In the

Supreme Court of the United States

JAMES R. SCHLESINGER, ET AL.,
Petitioners
v.
BRUCE R. COUNCILMAN.
Respondent.

No. 73-662

Washington, D. C.
December 10, 1974

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Tuesday, December 10, 1974

The above-entitled matter came on for argument at 10:08 a.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, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, for the petitioners.

NICHOLAS D. GARRETT, ESQ., Godlove, Joyner, Godlove, Garrett & Meyers, Inc., P.O. Box 1488, Lawton, Oklahoma 73501, for the Respondent.

ORIN CHRISTOPHER MEYERS, ESQ., Godlove, Joyner, Godlove, Garrett & Meyers, Inc., P.O. Box 1488, Lawton, Oklahoma 73501, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 73-662, Schlesinger against Councilman.

Mr. Solicitor General, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT H. BORK

FOR THE PETITIONERS

MR. BORK: Mr. Chief Justice, and may it please the Court: This case is here on writ of certiorari to the Court of Appeals for the Tenth Circuit. The respondent, Captain Councilman, is under court-martial charges for violating Article 134 of the Uniform Code of Military Justice, the general article, by wrongfully selling, transferring, and possession marihuana.

At the time of the offense Captain Councilman was off post, off duty and out of uniform. Although stationed at Fort Sill, Oklahoma, he was then in his apartment in Lawton, Oklahoma. The sale and transfer of marihuana were to a man who Councilman believed to be an enlisted man also not in uniform and off duty. He believed him to be a clerk-typist at Fort Sill. He was in fact an enlisted undercover agent for the Army's criminal investigation detachment which was investigating a report that the captain used marihuana at his apartment.

Councilman moved to dismiss the charges against him on the ground that the court-martial lacked jurisdiction because the crimes were not service-connected under O'Callahan v. Parker. The presiding military judge denied that motion and Councilman then brought this action in the district court which on the grounds of service connection permanently enjoined the military authorities from proceeding with the court-martial and the Court of Appeals affirmed.

This case puts in place two important issues. The first is the propriety of the district court's intervention in a pending court-martial proceeding; the second is the rationale and application of the service connection test for court-martial jurisdiction. These are both issues of serious concern to the Government for they bear directly upon the effectiveness of the armed forces.

We submit, in the first place, that the district court should not have interfered with this court-martial, and the reasons for that conclusion are inter-related. They are the doctrines we discussed yesterday of comity and exhaustion of remedy.

We have also contended that the finality provision of the Uniform Code of Military Justice, Article 76, precludes review by any mode other than a petition for habeas corpus.

Our arguments yesterday in McLucas v. DeChamplain dealt with the principles of exhaustion of remedies and comity

and here as there we rely upon Younger v. Harris and Gusik v. Schilder. The military justice system is a coordinate judicial system with a series of appellate stages through which any conviction must be tested and strained. The ordinary considerations of avoiding duplication, waste of judicial resources, and so forth, apply here as they did in Younger and Gusik.

QUESTION: Is your argument on this branch of the case identical to the arguments you made in DeChamplain?

MR. BORK: Virtually so, Mr. Justice Stewart, except for one point, and that is that I wish to distinguish the line of cases, Billings v. Truesdale, and Toth v. Quarles, etc., because of the nature of the trial that is required on a service connection issue. I will not repeat the argument about Younger v. Harris or Gusik v. Schilder in the ordinary considerations.

QUESTION: You are incorporating that by reference.

MR. BORK: Yes.

QUESTION: And then you have one additional argument, is that it?

MR. BORK: That is the nature of the trial required on the service-connection issue.

QUESTION: Or at least something additional you feel you need to say in view of those cases, is that it?

MR. BORK: Yes.

QUESTION: Isn't there a difference here in the claim you can't try him at all?

MR. BORK: That is correct. That is why I wish to say that it is semantically possible, Mr. Justice Marshall, to make this case sound as if it were similar to Toth v. Quarles or Reid v. Covert or that line of cases, because it can be put in terms that the question is the military's power to try the man.

I think it's quite different from those cases because in those cases the military's lack of power to try the man comes from his status and not from his conduct. And it's a quite simple trial. In fact, it's solely a legal issue whether the man is a civilian or a military man. Whether if he is a civilian, the military has a constitutional power to try him.

Here, however, the question of the power to try him -- and it's quite different, I think, when a man is not a civilian but is a military man who is ordinarily subject to military discipline and military jurisdiction, and in addition, when the claim that he may not be tried rests upon the factual details of what he did and where he did it and so forth it. Because that means that when the service-connection issue is raised, if he can go into a Federal district court, in many cases there should be a small trial of the crime to get out the details. In fact, I think in this case it may be that this

stipulation is seriously inadequate, I don't know. If district courts are going to come into these cases, I will advise U.S. attorneys and military lawyers to make much fuller records than this so we can find out about service connection much more effectively.

QUESTION: You consider it of particular importance that this was a transaction between a captain and an enlisted man who is under his command?

MR. BORK: I consider that of crucial importance on the service connection issue, Mr. Chief Justice. On the jurisdictional issue, however, I don't think that it bears as directly.

QUESTION: Even though they were off base and out of uniform.

MR. BORK: Well, by the jurisdictional issue I meant initially whether a district court ought ever to entertain a claim like this before the military process has run its course. And I think on the service connection issue it ought not. I think this clearly is service connected, and I will argue to that effect in a moment, but I wish to complete the answer to Mr. Justice Marshall's question.

If you may go into a civilian court in advance of a court-martial, the civilian court in many cases will have to hear the facts of the crime to determine the service connection issue. If the civilian court determines it is service

connected, you will then go back for a full military trial. You will have two trials, one civilian and one military. If the civilian court determines it is not service connected, you will then have two civilian trials, one on the injunctive action and one presumably when the local prosecutor brings a charge under the criminal law, the civilian criminal law.

So I think there is quite a waste of resources in this kind of a service connection case which is necessarily a factual case. If you elect to proceed to the military, then you need have only one trial of the facts, and a court looking at it on habeas corpus later on the service connection issue may rely upon the military record.

In addition to that there is in the service connection issue necessarily an expert judgment about the effect of the behavior upon the discipline, the morale, the effectiveness of the armed forces. And I think that judgment initially should be made and illuminated by a military tribunal with the expertise. It may then be reviewed on habeas corpus by a civilian court with the issue so illuminated.

I think that is why this case is a very different kind of a case, both in terms of expertise and in terms of trial of factual matters than the Toth v. Quarles or Billings v. Truesdale line of cases, and why the doctrine of exhaustion of remedies and comity is particularly appropriate here.

Now, Mr. Chief Justice, you mentioned the issue

raised in this case by the fact that the marihuana sale and transfer charges involve the sale and transfer of marihuana by an officer, Captain Councilman, to a man whom he knew to be an enlisted man and the enlisted man, he knew, understood him to be an officer. I think that makes the first two charges in this case quite clearly service connected.

O'Callahan v. Parker and Relford v. Commandant were cases which explicate a number of the criteria that are relevant in judging service connection. But the Relford opinion explicitly recognizes that those factors are not a closed set, that's not a codification, that there's a common law development in this field. And I think the O'Callahan case indicates the rationale which guides that common law development of these cases. It grows out of Congress' constitutional power which exists because the exigencies of military discipline required the existence of special courts with special expertise and special jurisdiction.

So I think an offense is service connected when it bears upon discipline, morale, and the effectiveness of the armed forces and when the armed forces have a reason of their own which is distinct from that held in common with civilian society to be so seriously concerned about the offense. And that's certainly true here. The rationale of service connection, indeed, I think is very similar to the rationale of Article 134 under which Captain Councilman is charged.

Article 134 prohibits all disorders and neglect to the prejudice of good order and discipline in the armed forces. So both issues, the jurisdictional and the substantive, service connection and disorders and neglects, are given meaning by the unique nature of the special needs and the vital mission of the military.

QUESTION: Are you, in speaking of the differences between this kind of an offense in a military society contrasted to what it would be in a civilian society, are you concentrating on the military's attitude toward the possession and use of marihuana or are you concentrating on the -- emphasizing the traditions in the military that officers and enlisted men do not fraternize?

MR. BORK: Well, Mr. Justice Stewart, those two rationales correspond to the different charges. I was addressing initially the relationship of officer to enlisted man and the destructive impact of shared criminal behavior upon that relationship.

QUESTION: Shared behavior of any kind, unless times have changed since I was in the military.

MR. BORK: Well, I wouldn't quite say shared behavior of any kind, Mr. Justice Stewart.

QUESTION: Off duty, except in the military mission.

MR. BORK: That's true.

I think the service connection becomes particularly

apparent when the shared behavior is criminal behavior and known to be such by both participants, because I think that is particularly destructive to morale and as word of it spreads around, as it will when an officer engages in this kind of behavior, destructive to the authority of all officers in that command or indeed in other commands that hear about it.

But I intend to address as well the fact that possession of marihuana, irrespective of the relationship to the enlisted man is also service connected.

QUESTION: Two distinct differences.

MR. BORK: Two distinct rationales, both of which I think apply to this case, and both of which I think uphold service connection.

We have just discussed that it's hardly relevant to the destructive impact of shared criminal behavior between an officer and enlisted man whether it takes place on post or off post or in or out of uniform or on or off duty. The relationship between those men is effectively destroyed. As word gets back in this closed society which the military is, very close-knit society, a society in which there is a great deal of gossip and rumor, it will undercut the authority of all officers in that command. And I think one need not strain one's imagination to think of a variety of criminal offenses that are wholly destructive of the relationship the armed forces must require. In fact, there may be such offenses

which are criminal under the Uniform Code which are not criminal under a State code. So that if it occurs in certain jurisdictions, civilian authorities will be without power to prosecute. But the military, nevertheless, has a vital interest in seeing that that kind of behavior does not take place between officers and enlisted men. And I think that much can hardly be denied.

QUESTION: What if this had been an alcoholic beverage instead of marihuana?

MR. BORK: I think fraternizing with an enlisted man might have called for disciplinary activity by the military. I don't think it would have been a general court. I think drinking with enlisted men is severely discouraged; it might have called for a reprimand; if repeated, it might have called for a more serious punishment, but since the underlying activity is not in itself criminal, the initial response of the military, I suspect, would have been milder than this.

QUESTION: You feel there are differences between drunkenness and grass?

MR. BORK: A distinction? No, no. I think the distinction between alcohol and drugs is simply that, if we are talking about the use rather than the relationship between the two men is simply that the military, as civilian society, chooses to regard only overuse of alcohol as an offense, whereas

they tend to regard any use of drugs as an offense. And that's a judgment which I think is essentially a legislative judgment and I think an allowable one.

QUESTION: Well, you mentioned just a moment ago that we might be in a jurisdiction where the use of marihuana was not a crime.

MR. BORK: That is correct. In fact, we have jurisdictions now, I think -- well, one thing is certainly true, Mr. Justice Blackmun, and that is that the treatment of marihuana possession or use by various localities and States varies enormously. There are -- we have heard of cases where 15 years for possession of minor amounts of marihuana. There are other jurisdictions where the offense is almost not prosecuted. So that the military's distinctive interest in this may be not vindicated at all by the civilian authorities, or it may be overvindicated in some sense, be much harsher than the military would choose to treat the matter.

QUESTION: Do I understand you, however, to say that if the captain here had gone off base, off duty and spent the evening in an apartment with an enlisted man and they both hung one on that this would not be service connected?

MR. BORK: No, no, I didn't suggest that, Mr. Justice Blackmun. I think it would be. I was suggesting that the service's response to an officer having a drink with an enlisted man might be not at the same level of concern and

might justify a milder level of punishment than its response to an activity which is itself criminal and the use of a drug, although it might have a disciplinary response to fraternization between an officer and an enlisted man. But fraternization in a criminal activity is a far more serious form of fraternization and far more destructive of morale and discipline than other forms of fraternization.

QUESTION: Because in this case if the captain had a bottle of whiskey, nothing would have happened to him, but if he had marihuana, he would have been prosecuted, without any association with anybody.

MR. BORK: If we are talking about the possession issue alone, that is correct, Mr. Justice Marshall. The possession of marihuana is certainly treated as a crime by the military, whereas the possession of alcohol is not.

QUESTION: Whether with anybody else or not.

QUESTION: Is fraternization itself a crime under the UCMJ?

MR. BORK: No, I think only if it reaches a level where it does become destructive of discipline; I suspect that fraternization which was regarded as unseemly would be handled by a word to the officer. Fraternization which becomes destructive of the relationship which the military must foster will ultimately reach a criminal level in that sense. Fraternization which involves participation in a criminal

activity is obviously a crime.

But I wanted to reach the issue of possession because -- I may say on the other issue of it, when it is behavior between an officer and an enlisted man that is criminal, the civilian court will never fully vindicate the military's interest because there is no element of any civilian crime which consists of the discipline-destroying aspect of this relationship.

Now, the charge of possession, I think, is equally serious and I think equally service connected. The military regard the use of drugs as highly detrimental to effective military performance. They may not be in any individual case. That is hard to say. On the average the military have good reason to know that the use of drugs is highly destructive of the efficacy of the armed forces.

Now, it may be that a variety of civilian jurisdictions will ultimate decriminalize marihuana. It may be that many of them won't. The military cannot afford to decriminalize marihuana because they think, on the basis of experience, on the basis of evidence, that the drug tends to decrease efficacy and that cannot be tolerated by an army --

QUESTION: Wouldn't alcohol also?

MR. BORK: It will if overused, yes.

QUESTION: This was off base, wasn't it?

MR. BORK: That is true, Mr. Justice Stewart, but I suspect that -- I am sure that the impact of the drug on

personal well-being is the same whether you are in uniform or out of uniform or on base or off base.

QUESTION: The same is true of alcohol, isn't it?

MR. BORK: That is true. An abuse of alcohol is a military offense off base or on base. The military regards that as an offense.

QUESTION: Do you not have the related factor that comes into this picture, then, somewhere, if enlisted men generally get the impression that the officers tolerate the use of marihuana or the drugs, which would go to your broad-based argument about maintenance of discipline, would it not?

MR. BORK: That's right, Mr. Chief Justice. I think one must look at this as a widespread problem in the army. This is not a problem of Captain Councilman and a few of his off-duty peccdillos. This is a serious, widespread concern to the military.

Now, I think at page 17 of our brief, to illustrate the problem, we have some figures which show how serious the problem is, on page 17 and running over onto page 18. That brief states that in two years over 86,000 servicemen underwent rehabilitation for drug use, and that 48 percent of those were unable to return to active duty. Now, that means something like a little over 40,000 men in two years were lost to the army, or the armed forces, through drug use. And that is the equivalent of two army divisions being lost without a shot being

fired. And that's the kind of problem we are talking about and the kind of problem the military faces. A civilian society in balancing its values may decide it doesn't care about efficiency, about effectiveness, and that what an individual does to himself is his own concern. And there may be a good deal to be said for that.

QUESTION: Mr. Bork, I notice you have consistently referred to drug use. Isn't this a marihuana case?

MR. BORK: Yes, a marihuana case. Perhaps I should confine it to that. But marihuana, the military thinks, as many people think, has some relationship, and not a perfect one, but then again not an insignificant one, to other drug use. And in itself it is increasingly thought to be harmful. It is particularly thought to be harmful to motivation.

QUESTION: There is some thinking that alcohol also does the same thing.

MR. BORK: Mr. Justice Blackmun, I think that's correct. I think it's fundamentally a mistake for us to think that if a society has learned to tolerate alcohol over a period of years and punish only its severe abuse in the military, that it then becomes somehow unconstitutional or illegal for that society to make a different judgment about marihuana whose effects in some respectsmay be similar, in some respects may be different. But I think it's an allowable legislative judgment that on the basis of present knowledge

and on the basis of the experience we have, marihuana may be regarded by any jurisdiction, civilian or military, as a more serious threat. The military so regards it, and I think allowably. In fact, I think much of the contrary feeling to my own about this case rests upon an unarticulated notion that perhaps marihuana ought to be decriminalized. I don't know whether marihuana ought to be decriminalized or not. I do think that the judgment for each jurisdiction involved, and the military has made its judgment, and I think it's a very reasonable judgment for the military to make and therefore one that ought not to be upset.

This is a massive problem for the military. They have lost a great deal of efficiency and loss of personnel through the drug problem, of which the marihuana problem is a part. So I think both --

QUESTION: And the alcohol problem must be a part also. It's a drug, isn't it?

MR. BORK: Yes, it is a drug, Mr. Justice Stewart.

QUESTION: And in your brief on pages 17 and 18 the two are linked, I notice, at least by the title of the --

MR. BORK: I am not quite --

QUESTION: On Review of Military Drug and Alcohol Programs.

MR. BORK: I am not quite certain why the subject of alcohol rises here because the military does concern itself

with the abuse of alcohol.

QUESTION: Unless again times have changed, one branch of the military, i.e., United States Navy, concerns itself not only with the abuse of alcohol, but with any possession of any kind of alcohol on any ship in the United States Navy.

MR. BORK: Aboard ship, that's certainly true, Mr. Justice Stewart. But I think the Navy would take the position that drug possession off base, out of uniform, is service connected, whereas alcohol possession off base out of uniform, they would not regard as service connected. I think that's an allowable legislative distinction, allowable judgment. It's one that our society generally makes, and I don't see why it should be denied to the military, and I think indeed it's justified.

For these reasons I think both because of the relationship between the officer and the enlisted man in a known criminal transaction which the civilian courts cannot fully vindicate, and the possession issue, which I think the military is entitled to view as service connected because of its disastrous effect upon efficiency and upon availability of manpower as shown by statistics, I think both of these offenses, if the merits of this case are reached, contrary to our submission that the district court had no jurisdiction, require that the judgment be reversed.

QUESTION: Was Toth v. Quarles an injunction? That was a habeas corpus, wasn't it?

MR. BORK: I believe so, I believe so.

QUESTION: It's difficult to tell from the opinion.

MR. BORK: I was reading that yesterday trying to tell, and as I recall, Mr. Justice Stewart --

QUESTION: Footnote No. 2 or 3 somewhere indicates it was habeas corpus.

MR. BORK: I think it was.

QUESTION: General Bork, could I ask you one other question? Apart from this case, do you know of any civilian court precedent ruling that marihuana possession is service connected?

MR. BORK: A civilian -- I don't know of one offhand, Mr. Justice Blackmun, unfortunately, That is not to say that there may not be one.

QUESTION: Do you know of any military case holding that marihuana possession is not service connected?

MR. BORK: No, I don't. In general, military courts think it is and civilian courts have thought not.

MR. CHIEF JUSTICE BURGER: Mr. Garrett.

ORAL ARGUMENT OF NICHOLAS D. GARRETT

ON BEHALF OF THE RESPONDENT

MR. GARRETT: Mr. Chief Justice, and may it please the Members of the Court: I think myself -- the Court has

granted a split argument in this case, myself and Mr. Meyers. He will address himself to the issue of jurisdiction; I will attempt to address myself to the issue of service connection as applied to O'Callahan and Relford and related cases.

I think that the Solicitor General has maybe overstated his case to one extent, and that we will soon have through the use of the military agents the service manufacturing jurisdiction, and as Justice Blackmun has pointed out, we now have a situation where the courts of military appeals chains have uniformly held that possession is per se service connected. And I would suggest that I don't believe that that was the holding of either Relford or O'Callahan wherein the individual rights seemed to be at stake in O'Callahan where we had the flagrant use of the military deciding jurisdiction was available, where the only thing was that he was a member of the service. There was no other service connection in attempted rape off post,off duty, out of uniform.

The Relford case, I think, tried to limit or at least to explain some of the factors that the military should look at in determining whether or not service connection lies. And I think that we find that the military has just by some means determined that marihuana is per se service connected. If you apply any of the factors set out in O'Callahan or in Relford, you reach a different conclusion. The only factor that the Relford decision would point to service connection

in this case, the Councilman case would be that of victim. And I might suggest that in this case I am not sure that victim was the kind of victim that O'Callahan spoke of and that Relford may have addressed itself to. That is to say, this victim is not engaged in any military activity or duty. This victim is an undercover agent who is holding himself out by the use of an alias. In the facts in this thing, Councilman was invited to a party for the very purpose of having met this undercover agent who was held out to be not an undercover agent, but as a clerk-typist.

Now, we would then have the Army stretching this thing if they stretch it much further to the point that they have reached the fact that if a government instrumentality used, then they may decide this is jurisdiction. I know that the military courts of appeal have uniformly held that it is service connection, and I can only suggest that after the Army has all the facts before it, as it did in this case, by virtue of the 32 hearing which is a hearing prior to 39a hearing where the evidence is adduced, then at the 39a hearing the Government called witnesses and more evidence was adduced, and although the facts in this case are very limited because they are reached by stipulation, they are the entire facts and there will never be any change in the factual circumstances. The Government called witnesses in 39a, and if they were present at the hearing before the district judge, and if there were to

be additional facts that would be presented, I would suggest they certainly would have called witnesses before the district judge or would have caused me to enter into another stipulation as they did in this instance and as attached to the brief in this matter.

QUESTION: Mr. Garrett, I am not sure that I understand -- perhaps I misunderstood your emphasis on the fact that this was a clerk-typist but known to the captain as a member of the military force. Is that correct?

MR. GARRETT: Yes.

QUESTION: Would it have made any difference to your case if he had been a lieutenant, first lieutenant, second lieutenant instead of a clerk-typist, an enlisted man?

MR. GARRETT: Mr. Chief Justice, I don't draw that distinction. What I am saying is whether the undercover agent is a lieutenant, a captain, or a general even, he is not a "victim" as I think is contemplated by O'Callahan in terms of the test set out in Relford. I don't know if that answers the question. Perhaps you are getting at the issue that it is a dealing between an officer and an enlisted man, and I can only suggest that the whole offense, if the service connection test we have means anything, we are dealing in a society that is -- I mean, the factual situation, everything, both people involved, the "victim" and Captain Councilman, everything took place in an area outside of the reservation. And he was not,

this agent was not, under the command of Captain Councilman as far as active duty on base. Captain Councilman was going to school out there, and, of course, the undercover agent was sent for the purpose of this.

QUESTION: Are you, or is your colleague, going to address the jurisdictional question?

MR. GARRETT: Yes, sir.

I think perhaps the Court has fairly well covered by questioning those items that seem to me to be important in this case, and that is to say that public drunkenness is a crime cognizable in the military and in the civilian courts, and yet we do not see soldiers that become drunk in civilian communities dragged into the military system and court-martialed. Yet we see this happening in several instances, or in numerous instances, in the case of marihuana.

Now, it seems to me we are applying a different standard, and I don't think that that is a proper standard where they can then ignore by selective prosecution the criteria laid down by Relford and O'Callahan.

QUESTION: Suppose the captain gave a party and invited a dozen enlisted men and they all made very excessive use of alcohol and ultimately the party went public and you had a public -- the public drunkenness criminal act you are talking about, do you think that might conceivably be different from the private party?

MR. GARRETT: I think if the party reached such proportions as the Court envisions where they spew out into the street and they are off post, then I think that then we would apply the Relford test to see if perhaps there there was service connection in your fact situation. And there may be that in that instance, again depending on the facts, there may be service connection enough for the bringing of a court-martial.

QUESTION: Possession of marihuana does not need to be in public in order to be a criminal act, does it?

MR. GARRETT: No, it does not. It is against the law both in Oklahoma and in the military to possess marihuana. I think there again, either in that instance or your first case involving public drunkenness, I think we need to apply the test in Relford, and it may be that in applying the test in the public drunkenness case, we might have a basis.

But as far as detrimental effect and the broad argument that the Solicitor General was using in terms of use of marihuana having a detrimental effect, why, I am sure that alcohol has more than a detrimental effect in a sense. That is to say, that probably alcohol is a more severe problem in the Army than is marihuana.

QUESTION: Mr. Garrett, how many times in your experience have these civilian courts in your State taken over

a case of drunkenness of a military person, public drunkenness? Many times?

MR. GARRETT: Oh, yes.

QUESTION: Don't they always turn it over to the military authorities?

MR. GARRETT: No, they do not. We live in a military community, and public drunk charges are brought against the soldiers in our town I would suggest at least a hundred over the payday periods, and they are treated as any other civilian would be in the city courts, and then the record is released back to the military, the fact that he was confined in our civilian courts. But, of course, then there is no jeopardy attaches and the only thing they then do is make a note administratively in his serviceman's file.

QUESTION: They will be sentenced for 10 days to county jail?

MR. GARRETT: Actually, as a practical matter, in our court it's a $25 to $50 fine in the civilian community for public drunkenness.

QUESTION: Where is this -- Fort Sill?

MR. GARRETT: Fort Sill -- the community is Lawton, Oklahoma.

QUESTION: Does that prevent the army from moving in afterwards?

MR. GARRETT: Yes, it does, if there is a conviction

in the civilian courts.

QUESTION: It does?

MR. GARRETT: Other than administratively. They make a note in a man's file.

QUESTION: Is that some agreement or something with Lawton?

MR. GARRETT: No, sir, that's just -- there is no way that they can try him again in the military for what took place -- I mean, if he is tried in the civilian courts.

QUESTION: After he is tried.

MR. GARRETT: After he is tried or after he pleads guilty.

QUESTION: But the military could take him, couldn't they, before trial?

MR. GARRETT: Yes, they could. They never have.

QUESTION: Well, they just waived it. They still have the right.

QUESTION: You had better not concede that they could. You are giving away your case if you do.

MR. GARRETT: Well, I am not sure that they could just come in and take him and try him. That is certainly an off-post offense without any service connection, unless we completely change where we are.

QUESTION: Is the possession of marihuana off the post, is that an offense? You agree that is a military offense?

MR. GARRETT: What?

QUESTION: The possession of marihuana while a memver of the military force anyplace.

MR. GARRETT: No, only if it takes place within the confines of the base.

QUESTION: And where do you get that from?

MR. GARRETT: Well, it seems to me -- I can say definitely if he possesses marihuana on base, that is a military offense. Then it seems to me we have then the next, if a serviceman possesses marihuana off base, out of uniform, off duty, then it seems to me we have the other side of the coin, the military does not have jurisdiction. And then I think as we apply the Relford factors to that, I think that maybe we may reach whether they do or don't have jurisdiction.

QUESTION: We weren't dealing with a drug in any of the other cases.

MR. GARRETT: I'm sorry, I don't understand, SIR.

QUESTION: We weren't dealing with drugs in any of the other cases, were we?

MR. GARRETT: Oh, in the other cases. Relford and O'Callahan? No, sir, and I don't think --

QUESTION: We weren't dealing with drugs. But now we are dealing with drugs which the military decided is just bad, unlawful, and should be stopped.

MR. GARRETT: I am not sure that the military -- I am

not sure that the use of drugs or that the military can say that this crime, marihuana, is a different type crime than any other crime. In other words, I don't see how we can ascribe some different status to marihuana --

QUESTION: Possession of money is no crime. The possession of marihuana is. Of course that's true. If it's your own money.

MR. GARRETT: Yes.

QUESTION: So they could make possession of certain substances a crime, and dope is one, narcotics is one, and marihuana is one. You don't say they can't make that a crime to possess it, do you? You only say they can't make it a crime to be caught in the possession of it off the base.

MR. GARRETT: No. It's a crime to possess marihuana in the military. It's a crime to possess marihuana in the civilian community. But in the issue of jurisdiction it seems to me -- or service connection -- it seems to me that there has to be something more than mere possession off post for the military to now say, "We have jurisdiction."

QUESTION: Like what?

MR. GARRETT: Captain Councilman in this case had mere possession off post.

QUESTION: He picks an enlisted man and makes a deal to sell him marihuana. If he had sold it to a civilian, you might have a different case. You might. But here is an

officer,knowing his rank and knowing the enlisted man's rank, selling him marihuana, knowing that they are both military people and knowing their rank. You don't see any problem with the military?

MR. GARRETT: Not in terms of the factual situation in this case. There is not a victim as such. This is an undercover agent that is holding himself out to be a military man. If we carry that argument further, it seems to me we then have, if we have a civilian agent that holds himself out to be an undercover agent, then he in that instance would be -- they would find service connection. I think that's the foggiest interpretation -- the example I gave is the foggiest interpretation of Relford and O'Callahan.

If the Court please, I see my time has expired.

MR. CHIEF JUSTICE BURGER: Your colleague is going to deal with jurisdiction.

MR. GARRETT: Yes, your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Meyers.

ORAL ARGUMENT OF O. CHRISTOPHER MEYERS

ON BEHALF OF THE RESPONDENTS

MR. MEYERS: Mr. Chief Justice, and may it please the Court: This portion of our argument is devoted to the question of the propriety of the Federal district court injunction of the pending court-martial. Our argument here is predicated on this Court finding that there is no service

connection on these facts. If the Court does find that there is sufficient service connection to allow a court-martial prosecution in the off-post, out of uniform, off duty, et cetera, possession and transfer of marihuana, then it is true, and I would agree, that Captain Councilman should stand trial by court-martial.

If, however, you agree that there was not sufficient service connection here and that if Captain Councilman is to be tried, he should be tried by civilian authorities instead of military authorities, then a court-martial has no jurisdiction and has no authority at all to try this man. And we have, therefore, no duty to exhaust our remedies within the military system.

Now, this Court --

QUESTION: We are not talking about the merits of the -- I mean, the jurisdictional question, I think, doesn't depend on the ultimate merits of your claim, does it? It depends upon whether or not every single court-martial can be tested out in advance in a Federal district court by way of the puted defendant, the court-martial defendant, bringing as a plaintiff an action for an injunction.

MR. MEYERS: I did intend to reach that, Mr. Justice Stewart. The way that I intend to reach it is to develop, first of all, where the military has the jurisdiction to try an individual for a particular offense. As I was saying, this

Court has set out in the O'Callahan opinion a two-step inquiry to determine whether the military court has jurisdiction in the first place to try a person. And this two-step inquiry requires asking the question, first of all, is this individual subject to the Uniform Code of Military Justice? And if that question be answered in the affirmative, then the second question arises, the second question being: Is this particular offense which is alleged here sufficiently service connected to allow the military court to have jurisdiction?

Now, unless both of these questions be answered in the affirmative, then the military court has no jurisdiction in the first place to try an individual. The question then arises if an individual finds himself in this position, that is, about to be deprived of his rights and tried by the military when the military has no jurisdiction, then what does he do? And the collateral question, of course, is whether or not the individual must exhaust his remedies within the military system before he can even raise the matter whether or not the court-martial has jurisdiction.

QUESTION: Well, another way to put it, it really is whether or not a Federal district court has any jurisdiction at all over this kind of a claim, or whether the only function of the civilian court is to deal with habeas corpus applications.

MR. MEYERS: I think that whether the civilian court has jurisdiction at all and when the jurisdiction of

the civilian court arises depends upon whether or not the military court has jurisdiction. It is my position if the military court has jurisdiction, then the civilian court can stay out of it. However --

QUESTION: And it's up to the civilian court in an action for an injunction to determine that question, you say.

MR. MEYERS: Yes, sir, the civilian court --

QUESTION: This would mean that in every single case where there is a threatened court-martial the defendant can come into a Federal district court and try this question out in the Federal district court in an action for an injunction to enjoin the military court-martial, is that right?

MR. MEYERS: I think that's not correct, although I would say, certainly, an individual always maintains his constitutional rights and always the civilian courts stand ready to protect his constitutional rights if they are infringed.

QUESTION: What cases do you have?

MR. MEYERS: In Toth v. Quarles --

QUESTION: Was that an injunctive proceeding?

MR. MEYERS: That was a habeas corpus proceeding. And in Toth v. Quarles the man who, as you recall, had been discharged from the Army was returned to Korea and tried for murder.

This Court, applying the two-step test found, O.K., service connection, murder in the Army, but the individual was not subject to the Uniform Code of Military Justice, therefore, both steps were not met, therefore the military does not have jurisdiction, therefore we do not require the exhaustion of remedies and habeas corpus is a proper relief.

QUESTION: But that was after he had been tried. The military proceedings were all over in Toth when he --

MR. MEYERS: No, Mr. Justice Rehnquist. The man was taken from Pennsylvania, I believe, back to Korea to stand trial for murder. And before the military could proceed with the murder trial, the matter was raised by habeas corpus.

QUESTION: That's correct, it was a pretrial habeas corpus.

MR. MEYERS: I think you are referring to the facts in Gusik.

QUESTION: I was thinking of Reid v. Covert actually, I think.

QUESTION: Those were close convictions.

MR. MEYERS: Reid v. Covert was a situation where a military dependent stood accused of murdering her serviceman husband. Again, this Court, applying the two-step test, found O.K. service connection for killing the fellow, but the first step fails because the wife was not subject to the Uniform Code of Military Justice. Therefore, this Court did not

require exhaustion of remedies, habeas corpus was relieved.

QUESTION: But there in Reid the trial had taken place, hadn't it, in the military?

MR. MEYERS: I believe not. Habeas corpus was the remedy, and this Court did not require the exhaustion of remedies in Reid.

QUESTION: Well, in any rate, in Reid the person was a civilian, were they not?

MR. MEYERS: In Reid the person was a civilian, the wife of the serviceman whom she murdered.

QUESTION: And the action was won for habeas corpus.

MR. MEYERS: That's correct.

The third case along these lines is McElroy v. Guagliardo where civilian employees of the military were accused of stealing military property. Again, the second part of the test, that is, service connection, is probably present, however, the people were found not to be subject to the Uniform Code of Military Justice, therefore, exhaustion was not required and the military could not proceed habeas corpus.

QUESTION: Was that an injunction?

MR. MEYERS: No, sir. Habeas corpus was the remedy as well.

QUESTION: Except for the case we heard yesterday and Avrech, are there any other cases where injunction has been concerned?

MR. MEYERS: I do have a case, Dooley v. Ploger, a Fourth Circuit case.

QUESTION: It's not in your brief, is it?

MR. MEYERS: Dooley v. Ploger, I believe, is cited in the Government's brief and also in the amici briefs.

Excuse me. That should have been Sedivy v. Richardson. That case was a case involving off-post, off-duty possession of marihuana. The Circuit Court said that injunctive relief in that case was not proper and the reason was that the facts were not clearly presented to the military court, so that the military court never had the opportunity to determine whether or not there was service connection. And that, I submit, is a significant distinction between the Sedivy case and the facts which are now before this Court.

QUESTION: The way you explained it, that was sort of a decision-on-the-merits case. The Federal civilian court didn't refrain from entertaining jurisdiction, the way you explained it, but just denied the injunction, is that it?

MR. MEYERS: The district court enjoined the court-martial proceedings. The Circuit Court said the injunction was not proper --

QUESTION: On the merits.

MR. MEYERS: On the merits -- because the military did not have a chance to develop the facts in that particular case.

QUESTION: But the Court of Appeals did not say, as you have explained it to us, that the district court was without jurisdiction to consider the merits, did it?

MR. MEYERS: That is my understanding of the case.

I would like to continue the line that I had started on the two-step inquiry. Gusik, I believe, is the case that you are referring to, Mr. Justice Rehnquist, in which the person charged was in the military. He had already gone through several trials for murder, and he brought the action to this Court asking for habeas corpus, and at that time a new type of relief was passed by statute, I believe. This Court required him to then go back and exhaust all of those remedies, I think properly so, because applying the two-step inquiry, one, the person was subject to the Uniform Code of Military Justice, and, two, the offenses he committed, murder of another serviceman in the service, certainly would satisfy the service connection. So on both points of the two-step inquiry, it points toward military jurisdiction, and I think in that situation a man should be required to exhaust all his military remedies.

This was basically the same situation in Noyd v. Bond in which an officer refused orders to teach pilots, to train pilots, for duty in Vietnam. Here, applying the two-step inquiry, we find a captain in the Army on active duty subject to the Uniform Code refusing an order, certainly a service-

connected offense. The Court properly held then that the man should be required to exhaust his military remedies.

The Court also pointed out that in Noyd v. Bond there was a particular question as to a technical interpretation of the language in the Uniform Code of Military Justice. In a footnote in Noyd v. Bond this Court cited Toth, Reid, and McElroy, the cases I've just discussed, pointing out that this Court had vindicated the claim of individuals without requiring exhaustion of military remedies. The reason: That this Court did not believe that the expertise of the military extended to the consideration of the types of constitutional claims there presented, and moreover, it appeared especially unfair to require exhaustion of military remedies where the complainant raised substantial arguments denying the right of the military to try them at all. And I believe that's where we are here today as well.

QUESTION: This man is in the military.

MR. MEYERS: He is in the military, I agree, your Honor. Let us apply the two-step inquiry to the facts before us here.

QUESTION: And you say that's step one only.

MR. MEYERS: Step one. Is this man subject to the Uniform Code of Military Justice? Certainly. He's a captain on active duty in the Army.

Is this offense sufficiently service connected to

allow court-martial jurisdiction? We feel that based on this Court's opinion in O'Callahan and Relford, applied to the facts in this situation, this offense is clearly not sufficiently service connected to allow the military to try this man.

Now, we don't say he shouldn't be tried. What we say is he should be tried in the civilian court for his Article III and fifth and sixth amendment rights.

QUESTION: Suppose one of the other people that Councilman sold heroin to brought it back onto the post. Would that be military then?

MR. MEYERS: Let me point out first, Mr. Justice Marshall, that we are dealing with marihuana and not heroin.

Now, if Captain Councilman or an individual serviceman off post, off duty, out of uniform sells some controlled substance to another person and just by selling it to another person, certainly he's committed a crime, but he should be tried in the civilian courts. If the person to whom he sells it --

QUESTION: If he brings it back onto the post --

MR. MEYERS: Then the second man has committed the service-connected offense.

QUESTION: But Councilman hadn't.

MR. MEYERS: Councilman has not committed the service-connected offense. Councilman has --

QUESTION: If Councilman sells marihuana at the post

on this side of the gate, it's service connected; if he sells it on the other side of the gate, it's not. Yes or no.

MR. MEYERS: Your Honor, I think the answer to that would have to be yes, all other things being equal.

QUESTION: Why do you say that this is a proper matter for a civilian court when the civil authorities turned your man over to the military authorities? This is a fact in your case, is it not?

MR. MEYERS: It is a fact, Mr. Justice Blackmun.

QUESTION: This doesn't jibe with your co-counsel's statement that your local Oklahoma courts are taking care of these things day by day. My experience has been, my impression anyway, is that the average civilian court is eager to have the military take care of their own problems.

MR. MEYERS: Not in this situation. The military courts were fully open for the trial of this particular type of offense.

QUESTION: The civilian authorities turned him over to the military, didn't want to have anything to do with him.

MR. MEYERS: They did. The civilian authorities did turn him over to the military, not, I think, because they didn't want anything to do with him -- I don't know why they did it. But I merely say that I know that on many, many occasions the military people are tried in the civilian courts for just this type of offense. It is certainly not the

practice of the civilian authorities to turn over people to the military simply because they are in the military for offenses which the military person commits in a civilian community. Civilian authorities try them regularly.

QUESTION: How many times do you think at Newport News do the Virginia courts try public drunkenness of sailors on shore leave?

MR. MEYERS: I have no idea.

QUESTION: The situation is different in Fort Sill.

MR. MEYERS: Mr. Justice Blackmun, I assure you the situation is different in Fort Sill. It is the rule that if a serviceman commits --

QUESTION: If it's a rule, they wouldn't have turned him over to the military courts in this case.

MR. MEYERS: The military authorities in this particular case particularly requested that Captain Councilman be turned over to them, and I think that the reason is this is a captain, this is an unusual situation, at least it was to the military, that a captain would be having something to do with marihuana. I think that's perhaps the only --

QUESTION: (Inaudible.)

MR. MEYERS: Yes.

QUESTION: Is there some basis for thinking that officers are less prone to use marihuana than enlisted men?

MR. MEYERS: I don't know the answer to that question.

I don't know why the military thinks the way they do. But I merely observe that this is what happened.

QUESTION: Mr. Meyers, what about the stipulation that many of the military offenders apprehended for drug sales and transfers to scags in the civilian community have been tried by the civilian authorities but some have been tried by the military?

MR. MEYERS: I merely say -- there were three captains involved in this particular case.

QUESTION: They are not talking about this particular case, are they?

MR.MEYERS: Well, I know that in this particular case --

QUESTION: There are several cases on page 24, many of the military offenders apprehended for drug sales and transfers -- that's not talking about this case; that's talking about the general work of this undercover agent, isn't it?

MR. MEYERS: That is correct, your Honor.

QUESTION: Who made the decision of which ones he gáve to the civilian and which ones he gave to the military?

MR. MEYERS: The military.

I see that my time's up.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, do you have anything further?

REBUTTAL ARGUMENT OF ROBERT H. BORK

ON BEHALF OF THE PETITIONERS

MR. BORK: Mr. Chief Justice, I just wish to respond more fully to Mr. Justice Blackmun's question about the cases. At the time you asked me, Mr. Justice Blackmun, I was perfectly accurate in saying I did not know of any cases. The situation has changed.

On pages 14 and 15 of the Government's brief, in footnote 4, running over from page 14 to 15, there is citation of some civilian courts that have held drug offenses off post, including a marihuana offense, to be service connected. And in the amicus brief filed by the American Civil Liberties Union, on page 14, there is an instance where one military judge held a marihuana offense not to be service connected.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:06 a.m., the argument in the above-entitled matter was concluded.]