The Burger Court Opinion Writing Database

Ellis v. Dyson
421 U.S. 426 (1975)

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 OF
THE CHIEF JUSTICE

February 12, 1975

PERSONAL

Re: 73-130 - Ellis & Love v. Dyson

Dear Harry:

I am now inclined to agree that it will probably produce confusion if we indicate this case is not controlled by Tollett v. Henderson. I am now satisfied that it is so controlled and that we should decide the issue here.

Regards,

WEB

Mr. Justice Blackmun

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

CHAMBERS OF
THE CHIEF JUSTICE

April 22, 1975

Personal

Re: 73-130 - Ellis v. Dyson

Dear Harry:

I resort to a memo only because sorting out the multiplicity of opinions in various cases (too often too many in the same case) makes oral exchanges difficult.

I question that the District Court and the Court of Appeals "had no reason to . . . determine the actual existence of a genuine threat of prosecution, or to inquire into the relationship between the past prosecution and the threat of prosecutions for similar activity in the future." 3rd draft at 8. First, it seems to me that the District Court in fact did hold that petitioners' complaint stated a justiciable claim for prospective relief. It is true that for the purpose of ruling on respondents' motion to dismiss, the court "assumed as true every factual allegation in [petitioners'] complaint and also assume[d] that the City of Dallas will continue to enforce the ordinance and this may subject [petitioners] to future arrest and prosecution under the ordinance." App. 64. But in discussing Reed v. Giarrusso, 462 F. 2d 706 (CA 5 1972), the District Court stated that CA 5 concluded in that case "as this court does in the case sub judice, that plaintiffs did have standing to sue since they had been arrested and alleged that they will continue to engage in the same conduct which brought about their arrests and that they fear future arrests and prosecutions." Id., at 65 n. 4. (Emphasis added).

Second, even if the District Court's "standing" determination was merely part and parcel of its earlier "assumptions", it seems to me that those "assumptions" do not establish a justiciable claim for declaratory relief.

Third, if one reads the District Court's opinion as simply assuming a justiciable claim for relief, rather than erroneously determining that certain assumed facts state such a claim, I believe that the District Court had an obligation, taking the allegations of the complaint as true, and before doing anything else to decide first whether petitioners' claim for

prospective relief was justiciable. If the claim was not justiciable, there was no jurisdiction to consider it under Article III or the Declaratory Judgment Act, and hence no occasion to reach the question whether Younger or related principles applied. In this context, justiciability was jurisdiction. I do not share Bill's view that this is simply a nicety of "conventional adjudication", nor do I agree with him that the considerations which have, on occasion, led this Court to avoid close or difficult jurisdictional issues in favor of resolving a case on another ground are equally applicable at the trial level. The first thing a trial court must decide is jurisdiction. Moreover, I note that in neither of the cases Bill cites was there a problem of justiciability in the Constitutional sense. Finally, your opinion seems to acknowledge that the issue of justiciability is a "threshhold requirement." 3rd draft at 9. But if it is such on remand, why was it not originally?

Although Steffel and O'Shea have provided the federal courts with some standards to aid in the resolution of problems of justiciability, they have not altered the rules of federal court adjudication. My worry is that the opinions in this case will not only encourage some district judges, we could name, not to follow the rules but confuse them as to the standards as well. I was never happy with Steffel, but I hoped that we could get some pattern that would reduce litigation. I fear that we have not provided as much light as we should.

If you think there is substance to my points, maybe you can embrace this in your disposition. There are already a confusing number of writings here.

Regards,

WEB

Mr. Justice Blackmun

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

CHAMBERS OF
THE CHIEF JUSTICE

May 5, 1975

PERSONAL AND CONFIDENTIAL

Re: No. 73-130 -Ellis v. Dyson

Dear Lewis:

To follow up on our "hall" conversation, I resort to a memorandum because sorting out the multiplicity of opinions in various cases (too often in the same case) makes oral exchanges less than satisfactory.

Although I agree with a large part of your dissent in this case, it seems to me that the issues raised by petitioners' prayer for expungement have not received sufficient attention, by the opinions in the courts below or in the briefs and argument in this Court, to warrant their resolution that you propose. I hasten to add that I agree with your conclusions on the merits but simply prefer to await another case.

Part II

I am in complete agreement, however, with your analysis of petitioners' claim for prospective relief. Indeed, it is because I feel so strongly on this question but hesitate to add to the confusion with yet another opinion that I offer these observations for your consideration, in the hope that I can join Part II of your dissent.

What troubles me most about Harry's opinion in this case is the statement that the District Court and the Court of Appeals "had no reason to . . . determine the actual existence of a genuine threat of prosecution, or to inquire into the relationship between the past prosecution and the threat of prosecutions for similar activity in the future." 3d draft, at 8.

(1) It seems to me that the District Court in fact held that petitioners' complaint stated a justiciable claim for prospective relief. For the purpose of ruling on respondents' motion to dismiss, the court "assumed as true every factual allegation in [petitioners'] complaint and also assume[d] that the City of Dallas will continue to enforce the ordinance and this may subject

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

CHAMBERS OF
THE CHIEF JUSTICE

May 14, 1975

Re: 73-130 - Ellis v. Dyson

Dear Lewis:

As revised, I join your Part II of your opinion.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 17, 1975

Dear Harry:

Please join me in your opinion in No. 73-130, Ellis v. Dyson.

Sincerely,

William O. Douglas

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 4, 1975

RE: No. 73-130 Ellis v. Dyson

Dear Harry:

Please join me in your fine opinion in the above. I too would be inclined to disallow costs and add "No costs are allowed" at the end of your opinion.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 5, 1975

No. 73-130 -- Ellis v. Dyson

Dear Harry,

After receiving a copy of Lewis Powell's note to you, I went back to the briefs and appendix in this case. Based upon that review, I have come to the conclusion that Lewis is right. The basic thrust of the Complaint was clearly to annul the prior conviction and its collateral consequences. There was no allegation that these plaintiffs were realistically threatened with future prosecutions under the state law. Accordingly, I agree with Lewis that it would mislead the federal courts for us to leave open even the possibility that the District Court might find this case governed by Steffel.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 4, 1975

73-130 - Ellis v. Dyson et al.

Dear Lewis,

I find your proposed dissenting opinion wholly persuasive, and, except for a couple of very minor details, agree with it.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 12, 1975

Re: No. 73-130 - Ellis v. Dyson

Dear Harry:

I shall await Lewis's dissent in this case.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to Conference

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: 3-5-75

Recirculated: _____

No. 73-130 - Ellis v. Dyson

Mr. Justice White, concurring in part and dissenting in part.

I join the opinion of the Court except insofar as it fails to affirm the dismissal in the courts below of petitioner's prayer for a mandatory injunction requiring the expunction of his criminal record. With respect to that issue, the prerequisite of a case or controversy is clearly present; but under Younger v. Harris, 401 U.S. 37 (1971), the District Court was plainly correct in dismissing the claim rather than ruling on its merits. Huffman v. Pursue, Ltd., ___ U.S. ___, ___ (1975), would appear to require as much.

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

1st DRAFT

From: White, J.

Circulated: 3-14-75

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 73-130

Tom E. Ellis and Robert D. Love, Petitioners, *v.* Frank M. Dyson et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1975]

MR. JUSTICE WHITE, concurring in part and dissenting in part.

I join the opinion of the Court except insofar as it fails to affirm the dismissal in the courts below of petitioner's prayer for a mandatory injunction requiring the expunction of his criminal record. With respect to that issue, prerequisite of a case or controversy is clearly present; but under *Younger* v. *Harris*, 401 U. S. 37 (1971), the District Court was plainly correct in dismissing the claim rather than ruling on its merits. *Huffman* v. *Pursue, Ltd.*, — U. S. —, — (1975), would appear to require as much.

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: _____

Recirculated: 3-22-75

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-130

Tom E. Ellis and Robert D. Love, Petitioners, *v.* Frank M. Dyson et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1975]

MR. JUSTICE WHITE, concurring in part and dissenting in part.

I join the opinion of the Court except insofar as it fails to affirm the dismissal in the courts below of petitioner's prayer for a mandatory injunction requiring the expunction of his criminal record. With respect to that issue, the prerequisite of a case or controversy is clearly present; but under *Younger* v. *Harris*, 401 U. S. 37 (1971), the District Court was plainly correct in dismissing the claim rather than ruling on its merits. *Huffman* v. *Pursue, Ltd.*, — U. S. —, — (1975), would appear to require as much.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 20, 1975

Re: No. 73-130 -- Ellis v. Dyson

Dear Harry:

Please join me.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 4, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 73-130 - Ellis v. Dyson

If this case is reversed and remanded, then, under our Rule 57.2, costs will be allowed to the petitioners "unless otherwise ordered by the court." Because of the nature of the case and because of the fact that petitioners' counsel have been out of touch with their clients for a year and do not know whether a case or controversy still exists, I would be inclined to disallow costs. This could be accomplished by adding the words "No costs are allowed" at the very end of the proposed opinion.

I shall be interested in the reaction of the Conference to this possibility.

Sincerely,

Harry

Somebody paid the expenses!!

1st Draft

SUPREME COURT OF THE UNITED STATES

No. 73-130

Tom E. Ellis and Robert D. Love, Petitioners, *v.* Frank M. Dyson et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1975]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This action, instituted in the United States District Court for the Northern District of Texas, challenges the constitutionality of the loitering ordinance of the city of Dallas. We do not reach the merits, for the District Court dismissed the case under the compulsion of a procedural precedent of the United States Court of Appeals for the Fifth Circuit which we have since reversed.

I

Petitioners Tom E. Ellis and Robert D. Love, while in an automobile, were arrested in Dallas at 2 a. m. on January 18, 1972, and were charged with violating the city's loitering ordinance. That ordinance, § 31–60 of the 1960 Revised Code of Civil and Criminal Ordinances of the city of Dallas, Texas, as amended by Ordinance No. 12991, adopted July 20, 1970, provides:

> "It shall be unlawful for any person to loiter, as hereinafter defined, in, on or about any place, public or private, when such loitering is accompanied by activity or is under circumstances that afford probable cause for alarm or concern for the safety and well-

pp. 3, 8, 10

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

From: Blackmun, J.

Circulated: _____

Recirculated: 3/3/75

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-130

Tom E. Ellis and Robert D. Love, Petitioners, *v.* Frank M. Dyson et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1975]

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-130

Tom E. Ellis and Robert D. Love, Petitioners, *v.* Frank M. Dyson et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1975]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

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> "It shall be unlawful for any person to loiter, as hereinafter defined, in, on or about any place, public or private, when such loitering is accompanied by activity or is under circumstances that afford probable cause for alarm or concern for the safety and well-

April 23, 1975

Re: No. 73-130 - Ellis v. Dyson

Dear Chief:

I have your personal letter of April 22. It seems to me -- if I correctly understand your letter, and it may be that I do not -- that the position you are taking ties in closely to Lewis' dissent. In fact, for some weeks now, and ever since your note of February 12, I have interpreted your expressions of concern as generally consistent with Lewis' views, and I have anticipated that you would join him.

My opinion is evidently a poor one, but I think it is correct in result, and four others at least have joined it. I am reluctant now to tamper with it. In addition, I suspect that the case, as a case, will probably fade away. That fact, of course, does not alleviate your general concern.

Sincerely,

HAB

The Chief Justice

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 4, 1975

No. 73-130 Ellis v. Dyson

Dear Harry:

I plan to circulate a dissent in due time.

As stated at the Conference, I do not view this as a Steffel situation as no new threatened criminal prosecution against Petitioners was averred or shown to be imminent. Petitioners already had been prosecuted and convicted on a nolo plea, and they simply elected to seek federal relief rather than appeal.

Moreover, insofar as petitioners do not seek prospective relief, they are in effect attempting to attack collaterally their misdemeanor convictions by way of a § 1983 action. In my view, such an attack is barred on these facts under the principles of Tollett v. Henderson, or by the application of general res judicata principles.

Sincerely,

L. Lewis

Mr. Justice Blackmun

CC: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-130

Tom E. Ellis and Robert D. Love, Petitioners, *v.* Frank M. Dyson et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1975]

MR. JUSTICE POWELL, dissenting.

Petitioners were convicted in Dallas, Texas, Municipal Court, on pleas of *nolo contendere*, of violating the City's loitering ordinance. They were fined $10 each. Under Texas law petitioners had the right to a trial *de novo* in the County Court. Appellate review of an adverse County Court judgment imposing a fine in excess of $100 would have been available in the Texas Court of Criminal Appeals. A determination by the highest state court in which a decision could be had, if it upheld the constitutionality of the ordinance, would have been appealable to this Court. 28 U. S. C. § 1257 (2).

Petitioners deliberately elected to forgo these remedies, allowed their convictions in Municipal Court to become final, and thereafter filed this action under 42 U. S. C. § 1983 in the Federal District Court. Petitioners' complaint attacked the constitutionality of the ordinance and sought two forms of relief: [1] (i) an order, characterized

[1] The complaint, couched in conclusory terms, does not specifically request a declaration that the ordinance cannot be applied to petitioners in the future. Petitioners' brief and argument in this Court nevertheless focused primarily on this relief, and the Court accepts this generous reading of the vague and general language of the complaint.

9-11, 13

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73–130

Tom E. Ellis and Robert D. Love, Petitioners, *v.* Frank M. Dyson et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1975]

MR. JUSTICE POWELL, dissenting.

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Petitioners deliberately elected to forgo these remedies, allowed their convictions in Municipal Court to become final, and thereafter filed this action under 42 U. S. C. § 1983 in the Federal District Court. Petitioners' complaint attacked the constitutionality of the ordinance and sought two forms of relief: [1] (i) an order, characterized

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73–130

Tom E. Ellis and Robert D. Love, Petitioners, *v.* Frank M. Dyson et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1975]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, dissenting.

Petitioners were convicted in Dallas, Texas, Municipal Court, on pleas of *nolo contendere,* of violating the City's loitering ordinance. They were fined $10 each. Under Texas law petitioners had the right to a trial *de novo* in the County Court. Appellate review of an adverse County Court judgment imposing a fine in excess of $100 would have been available in the Texas Court of Criminal Appeals. A determination by the highest state court in which a decision could be had, if it upheld the constitutionality of the ordinance, would have been appealable to this Court. 28 U. S. C. § 1257 (2).

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 20, 1975

No. 73-130 Ellis v. Dyson

MEMORANDUM TO THE CONFERENCE:

Please substitute the enclosed for the first page of Draft No. 3 of the above dissenting opinion circulated earlier today.

L.F.P., Jr.

ss

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-130

Tom E. Ellis and Robert D. Love, Petitioners, *v.* Frank M. Dyson et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1975]

MR. JUSTICE POWELL, dissenting.

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pp. 9, 13, 14

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

From: Powell, J.

4th DRAFT

Circulated: _____

Recirculated: MAY 8 1975

SUPREME COURT OF THE UNITED STATES

No. 73-130

Tom E. Ellis and Robert D. Love, Petitioners, *v.* Frank M. Dyson et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1975]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, dissenting.

Petitioners were convicted in Dallas, Texas, Municipal Court, on pleas of *nolo contendere,* of violating the City's loitering ordinance. They were fined $10 each. Under Texas law petitioners had the right to a trial *de novo* in the County Court. Appellate review of an adverse County Court judgment imposing a fine in excess of $100 would have been available in the Texas Court of Criminal Appeals. A determination by the highest state court in which a decision could be had, if it upheld the constitutionality of the ordinance, would have been appealable to this Court. 28 U. S. C. § 1257 (2).

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

From: Powell, J.

Circulated: _____

Recirculated: MAY 15 1975

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-130

Tom E. Ellis and Robert D. Love, Petitioners, *v.* Frank M. Dyson et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1975]

MR. JUSTICE POWELL, dissenting, in an opinion in which MR. JUSTICE STEWART joins and in Part II of which THE CHIEF JUSTICE joins.

Petitioners were convicted in Dallas, Texas, Municipal Court, on pleas of *nolo contendere,* of violating the City's loitering ordinance. They were fined $10 each. Under Texas law petitioners had the right to a trial *de novo* in the County Court. Appellate review of an adverse County Court judgment imposing a fine in excess of $100 would have been available in the Texas Court of Criminal Appeals. A determination by the highest state court in which a decision could be had, if it upheld the constitutionality of the ordinance, would have been appealable to this Court. 28 U. S. C. § 1257 (2).

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 4, 1975

Re: No. 73-130 - Ellis v. Dyson

Dear Harry:

I am happy to join your opinion for the Court in this case.

I might conceivably write a separate concurrence exploring at greater length some of the issues on which you have quite properly reserved judgment in your opinion for the Court.

I think that costs ought to be taxed in the normal manner in this case. I thought that petitioners' counsel's statement at argument that they had been out of touch with their clients for a year was something of a reflection on counsel, and I would not want to encourage this type of seemingly manufactured lawsuit by bestowing any special charity upon either client or counsel.

Sincerely,

WHR

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 4, 1975

Re: No. 73-130 - Ellis v. Dyson

Dear Harry:

As you can tell from the third paragraph of my "join" letter sent earlier today, I was at that time turned around as to who would recover costs if they were awarded. As you can also tell from that paragraph, your proposal is in accord with my view of the equities, which I had earlier mistakenly thought it was not. I still wonder, though, whether if we depart from the normal rule in a case such as this, we may not create at least intramurally a whole new crop of questions which must be decided on a case by case basis.

Sincerely,

WHR

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 5, 1975

Re: No. 73-130 - Ellis v. Dyson

Dear Harry:

When I joined your first circulation I told you that I might write separately, although of course concurring in your opinion. I think I will do that and will have something circulated within a day or two.

I have some trouble with two of the changes you made from the first or second draft of the opinion, apparently in response to Lewis' dissent.

On page 3, you have added a citation to Costarelli v. Massachusetts in footnote 4. To me this has the implication that those who are joining your opinion somehow are dissatisfied with the Court's opinion in Colten v. Kentucky, 407 U.S. 104, which both you and I joined. I am not dissatisfied with Colten, and would prefer not to see Costarelli mentioned in this manner which I think could be taken to undercut Colten.

You have added footnote 10 by way of direct response, I take it, to Lewis. I think that the reason you are right, and he is wrong, is that the District Court and the Court of Appeals relied solely on the doctrine of Becker v. Thompson to reach the result they reached, and we disapproved Becker in Steffel. Therefore it is proper that we reverse and send the case back for further consideration of all of the issues which

were not canvassed by the District Court or the Court of Appeals the first time around. But the intimation I get from your new footnote 10 is that assuming the truth of plaintiffs' allegations, they did establish a case or controversy within Steffel. I do not at all agree that they did, and it seems to me that you lose some of the basic rightness of your approach when you join issue with Lewis on whether or not there was a case or controversy in the Steffel sense. I take the text of your opinion to say that we do not pass upon that here, because neither the District Court nor the Court of Appeals addressed themselves to that issue. I would be most uneasy, to say the least, if this footnote were to remain in the opinion.

Sincerely,

Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73–130

Tom E. Ellis and Robert D. Love, Petitioners, *v.* Frank M. Dyson et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1975]

MR. JUSTICE REHNQUIST, concurring.

I join the opinion of the Court, and add these few words only to indicate why I believe the Court is quite correct in leaving to the District Court on remand the issues treated in the dissenting opinion of my Brother POWELL and the concurring and dissenting opinion of my Brother WHITE.

The District Court granted respondents' motion to dismiss petitioners' complaint because it regarded a prior decision of the Court of Appeals, *Becker* v. *Thompson,* 459 F. 2d (1972), as controlling. While it might have been more in keeping with conventional adjudication had that court first inquired as to the existence of a case or controversy, as suggested in the opinion of my Brother POWELL, I cannot fault the District Court for disposing of the case on what it quite properly regarded at that time as an authoritative ground of decision. Indeed, this Court has on occasion followed precisely the same practice. *Secretary of the Navy* v. *Avrech,* 418 U. S. 676 (1974); *United States* v. *Augenblick,* 393 U. S. 348 (1969). The Court of Appeals confirmed the District Court's understanding of the law when it affirmed by order, 475 F. 2d 1402 (1973).

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