

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.

[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

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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District of Texas.

[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 William

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SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 41.—OCTOBER TERM, 1970

Circulated:

Recirculated: 12-31

Frank Dyson, Chief of Police,
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On Appeal from the
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[January —, 1971]

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short & to the point

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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From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 41.—OCTOBER TERM, 1970 Recirculated:

1471

Frank Dyson, Chief of Police,
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On Appeal from the
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[January —, 1971]

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 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
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p. 4

SUPREME COURT OF THE UNITED STATES ^{Douglas, J.}

No. 41.—OCTOBER TERM, 1970

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On Appeal from the
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Chrg throughout

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

SUPREME COURT OF THE UNITED STATES

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On Appeal from the
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1/9/71

[January —, 1971]

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¹ 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."

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9th DRAFT

SUPREME COURT OF THE UNITED STATES

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

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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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12-10-70

SUPREME COURT OF THE UNITED STATES

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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:

Frank Dyson, Chief of Police,
 City of Dallas, et al.,
 Appellants,
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 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—inflicted 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 my opinion in *Perez v. Ledesma*, *post*.

SUPREME COURT OF THE UNITED STATES

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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).

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 my separate opinion in *Perez v. Ledesma, post*.

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