In the

Supreme Court of the United States

JOHN L. McLUCAS, Secretary of the Air Force, et al.,

Appellants

v.

RAYMOND G. DeCHAMPLAIN,

Appellee.

No. 73-1346

Washington, D. C.
December 9, 1974

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Appellants	:	
v.	:	No. 73-1346
RAYMOND G. DeCHAMPLAIN,	:	
Appellee.	:	

Washington, D. C.

Monday, December 9, 1974

The above-entitled matter came on for argument at 2:02 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT H. BORK, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, for the Appellants.

LEONARD B. BOUDIN, ESQ., Rabinowitz, Boudin & Standard, 30 East 42nd Street, New York, New York 10017, for the Appellee.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 73-1346, McLucas against DeChamplain.

Mr. Solicitor General, you may proceed.

ORAL ARGUMENT OF ROBERT H. BORK

ON BEHALF OF THE APPELLANTS

MR. BORK: Mr. Chief Justice, and may it please the Court: This is a direct appeal from the District Court for the District of Columbia. The posture of the case has changed considerably since the briefs were filed. I believe the only issue which is now disputed is the question of the power of the district court to intervene in a court-martial for the purpose of controlling a prefiled discovery and protective order.

The background of the case is this: The appellee is an Air Force Master Sergeant who is charged by the Air Force with, first, conspiring to communicate classified information to an agent of a foreign government, in this case the Soviet Union, in violation of Articles 81 and 134 of the Code of Military Justice and 50 U.S.C. 783(b); second, failing to obey an Air Force regulation requiring the reporting of contacts with foreign agents, in violation of Article 92 of the Military Code; and third, violating 134, the general Article, by copying classified documents in violation of 18 U.S.C. 793(b), and attempting to deliver such documents to

an unauthorized person in violation of 18 U.S.C. 793(d).

This court-martial was about to commence when the appellee began an action in the district court. And that court preliminarily enjoined the Air Force from trying Appellee Sergeant DeChamplain on any charges laid under Article 134. I think that aspect of the district court's order is now out of this case, as I discover from counsel's brief.

But, secondly, what is in this case, is the district court's order that the Air Force is not to try DeChamplain on any charges whatsoever without granting full and unlimited access to certain classified documents.

QUESTION: The appealability of the district court's order to this Court is still in the case.

MR. BORK: That is in the case, and I intend to address it. It is not, however, disputed any longer. I was called Friday by Mr. Boudin who said that he now agrees that this Court has appellate jurisdiction. And I will say a word on the subject because, of course, that is not a subject that Mr. Boudin and I can take out of the case. It's necessarily in the case.

But the order which, as a background, is an order for complete access to 15 documents from the Sergeant's prior trial which are no longer in this trial; the Government does not intend to rely upon those documents, as well as to 9

documents which are in this trial. And the military order which the district court found inadequate contemplates that the Sergeant DeChamplain, his military counsel, his civilian League counsel, one associate, one secretary, a foreign policy expert chosen by him, and a classification expert chosen by him shall have access to these 9 documents, may make notes, but the notes must be left in Air Force custody and they may be --

QUESTION: But the disclosure is to whom? That is, after these people get them, make them available in the district court or in the court-martial proceedings?

MR. BORK: The district court order is that they be made available in the court-martial proceeding on --

QUESTION: Not in the district court.

MR. BORK: No, Mr. Chief Justice. The dispute is really about the degree of freedom the court-martial allows the access to these documents. And this appeal followed.

Now, as I say, 134 is no longer in the case, the general Article, but the appellee did raise the question of this Court's appellate jurisdiction under 28 U.S.C. 1252, and we believe that this Court clearly has such jurisdiction. This Court asked that we discuss it in the briefs and discuss it on the merits.

Section 1252 provides direct review from a district court on any interlocutory order of any court in the United States holding an act of Congress unconstitutional, and this

Court did hold Article 134 unconstitutional, in any civil action where an officer or employee of the United States is a party. So I think the language of section 1252 covers our case exactly.

Now, the argument appellee made before which raised the issue was that -- he said that the jurisdiction of the district court which he had invoked was in fact faulty because a three-judge district court was required to consider the constitutionality of Article 134. And he then proposed this case go forward on the merits in the Court of Appeals. But I should point out, of course, that if a three-judge court was required, the Court of Appeals would not have appellate jurisdiction either, except for the purposes the Idlewild Bon Voyage Liquor Corp. case cited in the brief made clear, to say that the three-judge court was required to send it back with instructions to convene such a court, but it could not hear the merits.

Now, without going into a lot of the argument we have had on this issue, I think the central point we agree upon, the appellee agreed even in its prior position and we agree, that no three-judge district court was required if the constitutional question as to the Article 134 was insubstantial. And I think that it was insubstantial either on the logic that appellee was then using or on the logic that we were using.

QUESTION: Mr. Bork, where you are appealing from a

judgment holding a Federal statute unconstitutional under 1252, you don't find the counterpart of 1253's language where the right to appeal turns on whether or not a three-judge district court was required, do you?

MR. BORK: Well, no, I don't think we find the counterpart in the language, but I assume if there was no jurisdiction in the district court, there might well be a question about the jurisdiction here. Perhaps not. But I think the easiest and shortest way to the resolution of this issue is to show that no three-judge district court was required under the most expansive reading of the substantial question.

QUESTION: Here the district court clearly had jurisdiction, then the language of 1252 allows an appeal here.

MR. BORK: That is quite correct. That is quite correct.

The appellee's argument on this point before was that they did not convene a three-judge district court because the Avrech decision holding Article 134 unconstitutional was a decision of the D.C. Circuit and therefore, whether it was a three-judge court or a single-judge court, made no difference, it must follow the Court of Appeals' opinion.

I think if that's true, then there was no substantial question for the district court to decide and there is no point in convening a three-judge district court which must

automatically follow the Court of Appeals' decision.

Our argument was somewhat different. It was that there was no substantial question because the district court misunderstood the question before it. It was not a question about the first two sections of Article 134; it was simply a question about the third section which is an assimilative crime statute and to which nobody claims there is a problem of constitutionality. So that there was no substantial question before the district court to decide whether or not the district court thought so. And I think it is indeed the nature of the question rather than the subjective perception of the judge that determines jurisdiction.

But perhaps we need not even go as far as that, as your question suggests, Mr. Justice Rehnquist. But I think if one goes that far, it is quite clear that there is appellate jurisdiction in this Court and that, as I say, that is a subject no longer disputed by appellee.

And the only question left, as I say, is the question of district court control of the pretrial discovery process of the court-martial. And I think it's quite clear that there is no such power in a district court to intervene at this stage for that purpose. I think the military justice system has a freedom from intervention on such matters similar to that that the State justice systems have, and that intervention is justified only when, as Younger v. Harris would put it,

there is bad faith or harassment and when the party seeking relief is threatened with irreparable injury that is both great and immediate.

In this case the district court made no such findings as a precondition of its intervention, and indeed, bad faith or harassment were not even alleged. The fact that the appellee might have to be confined pending the outcome of the military prosecution and any appeals that follow does not constitute, is not cognizable as an irreparable injury. That's an incident of any criminal process, and if that were a grounds for intervention, Federal courts would be intervening all of the time in State and military justice appeals systems.

I think the decisionsof this Court rather uniformly show that this rule against intervention by Article III courts in military proceedings as in State proceedings rests upon a cluster of policy factors. I think some of them are of constitutional dimension and they are summed up generally in the words "exhaustion of remedies and comity." And I think these policies are so strong, indeed, that the appellee has not been able to point to a single decision of this Court sanctioning an intrusion like this one into the military justice system. It is an intrusion both unique and it's continuing because the terms of the district court's order contain words which must be construed, and the district court holds itself available for application to continue to supervise

the access to documents problem. And all of that takes place before the appellee has even been tried, much less exhausted his remedies within the military justice system.

A great deal of the argument in this brief rests upon, I think, unjustified denigration of the military justice system. There is much argument in the brief, the appellee's brief, that military tribunals do not apply all of the procedures that civilian tribunals do, which is quite true, but that is not a statement that military tribunals are in any way lax in applying those procedures which this Court and Congress has held appropriate for them.

Similarly, I think in an effort to avoid the plain thrust of cases like Gusik v. Schilder and Younger v. Harris, the appellee has tried to argue that any remedy he may have in the military system will be futile. That seems to be a very odd claim for a man who has been convicted once by a court-martial on an espionage charge and has appealed that conviction and has had it reversed by the Court of Military Review and has had that reversal sustained by the Court of Military Appeals.

His real complaint is that he has made three successive petitions for extraordinary relief prior to his second trial and that the Court of Military Appeals has denied them and said that that is extraordinary relief and is not to be used as a substitute for appeal. There is no reason

here to think that should he be convicted upon a second court-martial that the Court of Military Appeals and, indeed, the entire military appellate system would not be fully sensitive to his constitutional claims.

I will discuss only briefly this Court's opinion in Gusik v. Schilder, which is really a much stronger case for intervention by Article III courts because the serviceman there had been convicted and had exhausted all of his military remedies. After wards a new article gave him the right to ask for a discretionary new trial to be given by the Judge Advocate General, and that was the only remedy available to him and his chances didn't look very good. But this Court said that habeas corpus was not available to him until he had exhausted that remedy. It seems to me that he had a much slimmer chance at an adequate remedy at law than does the appellee here.

The Gusik case itself analogized the requirement of exhaustion of military remedies to the similar requirement of exhaustion of remedies within State court systems. I think Younger v. Harris, recently decided by this Court, shows the strength of that requirement. There it was a prosecution of a man under the California Criminal Syndicalism Act, an act of dubious constitutionality, and he raised a first amendment claim. It would seem to me much more compelling than the appellee's claim here because his conduct alleged is espionage

which does not fall near any constitutionally protected area.

But I think if one analyzes Younger and this case, you will find them parallel in many respects. There is here not the policy of federalism, which Younger found important, but there is the constitutional power of Congress to make rules for the armed forces which are separate. There is the same doctrine of equity jurisprudence against restraining criminal prosecutions; there is the same adequate remedy of law; and there is the same absence of a showing of irreparable injury.

There the same need, I think, to avoid friction and to avoid disruption of the court-martial. I think in considering this case, one ought to consider what the general principle at stake is. The general principle is really one that would countenance a general removal power from court-martial for constitutional issues, and the court below and the appellee here say that since military courts do not have a special expertise on such issues, there is no reason to let them decide them without having a Federal court intervene to decide them for them.

That would shuttle cases back and forth between the Article III system and the military system in a way that would be so disruptive and so costly for everybody concerned it would be better if the Article III court simply took over court-martial rather than did that.

Now, the only reply the appellee has to all of this,

the heart of his reply is at page 51 of his brief where he cites a string of cases, Billings v. Truesdale, Toth v. Quarles, Reid v. Covert, McElroy v. Guagliardo, and he cites those with the proposition that this Court has repeatedly sanctioned interference with ongoing military proceedings to correct fundamental constitutional errors.

I think not. I think not. Those are all cases in which the person seeking to have the Federal court intervene, successfully, claimed not to be a member of the armed forces. The integrity of the military trial process was not at stake, and the intervention to prevent the court-martial of a person who is not even subject to military law is hardly the same kind of disruption. In fact, those cases can be decided by the status of the person; he is a civilian, not a military person. And then the further legal question of may a court-martial constitutionally try a civilian under these circumstances, which is not at all the same as taking a person who is concededly subject to court-martial jurisdiction, concededly subject to trial and constantly filtering his constitutional claim out of the military system into the Federal system perhaps with full appeal and then back into the military system again.

So far as I can make out, that's about all there is to the appellee's case: It is a constitutional issue and therefore there is no reason why we should let the military

courts decide it before the civilian courts do. And we have seen that the intention of Congress and all the policy considerations underlying this Court's decisions run to the contrary.

There is one thing perhaps I should mention, and that is that appellee's brief mounts an extensive attack upon the constitutionality of Article 76 of the Code which is the finality provision and says that it's unconstitutional if it's interpreted to mean that the only collateral attack possible upon a military conviction is by habeas corpus by persons in confinement. That gets the appellee into Martin v. Hunter's Lessee and Ex Parte McCardle and a very exciting group of cases to teach, but I think not relevant to today's discussion.

We cite Article 76 as evidence of a congressional intent that the court-martial system be generally free of interference. It clearly is that.

We have argued thathabeas corpus is the only permissible form of collateral attack, but that's not necessary for the decision of the present case because whatever form of collateral attack may be available, Younger v. Harris and Gusik v. Schilder stand for the proposition that it takes place after the exhaustion of remedies in the military system.

QUESTION: Younger v. Harris, as we both know, is premised a great deal upon what the Court opinion called in capital letters "Our Federalism." And that is not an

ingredient here.

MR. BORK: No, I think there is a comparable, not as strong, but there is a constitutional value which parallels that in Congress' constitutional power to provide special rules and hence special courts for the military. And I think all of the policy reasons that are mentioned in Younger v. Harris are equally applicable here, and I think Gusik v. Schilder tends to equate the two systems, the State system and the military system, in terms of non-intervention, premature intervention, by Federal courts, by Article III courts.

So I have no doubt that the policy of Younger v. Harris is fully applicable here and that policy, of course, was recognized recently in Parisi v. Davidson, a case that appellee cites in that string which is distinguishable and which this Court takes particular pains to point out that the policy cited in Gusik v. Schilder is not being breached.

I might say finally about this point that the appellee, who is in confinement, I think has no standing to raise the issue of whether Article 76 would be unconstitutional if it were applied to somebody who was not in confinement to prevent him from bringing habeas corupus. That may be an issue in some case some day when there is such a person who is blocked by Article 76 interpreted that way, but I think the appellee has no standing to raise his case, for his purposes

in this case.

To return to the main point then, what we have before us, as I say, is simply a question of Federal court -- we have before the Supreme Court a question of pretrial discovery in a court-martial which hasn't taken place yet. I think nothing could show more clearly what a massive disruption of a coordinate branch of justice we have here. I think the clear intention of Congress and the clear policy of the cases of this Court is to let this court-martial go forward without interruption. There is no reason to believe the military tribunal will be insensitive to any of the appellee's claims and should they ultimately decide them against him and incorrectly, he has available habeas corpus, as does anybody wrongfully convicted in a military system of justice.

QUESTION: General Bork, if this case were not pursued in a military system, where would it be venued if it were on the civilian side?

MR. BORK: Well, I'm not quite clear where it would be, Mr. Justice Blackmun, because the offense took place overseas. I don't know how we would solve the jurisdictional problem if it were not a military -- it took place in Thailand, and I am not sufficiently versed to say whether or not we could solve the jurisdictional problem and get him into a civilian Article III court. I think that's been tried before without success.

We think for these reasons the case ought to be reversed and the complaint dismissed.

QUESTION: May I ask you one more question before you sit down? It's probably totally irrelevant. Did anyone formally request Judge Parker for the convening of a three-judge court?

MR. BORK: No. As I understand it, appellee thought it was not necessary because the three-judge court would be bound by the Court of Appeals decision in Avrech. So they would have no substantial question to decide in any event.

MR. CHIEF JUSTICE BURGER: Mr. Boudin.

ORAL ARGUMENT OF LEONARD B. BOUDIN

ON BEHALF OF APPELLEE

MR. BOUDIN: Mr. Chief Justice, and may it please the Court: We have agreed that the issue of this Court's jurisdiction should be resolved in favor of it for exactly the reason given by Mr. Justice Rehnquist. While the application of Stratton and Idlewild in principle could have dictated a different result, it is quite true that 1252 is unambiguous and in the thicket of three-judge court problems that have troubled the courts for so long, at least, and we have come to the conclusion that this is an issue which should be resolved in favor of the Court's jurisdiction.

We see three issues here, the second of which has really not been touched upon by my brother. The first issue

is whether the court-martial judge's refusal to give civilian defense counsel full access to the prior trial record and to the very documents that are the subject of these criminal charges was a violation of the sixth amendment right to the effective assistance of counsel going to the question of the jurisdiction of the court-martial under Johnson v. Zerps?, which we did not cite, though it seems the clearest case in point.

The second question, which, as I say, my brother did not develop an argument, was whether or not any collateral review of a court martial decision of this kind, court-martial action of this kind, other than habeas corpus, is permissible at some stage of the proceeding.

And the third issue, which is really a central issue, as we see it, is whether or not given these circumstances in this particular case, the appropriate remedy of collateral review was by injunction.

Now, the issues have to be decided in the reverse order of that dealt with in our brief and in the Government's brief, because the question of collateral review and the nature of it, to wit, is an injunction needed at an early stage, is a function of the nature of the constitutional right involved which we discuss in point I orally, III or V in our brief, a function of that right and of what actually happened in this case.

So I turn to the first issue, namely, the effective assistance of counsel. This, as we know, is not an abstract issue. It must be related to the crime charged, 18 U.S.C. 793, and to the prior history of this case. We must remember that Sergeant DeChamplain was arrested in July of 1971, charged with a violation of the espionage laws, among other things, and having conspired to deliver a package of 25 documents to a Russian agent in Indochina, and that he has been since July 3, 1971, in pretrial confinement, in post-trial confinement, and now in pre-trial confinement. And if the course of events follows which is suggested by the Government here, he can very well be in three years more confinement until this case is finally adjudicated again by this Court.

Now, as I said, the issue in the case of the second assistant counsel is determined by the nature of the case. Some problems we had in Powell v. Alabama where we know the interference that occurred there. There are other cases such as Moore v. Dempsey where you have a mob scene interfering with the effectiveness of the court.

In the present case, so far as the knowing documents ar concerned, just to take those away from the prior trial record, we have what may appropriately be called the core or the corpus delicti of the case. These are the documents whose transmittal by conspiracy or attempt is a basis of the charges against DeChamplain. It is these documents that, like any

other corpus in a crime, whether it's an obscenity book or some other analogies the Court may consider, are being restricted as far as access to me are concerned.

Now, this would be true in any case, as I say, in which the very core of the case is being prevented from getting counsel full access. We have a very special case here and that is the complexity of 18 U.S.C. 793, the espionage law.

Your Honors touch on the problem without adequate or virtually any briefing in several opinions of this Court, in United States v. New York Times and New York Times v. United States, the Pentagon Papers case. The Supreme Court, this Court, has passed upon the issue in Gorin where it says that the matters must be related to national defense to be a crime. And in United States v. Heine, Chief Justice Leonard Hand added another dimension to the problem, increasing the complexity whether or not the material in those documents were in the public domain.

Now, we had a star example, a long-winded and notorious example in the Ellsberg case before Judge Byrne where the most elaborate briefing on the question of the meaning of 793 was engaged in, was the subject of a very tentative decision by Judge Byrne and was the subject of our being given access to the documents involved, the very top secret documents, including many that were never given to the

New York Times, that were never published anywhere, and that the Government consistently insisted, hence the charge of the crime, related to the national defense.

We were given those documents, as your Honors will see from this record here without any limitation whatsoever except the word of counsel that the following persons, not disclosed to the Government, were entitled to examine those papers so that they could advise us as consultants and so many of them could testify at the trial.

Not only were some 20 consultants and experts testifying at the trial, but some 40 people, vast numbers, academicians, mimeograph operators, and a whole corps of lawyers, more than probably in any other trial, were given copies of those papers, so-called national defense documents.

In contrast, the military judge here whose decision is final has said, first, as your Honors will see from Appendix 61,that he doesn't think it important that the matters relate to national defense, and he will not consider expert testimony on the subject, a strange ruling in light of the decisions of this Court, and secondly, the military judge has said that I may examine these documents only in the presence of a person with security classification, would include military defense counsel, assuming that I retain them, because it may be that Mr. DeChamplain and I may decide to proceed alone, and in which case I would have to have a

Government security agent watch me as I examine these papers. I may not have a copy of them. I must examine them at a "secure" location. I may not take notes -- or, to be fairer, I may take notes, but they are to be read by the Government security people.

Now, this is, in this day, under our system of justice, with all due respect to the military establishment, I have a high regard for it, I think the U.S. Court of Military Appeals and the Uniform System of Justice are a great advancement over the days of Wellington when he referred to the soldiers as scum, great advancement, but this is what we have today from this military judge in contrast to the whole procedure.

Now, I may say, just to add something, that the prosecution counsel are under no such limitation. They have the whole record. They can examine the whole prior record, the nine documents, without limitation, and the 15 that made up the package of 24. So they and the trial judges, the Government, can see these things and I may not. The suggestion that my military counsel may have a recollection of what they saw before or may even refresh it by looking at it doesn't help because they are not allowed to transmit to me by note or verbalism the information in these top security documents.

Now, I don't have to contrast this with an obscenity

case in which it is obvious counsel may call as many consultants as he wishes to and not being restricted to two consultants and to two lawyers. I have selected an assistant in my office and then I have my partner Mr. Rabinowitz look at these papers, whatever his advantages over me may be. The result is I am restricted in number, I am restricted in place, I am restricted making copies. And the Ellsberg files are still in my office. I have examined them and the national security so far doesn't seem to have been imperiled.

Now, with respect to the prior trial records, which is a separate but related point, the prior trial record, as I said, is available to the prosecution. We would have had the right at one time to look at it under Article 54c which deals with appeals, but that right no longer exists here. These documents, the 15 documents of the prior trial record, have to be considered -- any lawyer would consider them in deciding to try a second case. The fact that the Government decides that it will remove in order to keep me from looking at them 15 documents hardly solves the problem, because those documents may very well be important and the transcripts of the earlier record may very well be important for me to decide, not on the advice of the Government or in its judgment, for me to decide what is exculpatory.

For example, Sergeant DeChamplain may say that the 24 documents, to take a hypothetical thing, 24 documents were

being taken overnight, as people have taken them from the Department of Defense overnight, for the purpose of studying them and that the 15 happened to be very innocent and that the 9 got in there by error. ... hypothesizing.

The fact is that under any consideration of Grady and what it means and Alderman where in many cases we were dealing with things ancillary to the case. These are the -- this is the prior trial record of the prosecution of a man who has spent three and a half years in jail now and promises to spend more.

QUESTION: Have I misrecollected, Mr. Boudin -- and maybe you have mentioned it -- that in this second proposed trial the Government is not going to use --

MR. BOUDIN: The Government is not going to use them. They can look at them.

QUESTION: -- the documents.

MR. BOUDIN: They may very well rely upon what was in the prior trial record, your Honor is quite right, to determine how to cross-examine DeChamplain. He may want to get on the witness stand and testify with respect to the 15. These weren't 15 separate entries, this was a package deal, it was a conspiracy with respect to 24. I don't know what the Government has expurgated from the prior record.

QUESTION: Well, you do know that they are not making the same charges. They have eliminated some of their charges.

MR. BOUDIN: They have eliminated some of the

documents and they say they are no longer charging us with respect to those 15.

QUESTION: Right.

MR. BOUDIN: But the 15 were part of the original conspiracy, and I have a right to direct myself to that original conspiracy which was the basis of the charges and to see what there is in the record that they have taken away. I have to depend on them to decide whether, not only the documents have they removed, but they deleted, they say, all references to the documents.

As a trial lawyer, or appellate lawyer, I'm not willing to rely on the Government's decision as to what was in the prior records.

QUESTION: Is the entire record of the first trial sealed?

MR. BOUDIN: Sealed for the Government. My military counsel may look at it, but they can't tell me about it.

QUESTION: The entire record?

MR. BOUDIN: Yes. I'm only entitled to look at that part of the record which deals with the 9 documents in this forthcoming procedure and under the limitations involved. And, of course, I am only allowed to show it, as I indicated, to a few people.

Now, this denial, if your Honors please, isn't a procedural matter. It doesn't go to the weight of the evidence

which your Honors will recall in Burns v. Wilson a record was examined very carefully by the Court of Appeals, and this Court accepted that very careful judgment of the Court of Appeals in reviewing the evidence. This is not a case of military expertise as in Noyd. This is not even a case of a fourth amendment right involved in the Schnackworth v. Bustamente case, 412 U.S, where the court distinguished the fourth amendment right from the right to a fair trial with the assistance of counsel. This is not even the case of an inability to put on a single particular defense, the insanity one that was referred to in Whelchel. This is very close -- I mean, no .. on counsel for the Government. We are dealing here with a relatively civilized society. This becomes a mask of the trial when counsel is not permitted to see the full record of the first trial that led to his client's conviction and where all of these handicaps are placed upon counsel.

Now, your Honors, as I said before at the beginning, there is one case that I think is critical here because it states a basic principle, and it was Mr. Justice Black's very early opinion in the Johnson v. Zerps case, where he said, "We now go to the question of when you went to .. for court-martial. A court's jurisdiction at the beginning of trial may be lost in the course of proceedings through the failure to complete the court, complete the court" --

QUESTION: Johnson v. Zerps was Federal review of Federal court.

MR. BOUDIN: Precisely, your Honor, quite true. -- complete the court -- the issue of jurisdiction seems to be fundamental -- "complete the court by providing counsel for an accused who was unable to obtain counsel," et cetera, et cetera. Repeatedly your Honors will see the words "where counsel is limited, as handcuffed, one way or the other, or counsel isn't supplied, then jurisdiction of the court is affected."

Now, I will pass from this point, pass over the question of collateral review generally, which is very thoroughly dealt with in our brief, and turn to what is the problem raised by the Solicitor General, namely, why injunctive relief, and wasn't there a Younger case?

In answer to that, I call your Honors' attention, not only to the majority opinion, but to the opinion of Mr. Justice Stewart, concurred in by another justice of the Court, Mr. Justice Harlan, but limiting myself to the majority opinion for the moment. First, the principle of federalism, as your Honor, Mr. Justice Stewart, pointed out, was, I think, central. I think equally relevant in the case was the fact there was a Federal statute which didn't have to be decided in application, which governed the question of injunctions against State courts.

I think thirdly, if we take Younger --

QUESTION: Younger wasn't based on that statute at all.

MR. BOUDIN: No, it was not. The Court pointed that out, but it did mention the statute at the beginning as an indication of Federal policy.

QUESTION: Mitchum v. Foster, though, held that the Civil Rights Act was an exception to that statute, and so nonetheless Younger applied independently of the statute and only Younger applied in that kind of a situation.

MR. BOUDIN: That I can't answer, your Honor, because I don't know the case. But if I may pursue the Younger thing, limiting myself for the moment to Younger, in the Younger case the Court did, of course, leave open the question of irreparable injury, and I do not think one can read Younger as requiring malice on the part of the Government to establish irreparable injury. The Court in Younger was concerned about attacking a statute on its face where you are dealing with two problems, as I pointed out, one that was a statute and a statute of another sovereignty, the State, and, secondly, it was attacking it on its face --

QUESTION: That was Barl v. Landrey in which it was attacking it on its face.

MR. BOUDIN: And the Younger was --

QUESTION: Younger was trying to enjoin a trial.

MR. BOUDIN: Yes. It was trying to enjoin a trial

on the ground that a statute is unconstitutional. And this Court said in the majority opinion, Constitutionality of -- the combination of the relative remoteness of the controversy, the impact on the legislative process of the relief sought, and above all, the amorphous nature of the required line-by-line analysis of the statute -- I'm quoting from the words of the Court -- and the problems of veto over legislative process. And I point out we are dealing here not with the legislative process, but with a tribunal which should not have the same weight as a State legislature and where there is nothing amorphous about this. This Court knows now, as Judge Parker did below, exactly the extent of the ineffectiveness of counsel that is predictable in this case. And as far as irreparable injury is concerned, let us consider what will really happen.

There has already been a trial, overturned, very properly, by the U.S. Court of Military Appeals for constitutional error. There will be a second trial. If this Court on analysis agrees with us that this kind of hampering of counsel which didn't exist in Coplon, which didn't exist Gorin, which didn't exist in Ellsberg, which has existed in no other case, espionage case. Coplon was collateral, as I said before. If this kind of limitation on what counsel can do before a court-martial is improper, then there will ultimately be a third trial because that conviction will be set aside

and we will be back with a third trial with whatever new constitutional problems the Government may pose by its behavior.

I submit, your Honors, that --

QUESTION: If irreparable injury is enough, then Younger is meaningless because you have to show irreparable injury to ever get any injunction from any court of equity under any circumstances.

MR. BOUDIN: I do not think so, your Honor. I rely on --

QUESTION: That's just the foundation for ever getting an injunction. You have to show irreparable injury and the lack of an adequate remedy at law.

MR. BOUDIN: But we also have here the problem of the constitutional right of the defendant, and whether or not he is to be tried before a tribunal. Moore v. Dempsey, Johnson v. Zerps, and I suspect if Powell v. Alabama were to occur today, this Court would recognize, I think, in any of those situations that an injunctive relief could be issued even as against a State court.

Your Honor's opinion, concurring opinion in Younger v. Harris, I remind your Honor, is based upon a statute,and the concern of attacking a statute is very different here from our concern with respect to a military tribunal, any tribunal, and your Honor said irreparable injury, both great and

immediate, if the statute were patently and flagrantly unconstitutional on its face. That's what your Honor said there in your concurring opinion.

Now, here we do not have the problem of a statute. We have the problem of what a military tribunal is going to do. This brings me to the point of the relationship between military tribunals and Federal courts on the one hand and on the other hand the relationship between State courts and Federal courts.

A different approach has been taken and I think will be taken or should be taken, since I may not predict, by this Court when we deal with the question of military tribunals as against State tribunals. We have to remember that the States, as this Court has said and others have said, were the original basic repositories of our constitutional rights. With all the improvements that have occurred in military courts, they still have the military influence even up to the U.S. Court of Military Appeals, with all the tradition, this Court has said several times in Parisi, referred to by the Solicitor General, and has said it also in Noyd and elsewhere and there runs right through that the line that in terms of military expertise the courts will defer to the military.

QUESTION: As a matter of fact, the courts had no jurisdiction before Burns, did they?

MR. BOUDIN: Exactly.

QUESTION: Absolutely none. And Burns is a recent case.

MR. BOUDIN: Burns was a recent case in which the Court examined the record --

QUESTION: For the first time.

MR. BOUDIN: Yes.

QUESTION: In a military case.

MR. BOUDIN: Exactly. Exactly. And in that case the Court essentially agreed that there was no merit. I don't think the Court was right and I stand by the views expressed by Mr. Justice Frankfurter's concurring opinion and by the dissenting Justices. I refer your Honors particularly to Mr. Justice Frankfurter's concurring opinion where he adopted the view on jurisdiction that I have just suggested to your Honors, that the denial of counsel and the other errors Mr. Justice Frankfurther was concerned with affect the jurisdiction of the tribunal.

QUESTION: But the Solicitor General says habeas corpus is just fine even in this case.

MR. BOUDIN: Well, the Solicitor General says habeas corpus is fine even here, but we have just gone through a trial and I am suggesting that if collateral review is ever proper -- and I will accept his concession, such as it is, that it is proper -- this is the time to have the collateral

review because our client is presently imprisoned. You didn't have that in Younger v. Harris. Our client has gone through one unconstitutional deprivation of rights. Our client will, if your Honors agree -- and I think your Honors will on this substantive issue -- we are going into a trial knowing that the tribunal does not have jurisdiction, if you accept my premises, and we are going to have a third trial and we have been denied relief by the Army from imprisonment, even pretrial imprisonment, under their system and a district court in a case which we have appealed has affirmed the district judge's decision even though there is no danger of the client disappearing.

So for these reasons I submit to your Honors that if you agree that these limitations on counsel unknown to any civilian court, Federal or State, without precedent at all, dealing with the core of the case, dealing with the most complex of statutes -- weeks were spent in preparing the proposed charges that Judge Byrne in the Ellsberg case on 17093 applies, and bearing in mind the military judge's statement that all of this is irrelevant despite Gorin, despite Heine. I submit that if there is a case in our universe in which an injunction is the proper remedy, and sometimes it is the proper remedy, this case against a military judge, not a statute, not a State court, this case against a military judge calls for the injunctive relief

we have sought.

I thank your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Boudin.

Do you have anything further, Mr. Solicitor General?

REBUTTAL ARGUMENT OF ROBERT H. BORK

ON BEHALF OF THE APPELLANTS

MR. BORK: Just to make the observation, Mr. Chief Justice, that in this case there is no charge that anything the military has done has not been done in good faith, and that what is being told to us here is that we must take this case on a rather hypothetical basis now and discuss the constitutional issue: Had we followed this procedure all the way through, Sergeant DeChamplain's original court-martial would have been stopped while we litigated the use of his statements in the first court-martial up through these courts, and then went back to the court-martial.

QUESTION: Is the entire record of the original trial under seal?

MR. BORK: I believe it is,your Honor. It has to be on a regional basis.

QUESTION: Everything.

MR. BORK: It is. And nothing -- the documents used in that original trial, because of the access problem are not going to be used, 15 of them are not going to be used, in this trial, and only 9 documents are going to be used in this

trial.

My point simply is although Mr. Boudin complains about the necessity to go up to a court-martial and have it appealed, come back and have it retried. That happens in many systems of justice, and the alternative he offers us is Federal court intervention whenever the constitutional issue arises in a court-martial. So that we will have massive disruptions and perhaps never complete these trials.

QUESTION: Would it be fair to say, Mr. Solicitor General, from what has been said so far in this case that the more sensitive the material involved in an alleged espionage case, the less possibility there is of successful prosecution?

MR. BORK: Well, if the rule is, Mr. Chief Justice, that no limitation of any sort upon the use of notes is ever possible, then, of course, it follows that the more sensitive the material, the less possible it is ever to prosecute anybody because if sensible limitations can't be used on the review of the documents to flow through the world and on which notes are allowed out to flow through the world, then I think prosecution often is impossible. I regret that I was not in the Ellsberg case and cannot draw parallels between the protective order there and the protective order here. Perhaps the documents were of different sensitivities.

QUESTION: Mr. Solicitor General, what restrictions,

if any, were imposed with respect to the 9 documents that are to be used in the trial?

MR. BORK: The restrictions, as the matter stands now, Sergeant DeChamplain -- the military restrictions imposed by --

QUESTION: Yes.

MR. BORK: Sergeant DeChamplain, his military counsel, his civilian lead counsel, one associate, I believe, one secretary, one foreign policy expert, and one classifications systems expert may all have access to the documents. They may not take the documents home with them. They can work on them under Air Force -- the documents remain in Air Force custody in that sense -- they may work on the documents there. They may make notes. The notes, if they are sensitive, must be left in Air Force custody, as I understand it. I don't think Mr. Boudin suggested that Air Force would be reading his notes. I suppose there can be a protective order worked out so that that doesn't happen.

But there is considerable access to these documents by counsel, military and civilian, by the client, and by experts. Now, it may turn out ultimately, if this case is tried and the facts are all developed, it may turn out that some court will think that not an adequate access. I don't think that question can be decided on this kind of a record at this time, and that's a very strong argument against

intervening, a Federal court intervening to try to solve that problem now before --

QUESTION: Mr. Bork, not that it's important, but why have a secretary look at it if he can't copy it?

MR. BORK: I think, Mr. Justice Marshall, they can make notes. I suppose a secretary can take dictation from them if they wish and write the notes up. I suppose that's the reason. I suppose it's an effort to --

QUESTION: A secretary has very little clearance. I just don't understand why the secretary is in there. Not that it's important to this hearing.

MR. BORK: I don't know why they negotiated the secretary into the deal, Mr. Justice Marshall.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:55 p.m., the argument in the above-entitled matter was concluded.]