

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 in St. Louis
Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

March 21, 1975

1424

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

Dear Lewis:

I will concur in the judgment and separately state the following:

I concur in the judgment because I believe that Art. 76 of the U.C.M.J. applies only to post-judgment attacks upon the proceedings of courts-martial and that the District Court should have dismissed the complaint on the basis of *Younger v. Harris*, 401 U.S. 37 (1971).

Regards,
W.B.

3-21
AC-100

Mr. Justice Powell

Copy to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 27, 1975

Dear Bill:

Please join me in your dissent
in 73-662, SCHLESINGER v. COUNCILMAN.

WOD/Sardus

WILLIAM O. DOUGLAS

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

February 6, 1975

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

Dear Lewis:

In due course I shall circulate a dissent in
the above.

Sincerely,

R. J. P.

Mr. Justice Powell

cc: The Conference

Concur in Part II

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

From: Brennan, J.

Circulated: 2-26-7

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-662

James R. Schlesinger et al., } On Writ of Certiorari to the
Petitioners, } United States Court of
v. } Appeals for the Tenth
Bruce R. Councilman. } Circuit.

[March —, 1975]

MR. JUSTICE BRENNAN, concurring and dissenting.

I agree that Art. 76 of the Uniform Code of Military Justice, 10 U. S. C. § 876, does not limit the jurisdiction of federal civil courts to habeas corpus review of court-martial convictions. I therefore join Part II of the Court's opinion.

I dissent, however, from the Court's holding in Part III that, as applied to his challenge that the offense charged was not service connected, this serviceman must exhaust every avenue within the military for determination and review of that question, and that, until he does, "federal district courts must refrain from intervention, by injunction or otherwise." The Court imposes this restraint upon the exercise by the District Court of its conceded jurisdiction for reasons that clearly are not persuasive. Moreover, today's holding departs from an unbroken line of our decisions that—consistently with our basic constitutional tenet that subordinates the military to the civil authority—restricts military cognizance of offenses to the narrowest jurisdiction deemed absolutely necessary, and precludes expansion of military jurisdiction at the expense of the constitutionally preferred civil jurisdiction. *Toth v. Quarles*, 350 U. S. 11 (1955); *Reid v. Covert*, 354 U. S. 1 (1957); *McElroy v. Guagliardo*, 361 U. S. 281 (1960); *Noyd v. Bond*, 395 U. S. 683 (1969).

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 12, 1975

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

Dear Lewis,

I am glad to join your opinion for the Court in
this case.

Sincerely yours,

P. S.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 12, 1975

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

Dear Lewis:

Please join me.

Sincerely,

Byron

Mr. Justice Powell

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 27, 1975

Re: No. 73-662 -- James R. Schlesinger et al. v.
Bruce R. Councilman

Dear Bill:

Please join me in your circulation of Feb. 26,
1975.

Sincerely,

T. M.
T. M.

Mr. Justice Brennan

cc: The Conference

✓
Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 24, 1975

Re: 73-662 - Schlesinger v. Councilman

Dear Lewis:

Please join me.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-662

Circulated: FEB 5 1975

Recirculated: _____

James R. Schlesinger et al.,
Petitioners, } On Writ of Certiorari to the
v. } United States Court of
Bruce R. Councilman. } Appeals for the Tenth
Circuit.

[February —, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

On March 27, 1972, court-martial charges were preferred against respondent Bruce R. Councilman, an Army captain on active duty at Fort Sill, Oklahoma. The charges alleged that Captain Councilman had wrongfully sold, transferred and possessed marihuana. On July 6, 1972, the District Court for the Western District of Oklahoma permanently enjoined petitioners, the Secretaries of Defense and of the Army and the Commanding General and Staff Judge Advocate of Fort Sill, from proceeding with Captain Councilman's impending court-martial. On appeal, the Court of Appeals for the Tenth Circuit affirmed, holding that the offenses with which Captain Councilman had been charged were not "service connected" and therefore not within the military court-martial jurisdiction. 481 F. 2d 613 (1973).

The judgments of the District Court and the Court of Appeals were predicated on certain assumptions, not hitherto examined by this Court,¹ concerning the proper relationship between the military justice system established by Congress and the powers and responsi-

¹ See *Secretary of the Navy v. Avrech*, — U. S. — (1974).

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
~~Mr. Justice Marshall~~
Mr. Justice Blackman
Mr. Justice Harlan

22-23
cite checking changes
throughout

Printed: February 1, 1975.

Original: 1975.

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-662

James R. Schlesinger et al., On Writ of Certiorari to the
Petitioners, v. United States Court of
Appeals for the Tenth
Bruce R. Councilman. Circuit.

[February —, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

On March 27, 1972, court-martial charges were preferred against respondent Bruce R. Councilman, an Army captain on active duty at Fort Sill, Oklahoma. The charges alleged that Captain Councilman had wrongfully sold, transferred and possessed marihuana. On July 6, 1972, the District Court for the Western District of Oklahoma permanently enjoined petitioners, the Secretaries of Defense and of the Army and the Commanding General and Staff Judge Advocate of Fort Sill, from proceeding with Captain Councilman's impending court-martial. On appeal, the Court of Appeals for the Tenth Circuit affirmed, holding that the offenses with which Captain Councilman had been charged were not "service connected" and, therefore not within the military court-martial jurisdiction. 481 F.2d 613 (1973).

The judgments of the District Court and the Court of Appeals were predicated on certain assumptions, not hitherto articulated by this Court, concerning the proper relationship between the military justice system established by Congress and the powers and responsi-

¹ See *Supervision of the Army*, 17 U.S. (4 Pet.) 418, 7 S. 626 (1834).

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 7, 1975

Cases held for No. 73-662, Schlesinger
v. Councilman

MEMORANDUM TO THE CONFERENCE:

No. 73-6030 Sedivy v. Schlesinger

General court-martial charges were preferred against petitioner, an Army sergeant first class, for possession of amphetamines in violation of U.C.M.J. Art. 92, 10 U.S.C. § 892 (violation of a lawful regulation or order), and for possession of marijuana in violation of U.C.M.J. Art. 134, 10 U.S.C. § 934 (the general article). Both offenses occurred while petitioner was off-post, off-duty, and not in uniform.

Petitioner brought this action in district court (D.N.J.) to enjoin his impending court-martial. The district court granted the injunction, holding that the offenses with which petitioner was charged were not service-connected. The Third Circuit reversed, holding that the military court system must be allowed to make the factual findings and initial legal determination concerning its jurisdiction and that petitioner was not entitled to equitable relief from an Article III court while adequate remedies remained within the military judicial system. After the Third Circuit's decision, the court-martial was held. Petitioner pleaded guilty and was sentenced to reduction in grade, with no confinement or forfeiture in pay.

This case, in all pertinent respects, is on all fours with the situation in Councilman. I will vote to deny the petition.

Wm. Doyle
Oct 74

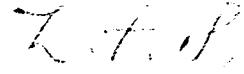
No. 73-1795 Mascavage v. Schlesinger; Rainville v. Lee

Court-martial charges were preferred against petitioner, Mascavage, a Navy enlisted man, for possession and use of marijuana off-base, and for sale of marijuana to another enlisted person, in violation of various U.C.M.J. articles. Petitioner brought suit in district court (D.D.C.) for habeas corpus relief and an injunction against the impending court-martial, contending that the offenses were not service-connected. The district court dismissed the suit for failure to exhaust military remedies and to allege irreparable injury. Shortly after the dismissal, petitioner moved the court-martial to dismiss the charges; the motion was denied. Petitioner then sought a writ of prohibition from the Court of Military Appeals; the writ was denied.

The facts with respect to petitioner Rainville are almost identical. Petitioner was charged with possession and use of marijuana and sale of marijuana to another enlisted person. The court-martial denied a motion to dismiss the charges. The district court (D.D.C.) dismissed petitioner's complaint for declaratory and injunctive relief because of failure to exhaust military remedies. The Court of Military Appeals denied a writ of prohibition, ruling that the charged offenses were service-connected.

The Court of Appeals for the District of Columbia consolidated the appeals and affirmed the dismissals, citing the Third Circuit's decision in Sedivy, supra. Thereafter, courts-martial were held in each case. Mascavage pleaded guilty to two specifications of possession and use, and was sentenced to reduction in grade and a \$500 fine. Rainville was convicted of possession, use and sale, and was sentenced to a \$675 fine, reduction in grade, and a reprimand.

As in Sedivy, I see nothing to distinguish the situations involved in this petition from that in Schlesinger. I will vote to deny.


L.F.P., Jr.

ss

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

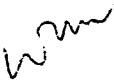
February 13, 1975

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

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

Copies to the Conference