

The Burger Court Opinion Writing Database

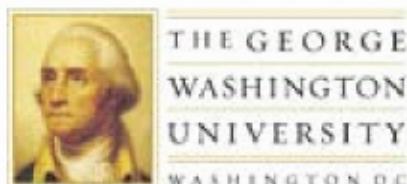
Schlesinger v. Councilman

420 U.S. 738 (1975)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 27, 1974

RE: No. 73-662 Schlesinger v. Councilman

Dear Bill:

I concur in your proposed questions.

Sincerely,

Bil

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 28, 1974

Re: No. 73-662, Schlesinger v. Councilman

Dear Bill,

I think the questions you have framed are entirely satisfactory.

Sincerely yours,

P.S.
P.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 28, 1974

Dear Bill:

Re: No. 73-662 - Schlesinger v. Councilman

The questions you propose seem all right to me.

Sincerely,



Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 27, 1974

No. 73-662 Schlesinger v. Councilman

Dear Bill:

I concur in your proposed questions.

Sincerely,

Mr. Justice Rehnquist

LFP/gg

CC: The Conference

L. C. C.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 21, 1974

MEMORANDUM TO THE CONFERENCE

Re: No. 73-662 - Schlesinger v. Councilman

In view of the questions as to jurisdiction and exhaustion of remedies which were raised during yesterday's argument in Avrech, I thought I would call the Court's attention to what seems to me a related issue in Schlesinger v. Councilman, in which probable jurisdiction was noted earlier this Term but no argument has yet been had.

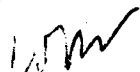
In that case, the Court of Appeals for the Tenth Circuit upheld the order of the District Court which had enjoined the commencement of court martial proceedings against the respondent on the grounds that the offense with which he was charged was not within the jurisdiction of the court martial under O'Callahan v. Parker, 395 U.S. 258. The only question presented in the government's jurisdictional statement is the correctness of the decision of the Court of Appeals that the sale and transfer of marijuana by an Army officer to an Army enlisted man off-post is not "service-connected" under O'Callahan.

The government has raised no exhaustion question or any other contention that the injunction issued by the District Court against the holding of the court martial was an improper exercise of judicial authority. It occurs to me, however,

that since O'Callahan, Relford v. Commandant, 401 U.S. 355, and Gosa v. Mayden, decided last Term, were all habeas corpus actions challenging confinement or sentence after the military procedures had been exhausted, the approach of the District Court here represented a substantial expansion of O'Callahan. Whether or not we decide to ask for additional briefs in Avrech, I think we should give serious consideration to asking for them in Schlesinger; I think it is one thing for a District Court to set aside a judgment imposed by a court martial after military proceedings have ended, and quite another to enjoin the conduct of the first round of the military proceedings.

If it would be in order, I will ask the Chief Justice at the conclusion of the discussion in Avrech if my suggestion may be brought to the attention of the Conference.

Sincerely,



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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 27, 1974

MEMORANDUM TO THE CONFERENCE

Re: No. 73-662 - Schlesinger v. Councilman

We granted certiorari in this case earlier in the Term, but Bill Brennan's report at the last Conference indicated that it would not be argued until next fall. Potter suggested that I be asked to draft a proposed set of questions to counsel along the lines of the memorandum which I had previously circulated, and along the lines of the additional briefing we requested earlier in Secretary of the Navy v. Avrec No. 72-1713, and the Conference agreed.

As noted in my earlier memorandum of February 21, 1974, the Court of Appeals for the Tenth Circuit in the Councilman case upheld the order of the District Court which enjoined the commencement of court martial proceedings against respondent on the grounds that the offense with which he was charged was not within the jurisdiction of the court martial under O'Callahan v. Parker, 395 U.S. 258 (1969). We granted the government's petition for certiorari on the question of whether the off-base sale of marijuana by an Army officer to an Army enlisted man was service-connected under O'Callahan. In its petition, the government has raised no question of jurisdiction or exhaustion, nor any other contention that the injunction issued by the District Court against the commencement of the court martial was an improper exercise of judicial authority. In No. 73-6030, Sedivy v. Schlesinger, the Court

of Appeals for the Third Circuit reversed a District Court injunction against a pending court martial on the grounds that the District Court was without authority to take such action while there was still an adequate remedy at law available to the petitioner in military courts. Sedivy has been relisted, I believe at Byron's request, to look further into the issue of possible mootness. Putting that to one side, if we were to simply hold Sedivy for Councilman, we would have argued only the merits of the O'Callahan issue, and none of the jurisdictional and related aspects of the case which the Third Circuit passed upon but which the Tenth Circuit did not.

I therefore suggest that the Clerk be asked to submit the following request to the parties:

"Counsel for the parties are requested to file within forty-five days supplemental briefs on the issues of (1) the jurisdiction of the District Court, (2) exhaustion of remedies, and (3) the propriety of a federal district court enjoining a pending court-martial proceeding."

Sincerely,

