

The Burger Court Opinion Writing Database

Bigelow v. Virginia

421 U.S. 809 (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

December 30, 1974

PERSONAL

Re: 73-1309 - Bigelow v. Commonwealth of Virginia

Dear Harry:

I am having grave second thoughts on this case after more study and reflection.

If, as I think we agree, a state can prohibit advertising medical services, especially by non-doctors, why can't it limit advertising of a particular medical service in which the quotient of public interest is very high -- higher certainly than on tonsillectomy, appendectomy or hair transplants.

I now note that both you, Thurgood Marshall and I had question marks on our votes to reverse.

In short, I'm about ready to vote to affirm on the narrow ground that a state probably has power to restrict advertising medical services, at least to licensed M.D.'s in Virginia. Let's discuss.

Regards,

1
RB/3

Mr. Justice Blackmun

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

CHAMBERS OF
THE CHIEF JUSTICE

May 13, 1975

PERSONAL

Re: 73-1309 - Bigelow v. Virginia

Dear Harry:

It seems to me the discussion of overbreadth in Part II gives a credibility to the nonsense the Court has been saying in this area over your protests and mine. What you say is correct, but is it necessary? I write because I may miss you on your return.

Regards,

W.B.

Mr. Justice Blackmun

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

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1975

PERSONAL

Re: No. 73-1309 - Bigelow v. Virginia

Dear Harry:

I can join you as to Parts I, III and IV.

If your final sentence in Part II omitted "in any substantial part" I could join in toto. I hesitate to place other courts in the posture of putting a caliper on just how much overbreadth weighed in light of almost three pages of treatment.

Regards,

WB

Mr. Justice Blackmun

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

CHAMBERS OF
THE CHIEF JUSTICE

June 11, 1975

Re: 73-1309 - Bigelow v. Virginia

Dear Harry:

Please join me.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 11, 1975

Re: Bigelow v. Virginia, No. 73-1309

Dear Harry:

Please join me.

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.

May 7, 1975

✓

RE: No. 73-1309 Bigelow v. Commonwealth of Virginia

Dear Harry:

I think your handling of the difficult question in this case is exemplary and I am delighted to join your opinion.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 10, 1975

RE: No. 73-1309 Bigelow v. Virginia

Dear Harry:

The change in your memorandum of June 10 is
all right with me.

Sincerely,

W. J. Brennan Jr.

Mr. Justice Blackmun

cc: Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Powell

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 7, 1975

73-1309 - Bigelow v. Virginia

Dear Harry,

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

Sincerely yours,

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 11, 1975

Re: No. 73-1309, Bigelow v. Virginia

Dear Harry,

The deletion of the phrase "in any substantial part" on the top of page 8 of your opinion will be wholly satisfactory to me.

Sincerely yours,

Mr. Justice Blackmun

Copies to Mr. Justice Brennan
Mr. Justice Marshall
Mr. Justice Powell

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 23, 1974

Re: No. 73-1309 - Bigelow v. Commonwealth of
Virginia

Dear Chief:

For now, at least, my vote in this case
is to affirm.

Sincerely,



The Chief Justice

Copies to Conference

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

CHAMBER OF
JUSTICE BYRON R. WHITE

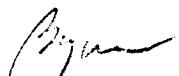
June 10, 1975

Re: 73-1309 - Bigelow v. Virginia

Dear Bill:

Please join me in your dissenting opinion
in this case.

Sincerely,



Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 8, 1975

Re: No. 73-1309 -- Jeffrey Cole Bigelow v. Commonwealth
of Virginia

Dear Harry:

Please join me.

Sincerely,

T. M.
T. M.

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 10, 1975

Re: No. 73-1309 -- Bigelow v. Virginia

Dear Harry:

I agree to omitting the words "in any substantial part" on page 8.

Sincerely,

T. M.

Mr. Justice Blackmun

cc: The Conference

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: 5/7/75

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1309

Jeffrey Cole Bigelow,
Appellant,
v. } On Appeal from the Su-
Commonwealth of Virginia. } preme Court of Virginia.

[May —, 1975]

MR. JUSTICE BLACKMUN.

An advertisement carried in appellant's newspaper led to his conviction for a violation of a Virginia statute that made it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the procuring of an abortion. The issue here is whether the editor-appellant's First Amendment rights were unconstitutionally abridged by the statute. The First Amendment, of course, is applicable to the States through the Fourteenth Amendment. *Schneider v. State*, 308 U. S. 147, 160 (1939).

¶

The Virginia Weekly was a newspaper published by the Virginia Weekly Associates of Charlottesville. It was issued in that city and circulated in Albemarle County, with particular focus on the campus of the University of Virginia. Appellant, Jeffrey C. Bigelow, was a director and the managing editor and responsible officer of the newspaper.¹

¹ His brief describes the publication as an "underground newspaper." Brief for Appellant 3. The appellee states that there is no evidence in the record to support that description. Brief for Appellee 3 n. 1.

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

pp. 1, 7, 19

From: Blackmun, S.

Circulated: _____

3rd DRAFT Recirculated: 6/6/75

SUPREME COURT OF THE UNITED STATES

No. 73-1309

Jeffrey Cole Bigelow,
Appellant,
v. } On Appeal from the Su-
Commonwealth of Virginia. } preme Court of Virginia.

[May —, 1975]

MR. JUSTICE BLACKMUN delivered the opinion of the /
Court.

An advertisement carried in appellant's newspaper led to his conviction for a violation of a Virginia statute that made it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the procuring of an abortion. The issue here is whether the editor-appellant's First Amendment rights were unconstitutionally abridged by the statute. The First Amendment, of course, is applicable to the States through the Fourteenth Amendment. *Schneider v. State*, 308 U. S. 147, 160 (1939).

1

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¹ His brief describes the publication as an "underground newspaper." Brief for Appellant 3. The appellee states that there is no evidence in the record to support that description. Brief for Appellee 3 n. 1.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 10, 1975

Re: No. 73-1309 - Bigelow v. Virginia

Dear Bill, Potter, Thurgood and Lewis:

The Chief Justice some time ago indicated some discomfort about the presence of Part II of the opinion where I speak generally of overbreadth. He has now indicated that he can join Parts I, III and IV of the opinion, and that he also can join Part II if the four words "in any substantial part," appearing in the two top lines on page 8, are omitted.

My own reaction is that this can be done without affecting the integrity of the opinion and holding. If all of you agree, I shall effect this change. Will you please let me know.

Sincerely,



Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall ✓
Mr. Justice Powell

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 11, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 73-1309 - Bigelow v. Virginia

On page 8 of the circulation of June 6 I am omitting
the words "in any substantial part" that appear in the two
top lines.

H. A. B.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 8, 1975

No. 73-1309 Bigelow v. Virginia

Dear Harry:

Please join me.

Sincerely,



Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20542

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

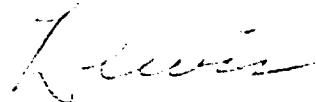
June 10, 1975

No. 73-1309 Bigelow v. Virginia

Dear Harry:

The suggested change is entirely satisfactory to
me.

Sincerely,



Mr. Justice Blackmun

lfp/ss

cc: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 8, 1975

Re: No. 73-1309 - Bigelow v. Virginia

Dear Harry:

I will in due course circulate a dissenting opinion in this case.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

No. 73-1309

Jeffery Cole Bigelow, Appellant

v.

Commonwealth of Virginia

On Appeal from the Supreme Court of Virginia.

MR. JUSTICE REHNQUIST dissenting.

The Court's opinion does not confront head-on the question which this case poses, but makes contact with it only on a series of verbal side-swipes. The result is the fashioning of a doctrine which appears designed to obtain reversal of this judgment, but at the same time to save harmless from the effects of that doctrine the many prior cases of this Court which are inconsistent with it.

I am in agreement with the Court, ante at 8, that Virginia's statute cannot properly be invalidated on grounds of overbreadth^{1/} given that the sole prosecution which has ever been brought under this now substantially altered statute is that now in issue. See Lewis v. City of New Orleans, 415 U.S. 130, 136 (1974) (Blackmun, J. dissenting joined by Burger, C.J. and Rehnquist, J.). While the Court may have on occasion forgotten that "[i]t is the law as applied that we review, not the abstract,

Wm. Day Jr. - is this the
missing WR draft
from 6/11/75

P. 1, 57

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Rehnquist, J.

No. 73-1309

Circulated: 6-4

Jeffrey Cole Bigelow,
Appellant,
v.
Commonwealth of Virginia.

On Appeal from the Su-
preme Court of Virginia.

Circulated: 6-6

[June --, 1975]

MR. JUSTICE REHNQUIST, dissenting.

The Court's opinion does not confront head-on the question which this case poses, but makes contact with it only in a series of verbal sideswipes. The result is the fashioning of a doctrine which appears designed to obtain reversal of this judgment, but at the same time to save harmless from the effects of that doctrine the many prior cases of this Court which are inconsistent with it.

I am in agreement with the Court, *ante*, at 8, that Virginia's statute cannot properly be invalidated on grounds of overbreadth¹ given that the sole prosecution which has ever been brought under this now substantially altered statute is that now in issue. "It is the law as applied that we review, not the abstract, academic questions which it might raise in some more doubtful case." *Saia v. New York*, 334 U. S. 558, 571 (1948) (Jackson, J., dissenting).

Since the Court concludes, apparently from two lines

¹ The Court, *ante*, at 7, states that the Virginia Supreme Court placed no limiting interpretation on its statute and that it implied that the statute might apply to doctors, husbands, and lecturers. The Court is in error. the Virginia Supreme Court stated that it would not interpret the statute to encompass such situations. *Bigelow v. Commonwealth*, 191 S. E. 2d 173, 177 (1972).

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

✓ U
P. 3, 6, 7

From: Rehnquist, J.

Circulated: 6 - 4

2nd DRAFT

Circulated: 6 - 9

SUPREME COURT OF THE UNITED STATES

No. 73-1309

Jeffrey Cole Bigelow,
Appellant,
v.
Commonwealth of Virginia.

} On Appeal from the Su-
preme Court of Virginia.

[June —, 1975]

MR. JUSTICE REHNQUIST, dissenting.

The Court's opinion does not confront head-on the question which this case poses, but makes contact with it only in a series of verbal sideswipes. The result is the fashioning of a doctrine which appears designed to obtain reversal of this judgment, but at the same time to save harmless from the effects of that doctrine the many prior cases of this Court which are inconsistent with it.

I am in agreement with the Court, *ante*, at 8, that Virginia's statute cannot properly be invalidated on grounds of overbreadth¹ given that the sole prosecution which has ever been brought under this now substantially altered statute is that now in issue. "It is the law as applied that we review, not the abstract, academic questions which it might raise in some more doubtful case." *Saia v. New York*, 334 U. S. 558, 571 (1948) (Jackson, J., dissenting).

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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 Black
Mr. Justice Powell

From: Rehnquist, W.

6-4

2nd DRAFT

Circulate

6-5

SUPREME COURT OF THE UNITED STATES

No. 73-1309

Jeffrey Cole Bigelow,
Appellant,
v.
Commonwealth of Virginia. } On Appeal from the Supreme Court of Virginia.

[June —, 1975]

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE WHITE joins, dissenting.

The Court's opinion does not confront head-on the question which this case poses, but makes contact with it only in a series of verbal sideswipes. The result is the fashioning of a doctrine which appears designed to obtain reversal of this judgment, but at the same time to save harmless from the effects of that doctrine the many prior cases of this Court which are inconsistent with it.

I am in agreement with the Court, *ante*, at 8, that Virginia's statute cannot properly be invalidated on grounds of overbreadth¹ given that the sole prosecution which has ever been brought under this now substantially altered statute is that now in issue. "It is the law as applied that we review, not the abstract, academic questions which it might raise in some more doubtful case." *Saia v. New York*, 334 U. S. 558, 571 (1948) (Jackson, J., dissenting).

Since the Court concludes, apparently from two lines

¹ The Court, *ante*, at 7, states that the Virginia Supreme Court placed no limiting interpretation on its statute and that it implied that the statute might apply to doctors, husbands, and lecturers. The Court is in error: the Virginia Supreme Court stated that it would not interpret the statute to encompass such situations. *Bigelow v. Commonwealth*, 191 S. E. 2d 173, 177 (1972).