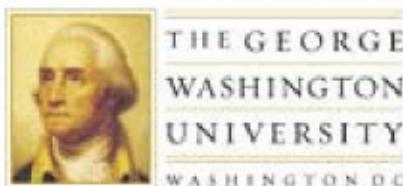


The Burger Court Opinion Writing Database

Flower v. United States
407 U.S. 197 (1972)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



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

CHAMBERS
THE CHIEF

June 9, 1972

Re: No. 71-1180 - Flower v. United States

Dear Byron:

Please show me in same dissenting category
as Harry and Bill Rehnquist.

Regards,

WB

Mr. Justice White

cc: The Conference

HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE
Sanford, California 94303-6010



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

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1972

Re: No. 71-1180 - Flower v. United States

Dear Bill:

For clarification, I join in your dissenting opinion.

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference

HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June third
1972

Dear Byron:

Re: No. 71-1180

Flower v. United States

Please join me in your Per Curiam
circulated June second.

W.W.D.
William O. Douglas

Mr. Justice White

CC: The Conference



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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 2, 1972

RE: No. 71-1180 - Flower v. United States

Dear Byron:

I agree with the Per Curiam you have
prepared in the above.

Sincerely,



Mr. Justice White

cc: The Conference

HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE



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

CHAMBERS OF
JUSTICE POTTER STEWART

File

June 2, 1972

71-1180 - Flower v. U.S.

Dear Byron,

I agree with your Per Curiam
in this case.

Sincerely yours,

*P.S.
P.*

Mr. Justice White

Copies to the Conference

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 6-2-7

Recirculated: _____

2nd DRAFT
SUPREME COURT OF THE UNITED STATES

JOHN THOMAS FLOWER v. UNITED STATES
ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-1180. Decided June —, 1972

PER CURIAM.

Petitioner John Thomas Flower, a regional "Peace Education Secretary" of the American Friends Service Committee and a civilian, was arrested by military police while quietly distributing leaflets on New Braunfels Avenue at a point within the limits of Fort Sam Houston, San Antonio, Texas. In an ensuing prosecution before the United States District Court for the Western District of Texas on charges of violating 18 U. S. C. § 1382 ("Whoever reenters or is found [within a military post] after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—shall be fined not more than \$500 or imprisoned not more than six months, or both"), it was established that petitioner had previously been barred from the post by order of the deputy commander because of alleged participation in an attempt to distribute "unauthorized" leaflets. The District Court found that § 1382 "is a valid law" and was validly applied. It sentenced petitioner to six months in prison. A divided panel of the Fifth Circuit Court of Appeals affirmed. *United States v. Flower*, 452 F. 2d 80 (CA5 1972).

We reverse. Whatever power the authorities may have to restrict general access to a military facility, see *Cafeteria & Restaurant Workers v. McElroy*, 367 U. S. 886 (1961), here the Fort Commander chose not to exclude the public from the street where petitioner was arrested. As Judge Simpson, dissenting, noted below:

"There is no sentry post or guard at either entrance or anywhere along the route. Traffic flows through



To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

JOHN THOMAS FLOWER v. UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-1180. Decided June —, 1972

PER CURIAM.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 5, 1972

Re: No. 71-1180 - Flower v. United States

Dear Byron:

Please join me in your per curiam.

Sincerely,


T.M.

Mr. Justice White

cc: Conference

THURGOOD MARSHALL
HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE
Sanford, California 94393-6030



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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 7, 1971

Re: No. 71-1180 - Flower v. United States

Dear Byron:

At the end of your Per Curiam will you please add the following:

"Mr. Justice Blackmun dissents, for he would grant the petition for certiorari and hear argument on the merits."

Sincerely,

H. A. B.

Mr. Justice White

cc: The Conference

HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE
Sanford, California 94505-6000

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 5, 1972

Lewis F. Powell, Jr.

Re: No. 71-1180 Flower v. United States

Dear Byron:

Please join me.

Sincerely,

Lewis F. Powell, Jr.

Mr. Justice White

cc: The Conference

HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE
Sanford, California 94303-6000



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1st DRAFT

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

SUPREME COURT OF THE UNITED STATES

JOHN THOMAS FLOWER v. UNITED STATES

From: Rehnquist, J.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Circulated: 6/8/72

Recirculated: _____

No. 71-1180. Decided June —, 1972

MR. JUSTICE REHNQUIST, dissenting.

The result, if not the reasoning, of the Court's impressionistic summary reversal of the Court of Appeals in this case is clear: without benefit of briefs or oral argument the Court declares unconstitutional this application of 18 U. S. C. § 1382, a statute enacted to give commanders of military posts authority thought necessary by Congress to exclude civilians from the post area after proper notice.

Because the post commander of Fort Sam Houston may have permitted civilian vehicular and pedestrian traffic on New Braunfels Avenue within the limits of Fort Sam Houston,* the Court holds that he has "abandoned" any claim of special interest in who walks, talks, or leaflets on the avenue. Obviously the Court can not be referring to the subjective intent of the base commander, since he gave petitioner due notice of his debarment from the base, and the bringing of this prosecution evinces a rather strong interest on the part of the commander in petitioner's leafleting activities. If the Court means to say that once any portion of a mili-

*From a record consisting largely of rejected offers of proof, the Court concludes that Fort Sam Houston was an "open" post. It also concludes that New Braunfels Avenue, a traffic artery within the post, was a "completely open" street, presumably more "open" than the post as a whole. While I have difficulty at this stage of the case in knowing how the Court reaches these factual conclusions, or indeed what exactly the varying degrees of "openness" are meant to connote, my disagreement with the Court's summary reversal is not limited to this aspect of the case.

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