

# The Burger Court Opinion Writing Database

*Secretary of Navy v. Avrech*  
418 U.S. 676 (1974)

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



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

CHAMBERS OF  
THE CHIEF JUSTICE

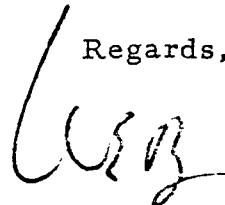
June 25, 1974

Re: 72-1713 - Secretary of Navy v. Avrech

Dear Bill:

I have your letter of June 25. We will, of course, hold Avrech until sometime in July when your dissent is ready.

Regards,



Mr. Justice Douglas

Copies to the Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

July 1, 1974

Re: 72-1713 - Secy. of the Navy v. Avrech

Dear Bill:

Please join me.

Regards,

*W. B.*

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

July 5, 1974

Re: 72-1713 - Secy of the Navy v. Avrech

MEMORANDUM TO THE CONFERENCE:

Bill Douglas and Potter Stewart have indicated readiness in the above case. It could be announced on Monday. There is no particular need for an immediate announcement, but if there are no more dissenting or concurring opinions we could treat it routinely on Monday.

Please let me know if there is any objection to a Monday announcement.

Regards,  
*WB*

Supreme Court of the United States  
Washington, D. C. 20530

File

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

73-767

April 26, 1974

Dear Chief:

As respects the argued cases discussed at today's Conference may I make the following report:

In 72-1713, Secretary of the Navy v. Avrech, there were three to affirm; my own, Brennan's and Marshall's. All members of the Court believed there had been an exhaustion of administrative remedies. Potter, Byron, Harry, Lewis, and Bill Rehnquist seemed generally to agree that there was no jurisdiction in the District Court to go to the merits but the problem was complexing to them and I gathered at the end that a consensus would probably emerge to set the case down for reargument in the fall.

In 73-29, Corning Glass v. Brennan, Douglas, Brennan, White, Marshall, and Powell voted to affirm. Potter Stewart takes no part. Blackmun and Rehnquist vote to reverse. The vote in 73-695, Brennan v. Corning Glass was just the opposite.

In 73-5615, Codispoti v. Pennsylvania, Douglas, Brennan, Stewart, White, and Marshall voted to reverse on the merits which means if a judge retains all of the contempt episodes for trial at the end of the case he is limited to a six month aggregate sentence unless he tries it before a jury. Blackmun, Powell and Rehnquist would dismiss as improvidently granted. On the merits, however, Powell would reverse; and on the merits, Rehnquist would affirm.

In 73-38, United States v. Marine Bancorporation, Inc., I took no part. Brennan, White, and Marshall voted to reverse. Stewart, Blackmun, Powell, and Rehnquist voted to affirm.

In 73-767, United States v. Connecticut National Bank, all of us took part and while Douglas, Brennan, White, and Marshall voted to reverse, Stewart suggested that after the Marine Bancorporation opinion was written this Connecticut case should be vacated and remanded in light of the companion case and for the purpose of the District Court making necessary additional findings. I gathered that Potter's view to vacate and remand represented pretty much the consensus.

April 26, 1974

Page 2

In 73-804, Baker v. Gold Seal Liquor, all voted to reverse except Rehnquist who voted to affirm.

In 73-795, National Labor Relations Board v. International Brotherhood of Electrical Workers, all voted to affirm except Byron and Bill Rehnquist who voted to reverse.

In 73-841, Holder v. Banks, the case in which Justice Powell took no part, the first vote was all to affirm except Rehnquist who voted to reverse. But after further Conference discussion there were five who voted to dismiss as improvidently granted, Douglas, Brennan, Stewart, Marshall, and Rehnquist. Blackmun and White reserved decision on that disposition. The Conference asked that I send to the printer a per curiam dismissing the case as improvidently granted, and that should reach you by the first of the week.

In 73-362, Morton vs. Mancari and 73-364, Amerind v. Mancari, all voted to reverse.

In 73-690, Air Pollution Variance Board of the State of Colorado v. Western Alfalfa Corporation, all voted to reverse but a word of explanation is necessary. The consensus was that we should rule only on the Fourth Amendment issue on which the Court of Appeals in Colorado had primarily relied and remand the case to that Court leaving open any questions such as procedural due process. We left it that way because while the Court of Appeals of Colorado seemed to rely on the lack of due process it wasn't clear whether they were relying on Colorado due process, Fourth Amendment due process, or both. The Justices were unanimous in thinking the Fourth Amendment was not violated. The "open fields" that Holmes expressed in the Hester case was probably applicable here.

The opinions coming down on Monday are:

- 72-6902 GOODING V. U.S.
- 72-1465 PROCUNIER V. MARTINEZ
- 73-439 LEHMAN BROS V. SCHEIN
- 73-440 SIMON V. SCHEIN
- 73-495 INVESTORS DIVERSIFIED SERVICES V. SCHEIN

W.O.D  
William O. Douglas

The Chief Justice  
cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

June 25, 1974

RE: 72-1713, Secretary of Navy v.  
Avrech

Dear Chief:

I wonder if this case could be held until July 8th and handed down with the other held cases? The reason is that I have just received Justice Rehnquist's memo and I am writing in the case; and I can't possibly get it to you by tomorrow morning.

Warm regards,

*William O. Douglas*  
William O. Douglas

The Chief Justice

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1713

### Report - Organization

### Circulation

Secretary of the Navy, Appellant, v. Mark Avrech, On Appeal from the United States Court of Appeals for the District of Columbia Circuit.

[July —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

Respondent was convicted of an attempt to publish a statement disloyal to the United States to members of the armed forces "with design to promote disloyalty and disaffection among the troops." Article 80 of the Uniform Code of Military Justice, 10 U. S. C. § 880, covers the attempt and Art. 134, 10 U. S. C. § 934, covers the substantive offense.

Respondent was on active duty in Vietnam in a combat zone and like most soldiers on night duty had a lot of time on his hands. He typed the following statement:

"It seems to me that the South Vietnamese people could do a little more for the defense of their country. Why should we go out and fight their battles while they sit at home and complain about communist aggression. What are we, cannon fodder or human beings? The United States has no business over here. This is a conflict between two different politically minded groups. Not a direct attack on the United States. We have peace talks with North Vietnam and the V. C. That's just fine and dandy except now how many men died in Vietnam the week they argued over the shape of the table? . . . Do we dare express our feelings with the threat of court-martial perpetually hanging over

To : The Chief Justice  
Mr. Justice Black  
Mr. Justice Black

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Form: Douglas; J.

No. 72-1713

Circumlocution:

Secretary of the Navy, On Appeal from the ~~United States Court of Appeals for the District of Columbia Circuit~~:  
Appellant, States Court of Appeals for the District of Columbia Circuit.  
v.  
Mark Avrech.

[July —, 1974]

MR. JUSTICE DOUGLAS, dissenting

Respondent was convicted of an attempt to publish a statement disloyal to the United States to members of the armed forces "with design to promote disloyalty and disaffection among the troops." Article 80 of the Uniform Code of Military Justice, 10 U. S. C. § 880, covers the attempt and Art. 134, 10 U. S. C. § 934, covers the substantive offense.

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

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

July 5, 1974

Dear Chief:

In 72-1713, Secretary of Navy  
v. Avrech as far as I am concerned it's  
fine for Monday.

*WD by  
T. Sandoval*

William O. Douglas

The Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR. June 24, 1974

RE: No. 72-1713 Secretary of the Navy v.  
Avrech

Dear Chief:

I agree with Bill Rehnquist that if other members of the Conference agree, it could be announced July 8th before the argument in United States v. Nixon.

Sincerely,

*Brennan*

The Chief Justice

cc: The Conference

*SC*  
1st DRAFT

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

SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
No. 72-1713

From: Stewart, J.

\_\_\_\_\_  
Circulated: JUL 3 1974

Secretary of the Navy, } On Appeal from the United  
Appellant, } States Court of Appeals for  
v. } the District of Columbia Cir-  
Mark Avrech. } cuit.

[July —, 1974]

MR. JUSTICE STEWART, concurring in the result.

I indicated my view in *Parker v. Levy*, 417 U. S. —, —, that Art. 134 of the Uniform Code of Military Justice, 10 U. S. C. § 934 (1970), is unconstitutionally vague. However, my views did not prevail in *Parker*, where the Court upheld the military General Articles against constitutional attack. Given that result, which controls the merits of the appellee's substantive claims here, I agree that it would be inappropriate to require further argument of the jurisdictional issues in this case. Consequently, I am content to leave those issues for another day, and concur in the judgment of the Court.

✓

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

July 2, 1974

Re: No. 72-1713 - Secretary of the Navy v.  
Avrech

---

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

July 5, 1974

Re: No. 72-1713 - Secretary of the Navy v.  
Avrech

---

Dear Chief:

I have no objection to this case coming  
down on Monday.

Sincerely,



The Chief Justice

Copies to Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

February 21, 1974

MEMORANDUM TO THE CONFERENCE

No. 72-1713 Secretary of the Navy v. Avrech

I offer, for what it is worth, the attached memorandum hastily prepared by one of my law clerks on the jurisdictional issue raised at oral argument in this case.

Sincerely,

*T. M.*  
T. M.

JUDGE:

I've prepared the attached memorandum on the jurisdictional issue in the Avrech case. The memorandum indicates that the jurisdictional question was raised before the District Court but was apparently abandoned on appeal, that the jurisdictional question is a substantial one which the Court itself recently recognized was wide open, and that Avrech may well have failed to exhaust his administrative remedies.

It is my view that this Court could dispose of this case on the exhaustion point without asking for further briefing on the jurisdictional point.

AMK 2-21-74

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

July 5, 1974

Re: No. 72-1713 -- Secretary of the Navy v. Mark Avrech

Dear Chief:

I have no objection to this case coming down on  
Monday.

Sincerely,



T. M.

The Chief Justice

cc: The Conference

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

1st DRAFT

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated: JUL

No. 72-1713

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

Secretary of the Navy, } On Appeal from the United  
Appellant, } States Court of Appeals for  
v, } the District of Columbia Cir-  
Mark Avrech. } circuit.

[July —, 1974]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court's decision in *Parker v. Levy*, — U. S. — (1974), establishes that the Court of Appeals erred in overturning respondent's court-martial conviction on the basis of the unconstitutional vagueness of Art. 134. In these circumstances, I agree that this case does not present an appropriate vehicle for this Court's consideration of the substantial jurisdictional issues presented. Respondent also claimed, however, that Arts. 80 and 134, as applied to his case, infringed his First Amendment rights, claims rejected by the District Court but never passed upon by the Court of Appeals because of that court's holding as to the vagueness of Art. 134. See *Avrech v. Secretary of Navy*, — U. S. App. D. C. —, —, 477 F. 2d 1257, 1239 (1973). I think it inappropriate for this Court to pass on these claims without the benefit of the Court of Appeals' consideration in the first instance. I would therefore vacate the judgment of the Court of Appeals and remand for reconsideration of the jurisdictional questions and the merits in light of *Parker v. Levy*.

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

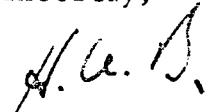
June 24, 1974

Re: No. 72-1713 - Secretary of the Navy  
v. Avrech

Dear Bill:

I agree with the suggested announcement on  
July 8.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

July 1, 1974

Dear Bill:

Re: No. 72-1713 - Secretary of the Navy  
v. Avrech

I prefer the proposed per curiam disposition  
and am willing to join it. I suspect this will prevent  
misunderstanding as to the significance of the reversal.

Sincerely,



Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

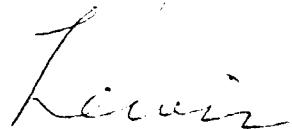
June 24, 1974

No. 72-1713 Secretary of Navy v. Avrech

Dear Bill:

I agree with the suggested announcement on July 8.

Sincerely,



Mr. Justice Rehnquist

1fp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

July 2, 1974

No. 72-1713 Secretary of the Navy v. Avrech

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

CC: The Conference

*L. F. Powell, Jr.*

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 19, 1974

MEMORANDUM TO THE CONFERENCE

Re: No. 72-1713 - Secretary of the Navy v. Avrech

Since we have not yet decided what to do with this case, which was argued at the same time as Parker v. Levy, I thought it might be helpful to circulate this memorandum on it along with my memorandum on McLucas v. DeChamplain, which was held for Parker v. Levy.

Appellee Avrech, then a U. S. Marine with the rank of private first class serving in Vietnam, was tried by a special court-martial on charges of having violated Articles 80 and 134 of the Uniform Code of Military Justice. Article 80 provides for punishment of attempts to commit offenses otherwise punishable under the UCMJ. Article 134, one of the articles challenged in Parker v. Levy, punishes "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces." Appellee was acquitted on the Article 134 charge, but was convicted on the attempt specification under Article 80, which alleged that he had attempted to publish a statement disloyal to the United States to members of the armed forces "with design to promote disloyalty and disaffection among the troops."

The events leading to his conviction took place at Danang in February 1969 while appellee, who had enlisted in 1967, was on active duty in the combat zone. While on night duty at his base, he typed a stencil of a statement which read in part:

"It seems to me that the South Vietnamese people could do a little more for the defense of their country. Why should we go out and fight their battles while they sit at home and complain about communist aggression. What are we, cannon fodder or human beings? The United States has no business over here. This is a conflict between two different politically minded groups. Not a direct attack on the United States. We have peace talks with North Vietnam and the V. C. That's just fine and dandy except now how many men died in Vietnam the week they argued over the shape of the table? . . . Do we dare express our feelings with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a court-martial? We must strive for peace and if not peace then a complete U. S. withdrawal. We've been sitting ducks for too long. . . ."

The mimeograph operator refused to make copies of the statement, and after reading it turned it over to a superior officer.

Upon conviction, appellee was sentenced to reduction in rank to the lowest enlisted grade, forfeiture of three months' pay, and confinement at hard labor for one month. The commanding officer suspended the confinement, but the remainder of the sentence was sustained by the Staff Judge Advocate and the Judge Advocate General of the Navy. Appellee was subsequently given a bad-conduct discharge after an unrelated second court-martial conviction for stealing a camera.

In December 1970, appellee brought this action in the USDC D.C., asserting jurisdiction under 5 U.S.C. §§ 701-706 (the APA), 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1362 (mandamus). He claimed that Article 134 was unconstitutionally vague and overbroad on its face and as applied,

that his statement was protected speech, and that he was convicted without sufficient evidence of criminal intent. He sought an order requiring the Secretary of the Navy to expunge any record of his conviction and to restore all pay and benefits lost because of the conviction. After the District Court denied relief, the Court of Appeals reversed, holding that Article 134 is unconstitutionally vague. We noted probable jurisdiction. Following oral argument, we directed counsel to file supplemental briefs on the issues of the jurisdiction of the District Court and the exhaustion of remedies. They have now done so.

Several alternative courses of action are available to us at this point. We could decide the jurisdictional issue on the briefs, without hearing further argument from the parties. I would have some reluctance to decide what seems to be a rather important issue of law solely on the basis of briefs, but others may differ. We could direct oral argument on the jurisdictional issue next Term, but this route has the disadvantage that counsel for respondent, who prevailed on the merits in the Court of Appeals, will know from a reading of Parker v. Levy that he is going to lose on the merits in this Court and therefore might be forgiven if he made a less than full fledged effort on the jurisdictional issue. Another alternative disposition would be to grant, vacate, and remand for reconsideration in the light of Parker v. Levy; the difficulty with this approach is that it suggests we may have decided sub silentio that the lower court did have jurisdiction, and by our order vacating to reconsider the merits have approved the proposition that there was jurisdiction in the courts below.

None of these suggestions seems as satisfactory to me as an outright reversal of the Court of Appeals, citing Parker v. Levy. The two cases are so similar that I cannot conceive of our upholding the validity of Article 134 against vagueness and overbreadth claims in Captain Levy's case, and reaching a different result in Avrech's case. If we reverse outright,

I think our order is less subject to the construction that we have impliedly affirmed the existence of jurisdiction than if we merely vacate it for reconsideration.

Sincerely,  
J. W. M.

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 24, 1974

Re: No. 72-1713 - Secretary of the Navy v. Avrech

Dear Chief:

The Conference voted last Friday to dispose of Secretary of the Navy v. Avrech, No. 72-1713, argued with Parker v. Levy, in substantially the following language:

"The judgment of the Court of Appeals is reversed. Parker v. Levy, \_\_\_ U.S. \_\_\_."

Because Bill Douglas had not received a copy of my pre-Conference memorandum suggesting that we take the case up last Friday, we decided to delay the order in the case until the July 8th Order List. Mike Rodak informed me at the Order List Conference that past practice suggests that the order in this case should be announced from the bench, since it was an argued case. If other members of the Conference agree, I suppose it could be announced July 8th before the argument in United States v. Nixon.

Sincerely,

W

The Chief Justice

Copies to the Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 28, 1974

MEMORANDUM TO THE CONFERENCE

Re: No. 72-1713 - Secretary of Navy v. Avrech

Potter has suggested that since Bill Douglas is planning to write something in this case, it might be desirable for those of us joining in the Court's disposition to explain in a per curiam why we dispose of the case as we do. His fear, and I think there is some reason for it, is that the combined effect of the simple reversal citing Parker v. Levy with whatever Bill Douglas writes may be taken as an indication that we had implicitly resolved the jurisdictional issue in favor of the existence of jurisdiction. I therefore attach a proposed per curiam disposition which gives a fuller explanation of our reasoning. I would appreciate hearing from you as to which of the two proposed routes you prefer.

Sincerely,

Wm. H. Rehnquist

Attachment

Mr. Justice Black  
Mr. Justice Brandeis  
Mr. Justice Holmes  
Mr. Justice Stone  
Mr. Justice Tamm  
Mr. Justice Wherry  
~~Mr. Justice Van~~  
Mr. Justice Black  
Mr. Justice Page

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

The Evangelist, 3

ATES 6128

No. 72-1713

1000-2211-97-01

Secretary of the Navy, Appellant,  
*v.*  
Mark Ayrech, On Appeal from the United States Court of Appeals for the District of Columbia Circuit.

[July —, 1974]

PER CURIAM.

Appellee Mark Avrech was convicted by a special court-martial on charges of having violated Art. 80 of the Uniform Code of Military Justice, 10 U. S. C. § 880. The specification under Art. 80, which punishes attempts to commit offenses otherwise punishable under the U. C. M. J., charged an attempt to commit an offense under the first and second clauses of Art. 134, 10 U. S. C. § 934, namely, an attempt to publish a statement disloyal to the United States to members of the Armed Forces "with design to promote disloyalty and disaffection among the troops."

Upon conviction, appellee was sentenced to reduction in rank to the lowest enlisted grade, forfeiture of three months' pay, and confinement at hard labor for one month. The commanding officer suspended the confinement, but the remainder of the sentence was sustained by the Staff Judge Advocate and the Judge Advocate General of the Navy. Appellee was subsequently given a bad-conduct discharge after an unrelated second court-martial conviction.

In December 1970, appellee brought this action in the United States District Court for the District of Columbia, asserting jurisdiction under 5 U. S. C. §§ 701-706, 28 U. S. C. § 1331, and 28 U. S. C. § 1332. He claimed

Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Black  
Mr. Justice Powell

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Rehnquist, J.

No. 72-1713

Circulated 6/28

Decided 7/1

Secretary of the Navy, | On Appeal from the United  
Appellant, | States Court of Appeals for  
v. | the District of Columbia Cir-  
Mark Avrech. | cuit.

[July —, 1974]

PER CURIAM.

Appellee Mark Avrech was convicted by a special court-martial on charges of having violated Art. 80 of the Uniform Code of Military Justice, 10 U. S. C. § 880. The specification under Art. 80, which punishes attempts to commit offenses otherwise punishable under the U. C. M. J., charged an attempt to commit an offense under the first and second clauses of Art. 134, 10 U. S. C. § 934, namely, an attempt to publish a statement disloyal to the United States to members of the Armed Forces "with design to promote disloyalty and disaffection among the troops."

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