Supreme Court of the United States

October Term, 1968

In the Matter of:

DALE E. NOYD,

Petitioner,

vs.

CHARLES R. BOND, JR., etc., et al.,

Respondents.

Docket No. 830

Place Washington, D. C.

Date April 24, 1969

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C O N T E N T S

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Washington, D. C.
Thursday, April 24, 1969.

The above-entitled matter came on for argument at 12:55 p.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

MARVIN M. KARPATKIN, Esq.
660 Madison Avenue
New York, New York 10021
(Counsel for Petitioner)

JAMES van R. SPRINGER, Esq.
Office of the Solicitor General
Department of Justice
Washington, D. C. 20530
(Counsel for Respondents)

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 830, Dale E. Noyd, Petitioner, versus Charles R. Bond, Jr., et al.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Karpatkin.

ORAL ARGUMENT OF MARVIN M. KARPATKIN, ESQ.

ON BEHALF OF PETITIONER

MR. KARPATKIN: Mr. Chief Justice, may it please the Court.

The essential question of this case concerns the right of a convicted serviceman to a meaningful appeal.

And more specifically it concerns the power of the military commander to order the immediate confinement of a serviceman convicted by general Court Martial and sentenced to a bad conduct dismissal from the service or confinement to one year or more and entitled thereby to certain valuable appellate rights to order his immediate confinement notwithstanding the explicit provision of Article 71(c) of the Uniform Code of Military Justice which prohibits execution of such sentences prior to the completion of the military appellate review.

Under the existing practice of confinement pending completion of appellate review the entire sentence may be served prior to final appellate action and the guaranteed right of appeal from serious convictions in the military will be rendered meaningless.

The military and the Government assert this power on the basis of an overstrained conceptual distinction between confinement pending completion of review and confinement after final approval of sentence.

This right is asserted further in violation of military law without regard to whether or not confinement is necessary to insure the prisoner's presence after completion of appellate review.

This is a habeas corpus case and it presents the question of the power to confine a military prisoner prior to the completion of military review in two contexts.

First, the power to confine him at the United States disciplinary barracks at Fort Leavenworth, Kansas, a maximum security institution.

And, second, the power to confine in a unique status of confinement at Cannon Air Force Base, New Mexico, which was especially devised for petitioner after an order attempting to transfer him for confinement to Leavenworth was declared unlawful by the district judge in New Mexico.

There is, however, a threshold question of habeas corpus jurisdiction raised by the Tenth Circuit's reversal of District Court on grounds of alleged failure to exhaust all military remedies.

After the decision of the Tenth Circuit when certiorari application was pending in this court, an application was made

to the Circuit justice for releasing from confinement pending certiorari. It was denied first by the Circuit justice and further application was made to Mr. Justice Douglas and it was granted on December 24, 1968.

In his order granting the application for release from confinement, pending certiorari, Mr. Justice Douglas specified two issues related to exhaustion.

First, whether the doctrine of exhaustion of military remedies applies whether habeas corpus petitioner does not challenge any purported error in the court martial proceedings themselves, but rather whether the question, where the question is whether the court martial convening authority, in this case the Respondent, General Bond, acted beyond his jurisdiction in attempting to order confinement prior to the completion of military appellate review in violation of Article 71(c) UCMJ.

Also specified by Mr. Justice Douglas in his opinion is the question of the respective scope of review by the Court of Military Appeals in the Federal Courts on military habeas corpus applications of this nature.

It is necessary to state the facts a bit, and may it please the Court, in order to indicate the dimensions of the problems involved in this case.

Petitioner, a Captain in the Air Force, was convicted by a general court martial at Cannon Air Force Base, New Mexico, on March 8, 1968, for violation of Article 90 of the UCMJ.

He was accused and convicted of willful disobedience of a lawful order. The order he was convicted of violating was that he fly an instructional mission with a student pilot being trained for combat duty in Vietnam.

The principal defense which was sought to be raised at the general court martial was that he had previously applied for classification as a Conscientious Objector and either separation from the Service or reassignment to duties not inconsistent with his conscience.

That his application was denied because of an error of law on the part of the Secretary of the Air Force and those officers acting in the name of the Air Force. The error which was alleged was the Secretary's denial of the claim because Captain Noyd was a selective Conscientious Objector and not a universal pacifist.

I must observe that even though this issue bisn't before the Court that this is not a wholly frivolous contention as demonstrated by the recent decision of Judge Wyczanski, an assistant case in the District of Massachusetts, which I understand the Solicitor General is taking a direct appeal on to this Court.

However, Petitioner was unable to raise that defense at his general court martial. The law officer held that the general court martial was without jurisdiction and the Board of Review which heard the first appeal from the conviction

specifically held that only Federal Courts had jurisdiction. The case is now pending in the Court of Military Appeals and will be argued some time next month.

The criminal proceedings at the general court martial and the futile attempt to appeal therefrom were Captain Noyd's second unsuccessful attempt to obtain judicial review on whether the Secretary's denial of his conscientious objector application was lawful or unlawful.

The prior attempt was in the case of Noyd against McNamara where the District Court of Colorado in the Tenth Circuit held without reaching the merits that they were jurisdictionally barred from ruling because again the doctrine of exhaustion of military remedies barred them they so held, and they stated further and the Government so argued before those courts, that whether the application for conscientious objection was rightfully or wrongfully denied could not be judicially reviewed in the civil courts but only as a defense to a court martial.

And involving as it does the necessity of disobeying an order and raising the issue of wrongful denial. Certiorari was denied by this Court in Noyd against McNamara in December of 1967.

Thus, the civilian courts directed petitioner to raise his defense in the military courts and the military courts said in turn that only the civilian courts had

jurisdiction. The sentence of the general court martial imposed March 9, 1968, was for dismissal from the service, total forfeiture of all paying allowances and one year's confinement at hard labor.

On that day, the day the sentence was imposed, petitioner was ordered to immediate confinement at quarters which he had at Ca-non Air Force Base. As a Senior Captain, on the list for promotion to Major, from which list he was removed after he filed the C.O. application, he was entitled to reasonably comfortable officers residence on base with wife and two infant children.

On May 10, 1968, the convening authority of the general court martial, the respondent General Bond, approved the court martial findings and sentence and ordered petitioner confined at the Disciplinary Barracks at Fort Leavenworth, Kansas, pending the completion of appellate review.

The appendix contains in full general court martial Order No. 13 which sets forth the convening authority's action. He attempts to implement the convening authorities' Leavenworth confinement order lead to the instant proceeding.

Q Who or what was the convening authority? Was that the Commanding General?

A It depends on the echelon of the level of command, your Honor. It wasn't his immediate commander, but it was the first commander who had general court martial

convening authority, the Commander of Twelfth Air Force, General Bond.

A habeas corpus petition was filed immediately in the District Court of New Mexico. Judge Payne acted promptly, issued a stay immediately, there was no return by the Government to the habeas corpus petition, no request for additional time in which to file a return.

It was argued and presented purely as a question of law. It was a hearing within a matter of days, briefs and oral argument, decision from the bench on May 23rd, written opinion on May 24th, which is set forth in the appendix to the effect that Article 71(c) was violated by the attempted confinement of petitioner at the Disciplinary Barracks at Fort Leavenworth.

However, Judge Payne declined to order complete release from petitioner's then status of arrest in his residence. Both sides appealed to the Tenth Circuit.

Early in June of 1968, while the appeal was pending, petitioner and his family were evicted from their residence and special conditions of confinement were set up for petitioner. He was ordered to move to a room specially prepared for him in the Visiting Officers Quarters and conditions were established which I can best characterize as being a hybrid, having certain characteristics of arrest, certain characteristics of imprisonment and certain characteristics of solitary confinement.

It was arrest in that or at least it resembled arrest in that there was no lock on the door and he was allowed use of the telephone and TV set at his own expense. It was imprisonment in that all of his activities were strictly regulated, he was subject to surveillance by Air Force Security Police, permitted to leave his room for meals, chapel, laundry, but only under conditions similar to those whereby a penitentiary prisoner could leave his cell to obtain these services elsewhere in the penitentiary complex.

However, it also had certain attributes of solitary confinement in that posted on his door was a huge sign, "Room Off Limits to Military Personnel." He was not permitted to have exercise except for 1-1/2 hours per week with an approved officer and denied the opportunity of contact with other human beings, fellow prisoners or otherwise, which even inmates in the Disciplinary Barracks have unless they are in solitary confinement.

This unique hybrid status continued from June of 1968 to December 24, 1968, when he was ordered released from confinement by order of Mr. Justice Douglas.

In the interim, the Board of Review affirmed the court martial conviction and the Tenth Circuit reversed the District Court of New Mexico in this habeas corpus proceeding. The Tenth Circuit did not consider the merits, we respectfully suggest by the citation of cases in footnote 4 of its opinion

which is printed in the appendix. It appears to agree with petitioner's position that 71(c) was violated. The Tenth Circuit held, however, that it was jurisdictionally barred from ruling once again because of the doctrine of exhaustion of military remedies.

Since petitioner is in confinement he is entitled under Air Force Regulations to credit for good time. He was. A one-year sentence less good time was computed to expire on the 26th of December, 1968.

Q Wouldn't that be true whether or not he had been in confinement under the provisions of 57(b)?

The confinement begins to run, the sentence to confinement begins to run as soon as it is imposed.

A Mr. Justice, the sentence does indeed begin to run.

Q Whether or not he is confined.

A Yes. Apparently it took a special ruling from the Judge Advocate General in this case to decide that Captain Noyd was entitled to good time credit. And I believe the Government so states in its brief.

We contend ---

Q So the answer is yes?

A Yes, yes, of course.

Q Whether or not he was confined the sentence begins to run and he is entitled to good time ---

A I don't know what position the Government will take on that. We take the position, of course, that he is entitled to good time.

Q I understand the Government in the brief not only take that position but concede that position and urge that position.

A Yes, sir.

Q Whether or not he is confined, so the fact he was confined has nothing to do with the computation of his good time.

A All that I can say to that, your Honor, is that there appears to be nothing specific in Air Force Regulations on that point and it required a specific ruling from the Judge Advocate General.

Consequently, because of the possibility that the sentence would expire with good time allowance prior to this Court's action on the certiorari petition, it was accompanied by a release application to avoid the possibility of mootness.

I stated before Mr. Justice Douglas on December 24, 1968 granted the application.

In response to the certiorari petition, however, the Government submitted a memorandum suggesting mootness and then a further supplemental memorandum further arguing mootness and said nothing whatsoever in opposition to the merits of the case.

However, on January 20, 1969, certiorari was granted and Mr. Justice Douglas' stay order was specifically continued by this court.

Now, it is hard to tell if the Government is continuing to seriously press its mootness. It first seemed to argue in the two memorandums which were submitted and Mr. Justice Douglas was without power to interrupt the termination of the sentence.

Now apparently it concedes that Mr. Justice Douglas had the power, but it argues that it is unclear whether Mr. Justice Douglas intended to interrupt the sentence.

With all due respect I suggest that argument is fatuous. Petitioner's concern about mootness was made very, very clear in the release applications presented first to Mr. Justice White and later to Mr. Justice Douglas and obviously the members of the Court were aware of it.

Now in the brief presented in this court the Government's position is somewhat schizophrenic at one place saying that it is moot and the other place saying maybe it isn't moot, and then finally concluding saying it is all up to what Mr. Justice Douglas intended and then there is a reference to the decision of this court in Iowa against Philadelphia Marine Trade which reversed a contempt order because in accordance with the decision of this court it was unintelligible, too vague to be understood and defies comprehension.

I respectfully suggest that this characterization of Mr. Justice Douglas' order by the Government is completely uncalled for.

If I may reach the preliminary question in this case, the question of exhaustion of military remedies, the Court of Appeals denied relief we hold improperly on grounds of the alleged failure to exhaust military remedies.

The decision of the Tenth Circuit was based on one decision of this Court, Gusik against Schilder in 1950. I have not been able to find a single instance where the doctrine of Gusik in so many words has been reaffirmed by this court since then and it has apparently, however, been held inapplicable in military habeas corpus cases which do not attack court martial proceedings per se but rather question military jurisdiction.

Q I am sorry, but I don't quite get your answer to the Solicitor General's principal argument on mootness as I understand it which is if the sentence has expired, terminated and the show is over, isn't that right?

A That is what the Solicitor General argued.

Q What is your reply to that?

A That first the sentence, the reply is two-fold. First that any Justice of this Court, just as the entire court has the right to interrupt the sentence for the purpose of preventing the cause from becoming moot.

And I believe the Government concedes that that power is ---

Q And you say that Mr. Justice Douglas' order did that?

A Yes, your Honor.

Q How?

A By ordering that the petitioner be released from confinement.

Q But under the rule of criminal justice as I understand it the computation of the amount of time that a man has served does not depend on whether he is or is not in confinement. That is the rule Mr. Justice Stewart was talking about.

A Yes, your Honor.

Q 57(b).

A 57(b), your Honor, Article 57(b) does, however, provide that time shall not be credited where the sentence is suspended. Now the manual for courts martial which has the effect ---

Q What suspended the sentence? That is not the same thing as releasing a man from confinement is it?

Q It says the sentence to confinement is suspended.

A Paragraph 97(c) of the Manual for Courts Martial which appears in our brief sets forth a series of circumstances

where a sentence is considered suspended. And, it is evident from the text of the language itself that these were not intended to be an exclusive cataloging. 97(c), Mr. Justice, is on pages 6 and 7 of Petitioner's brief.

Now one of the specifications in this concededly non-exhaustive listing is periods during which the person undergoing such a sentence is erroneously released from confinement upon his petition for writ of habeas corpus under a court order which is later reversed by a competent tribunal, shall be excluded in computing the services of the time of the punishment.

If I may proceed with the argument on exhaustion, there is great significance here in the decision of the Court of Appeals of the District of Columbia affirmed by this Court in the case of United States ex rel. Guagliardo against McElroy.

It was specifically held there that the rule of exhaustion does not apply where military jurisdiction is challenged. Petitioner in this case is not making a habeas corpus attack on the many errors which he believes occurred in the court martial.

He is content to exhaust all of his military remedies for that purpose. Habeas corpus here is sought so that if the errors are redressed on appeal he will not have been deprived of that redress by intervening confinement.

When the convening authority, the Respondent General Bond attempted to confine Captain Noyd in violation of Article 71(c), we contend that he acted beyond his jurisdiction. He certainly had jurisdiction to convene a court martial to try Captain Noyd. He had jurisdiction to confine him if a determination was made that restraint was necessary to insure his presence.

He had jurisdiction to confine him after completion of appellate review but he was totally devoid of jurisdiction to confine prior to the completion of appellate review.

If I may respectfully suggest, the entire doctrine of exhaustion of remedies is subject to continuing re-examination these days, because of its sometimes wooden application, causes, renders the right remediless.

As this Court observed in the case of NLRB against Marine Workers, as a result of the original application of the doctrine sometimes the litigant becomes exhausted instead of the remedies.

Our brief cites a large number of cases where courts have not required exhaustion where one the imposer of sanctions acted beyond his jurisdiction, two, the administrative remedy or the remedy which it is said one should exhaust is inadequate, or whether the delay of the exhaustion process would cause irreparable injury, or whether the attempted exhaustion would be a futility.

Indeed, if I may respectfully suggest further that perhaps the entire doctrine of exhaustion of remedies arose in an administrative law context in an era of 20, 30, 40 years ago when there was an atmosphere of administrative omnipotence, a feeling I believe communicated to me in part when I went to law school and all of the nation's problems could be solved by administrative agencies and the administrative process and let us keep the courts out.

But now on a sober second look, the Courts are increasingly recognizing in this court that the judicially developed doctrine of exhaustion of administrative remedies very often causes injustice and must be disregarded where it would cause injustice.

With specific reference to the suggested remedies in the opinion of the court below, it was first suggested that perhaps the normal appellate process should be used. But the normal appellate process in this case would obviously have been ineffective because of a lapse of many months between conviction and appellate decisions.

We cite in our brief a number of cases where that was in fact the case. I cited that just on review generally of one volume of the court martial reports, many cases were found where the Court of Military Appeals reverses a conviction only to find that the entire time of confinement has already been served.

Well, it was suggested that an extraordinary writ application should be made to the Court of Military Appeals. We suggest that this is inappropriate for a number of reasons. First of all the Court of Military Appeals which only recognized that it had such jurisdiction within the last year or so would have an extraordinary strain placed on its facilities.

It is a three judge appellate tribunal sitting in Washington. It can handle only a handful of the cases that are presented to it for review.

If it was the court of original and exclusive jurisdiction of military habeas corpus applications for more than 100 Federal Districts in the Territory of the United States and in the States of Alaska and Hawaii and the territories and possessions as well, it would be just impossible for the Court of Military Appeals to handle such a load.

Furthermore, the nature of habeas corpus as this Court instructed in Johnson against Eisentrager requires the personal presence of the individual at the habeas hearing. It would obviously be impracticable to place upon the military this requirement of producing a military prisoner in Washington whenever an application or a petition for a writ is filed.

Also there would be grave difficulties in the face of military prisoners attempting to secure counsel to represent them if the only place they can appear is a court in

Washington, D. C. It is hard enough for a serviceman to get an attorney willing to bring a petition for writ of habeas corpus in the Federal District Court. It would be well nigh impossible to find one ready, willing, able and financially equipped to come to Washington.

Then with respect some mention may be made of the hesitant qualify of the practice of the Court of Military Appeals on extraordinary writ applications.

Although it has asserted that it has the right, it is most significant that it has not yet found the occasion to exercise it. Obviously, the evolution of a new jurisdictional base takes time and it is only to be welcomed that the Court of Military Appeals has asserted that it has its right.

But it would certainly be ineffective and impracticable to say that athis time in history the Court of Military Appeals stands readyto listen to and grant relief in habeas corpus applications for military prisoners all over the country.

I might further say the Tenth Circuit's narrow jurisdictional position requiring the exhaustion of every conceivable military remedy has caused an apparent conflict between the Circuits.

The decisions in the Tenth Circuit in Noyd against McNamara and Noyd against Bond, which refused to consider the merits because of the doctrine of exhaustion of military

remedies, are directly contrary to decisions of the Second Circuit and the Fifth Circuit and the Third Circuit which we cite in our brief.

Furthermore, there are a large number of cases which the Government does not in any way seek to explain where Federal Courts on habeas applications didn't require application to the Court of Military Appeals but ruled on the merits.

The Government's position likewise casts doubt on the recognized practice of utilizing habeas corpus without any requirement of exhaustion in the Court of Military Appeals to test the validity of the induction letter and also the validity of the in-service denial of conscientious objector claims for draftees as well as enlistees.

Finally, if I may turn to the merits of this case, which I respectfully suggest present as clear a case as we say in the brief.

Has there been a violation of Article 71(c) in this case? It might first be observed that we are not attacking the military process. We are not attacking the military appellate process by any means. Indeed, we regard ourselves as the champions of it.

Our position supports the integrity of the military appellate process. For if a commanding officer can effect a de facto execution of a one-year prison sentence prior to the completion of the military appellate process in direct

violation of an Act of Congress, the integrity of the appellate process is seriously compromised if not destroyed.

Our brief traces the development of the military appellate process from the Articles of War, the UCMJ in 1951, and suggest that one of the essential developments in the development of greater rights for the serviceman is the development of further and more refined appellate jurisdiction, that part of the history of increasing due process has been the providing of a gap of a space between the Court of first instance, between the original action and final review by higher appellate authority.

The consistent interpretation of Article 71(c) which we have catalogued in a long list of cases in our brief does not show a single instance where the Government's argument that it can confine prior to the completion of military appellate review in the absence of necessity to secure presence and the Government cites no cases.

At the very least, Judge Payne in the District of New Mexico was right when he held that confinement at Leavenworth would in effect constitute in part at least execution of the sentence.

The only case contrary, the decision of the District of Kansas in Levy against Dillon gives a contrary interpretation for 71(c); it is now on appeal to the Tenth Circuit; and we respectfully suggest that Judge Payne was right and the

District Court of Kansas was wrong.

The distinction is attempted to be made by the Government between the treatment of adjudged prisoners whose sentences have not been finally approved and sentence prisoners whose sentences have been finally approved.

But we respectfully suggest that the Air Force Manual for the guidance of prisoners, the manual applicable to the institution of the Disciplinary Barracks shows no significant difference whatsoever, no difference in treatment of mail, all of which is subject to opening and inspection, I respectfully suggest there is an error in the footnote in the Government's brief, no differences in uniform regulations, no differences with regard to visiting, no difference with regard to library privileges and so forth.

It is suggested that there is one difference in that an adjudged prisoner is not compelled to work, but the manual requires that they be encouraged to do, and in fact most of them do so.

However, even if there is a difference in this one area, the essential characteristics of confinement in a maximum security military prison are applied equally to adjudge and sentence prisoners.

There are bars on the windows, there is control of hours of meals, sleep and all other activities, constant surveillance by armed guards, restriction of reading matter,

restriction of visitors, and a whole host of other specifications in the Leavenworth Manual which we cite in our brief.

I will save what time I have remaining for rebuttal.

MR. CHIEF JUSTICE WARREN: Mr. Springer.

ORAL ARGUMENT OF JAMES van R. SPRINGER, ESQ.

ON BEHALF OF RESPONDENTS

MR. SPRINGER: Mr. Chief Justice and may it please the Court.

Captain Noyd's Air Force career has, in fact, given rise to a number of difficult questions about the Government in regulation of the Armed Forces.

Mr. Karpatkin enumerated some of the history of the litigation in which he has been involved. His principal claim concerning the alleged impropriety and the denial of conscientious objector status to him is now before the Court of Military Appeals. It may well return to the civil courts and it may well return here.

But those questions are not involved in the case that is here now. In contrast, this case involves a bottom of what is a rather narrow and highly technical question of military penology, the nature of the restraints that the Uniform Code of Military Justice permits the military to put upon a serviceman after a court martial conviction and while he is in the process of exhausting his military rights to appeal.

Fortuitously, this case comes here with Captain Noyd as the defendant, but it might as well have been a more conventional serviceman charged with a routine military offense.

And, of course, it is important to recognize that the legal principles for which the petitioner is arguing here are principles that would apply across the board in military cases to any military defendant, whether he were charged with desertion or murder or any other crime that could appropriately be tried by a court martial.

Q Are there any differences made by the Uniform Code of Military Justice in this area between officers and enlisted men?

A I believe not in the Code. In the regulations there are certain more or less technical distinctions in the treatment that may be given to an officer as distinguished from an enlisted man at any particular point.

This, of course, arises out of the time-honored distinctions that have existed in the services in those regards.

In our brief ---

Q These provisions we are dealing with here primarily are applicable throughout the Air Force?

A Generally applicable throughout the Air Force and, of course, throughout all the services because it is a

uniform code.

In our brief and in our submissions in response to the petition for certiorari we have raised the suggestion that this case may have become moot because of certain technical rules in the Code relating to the service of confinement, to the service of military sentences to confinement.

I would suggest unless the court desires otherwise that we simply refer the court to what we have said in our brief, I think there is little more that can be said.

In any event there seems to be agreement on the fact that at most Captain Noyd has two days remaining to serve on his sentence to confinement.

Q Before you leave that question, Counsel, does it not turn on the last part of Article 57(b), that the period during which the sentence to confinement is suspended shall be excluded in computing the service?

A I think certainly if this sentence were in fact suspended, Mr. Justice, by your order.

Q Yes, the sentence to confinement.

A Yes, if that had been the effect, I think it would certainly follow that the case is not moot and there are two days remaining.

I might just point out in that regard a recent amendment to Article 57(b) that is not applicable here but will become applicable on August 1 of this year and perhaps

does cast some light on what the meaning of suspension is.

That amendment for the first time introduces something approximating bail in the military and it says that a commanding officer may defer serving of a sentence to confinement. The sentence in the existing Article 57(b) to which you have referred, Mr. Justice, is now amended to read effective August 1, 1969, "That periods during which the sentence to confinement is suspended or deferred shall be excluded in computing the services of the client."

So I would suggest for what it is worth that that is some, perhaps after the fact, an indication by Congress as to what suspension may have meant.

Q What do you deduce from that with respect to this case?

A That the release from confinement is not tantamount to a suspension within the meaning of Article 57(b) as it reads effective August 1, 1969, or effective in Noyd's case.

Q Mr. Springer, what is the reason for serving a sentence while the case is on appeal?

A Is the question why should a man be in confinement?

Q Why should he be serving his sentence which is on appeal?

A Perhaps I will have to break that down.

If there are, as there are in the civilian courts,

of course, provisions allowing a man to be in prison or in confinement ---

Q Well, I don't know of any provision in the civilian court that requires that he stay in prison.

A No, and, of course, we are not suggesting that the Army is requiring that he be in prison.

Q As they did in this case.

A Yes, is that in the case of a civilian trial there is discretion ---

Q Why, why in this case?

A Well, there are a number of elements that could go into the Commanding Officer's exercise of his discretion.

One, that has been suggested and is conceded by Mr. Karpatkin is the desire to avoid flight. There are -- well the Bail Reform Act of 1966 states as to civilian criminals that in addition to that reason the danger to the community may be a factor.

Q Is there much danger of fleeing a military installation? Why couldn't he be confined to the camp?

A That certainly would be a factor to go into the military Commanding Officer's discretion. My only point here is that there is a discretion.

Q My final question is, this case that is now in the Court of Military Appeals, if the petitioner wins, he just lost a year on general principle. Am I right?

A Well, of course, he has at the most two days, Mr. Justice, left to serve on his sentence. In any event he has been under an obligation to the Service to stay in.

Q No, I say if they find that he was not convicted legally under the Military Code ---

A It is certainly true in a sense it is then retroactively no reason for him to have been confined while his appeal was pending. Of course, it is a disability to which civilian criminals are also subject.

Q I thought your construction of the Military Code was that the sentence ran whether he was confined or not, is that right?

A Yes, yes, that is correct.

Q Unless there is some formal suspension of the sentence?

A Yes.

My suggestion was that he has, of course, been under some restraint.

Q Oh, I know, but Mr. Justice Marshall asked you what is the reason for the provision of saying the sentence runs whether you are confined or not? Now let us assume a case where he is not confined at all, on appeal. The sentence still runs. Why?

A There are a number of reasons perhaps. There are peculiar rules about the computation of sentences within

the service. There are no concurrent sentences.

Q Well, this is one peculiar rule I would think that you are saying and the law seems to say that it just runs, from the time it is imposed, period, whether he is confined or not.

A Yes.

Q Well, why is that?

A This may be an element of equity that there are no concurrent sentences -- it may be also that it is in fact I think probably less easy to be released, for a serviceman to be relieved of confinement while his appeal is pending under the rules in the Manual of Courts Martial that apply here.

For that reason it may be appropriate to say, certainly it is credit in fact. I must say this is Congressional judgment.

Q What you really are suggesting then is that the sentence runs when he is confined and it doesn't run when he isn't?

A No, it runs one way or another. Of course, there are these technical problems as to what is confinement and what is not. We say that in fact the status in which Captain Noyd was, though it was undoubtedly unpleasant ---

Q Well, what difference does it make for purposes of your mootness argument it doesn't make any difference at all.

A Whether he was in fact confined, that is true. I think there is no question whatever that whatever the reason may be, Article 57(b) does make a sentence run.

Q No matter ---

A No matter what the treatment was or ---

Q Well, you see 57(b) as we pointed out earlier refers to the suspension of a sentence to confinement and that suspension of a sentence to confinement told the length of the term.

A Yes, but we say certainly in the ordinary case the fact that a man is not in restraint does not, does clearly not amount to a suspension.

Q But the sentence to confinement to which he was sentenced here, he was sentenced to confinement for a year, wasn't he?

A Yes, he was.

Q Now, that sentence to confinement couldn't be executed so-called, could it?

A It could not be executed until after the military ---

Q And that means he couldn't be confined?

A He couldn't be confined at hard labor.

Q Yes, he couldn't be confined at hard labor until there had been an affirmance.

A Yes.

Q But, nevertheless until there is affirmance, it is assumed that he is serving it?

A Serving it only in the technical sense that he receives credit for it, not serving it in the sense of what he is compelled to do. We do not derive any ---

Q Well, my order, however, it may be viewed at this time seems on the face to address itself to the problem of confinement.

A Yes, and, of course, that is the basis of our mootness argument, that confinement and service are in this peculiar code we are dealing with different things.

We have also urged that the Court of Appeals was right in treating the merits of Captain Noyd's claim as improperly before the civil courts because of his failure to exhaust the remedy in the military courts that was clearly available to him at the time that he came to the civil courts.

This is an important point and it is one I would like to return to but I think perhaps it would be helpful if I discussed the merits even though we have two reasons for saying why the merits should not be reached.

I think it perhaps will put the case in better focus.

Mr. Karpatkin's argument, at least orally, rests largely upon his interpretation of Article 71(c) of the Code, which is the provision that prohibits the execution of a sentence until it has been completely reviewed by the military

courts and in the case of an officer such as Captain Noyd by the Service Secretary.

He says that for this reason the order directing that Captain Noyd be sentenced to the special officer facilities at Fort Leavenworth was an improper order.

I think the first thing that should be said about that is that whatever else may be moot in this case, certainly the order purporting to send Captain Noyd to Leavenworth is now moot.

The regulations that govern such matters make it clear that no man can be sent to a disciplinary barracks unless he has six months remaining to serve on his sentence. Now even if this case is not moot it appears to be agreed that there are only two days left.

So for that reason, I think that the Leavenworth Order, which has been suspended ever since -- shortly after it was issued by the order of the DistrictCourt and the stay by the Tenth Circuit of Mandate, I would suggest that that order is not as a practical matter in issue in this case.

Q It wasn't restored after the District Court order was was vacated?

A No, Mr. Justice, the District Court said, "Don't send him to Leavenworth but do whatever else you want." The Tenth Circuit reversed that and said that the case should not have been entertained but has stayed its mandate pending

this court's action so that order has remained in effect.

Q Didn't the convening authority withdraw that order then and amend it or something?

A I believe not as a technical matter, Mr. Justice. There have been subsequent orders about the confinement that has in fact taken place.

Q But that was never actually withdrawn by the original poligator (?) of it?

A It is simply by operation of the court's order.

In any event we would suggest as we point out in our brief the District Court's disposition of the Leavenworth order reflected either a misunderstanding again of what is a highly technical provision in the military law as to what execution is, or else perhaps, and this matter is not discussed in much detail in the District Court opinion, a misunderstanding of the nature of the confinement to which Captain Noyd would have been subjected had he been at Leavenworth.

There are, in fact, separate facilities with very separate treatment for officers awaiting appeal. They are very separate and very different from the facilities and treatment that are given to regular prisoners at Leavenworth.

It has been the standard practice to send so-called adjudged officers awaiting appeal to Leavenworth rather than retaining them at their bases because of the special problems that the status of an officer creates with respect to

restraints on his base.

This has been up held in the case of Captain Levy and we submit that it is an abuse of discretion or an execution of the sentence in this case but as I said, I don't think we have to reach the Leavenworth order.

So that reduces the case on the merits, if the merits should have been reached, to the petitioner's claim that the restraint to which he was subjected at Cannon Air Force Base where he has been stationed at the pertinent times exceeded what the Uniform Code of Military Justice permits.

I believe it is accurate to say that the petitioner concedes that some restraint of a convicted person and a convicted officer while there is appeal pending is permissible.

So the real question here is whether the restraint that it was imposed upon Captain Noyd by his arrest in quarters was a proper restraint.

The answer at least to the legal principles that govern the question of the restraint that is allowed require the locating and interpreting of a number of different provisions of the Uniform Code of Military Justice and the Manual, Courts Martial which is, of course, an executive order technically of the President and, of course, has the force of law.

It is the manual -- it is promulgated by the President under a provision of the Uniform Code, Article 36, which is somewhat like the rules enabling act that has permitted this

court to promulgate the rules of civil and criminal procedure. It is a direction to the President to provide for the procedure in cases before courts martial.

Now there is nothing in the Code itself, the statutory Code, we submit that speaks expressly to the question of restraint of a convicted prisoner or convicted individual while his appeal is pending.

But there are certain provision in the Manual which do speak directly to ithis. First is Article, is Paragraph 21(d) of the Manual which provides that "Upon notification of the result of the Court Martial trial the Commanding Officer of the defendant in that trial will take prompt and appropriate action with respect to the restraint of the person tried. Such action," and continuing to quote, "depending upon the circumstances may involve the immediate release of the person from any restraint or the imposition of any necessary restraint pending final action on the case."

In its most recent statement on this question of custody pending the appeal, the Levy case some two years ago, the Court of Military Appeals held that although there is no such thing as bail in the sense that we understand it, in the military system, this section of the manual does give the commanding officer of the defendant a discretion to determine what custody, if any custody, is appropriate following a conviction.

And the Court of Military Appeals in that Levy case, although it denied Captain Levy release, made it very clear that it would review the exercise of that discretion by the commanding officer involved in each case it was brought to it on habeas corpus and would reverse the commander's action if the discretion was abused.

The first step of review of a court martial conviction is, as has been indicated, approval by the convening authority, in this case the Commander of the Twelfth Air Force, General Bond. And there are provisions -- there is a provision relating to restraint following this stage and that provision is paragraph 89(c) of the Manual for Courts Martial.

That directs the convening authority to "Provide in his action for the temporary custody of the accused pending final disposition of the case upon further appellate review." And that further review is reviewed by the Board of Review which has taken place in this case and by the Court of Military Appeals, the civilian court, a court with civilian members which action is still pending in Captain Noyd's case.

One other provision of the manual relates to custody pending appeal and that is paragraph 18(b)(3) of the Manual which provides that no punishment other than restraint imposed in accordance with regulations may be imposed upon an accused while his appeal is pending.

We think it is clear, as the Court of Military

Appeals has held that these provisions of the Manual issued by the President pursuant to statutory authority, provide a basis for appropriate restraint pending a military appeal.

Now, petitioner contends that a provision of the Code does in fact relate to this Article 13 which says that the arrest or confinement of a person "being held for trial or the result of trial" may not be any more rigorous than the circumstances required to insure his presence.

He interprets result of trial to include appellate review. This, we think, is wrong, if nothing else in light of the caption of that article of the Uniform Code of Military Justice which says punishment prohibited before trial and in fact there are other places in the manual where it is made clear that the result of the trial means what in common sense terms you would think it would mean, the result of the trial proceeding itself, and not the further steps of appeal.

Q Isn't it fairly chronological, repetitious, that being held for trial or trial that ---

A Well, I suppose result of trial could mean while the jury is out, when the trial proceeding itself is over and you are waiting for the decision that will result from that trial proceeding. The court martial is still in progress but in some sense the trial may be over.

Q I see.

A In any event, we suggest that the rule for which

petitioner contends in this interpretation is a startling one. It does mean in the military despite the well recognized disciplinary needs of the military a convicted serviceman could not be subjected to restraint pending appeal that are allowed in the case of a civilian prisoner convicted by a civilian court while his civilian appeals are pending.

You would have to have a very clear statement by Congress that this was truly intended before we should accept such an unusual proposition.

Q Is that the crucial question between you and ---

A Well, I would go on to say that, no, I don't think it is. But that is a question. A question is -- the question at this point is, what are the legal standards that should be applied.

Q What would you consider is the crucial, single question?

A Apart from mootness and apart from exhaustion, I think the question is whether -- and assuming we have to reach the merits, the question is whether there has been or petitioner's claim is really that there has been an abuse of discretion in determining what kind of restraint is appropriate.

Q You mean whether he should be a -- what had happened to him while he is waiting appeal?

A Yes.

Q And your position, the Government's position is

that he is not entitled to bail or be released as a matter of right?

A No, but he is entitled to a reasonable exercise of the discretion of the commanding officer.

Q And what is their position? Different than that.

A On this point, Mr. Justice, I confess I don't see a difference, except they say the standard is different. The standard is the Article 13 standard which is whether there is an ---

Q Well, does it boil down to a difference then between you as to whether the exercise of discretion was right?

A I would certainly say that is what the case when you boiled it down the last time that is what it boils down to. And on that, of course, we would say that it is not appropriate for a civilian court, at least under the facts of this case, a case of this kind to review that discretion of the military officers.

Q Your position is that the Government has the right if it chooses to do so in its discretion to keep a man a prisoner while his appeal is awaiting action by the high authorities?

A Yes, but I should add one further thing and this gets me into exhaustion. That discretion is reviewable by the Court of Military Appeals which is, of course, civilian members that was established for the express purpose of giving

a kind of civilian review, the rights of servicemen. That court has a supervisory power over the operation of military justice and it is a power that has articulated itself and recognized and I think that that supervisory power gives it perhaps a good deal more discretion than I would say a civilian court has -- a good deal more latitude than a civilian court has in reviewing the discretion of the military officers.

I think this court recognizes that its supervisory power over the Federal criminal justice gives it a good deal more power than for example, its more strictly legal authority over state criminal justice.

Q Approximately how long does it take to process the case in the Military Court of Appeals?

A Well, in this case, for the remedy that we are suggesting here, habeas corpus, it takes no longer than a habeas corpus in a civilian court.

Q How long does the regular one take?

Over a year isn't it?

A I would say yes, sir.

Q So that anybody with a one-year sentence, he might just as well forget about it?

A Well, except, Mr. Justice, and this is the military remedy to which we really point, there is this remedy of habeas corpus in the Court of Military Appeals which can be had as promptly as civilian habeas corpus.

Q Is the military lawyer for the military prisoner required to go for habeas corpus?

A This is an uncharted area. I would suggest, Mr. Justice, that -- and perhaps more so than in the case of the civilian courts, the Court of Military Appeals certainly has the power upon ---

Q Well, I would suggest that the military lawyer for themilitary prisoner would really be an outstanding one if he did go for habeas corpus.

A Well, I think perhaps as in any case the applications of a lawyer depend upon ---

Q Well, approximately how many writs of habeas corpus are filed a year?

A In the Court of Military Appeals?

Q Yes, sir.

A I think there have been relatively few thus far.

Q I could be right.

A But I suggest that there is no reason why Captain Noyd could not have filed such a petition or why if the case is not moot he could not file such a petition now. I think he can get more relief from the Court of Military appeals because of the supervisory power and I would also suggest in accordance with familiar principles of exhaustion or remedies in other areas and in light of what is obviously a highly technical question here there is good reason why

the expert court that is charged with working out these matters in military justice should pass upon them before a civilian court is asked to come in with relatively little guidance other than normally the guidance that civilian counsel can give him.

Q How long has he been confined now?

A It was of the order of nine months that he was in this restrained state of arrest in quarters. Of course, if assuming that he had gone to the Court of Military Appeals when he went to the civilian court he could have been out, as he could have been in the case of a civilian habeas corpus within the matter of a week or two.

Q What is the Government's position with respect to the power of a District Judge or a Federal District Judge to direct that the prisoner held on the court martial be released pending further proceedings?

A Well, I think that would depend upon the nature of the question that he raises. Mr. Karpatkin has referred to the Reid and Covert line of cases where the claim is that the military has no jurisdiction to try this matter.

I think it is the same as the O'Callahan case that is now pending.

Q I understand that. But suppose it is not that.

A If it is not a question of jurisdictional power ---

Q Suppose it is a question of an alleged misapplication of statutory remedy, statutory right, denial of a statutory right. This is more or less what is the allegation here.

A In a military trial or here as not in a trial but in one of the incidental areas related to trial we would suggest that the position is the same as to exhaustion. The military remedy should be exhausted.

Q You mean that the District Judge, suppose he comes in the District Court and says, "My court martial proceeding has been concluded, I have been found guilty, I have gone to the Court of Military Justice and asked to be released pending their review, they have denied it, I come here and ask to be released pending completion of the administrative process.

A Certainly, Mr. Justice, the civilian court would have jurisdiction to entertain that claim as to whether or not it should give relief we would suggest that the old standard in Burns and Wilson is still the standard under the law in this court that should apply the question of whether or not the military courts gave fair consideration to the serviceman's claim.

Q But you would say that the power does exist?

A Certainly the power -- once there has -- the power exists I think in any event. I think the case should not

be entertained as a matter of some kind of judicial discretion if there has not been exhaustion. When there has been exhaustion, clearly there is power.

Q You and I understand that we are talking about a case like this one where the allegation is that there has been a denial of a statutory right, not a question of jurisdiction, and in that case you nevertheless take the position that there is power, power in the District Court.

A Yes.

Q Even though I understand what you say about the propriety of its exercise.

A I find it difficult to concede but in this case with the nature of claims to be handled that there would be room left for civilian court to do anything after -- assuming ---

Q But if you assume, if you start off with an order shipping him to Leavenworth and then you read Article 13, which says that the confinement during or after the trial, presumably pending exhaustion shall be no more rigorous than circumstances required to insure his presence, you get into deep water, don't you?

Because sending him to Leavenworth is certainly more rigorous than what is needed to require his presence.

A In the first place, Mr. Justice, we do say that Article 13 does not apply to the post conviction period pending appeal.

Q It says while being held for trail or the result of trial.

A Yes, but it for one thing looking at the heading of that section where it says no punishment before trial we suggest that provision of theCode does not govern the period when appellate review was pending.

In any event, the question is of course a question of whether ornot discretion was abused.

Q I didn't think whether the discretion was abused, whether the standard to insure his presence was abused if 13 applies.

A Yes, but it is a matter of discretion with the appropriate commander to determine, a matter of reviewable discretion to determine what is necessary to keep this prisoner from fleeing.

Now, for example, in the case of Captain Levy, I believe the District Court in Kansas held, has reviewed it and determined that that was a permissible exercise of discretion. This, of course, was in light of the fact that the man was an officer, that there are practical matters ---

Q You suggest that 13 be read as if it did not include the words "or the result thereof"?

A I am suggesting that the words "as a result of trial" not be read to encompass the extended period when appellate processes are in course. I suggest it is a strained

reading to say that when this court grants certiorari ---

Q It is a strained reading for me to eliminate from Article 13 "as a result of trial".

A Yes, and the one other point I would like to make in this regard again is that it is a strange result if the military, in fact, is more restricted in the restraints it can impose pending appeal than are the civilian authorities, while civilian appeals are pending.

Q Well, to insure his presence has a flavor of our bond provision to release on bond and recognizance and all that to insure his presence.

A Yes, Mr. Justice, but my point here is that where in the civilian system whereas I believe it is correct to say that before trial the only reason for keeping a man in custody is to assure his presence.

Following a conviction and pending an appeal there are other applicable standards in the statute. For example, danger to the community and things like that.

Q But curiously, 13 combines both.

A Yes, if it applies but I suggest that that perhaps startling result is one reason why 13 should not be so read.

MR. CHIEF JUSTICE WARREN: Mr. Karpatkin.

REBUTTAL ORAL ARGUMENT OF MARVIN M. KARPATKIN, ESQ.

ON BEHALF OF PETITIONER

MR. KARPATKIN: Thank you, Mr. Chief Justice.

I should first observe that I believe I was reliably informed by a responsible officer in the Judge Advocate General's department of the Air Force that the Air Force still regards the Leavenworth order as in effect and that they are not -- that they do not believe that they are limited by the six-month proviso for the service of time at Leavenworth because it applies from the date of the issuance of the order.

I don't believe that they would practically try to ship Captain Noyd there for two days. But they do regard the order as being in legal effect.

I am surprised at the Solicitor General's recent statement because it seems to be in direct conflict with the words in his brief.

Referring to two decisions of the Court of Military Appeals, the cases of Teague and Petroff-Tachomakoff, on page 52 of the Government's brief, while those cases do find express statutory support in Article 13 for imposing conviction restraint they do not hold that the permissible grounds for pretrial restraint are also the only justification for post-trial restraint.

I believe he is coming to this court now and making a completely different argument. Now he says it provides no

basis whatsoever for post-conviction restraint.

I think that what we have here is an assertion by the Government of raw, naked power to eimprison a convicted prisoner prior to the completion of his appellate process without stating any justification whatsoever.

There was no return to the petition for the writ here. There was no statement by the Government of any desire to present evidence. No attempt was made to show that the conditions of Captain Noyd's confinement at any time either at Leavenworth or anywhere else were necessary to insure his presence at trial.

The civilian cases which are cited in the Solicitor General's brief involve, in addition to insuring presence at trial, where an appeal is frivolous or dilitary or like in the Carbo case where the substantial probability of danger to witnesses.

Now surely nothing like that is even remotely involved in this case. The Government in effect concedes that no such showing could be made and indeed no such showing could be made.

The prosecutor at the trial and everybody involved in Captain Noyd's tortuous, legal proceedings have conceded from beginning to the end his excellent character and sincerity and that there is no danger of his doing anything of the nature of flight.

In essence, I respectfully suggest that the Government is arguing that there was a right to preventative detention under these circumstances. Even without any showing that the detention was necessary.

The Government is arguing that there is a right to punish without an offense being committed, without any charge, without any trial and without any conviction.

I respectfully suggest that this process, which has apparently been going on in the military for many years where just automatically somebody is just sent off to jail as soon as he is convicted regardless of his appeals. That finally a case involving this issue has reached this honorable court and that this, I respectfully suggest, is the appropriate time for this court to advise themilitary and to advise the population that not only can the military not violate the Constitution but they certainly cannot violate their own Uniform Code of Military Justice which apparently they have been flagrantly doing for the last 15 years.

Thank you very much.

MR. CHIEF JUSTICE WARREN: We will rise now.

(Whereupon, at 2:10 p.m. the oral argument in the above-entitled matter was concluded, the Court recessing, to reconvene at 10 a.m. Monday, April 28, 1969.)