

The Burger Court Opinion Writing Database

Middendorf v. Henry

425 U.S. 25 (1976)

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 18, 1976

Re: (74-175 - Middendorf v. Henry
(74-5176 - Henry v. Middendorf)

Dear Bill:

I join your proposed opinion dated February 23.

Regards,



Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 6, 1976

RE: Nos. 74-175 and 74-5176 Middendorf v. Henry

Dear Thurgood:

Please join me in your dissenting opinion in
the above.

Sincerely,

W. J. Brennan

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 16, 1976

Re: Nos. 74-175 and 74-5176
Middendorf v. Henry

Dear Bill,

I should appreciate your adding
the following at the foot of your opinion:

"MR. JUSTICE STEWART dis-
sents, believing that the Due Process
Clause of the Fifth Amendment requires
that a defendant be accorded the assist-
ance of counsel in a summary court-
martial proceeding.

Sincerely yours,

P.S.
✓

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 4, 1976

Re: Nos. 74-175 & 74-5176 - Middendorf v. Henry

Dear Bill:

I am now content to join your opinion and
hope to stay with this disposition.

Sincerely,



Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 11, 1975

MEMORANDUM TO THE CONFERENCE

Re: Nos. 74-175 and 74-5176, Middendorf v. Henry

In due course I will circulate a dissent in this case.

T.M.
T.M.

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: FEB 4 1976

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-175 AND 74-5176

J. William Middendorf, II,
et al., Petitioners,
74-175 v.

Daniel Edward Henry
et al.

Daniel Edward Henry
et al., Petitioners,
74-5176 v.

J. William Middendorf, II,
Individually and in his
Capacity as Secretary
of the Navy, et al.

On Writs of certiorari to the
United States Court of
Appeals for the Ninth
Circuit.

[February —, 1976]

MR. JUSTICE MARSHALL, dissenting.

We only recently held that, absent a waiver, "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger v. Hamlin*, 407 U. S. 25, 37 (1972). Today the Court refuses to apply *Argersinger's* holding to defendants in summary court-martial proceedings. Assuming for purposes of its opinion that the Sixth Amendment applies to courts-martial in general, the Court holds that, because of their special characteristics, summary courts-martial in particular are simply not "criminal prosecutions" within the meaning of the Sixth Amendment, and that the right to counsel is therefore inapplicable to them. I dissent.

I

Preliminary, summary courts-martial aside, it is clear

018

✓
Pages 1, 3, 12, 14, 17, 20, 21; Change in footnote numbers;

STYLISTIC CHANGES THROUGHOUT.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Black
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

3rd DRAFT

From: Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: **FEB** _____

Nos. 74-175 AND 74-5176

J. William Middendorf, II,
et al., Petitioners,
74-175 v.

Daniel Edward Henry
et al.

Daniel Edward Henry
et al., Petitioners,
74-5176 v.

J. William Middendorf, II,
Individually and in his
Capacity as Secretary
of the Navy, et al.

On Writs of Certiorari to the
United States Court of
Appeals for the Ninth
Circuit.

[February --, 1976]

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

We only recently held that, absent a waiver, "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger v. Hamlin*, 407 U. S. 25, 37 (1972). Today the Court refuses to apply *Argersinger*'s holding to defendants in summary court-martial proceedings. Assuming for purposes of its opinion that the Sixth Amendment applies to courts-martial in general, the Court holds that, because of their special characteristics, summary courts-martial in particular are simply not "criminal prosecutions" within the meaning of the Sixth Amendment, and that the right to counsel is therefore inapplicable to them. I dissent.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: _____

Recirculated: FEB 23

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-175 AND 74-5176

J. William Middendorf, II,
et al., Petitioners

74-175 v.

Daniel Edward Henry
et al.

Daniel Edward Henry
et al., Petitioners.

74-5176 v.

J. William Middendorf, II,
Individually and in his
Capacity as Secretary
of the Navy et al.

On Writs of Certiorari to the
United States Court of
Appeals for the Ninth
Circuit.

[February -- 1976]

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

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FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Sup. Ct. of the U.S.
Washington, D.C. 20540

U.S. DEPT. OF JUSTICE
BY A. BLACKMUN

January 17, 1976

Re: No. 74-175 - Middeldorf v. Henry
No. 74-5176 - Henry v. Middeldorf

Dear Lewis:

If you will permit me to do so, I would like to be
joined in your concurring opinion.

Sincerely,



Wm. Justice Powell

cc: Justice on

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN


February 17, 1976

Re: No. 74-175 - Middendorf v. Henry
No. 74-5176 - Henry v. Middendorf

Dear Bill:

I am joining Lewis' concurring opinion, and thereby
am joining your opinion.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN


February 17, 1976

Re: No. 74-175 - Middendorf v. Henry
No. 74-5176 - Henry v. Middendorf

Dear Bill:

I am joining Lewis' concurring opinion, and thereby
am joining your opinion.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

[note to Justice Rehnquist only]

Dear Bill:

Should the usual recital that John is not participating be
added on page 21? I wonder, too, whether a "not" has been
omitted in the last sentence in the new footnote 19 on page 15
of the recirculation of February 10. Perhaps I misread it.

H. A. B.

February 6, 1976

No. 74-175 Middendorf v. Henry

Dear Bill:

I have sent to the printer this afternoon a brief opinion concurring in your opinion. I expect to send you a join note when I circulate my concurrence.

As a matter of prudence, I will defer circulation until I see the changes you are making in your opinion.

It would help me if you clarified one point. On pages 13-14 you refer to the option to elect a special or general courts-martial, where counsel is available, rather than to proceed in a summary court. I personally attach little significance to this option in view of the significantly higher penalties that may be imposed. The option does reflect some of the flexibility that inheres in the military system, and accordingly it may have a proper place in the Court's opinion. I would be more comfortable if you made it clear, perhaps in a note, that this option would not have any constitutional significance in a non-military context.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

✓
To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
~~Mr. Justice Marshall~~
Mr. Justice Black
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: FEB 11 1976

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-175 AND 74-5176

J. William Middendorf, II,
et al., Petitioners,
74-175 v.

Daniel Edward Henry
et al.

Daniel Edward Henry
et al., Petitioners,
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J. William Middendorf, II,
Individually and in his
Capacity as Secretary
of the Navy, et al.

On Writs of Certiorari to the
United States Court of
Appeals for the Ninth
Circuit.

[February —, 1976]

MR. JUSTICE POWELL, concurring.

As I agree with the substance and holding of the Court's opinion, I join it. I write separately to emphasize the factor which, in my view, distinguishes this case from *Argersinger v. Hamlin*, 407 U. S. 25 (1972). One sentence expresses the fundamental basis for the distinction:

"This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U. S. 733, 743 (1974).

In *Parker*, the Court went on to say that we also have recognized that "the military has, again by necessity, developed laws and traditions of its own during its long

✓
p. 1

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

From: Mr. Justice Powell

Circulated: _____

Recirculated: FEB 18 1976

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-175 AND 74-5176

J. William Middendorf, II,
et al., Petitioners,
74-175 v.

Daniel Edward Henry
et al.

Daniel Edward Henry
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74-5176 v.

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On Writs of Certiorari to the
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Appeals for the Ninth
Circuit.

[February —, 1976]

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACK-
MUN joins, concurring.

As I agree with the substance and holding of the Court's opinion, I join it. I write separately to emphasize the factor which, in my view, distinguishes this case from *Argersinger v. Hamlin*, 407 U. S. 25 (1972). One sentence expresses the fundamental basis for the distinction:

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P. 2, 5 & 11

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-175 AND 74-5176

J. William Middendorf, II,
et al., Petitioners,
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Daniel Edward Henry
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Daniel Edward Henry
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74-5176 v.
J. William Middendorf, II,
Individually and in his
Capacity as Secretary
of the Navy, et al.

On Writs of certiorari to the
United States Court of
Appeals for the Ninth
Circuit.

[December —, 1975]

MR. JUSTICE REHNQUIST delivered the opinion of the
Court.

In February 1973 plaintiffs¹—then enlisted members
of the United States Marine Corps—brought this class
action in the United States District Court for the Central
District of California challenging the authority of the
military to try them at summary courts-martial without
providing them with counsel. Five plaintiffs² had been
charged with “unauthorized absences”³ in violation of

¹ Both parties have petitioned from the judgment of the court
below. For simplicity we refer to the servicemen as “plaintiffs”
and the federal parties as “defendants.”

² Including two who were not among the original six plaintiffs
but later intervened.

³ One of these plaintiffs was also charged with several other

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P-14 ✓

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12/17/75

2nd DRAFT

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 6, 1976

Re: Nos. 74-175 and 74-5176 - Middendorf v. Henry

Dear Thurgood:

I have had an opportunity to read and briefly consider your well-written dissent in this case -- sufficiently well so that I anticipate responding to at least two of the points you make. I hope to re-circulate in a couple of days, dealing at greater length with the questions of whether a summary-court is a "criminal proceeding" within the meaning of the Sixth Amendment, and with the question of "military necessity".

Sincerely, ,
W. H. Rehnquist

Mr. Justice Marshall

Copies to the Conference

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

From: Mr. [illegible]

Re: [illegible]

Re: [illegible] SEP 1

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-175 AND 74-5176

J. William Middendorf, II,
et al., Petitioners,
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Daniel Edward Henry
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On Writs of Certiorari to the
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The Chief Justice
Mr. Justice Brennan
Mr. Justice Souter
Mr. Justice White
Mr. Justice Black
Mr. Justice Powell
Mr. Justice Stevens
Mr. Justice O'Connor
Mr. Justice Scalia
Mr. Justice Kennedy
Mr. Justice Thomas
Mr. Justice Alito
Mr. Justice Gorsuch
Mr. Justice Kavanaugh
Mr. Justice Barrett

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

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On Writs of Certiorari to the
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✓
P. 11, 13
The United States
Court of Appeals
for the Ninth
Circuit
San Francisco, California
94105
February 1, 1975
Clerk of Court
Room 1100
333

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-175 AND 74-5176

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et al., Petitioners,
74-175 v.

Daniel Edward Henry
et al.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 1, 1976

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Middendorf v. Henry, No. 74-175
and Henry v. Middendorf, No. 74-5176

There is one case being held for Henry. Crosby v. Middendorf, No. 73-6642 presents the identical issues under essentially identical facts, decided in the argued case: Does the Fifth or Sixth Amendment require counsel in a summary court martial proceeding? This case was decided by CA 9 prior to its decision in Henry [sub nom Daigle v. Warner, 490 F.2d 358 (CA 9, 1974)] and was relied on by CA 9 in reaching its decision in Henry.

CA 9 reversed the judgment of the District Court and denied the petitions for writs of habeas corpus as to all appellees but one (Robinson) whose case was remanded to the District Court for a determination of the applicability of the Due Process Clause of the Fifth Amendment to his counsel claim. The government did not petition for review of Robinson's case. While the reasoning of the Court of Appeals was inconsistent with Middendorf, the only parties petitioning got no relief from the court. Accordingly this case should be a deny.

Sincerely,

