The Burger Court Opinion Writing Database

Schacht v. United States

398 U.S. 58 (1970)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 16, 1970

Re: No. 628 - Schacht v. U. S.

Dear Byron:

At present I lean to joining your concurring opinion. I will await events. I agree generally on the first amendment point. I still stand on the jurisdictional position.

Regards,

WEB

W. E. B.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 22, 1970

Re: No. 628 - Schacht v. U. S.

Dear Byron:

I join in your concurring opinion.

W.E.B.

Mr. Justice White

cc: The Conference

Not available from JMH. Papers

SUPREME COURT OF THE UNITED STATES

No. 628.—October Term, 1969

Daniel Jay Schacht, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April —, 1970]

Mr. Justice Black delivered the opinion of the Court.

The petitioner, Daniel Jay Schacht, was indicted in a United States District Court for violating 18 U. S. C. § 702 which makes it a crime for any person "without authority (to wear) the uniform or a distinctive part thereof . . . of any of the armed forces of the United States . . . ."[1] He was tried and convicted by a jury, and on February 29, 1968, he was sentenced to pay a fine of $250 and to serve a six-month prison term, the maximum sentence allowable under 18 U. S. C. § 702. There is no doubt that Schacht did wear distinctive parts of the uniform of the United States Army[2] and that he was not a member of the Armed Forces. He

[1] Title 18 U. S. C. § 702 provides as follows:

"Whoever, in any place within the jurisdiction of the United States or in the Canal Zone, without authority, wears the uniform or a distinctive part thereof or anything similar to a distinctive part of the uniform of any of the armed forces of the United States, Public Health Service or any auxiliary of such, shall be fined not more than $250 or imprisoned not more than six months, or both."

[2] Schact wore a blouse of the type currently authorized to Army enlisted men with a shoulder patch designating service in Europe. The buttons on his blouse were of the official Army design. On his head Schacht wore an outmoded military hat. Affixed to the hat in an inverted position was the eagle insignia currently worn on the hats of Army officers.

SUPREME COURT OF THE UNITED STATES

No. 628.—October Term, 1969

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SUPREME COURT OF THE UNITED STATES

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April 23, 1970

Re: No. 628 - Schacht v. United States

Dear Hugo,

I thought I would put on paper my reactions to your opinion in Schacht v. United States, which you were so kind as to allow me to see before it was circulated.

I. The Merits

Insofar as the merits are concerned, I have only three observations. In making them, however, I wish to add that if the majority of the Court is in accord with Part I of your opinion as it stands now, I would be content to go along.

First, I agree with you that § 702 is a valid statute on its face. However, I could imagine applications of the statute that might well raise not insubstantial constitutional problems. Do you think you might add the phrase "on its face" to the end of the first sentence in Part I?

Second, your opinion holds that as a matter of law this record shows that petitioners were engaged in a "theatrical production." The Solicitor General, on the other hand, argues that as a matter of law these facts do not make out a theatrical production. My own view is that whether petitioner was engaged in a theatrical production was a factual issue that was quite properly submitted to the jury in the circumstances of this case. However, it cannot be determined whether the jury's conviction of petitioner rested on a finding of no theatrical production or, instead, on a finding that there was a theatrical production but that it tended "to discredit" the Army. Because I quite agree with your analysis demonstrating the invalidity of the "tending to discredit" clause in § 772(f), I would reverse the conviction under Stromberg, and remand.

Third, even assuming you wish to hold that the facts here show a "theatrical production" as a matter of law, I do not think anything would be lost if you omitted the material beginning on page 4 with the sentence "The Government concedes . . ." and ending with the sentence on page 5 concluding ". . . screen were real." Footnote 3 might then be simply shifted to another appropriate place. You criticize what you characterize as the Government's "audience apprisal" standard and announce instead a test which asks whether "the person wearing the military uniform in fact [is] an actor portraying a military character in a play or skit or other theatrical production." With deference, I think your "test" does no more than pose the issue. Is a person "in fact" an actor if he thinks he is acting, but other people reasonably believe from the circumstances that he is an Army officer having no connection with a theatrical production? If so, how do you distinguish a person impersonating an Army officer, who subjectively thinks of himself as an actor, but who is wearing a uniform under circumstances that could not reasonably be thought to be part of a play? Surely, how a reasonable man might view the circumstances of a claimed production enters into the determination of what is a "theatrical production" even under your proposed "in fact" test.

II. Jurisdictional Argument

Insofar as the Government's jurisdictional argument is concerned, I agree with the result you reach. However, you have not, in my view, treated the Government's argument with the seriousness it deserves. I think this is true in several respects. First, and most importantly, you do not fully state the Solicitor General's position. You reject the argument that untimeliness under our Rule should be given jurisdictional effect by stating, in part, that the Rule "contains no language that calls for so harsh an interpretation." In this regard, however, Rule 22(2) is no different than the statute -- neither make explicit reference to waivers. In the absence of language providing for waiver, we have without exception treated statutory limitations as jurisdictional. The Solicitor General asks why we should not do the same with our Rule.

This issue, i.e., why we treat time requirements under our Rule differently than the requirements imposed by statute, is not even acknowledged in your opinion. Moreover, the Solicitor General relies

on language in United States v. Robinson, 361 U.S. 220, a case that you do not cite, to support his contention that untimeliness under our Rule is jurisdictional. Finally, although it is true that Taglianetti and Heflin held that the Court could waive untimeliness under our Rule, neither opinion explained why this was so. The Solicitor General does not belittle those two cases because each dealt with the problem in a footnote, but rather because neither gave reasons for the conclusion.

I think an answer to the Solicitor General's contentions might be made along the following lines. First, there can be little question, given the broad and unqualified terms of the congressional delegation in 18 U.S.C. § 3772, that the Court might promulgate a rule that expressly provided for waiver for good cause. Second, Rule 22(2), although it contains no express waiver provision, has been interpreted by this Court to allow waiver in order to avoid unfairness in extraordinary cases. Our Rule, as interpreted, is no less authorized than a rule that expressly provided for a waiver. Finally, our authority is quite different when it comes to statutory time limits. In the absence of congressional authorization, the Court does not presume to have the power to extend time limits specified by statute. The Court cannot "waive" congressional enactments; statutory time limits are therefore treated as jurisdictional.

In closing, I think it would be useful to indicate that time requirements are essential to an orderly appellate process, and that the Court's discretion to waive its Rules imposing such requirements will be exercised sparingly, and only when the petitioner adequately explains his failure to comply with the rule. I fully concur in the conclusion that this is such a case.

The net of all of this is that I could join this opinion as written, with a separate concurrence on the "timeliness" issue. However, I would much prefer not to write separately if you could see your way clear to meeting my difficulties.

Sincerely,

J.M.H.

Mr. Justice Black

April 24, 1970

Ref. No. 528 - Schenck v. United States

Dear Hugo:

Confirming my statement to you today at the luncheon hour, I intend to join your opinion, with a concurring note simplifying the problem you have given the "clear-and" issue in part II.

Sincerely,

Supreme Court of the United States

Memorandum

April 29, 19 70

3, 1970

Dear Byron:

In light of the question you asked me before going on the Bench today, I thought you might like to see a copy of my uncirculated letter to Hugo on the Schacht case. Please return.

Schacht v. United States

Sincerely,

J. M. H.

John: Hugo's very much. I should be interested in what you write

Mr. Justice White

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May 7, 1970

Re: No. 628 - Schacht v. United States

Dear Hugo:

In circulating this opinion I wish to add the following comment respecting Part I of your opinion. My Conference vote was to reverse on the merits on Stromberg grounds, now reflected in Brother White's concurring opinion. I still prefer that ground, and, as I indicated to you in earlier discussion, I would make a Court for such a disposition. Hence, please take my present joinder in Part I of your opinion as conditioned upon a Court not being obtained for a Stromberg disposition.

Sincerely,

J.M.H.

Mr. Justice Black

CC: The Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

No. 628.—October Term, 1969

Daniel Jay Schacht, Petitioner, v. United States. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

From: Harlan, J.

Circulated: MAY 7 1970

Recirculated:

[May —, 1970]

Mr. Justice Harlan, concurring.

I join Part I of the Court's opinion. With respect to Part II, I agree with the Court's rejection of the Government's "jurisdictional" contention premised on the untimely filing of the petition for certiorari. In my view, however, that contention deserves fuller consideration than has been accorded it in the Court's opinion.

I

The Court's opinion does not fully come to grips with the Solicitor General's position. The Court rejects the argument that untimeliness under our Rule 22 should be given jurisdictional effect by stating, in part, that the Rule "contains no language that calls for so harsh an interpretation." In this regard, however, the time limitation found in Rule 22 (2) is no different from those established by statute;[1] neither makes explicit reference to waivers of the limitation. In the absence of language providing for waiver, we have without exception treated the statutory limitations as jurisdictional.[2] The Solicitor General asks why we should not do the same under our Rule. This issue, *i. e.*, why we treat time require-

[1] Compare Rule 22 (2) with, *e. g.*, 28 U. S. C. § 2101 (b), (c).

[2] *Matton S. S. Co., Inc.* v. *Murphy*, 319 U. S. 412 (1943); *Department of Banking* v. *Pink*, 317 U. S. 264 (1942); *Citizens Bank* v. *Opperman*, 249 U. S. 448 (1919).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 27, 1970

RE: No. 628 - Schacht v. United States

Dear Hugo:

I agree with your opinion in the above case.

Sincerely,

W. J. B. Jr.

Mr. Justice Black

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 12, 1970

No. 628 - Schacht v. U. S.

Dear Byron,

I am glad to join your concurring opinion in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

SUPREME COURT OF THE UNITED STATES

No. 628.—October Term, 1969

Daniel Jay Schacht, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1970]

Mr. Justice White, concurring in the result.

I agree that Congress cannot constitutionally distinguish between those theatrical performances which do and those which do not "tend to discredit" the military, in authorizing persons not on active duty to wear a uniform. I do not agree, however, with the Court's conclusion that as a matter of law petitioner must be found to have been engaged in a "theatrical production" within the meaning of 10 U. S. C. § 772 (f). That issue, it seems to me, is properly left to the determination of the jury.

The United States has argued that the exception for "theatrical productions" must be limited to performances in a setting equivalent to a playhouse or theater where observers will necessarily be aware that they are watching a make-believe performance. Under this interpretation, the Government suggests, petitioner must be found as a matter of law not to have been engaged in a "theatrical production"; hence, his conviction for unauthorized wearing of the uniform is lawful without regard to the validity of the "tend to discredit" proviso to § 772 (f). The Court, on the other hand, while refusing to assay a definition of the statutory language, flatly declares that under any interpretation, Congress could not possibly have meant to exclude petitioner's "street skit" from the class of "theatrical productions." Neither extreme, in my view, is correct. The critical question

SUPREME COURT OF THE UNITED STATES

No. 628.—October Term, 1969

Daniel Jay Schacht, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May 25, 1970]

Mr. Justice White, with whom The Chief Justice and Mr. Justice Stewart join, concurring in the result.

I agree that Congress cannot constitutionally distinguish between those theatrical performances which do and those which do not "tend to discredit" the military, in authorizing persons not on active duty to wear a uniform. I do not agree, however, with the Court's conclusion that as a matter of law petitioner must be found to have been engaged in a "theatrical production" within the meaning of 10 U. S. C. § 772 (f). That issue, it seems to me, is properly left to the determination of the jury.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 28, 1970

Re: No. 628 - Schacht v. United States

Dear Hugo:

Please join me.

Sincerely,

T.M.

Mr. Justice Black

cc: The Conference