record of the military trial.

16 A Yes, Your Honor. I believe that is so, and I  
17 believe it is a constitutional deprivation. This man could have  
18 been sentenced to 16 years in prison. But this record was so  
19 unreliable that even they could not believe it. What they must  
20 have reacted upon was that he was charged, so he must be guilty.  
21 so we will give him six months and then there is no review.

22 Q Is that the difference between your case and the  
23 Augenblick case, namely that you did apply to the Board for  
24 the Correction of Records and had his determination before  
25 you went to the Board of Claims?

1 A I had two, Your Honor. I have three, really.

2 Q That is what I want to be sure of. The Augenblick  
3 case did not have any.

4 A I do not know about Augenblick. There is something  
5 about that - I know they did not make it an issue in the Court  
6 of Claims, whether they would appeal under the Board of  
7 Corrections. But I hate to say on Augenblick on this thing.  
8 But there were other differences --

9 Q You were saying, if I understand you, that whatever  
10 may be the interpretation of 76, there is review in the Court  
11 of Claims of the determination of the board to correct the  
12 records, because Congress considered having the same prohibition  
13 against judicial review as to determinations of that board,  
14 and they rejected that in this case.

15 A Yes, Your Honor. This legislative history is in  
16 Ashe versus McNamara. They discuss it pretty thoroughly.

17 Q Is there any express statute which grants the Court  
18 of Claims this kind of appellate jurisdiction?

19 A Well, Your Honor, the Court of Claims has jurisdiction  
20 under any statute, treaty or constitution. And this would be  
21 under a statute.

22 Q You mean mainly a pay statute?

23 A Yes, the pay statute, and also the correction board  
24 statute. Because the secretary, under the statute, is given  
25 the authority to correct error or correct an injustice, and

1 if that decision is arbitrary and capricious and not supported  
2 by substantial evidence, they can then take it to the Court of  
3 Claims.

4 Q Your authority for that is what? Just logic or --

5 A The correction statute and the legislative history,  
6 Your Honor, and the wordings of the two statutes. Section 76 -

7 Q Do any of the statutes say that this kind of a  
8 determination may be reviewed in the Court of Claims?

9 A No, Your Honor. I know of nowhere where they say  
10 a Court-Martial shall specifically be reviewed, but they have  
11 reviewed - the Attorney General says the secretary can review  
12 this.

13 There is no basis in the history for distinguishing  
14 between the decisions of the secretary --

15 Q Well, I suppose if Shapiro was considered by the  
16 Congress in the context of all of this, Shapiro at least  
17 indicated that there was authority in the Court of Claims, and  
18 what you are saying, if I understand you, on the applications  
19 made for review to the Board of Corrections of Records, that  
20 they consider the same kind of prohibition review that we have  
21 in 76 to begin with.

22 A Yes, Your Honor. They considered whether to make this  
23 binding final on the courts, and struck it out. That is in the  
24 legislative history.

25 Q Do you have that in your brief?



1 A Yes, Your Honor, I have cited in Ashe versus  
2 McNamara which has a full discussion of it, which I have  
3 referred from Ashe v. McNamara to the legislative history.  
4 But in addition --

5 Q What brief is that you say you have it in?

6 A In my brief that I filed here where I cite --

7 Q This brief?

8 A Yes, Your Honor, on page 14 of my brief, second  
9 paragraph.

10 Q Mr. Steiner, you filed more than a memorandum on  
11 opposition, did you not?

12 A Yes, Your Honor, I filed a brief, a reply brief for  
13 the respondent, Kenneth N. Juhl.

14 Two circuits, the First and Tenth, have construed this  
15 correction statute to give them authority to review Court-  
16 Martial. And Ashe v. McNamara is one. Smith v. McNamara is  
17 the other.

18 There is no decision saying that the courts cannot  
19 look into Court-Martials under the correction board statute.  
20 The only case close is this Davies v. Clifford which the  
21 government cited, in which they said he received full relief  
22 from the secretary, so he had no claim under that.

23 My main difference that I made with Augenblick was  
24 the correction board statute, the fact that there was no review  
25 whatsoever for this man, not even discretionary, and the fact

1 that this was jurisdictional. That was basic jurisdiction  
2 under 153(a).

3 The Court-Martial cannot base a conviction on the  
4 uncorroborated testimony of an accomplice, where it is uncertain,  
5 doubtful or improbable. That was jurisdictionally told them.  
6 Those three factors are the reasons that we respectfully --

7 Q To what extent must it be corroborated?

8 A I think if there is any corroboration, Your Honor,  
9 that it is corroborated. But, for example, from the testimony  
10 of the people who said, "Yes, he was out here, but he did not  
11 engage in any of this activity. In fact, he went around and  
12 sat in the front yard with my wife, and I was so surprised to  
13 see him out there."

14 In other words he contradicted Hughes on everything  
15 that Hughes said to implicate him, contradicted him on every  
16 single factor. That cannot be corroboration, just because he  
17 was out there and went around to sit in the front yard where  
18 his wife also in a later affidavit said he was in her front  
19 yard the whole time.

20 Hughes' testimony on that varied. He said, "Once he  
21 rode out there with me, stood beside the car and acted as a  
22 lookout." Later in the trial he said, "He went out into the  
23 road, down the driveway, to act as a lookout."

24 He testified at Article 32 that all these cigar boxes  
25 were sitting on the front seat where he could see them.

1           The other man comes up and says they were in the  
2 trunk and there was no way he could see them. This was the  
3 corroborating witness, Squire.

4           Q     You say the other man --

5           A     Yes, Squire, the other possible corroborator. In  
6 other words, he contradicted him on everything --

7           Q     The fact that he contradicted would make it a fact  
8 of credibility, would it not?

9           A     Yes, Your Honor, but that has to be corroborated.  
10 In other words he did not corroborate him on any of the  
11 criminal f actors, and Hughes did not repeat that testimony at  
12 the trial.

13          Q     Who said the cigar boxes were on the front seat?

14          A     Hughes, the named accomplice, the man we complain of.  
15 He said they were on the front seat --

16          Q     In the car in which the defendat was when they went  
17 to see this --

18          A     Yes, Your Honor. He said they were sitting in the  
19 front seat.

20          Q     Why is not that corroboration?

21          A     That is his testimony. His testimony has to be  
22 corroborated. He is Hughes, he is testifying, but he did not  
23 repeat that at the trial, because Squire said, "No, it was in  
24 the trunk, there was no way he could have seen it."

25                But these are just replete with this throughout this

1 record. For the foregoing reasons --

2 Q I understand you now to be saying that despite 76,  
3 despite the conviction, despite the Board of Appeals in the  
4 Military, there is still a remedy provided in a code section  
5 for an examination by board, and if they decide against the  
6 men, the soldier there, he can have that reviewed in the  
7 Court of Claims.

8 A Yes, Your Honor. That is correct.

9 Q What is that code section that authorizes that?

10 A 10USCA 1552(a). I have cited it on page 2 of my  
11 brief. 10USCA 1552(a).

12 Q Has the government said anything about that in its  
13 brief?

14 A They say this is okay for the secretary to do it,  
15 but they did not mean to bury it. But there is no provision -  
16 they did not mean that a court could then review it. But there  
17 is no basis for --

18 Q They had authorized it in the Court of Claims. Is  
19 that set out anywhere in your brief, or do you just refer to it?

20 A This is one of my basic arguments, Your Honor.

21 Q Is it set out in your brief, the code section?

22 A Yes, Your Honor, it is. I cite it.

23 Q But is it quoted?

24 A Yes, Your Honor, it is quoted.

25 Q Where?

1 A On page 2.

2 Q Of the reply brief?

3 A Yes, Your Honor.

4 Q 1552(a). But it does not say anything about the  
5 Court of Claims.

6 A No, Your Honor, but in the legislative history they  
7 said it would be final, just on officers --

8 Q It says officers --

9 A It says officers and the deleted courts.

10 Q But it does not say in the statute and the Court of  
11 Claims has never reviewed that sort of a determination. Am I  
12 right or wrong?

13 A You are right in that they have never reviewed a  
14 Court-Martial, but two circuits have.

15 Q I know, but you were saying the Court of Claims.  
16 And the fact of the matter is that the statute does not mention  
17 the Court of Claims and the Court of Claims has never reviewed  
18 it. It has never exercised the power but I understood you to  
19 assert that it has.

20 A Your Honor, I think if they were faced with the case  
21 directly in point, that is the only basis on which they would  
22 construe it. That is just conjecture. They have not ruled,  
23 that I know of, that this prohibits us from review, and the  
24 thing that excluded any court is the general court. They did  
25 not specify which courts could and which could not.



1 Q Was that involved in the Ashe case?

2 A Yes, Your Honor. This is the very basis of the  
3 Ashe holding.

4 Q 2028 US code?

5 A Yes, Your Honor.

6 Q Now these two circuits that have ruled - what cases  
7 are those?

8 A The First and the Tenth Circuits, Your Honor,  
9 Ashe v. McNamara, which is 3355 federal section 277.

10 Q That is the First Circuit, and the Tenth Circuit case  
11 is --

12 A Smith versus McNamara, 395 F7 396.

13 Q I thought those were habeas corpus cases.

14 A No, Your Honor, these were under the Correction  
15 Board statute. Ashe, for example, was not in confinement, and  
16 they did not hold in his favor in Smith, but they ruled that  
17 they had jurisdiction in accordance with that.

18 Q I take it there would be no limit on the nature of  
19 the attack which the secretary or the board, under this  
20 statute, entertained?

21 A The secretary could do anything, I believe.

22 Q In this section he could go in and say - there has  
23 been an error here because there was not enough evidence to  
24 sustain my conviction by the Court-Martial. So the secretary  
25 could, if he wanted to , despite 76, review the evidence and

1 then he would say the Court of Claims should review him.

2 A Yes, Your Honor.

3 Thank you.

4 MR. CHIEF JUSTICE WARREN: Mr. Weisl.

5 MR. WEISL: Very briefly, Mr. Chief Justice --

6 Q Was Certiorari sought in the Ashe case?

7 A I do not believe it was, Mr. Justice Douglas.

8 Q Do you know?

9 A I do not believe it was.

10 As to the board question, that has been the subject  
11 of extensive examination by the Court, there is a discussion in  
12 our brief, footnote 31 on page 46, and it is briefly our  
13 position that legislative history of this statute provides  
14 that there may be judicial review under appropriate circum-  
15 stances.

16 The government, I feel certain, would take the  
17 position that if the underlying action being reviewed by the  
18 board was a Court-Martial, that the finality clause of Article  
19 76 would bar judicial review of the board's decision.

20 A board decision, however --

21 Q What does this mean? I am reading from Ashe:

22 "In light of this history we are confident that the finality  
23 provision as it now exists, a correction under this section is  
24 final and conclusive on all officers of the United States, was  
25 not intended to do any otherwise proper judicial review of

1 departmental action upon a petition to change the type of  
2 disciplinary action."

3 A I think that case is clearly wrong to the extent  
4 that it says you can review a board action --

5 Q Is this contrary to your position, as I see it?

6 A I think you will see from the Court of Claims  
7 position in Juhl that they, too, question the power --

8 Q May I ask you, then, what about the other case --  
9 was there any proceeding before the Augenblick case, any effort  
10 to get a proceeding before a correction board?

11 A To the best of my knowledge there was none.

12 Q The point of fact was denied, as was in Juhl. I do  
13 not see any comparison between Ashe and your position here.

14 A I say that if the question arose again whether the  
15 board for the correction of records could be reviewed in court  
16 when they have corrected a Court-Martial, we would urge that  
17 Article 76 bars judicial review of that board action.

18 Finally, in conclusion, I would like to place this  
19 case, both these cases, in perspective by saying what I think  
20 we are all concerned about, and properly, is whether a military  
21 defendant has access at some point to a civilian court to make  
22 sure that he was not convicted on fundamentally unfair grounds  
23 and by fundamentally unfair procedure.

24 And briefly, these are the instances under which a  
25 military defendant can, at some point, get civilian review by

1 a civilian court. He is imprisoned over one year, he can go to  
2 the Court of Military Appeals or habeas corpus. He is dis-  
3 missed from the service, as was Augenblick, gets a bad conduct  
4 or a dishonorable discharge, if he is an enlisted man, he can  
5 go to the Court of Military Appeals, a civilian court.

6 If he is imprisoned for less than one year, true, he  
7 must act promptly, but he can seek the remedy of habeas corpus,  
8 and that remedy has been made much more meaningful by this  
9 Court, because even if he properly applied for this writ, even  
10 though his imprisonment is over and he has served his term, this  
11 Court has recently held in the Carafas and LaVallee case that  
12 he can review his habeas remedy and have his conviction expunged.

13 Therefore, only a petty area where a fine is  
14 imposed or a reduction in pay takes place is he foreclosed for  
15 review by habeas or the Court of Military Appeals.

16 I think that this situation shows that fundamentally  
17 the position that the government has urged is fair.

18 Thank you.

19 (Whereupon, at 2:00 p.m. the Court recessed, to  
20 reconvene at 10:00 a.m. on Monday, December 9, 1968.)  
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