# The Burger Court Opinion Writing Database

## *Parker v. Levy*

417 U.S. 733 (1974)

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

June 12, 1974

Re: 73-206 - Parker v. Levy

Dear Bill:

Please join me.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

73-206

*Supreme Court of the United States*

*Memorandum*

5/13

----------, 19----

Bill

A little work with
a dissent — Parker
v. Levy — no vagueness
and/or overbreadth. 9-4
undoubtedly firm at
9 may additionally
be a First Amendment
case. WW

First Amendment case

To : The Chief Justice
Mr. Justice [illegible]

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 73-206

From: Douglas, J.

Circulated: 6-12

Recirculated: _____

Jacob J. Parker, Warden, et al., Appellants, *v.* Howard B. Levy. } On Appeal from the United States Court of Appeals for the Third Circuit.

[May —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

Congress by Art. I, § 8, cl. 14, has power "To make Rules for the Government and Regulation of the land and naval Forces."

Articles 133 [1] and 134 [2] of the Code of Military Justice, 10 U. S. C. §§ 933, 934, at issue in this case, trace their legitimacy to that power.

So far as I can discover the only express exemption of a person in the Armed Services from the protection of the Bill of Rights is that contained in the Fifth Amendment which dispenses with the need for "a presentment or indictment" of a grand jury "in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."

By practice and by construction the words "all criminal prosecutions" in the Sixth Amendment do not necessarily

[1] "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

[2] "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 14, 1974

Dear Potter:

In 73-206, Parker v. Levy please join me in your dissent.

William O. Douglas

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 11, 1974

RE: No. 73-206 Parker v. Levy

Dear Potter:

Please join me in your dissenting opinion in the above.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 4, 1974

Re: No. 73-206, Parker v. Levy

Dear Chief,

It seems to me that I am not the one to write the opinion for the Court in this case. My Conference notes indicate that five of the Brethren are of the view that Articles 133 and 134 are constitutionally valid; I am not one of them. I originally had the tentative view that the judgment could be reversed on the ground that the Article 90 conviction is valid, and that this conviction did not taint the conviction on the Article 133 and 134 counts. Discussion at the Conference, however, convinced me that this view will not stand up in light of the gross three-year sentence imposed upon all three convictions, with no way to know whether the sentence would have been less on the Article 90 conviction alone.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 13, 1974

MEMORANDUM TO THE CONFERENCE

Re: No. 73-206, Parker v. Levy

In due course I plan to circulate a dissenting opinion in this case.

P.S.

P.S.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Stewart, J.

Circulated: JUN 11 1974

Recirculated: _____

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 73-206

Jacob J. Parker, Warden, et al., Appellants, *v.* Howard B. Levy.

On Appeal from the United States Court of Appeals for the Third Circuit.

[June —, 1974]

MR. JUSTICE STEWART, dissenting.

Article 133 of the Uniform Code of Military Justice, 10 U. S. C. § 933 (1970), makes it a criminal offense to engage in "conduct unbecoming an officer and a gentleman." [1] Article 134, 10 U. S. C. § 934 (1970), makes criminal "all disorders and neglects to the prejudice of good order and discipline in the armed forces." and "all conduct of a nature to bring discredit upon the armed forces." [2] The Court today, reversing a unanimous

[1] Article 133 provides:

"Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

[2] Article 134 provides:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

The clause in Art. 134 prohibiting "all crimes and offenses not capital" applies only to crimes and offenses proscribed by Congress. See Manual for Courts-Martial, United States ¶ 213 (e) (1969) [hereinafter referred to as Manual]. Cf. *Grafton* v. *United States*, 206 U. S. 333. As such, this clause is simply assimilative, like 18

pp. 1, 4, 8 + stylistic changes

To: The C
Mr. [illegible]
Mr. [illegible]nan
Mr. [illegible]to
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Stewart, J.

Circulated: _____

Recirculated: JUN 14 1

3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 73-206

Jacob J. Parker, Warden, et al., Appellants, v. Howard B. Levy. | On Appeal from the United States Court of Appeals for the Third Circuit.

[June —, 1974]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, dissenting.

Article 133 of the Uniform Code of Military Justice, 10 U. S. C. § 933 (1970), makes it a criminal offense to engage in "conduct unbecoming an officer and a gentleman." [1] Article 134, 10 U. S. C. § 934 (1970), makes criminal "all disorders and neglects to the prejudice of good order and discipline in the armed forces." and "all conduct of a nature to bring discredit upon the armed forces." [2] The Court today, reversing a unanimous

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To: The Chief ...
Mr. Justice Douglas
Mr. Justice Brennan ✓
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: Stewart, J.

# SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 73-206

Recirculated: JUN 17 1974

Jacob J. Parker, Warden, et al., Appellants, *v.* Howard B. Levy. | On Appeal from the United States Court of Appeals for the Third Circuit.

[June 19, 1974]

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

Article 133 of the Uniform Code of Military Justice, 10 U. S. C. § 933 (1970), makes it a criminal offense to engage in "conduct unbecoming an officer and a gentleman." [1] Article 134, 10 U. S. C. § 934 (1970), makes criminal "all disorders and neglects to the prejudice of good order and discipline in the armed forces." and "all conduct of a nature to bring discredit upon the armed forces." [2] The Court today, reversing a unanimous

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

CHAMBERS OF
JUSTICE BYRON R WHITE

May 10, 1974

Re: No. 73-206 - Parker v. Levy

Dear Bill:

Please join me in your opinion in this case.

Sincerely,

Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 29, 1974

Re: No. 73-206 -- Parker v. Levy

Dear Bill:

I have disqualified myself in this case.

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 13, 1974

Re: No. 73-206 -- Parker v. Levy

Dear Bill:

Please add to your opinion that I did not participate in it.

Sincerely,

T. M.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 12, 1974

Re: No. 73-206 -- Parker v. Levy

Dear Bill:

Please do not forget to add to your opinion that I did not participate in it.

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 13, 1974

Re: No. 73-206 - Parker v. Levy

Dear Bill:

Please join me.

Sincerely,

H. A. B.

Mr. Justice Rehnquist

cc: The Conference

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

From: Blackmun, J.

Circulated: 6/14/74

Recirculated:

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 73-206

Jacob J. Parker, Warden, et al., Appellants, *v.* Howard B. Levy. } On Appeal from the United States Court of Appeals for the Third Circuit.

[June —, 1974]

MR. JUSTICE BLACKMUN.

I wholly concur in the Court's opinion. I write only to state what for me is a crucial difference between the majority and dissenting views in this case. My Brother STEWART complains that men of common intelligence must necessarily speculate as to what "conduct unbecoming an officer and a gentleman" or conduct to the "prejudice of good order and discipline in the armed forces" or conduct "of a nature to bring discredit upon the armed forces" really mean. He implies that the average soldier or sailor would not reasonably expect, under the General Articles, to suffer military reprimand or punishment for engaging in sexual acts with a chicken, or window peeping in a trailer park, or cheating while calling bingo numbers. *Ante*, p. 6. He argues that "times have changed" and that the Articles are "so vague and uncertain as to be incomprehensible to the servicemen who are to be governed by them." *Ante*, pp. 9, 15.

These assertions are, of course, no less judicial fantasy than that which the dissent charges the majority of indulging. In actuality, what is at issue here are concepts of "right" and "wrong" and whether the civil law can accommodate, in special circumstances, a system of law which expects more of the individual in the context of a broader variety of relationships than one finds in civilian life.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 15, 1974

No. 73-206 Parker v. Levy

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

2nd DRAFT

4/22/74

# SUPREME COURT OF THE UNITED STATES

No. 73-206

| | |
|---|---|
| Jacob J. Parker, Warden, et al., Appellants, *v.* Howard B. Levy. | On Appeal from the United States Court of Appeals for the Third Circuit. |

[April —, 1974]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellee Howard Levy, a physician, was a Captain in the Army stationed at Fort Jackson, South Carolina. He had entered the Army under the so-called "Berry Plan,"[1] under which he agreed to serve for two years in the armed forces if permitted first to complete his medical training. From the time he entered on active duty in July 1965 until his trial by court-martial, he was assigned as Chief of the Dermatological Service of the United States Army Hospital at Fort Jackson. On June 2, 1967, appellee was convicted by a general court martial of violations of Arts. 90, 133, and 134 of the Uniform Code of Military Justice, and sentenced to dismissal from the service, forfeiture of all pay and allowances, and confinement for three years at hard labor.

The facts upon which his conviction rests are virtually undisputed. The evidence admitted at his court-martial trial showed that one of the functions of the hospital to which appellee was assigned was that of training Special Forces aid men. As Chief of the Dermatological Service, appellee was to conduct a clinic for those aid men. In

[1] See 50 U. S. C. § 454 (1970).

3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

4/26
5/10

No. 73-206

Jacob J. Parker, Warden, et al., Appellants, v. Howard B. Levy. | On Appeal from the United States Court of Appeals for the Third Circuit.

[April —, 1974]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellee Howard Levy, a physician, was a Captain in the Army stationed at Fort Jackson, South Carolina. He had entered the Army under the so-called "Berry Plan,"[1] under which he agreed to serve for two years in the armed forces if permitted first to complete his medical training. From the time he entered on active duty in July 1965 until his trial by court-martial, he was assigned as Chief of the Dermatological Service of the United States Army Hospital at Fort Jackson. On June 2, 1967, appellee was convicted by a general court martial of violations of Arts. 90, 133, and 134 of the Uniform Code of Military Justice, and sentenced to dismissal from the service, forfeiture of all pay and allowances, and confinement for three years at hard labor.

The facts upon which his conviction rests are virtually undisputed. The evidence admitted at his court-martial trial showed that one of the functions of the hospital to which appellee was assigned was that of training Special Forces aid men. As Chief of the Dermatological Service, appellee was to conduct a clinic for those aid men. In

[1] See 50 U. S. C. § 454 (1970).

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

From: Rehnquist, J.

Circulated: 4/2

Recirculated: 6/14

4th DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 73-206

Jacob J. Parker, Warden, et al., Appellants, v. Howard B. Levy. | On Appeal from the United States Court of Appeals for the Third Circuit.

[April —, 1974]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellee Howard Levy, a physician, was a Captain in the Army stationed at Fort Jackson, South Carolina. He had entered the Army under the so-called "Berry Plan,"[1] under which he agreed to serve for two years in the armed forces if permitted first to complete his medical training. From the time he entered on active duty in July 1965 until his trial by court-martial, he was assigned as Chief of the Dermatological Service of the United States Army Hospital at Fort Jackson. On June 2, 1967, appellee was convicted by a general court martial of violations of Arts. 90, 133, and 134 of the Uniform Code of Military Justice, and sentenced to dismissal from the service, forfeiture of all pay and allowances, and confinement for three years at hard labor.

The facts upon which his conviction rests are virtually undisputed. The evidence admitted at his court-martial trial showed that one of the functions of the hospital to which appellee was assigned was that of training Special Forces aid men. As Chief of the Dermatological Service, appellee was to conduct a clinic for those aid men. In

[1] See 50 U. S. C. § 454 (1970).

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

CHAMBERS OF
STICE WILLIAM H. REHNQUIST

June 20, 1974

MEMORANDUM TO THE CONFERENCE

Re: No. 73-1346, McLucas v. DeChamplain (Appeal from USDC D.C.)

This case which appears on sheet 1 of the June 21st Conference List has been held for No. 73-206, Parker v. Levy.

Appellee, an Air Force Master Sergeant, was charged before a court-martial with copying and attempting to deliver classified information (ranging from "confidential" to "top secret") to a Russian government agent. In November 1971, he was tried and convicted by general court-martial of violations of articles 81, 92, and 134 of the Uniform Code of Military Justice. The article 81 conviction was for conspiring to communicate classified information to an agent of a foreign government in violation of article 134 and 50 U.S.C. § 783(b). The article 92 conviction was for failure to obey an Air Force regulation requiring contacts with foreign agents to be reported. The article 134 conviction was under the third clause of the article (punishing "crimes and offenses not capital") for copying classified documents and attempting to deliver them to unauthorized persons, in violation of 18 U.S.C. § 783(b) and (d). The Air Force Ct. of Military Review reversed appellee's conviction and remanded in 1972, on the ground that his confession had been involuntary.

The Air Force then prepared to retry appellee on substantially the same charges. Appellee filed a number of motions to dismiss, based among other things on claims that article 134 was unconstitutional and that he had been denied access to classified documents relevant to

Wm. D. 73-1346
Oct. 71

his prosecution. Those motions and appellee's three petitions for extraordinary relief in the Court of Military Appeals were denied, and his trial was set for November 15, 1973.

On October 3, 1973, appellee brought this action in the USDC D.C. to enjoin the court-martial. The DC (Parker) granted a preliminary injunction on November 13, 1973. The DC first concluded that intervention in the court-martial proceedings was warranted. The DC said that unless it took affirmative action appellee would be denied fundamental constitutional guarantees, noting that he would have served much or all of his sentence before exhausting military review. The DC also said that appellee's claims were purely legal and did not necessitate determinations which a military forum is best equipped to handle. Next, the DC held that appellee could not be tried on the two charges under article 134 because that article is unconstitutionally vague. The DC relied on the Court of Appeals' decisions in Levy and Avrech. Finally, the DC ruled that the restrictions imposed upon use of classified documents for trial preparation by appellee's civilian defense counsel precluded a fair trial, and enjoined prosecution unless "full and unlimited access to all documents relevant and material to" the case was granted appellee, his civilian counsel, and such legal associates as were ruled necessary. The DC did not reach appellee's claims that his military counsel should be authorized to represent him in ancillary civilian proceedings and that the public should be admitted to the court-martial.

The SG makes three contentions in his jurisdictional statement. (1) First, he contends that the DC should not have intervened in the court-martial proceedings, citing Younger v. Harris, 401 U.S. 37, and Dombrowski v. Pfister, 380 U.S. 479. He notes that this is one of several recent cases in which DC's have enjoined pending court-martials, citing among other cases, Schlesinger v. Councilman, No. 73-663, to be argued next Term, and Sedivy v. Schlesinger, No. 73-6030, held for Councilman. He says that this case is an appropriate vehicle in which to decide the question.

Appellee responds by asserting that this Court has no jurisdiction on appeal. First he argues that the only DC ruling from which the SG may take a direct appeal under

28 U.S.C. § 1252 is its ruling that article 134 is unconstitutional. Since that ruling is so clearly correct that the SG's appeal from that ruling does not raise a substantial federal question, this Court cannot rest its jurisdiction on that claim and decide the other issues in the case, and the appeal should be dismissed. Appellee alternatively argues that this Court lacks jurisdiction on appeal because the single-judge DC lacked jurisdiction to enter an order enjoining enforcement of article 134, Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962), since a three-judge DC should have been convened. Appellee says that the single judge did have jurisdiction to consider his separate claims concerning access to the documents and conduct of the trial, but that his decision on them was not directly appealable to this Court.

In a reply to appellee's response filed after this case was held for Parker v. Levy, the SG argues that the present appeal is expressly authorized by § 1252, because it involves review of "an interlocutory or final order ... of any court of the United States ... holding an Act of Congress unconstitutional in any civil action ... to which" an officer of the United States is a party. The precedents cited by appellee merely hold that 28 U.S.C. § 1253 does not authorize a direct appeal in such circumstances. The SG further argues that even if the DC lacked jurisdiction, this Court should vacate the preliminary injunction. See Federal Housing Administration v. Darling, Inc., 352 U.S. 977; Flemming v. Nestor, 363 U.S. 603, 607. The SG next argues that a three-judge court was not required here because appellee sought only to enjoin his own court-martial, not to "interdict the operation of a statutory scheme." 363 U.S., at 607. Finally, the SG says that even if the DC did not properly reach the constitutionality of article 134, it could decide the threshhold issue of whether appellee's complaint at least formally alleges a basis for equitable relief, and the DC's erroneous resolution of that question can be reversed on appeal.

(2) The SG contends that the DC erred in holding clause three of article 134 unconstitutional. The third clause, which punishes "crimes and offenses not capital" is merely an assimilative crimes act, like that upheld in United States v. Sharpnack, 355 U.S. 286. Moreover, appellee's

conduct was within the clause's hard core. Appellee responds that article 134 cannot be neatly divided into three clauses, and that it is possible that he will be convicted upon retrial under one of the first two clauses. In his reply, the SG says that contrary to his suggestions appellee is charged only under the third clause, which is not involved in Levy or Avrech.

(3) Finally, the SG argues that the DC erred in holding that the restriction imposed on appellee and his counsel's access to and use of classified materials precluded a fair trial, since those restrictions were a reasonable accommodations of the appellee's and the Government's interests.

I think that there is serious doubt that the single-judge DC had jurisdiction here to enjoin the court-martial proceedings and therefore serious doubt that we have jurisdiction on direct appeal brought under 28 U.S.C. § 1252. This case also raises the Younger issue presented by the Councilman case. The challenge to the third clause of article 134 presented on the merits is not strictly governed by the Levy case, but the government seems to have a stronger case with respect to this assimilative-crimes clause than it did in Levy. The remaining contention on the merits -- regarding the availability of the classified documents to appellee's civilian counsel -- is not before the Court in Councilman.

Because of the important jurisdictional questions presented that are not involved in Councilman, I will vote to set the case for argument with Councilman, postponing the question of our jurisdiction to the hearing on the merits.

Sincerely,