

# The Burger Court Opinion Writing Database

## *Dyson v. Stein*

401 U.S. 200 (February 23, 1971)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



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

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From: Black, J.  
NOV 27 1970

SUPREME COURT OF THE UNITED STATES

No. 41.—OCTOBER TERM, 1970

Recirculated: \_\_\_\_\_

Frank Dyson, Chief of Police, City of Dallas, et al., Appellants, v. Brent Stein.	}	On Appeal from the United States District Court for the Northern District of Texas.
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[December —, 1970]

PER CURIAM.

The appellee, Stein, published a bi-weekly newspaper, the "Dallas Notes." Stein was charged with two violations of Art. 527, § 1, of the Texas Penal Code, which then prohibited, among other things, the possession of obscene materials.\* While these two cases were pending

\*Texas Penal Code, Art. 527, 1961 Tex. Gen. Laws, c. 461, § 1, provided:

"Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars (\$1,000) nor imprisoned more than one (1) year in the county jail or both.

"Sec. 2. Whoever shall knowingly offer for sale, sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, to a minor shall be fined not more than Two Thousand, Five Hundred Dollars (\$2,500.00) nor imprisoned in the county jail more than two (2) years or both.

"Sec. 3. For purposes of this article the word 'obscene' is defined

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Mr. Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan ✓  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

93, J.  
12/1/70

No. 41.—OCTOBER TERM, 1970

Frank Dyson, Chief of Police, City of Dallas, et al., Appellants, v. Brent Stein.	}	On Appeal from the United States District Court for the Northern District of Texas.
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[December —, 1970]

MR. JUSTICE DOUGLAS, dissenting.

I

The two raids in this case were search-and-destroy missions in the Vietnamese sense of the phrase. In each case the police came at night. The first search warrant authorized a search and seizure of "obscene articles and materials, to-wit: pictures, photographs, drawings and obscene literature" concealed at a given address. The seizures included: a large quantity of newspapers, two tons (Dallas Notes), one photograph enlarger, two portable typewriters, two electric typewriters, one camera, "numerous obscene photographs," and \$5.43 in money. The second warrant was issued 16 days later, in response to a claim that marihuana was concealed on the premises. It authorized the officers "to search for and seize the said narcotic drug and dangerous drug in accordance with the law in such cases provided." Not finding any marihuana on the premises, the sergeant asked instructions from his lieutenant. He was told to seize pornographic literature and any equipment used to make it. He "didn't know what to seize and what not to seize so [he] just seized everything." "Everything" in-

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To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 41.—OCTOBER TERM, 1970

Circulated: \_\_\_\_\_

Recirculated: 12-31

Frank Dyson, Chief of Police,	} On Appeal from the
City of Dallas, et al.,	
Appellants,	
v.	
Brent Stein.	United States District Court for the Northern District of Texas.

[January —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

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The two raids in this case were search-and-destroy missions in the Vietnamese sense of the phrase. In each case the police came at night. The first search warrant authorized a search and seizure of "obscene articles and materials, to-wit: pictures, photographs, drawings and obscene literature" concealed at a given address. The seizures included: a large quantity of newspapers, two tons (Dallas Notes), one photograph enlarger, two portable typewriters, two electric typewriters, one camera, "numerous obscene photographs," and \$5.43 in money. The second warrant was issued 16 days later, in response to a claim that marihuana was concealed on the premises. It authorized the officers "to search for and seize the said narcotic drug and dangerous drug in accordance with the law in such cases provided." Not finding any marihuana on the premises, the sergeant asked instructions from his lieutenant. He was told to seize pornographic literature and any equipment used to make it. He "didn't know what to seize and what not to seize so [he] just seized everything." "Everything" in-

*change through*

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan ✓  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

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SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

Circulated: \_\_\_\_\_

No. 41.—OCTOBER TERM, 1970

Recirculated: 1/4/71

Frank Dyson, Chief of Police, City of Dallas, et al., Appellants, v. Brent Stein.	}	On Appeal from the United States District Court for the Northern District of Texas.
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[January —, 1971]

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 Mr. Justice Brennan  
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*p. 4*

SUPREME COURT OF THE UNITED STATES *Justice Douglas, J.*

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Recirculated: 1-6

On Appeal from the  
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[January —, 1971]

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To: The Chief Justice  
 Mr. Justice Black  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Rehnquist  
 Mr. Justice Souter  
 Mr. Justice Ginsburg  
 Mr. Justice Breyer

SUPREME COURT OF THE UNITED STATES

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On Appeal from the  
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 District of Texas.

1/9/71

[January —, 1971]

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<sup>1</sup> This indiscriminate seizure is hardly surprising since none of the officers knew what to seize, as the questioning of the lieutenant in charge of the raid shows.

"Q. What instructions did you give the officers in effecting this search and seizure as to what they were to do?

"A. They were to search for any obscene material they could find. All of our officers know what obscene material is.

"Q. What is obscene material?

"A. Well, I wish you hadn't ask [sic] that. I take that back. They don't know, neither do I.

"Q. What instructions had you given then in terms of what they were to do?

"A. To search for obscene material and seize it.

"Q. What definition, if any, did you give them as to obscene material?

"A. I didn't."

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

9th DRAFT

SUPREME COURT OF THE UNITED STATES

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Brent Stein.

On Appeal from the  
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Court for the Northern  
District of Texas.

2/8/71

[February —, 1971]

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[December —, 1970]

MR. JUSTICE BRENNAN concurring in result.

My Brother DOUGLAS' dissenting opinion describes graphically the police conduct upon which appellee rested his allegations of bad faith and harassment. If proved, these allegations would, I think, justify federal intervention. The mass seizure of some two tons of the issues of the newspaper without a prior judicial determination of the alleged obscenity of the issues was unconstitutional. *Marcus v. Search Warrant*, 367 U. S. 717 (1961); *A Quantity of Books v. Kansas*, 378 U. S. 205 (1964); *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58 (1963). Similarly, the mass seizure of the tools and equipment required to prepare the newspaper—insofar as it disabled appellee from publishing future issues— infringed the principle of *Near v. Minnesota*, 283 U. S. 697 (1931).

But these questions are not before us. The three-judge court below remanded to a single judge for determination all questions advanced by appellee except the contention that the Texas statute was unconstitutional on its face, and the appellee does not challenge this order of remand here. I, therefore, would reverse the judgment of the District Court, except for paragraph 4, for the reasons stated in *Perez v. Ledesma*, *post*.

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[December —, 1970]

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12-10-70

To: The Chief Justice  
 Mr. Justice Black  
 Mr. Justice Douglas  
 Mr. Justice Harlan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Brennan, J.

No. 41.—OCTOBER TERM, 1970

Circulated: \_\_\_\_\_

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 City of Dallas, et al.,  
 Appellants,  
 v.  
 Brent Stein.

On Appeal From the  
 United States District  
 Court for the Northern  
 District of Texas.

Recirculated: 1-29-71

[February —, 1971]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the result.

My Brother DOUGLAS' dissenting opinion describes graphically the police conduct upon which appellee rested his allegations of bad faith and harassment. If proved, these allegations would justify federal intervention. The mass seizure of some two tons of the issues of the newspaper without a prior judicial determination of the alleged obscenity of the issues was unconstitutional. *Marcus v. Search Warrant*, 367 U. S. 717 (1961); *A Quantity of Books v. Kansas*, 378 U. S. 205 (1964); *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58 (1963). Similarly, the mass seizure of the tools and equipment required to prepare the newspaper—insofar as it disabled appellee from publishing future issues—infringed the principle of *Near v. Minnesota*, 283 U. S. 697 (1931).

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# SUPREME COURT OF THE UNITED STATES

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Frank Dyson, Chief of Police, City of Dallas, et al., Appellants, v. Brent Stein.	}	On Appeal From the United States District Court for the Northern District of Texas.
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[February 23, 1971]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the result.

My Brother DOUGLAS' dissenting opinion describes graphically the police conduct upon which appellee rested his allegations of bad faith and harassment. If proved, these allegations would justify federal intervention. The mass seizure of some two tons of the issues of the newspaper without a prior judicial determination of the alleged obscenity of the issues was unconstitutional. *Marcus v. Search Warrant*, 367 U. S. 717 (1961); *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58 (1963); *A Quantity of Books v. Kansas*, 378 U. S. 205 (1964). Similarly, the mass seizure of the tools and equipment required to prepare the newspaper—insofar as it disabled appellee from publishing future issues—infringed the principle of *Near v. Minnesota*, 283 U. S. 697 (1931).

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December 14, 1970

Re: No. 41 - Dyson v. Stein

Dear Hugo:

Please note at the foot of  
your opinion in this case that Mr.  
Justice White concurs in the result.

Sincerely,

B.R.W.

Mr. Justice Black

cc: Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 28, 1970

Re: No. 41 - Dyson, Chief of Police v. Stein

Dear Bill:

Please join me.

Sincerely,

  
T.M.

Mr. Justice Brennan

cc: The Conference

December 28, 1970

Re: No. 41 - Dyson v. Stein

Dear Hugo:

Please join me in your opinion for this case.

Sincerely,

H. A. B.

Mr. Justice Black

cc: The Conference