

# The Burger Court Opinion Writing Database

## *Kelley v. Johnson*

425 U.S. 238 (1976)

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

March 24, 1976

Re: 74-1269 - Kelley v. Johnson

Dear Bill:

I join you in your circulation of March 24.

Regards,

WRB

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

March 24, 1976

RE: No. 74-1269 Kelley v. Johnson

Dear Thurgood:

Please join me in your dissenting opinion in  
the above.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

March 4, 1976

No. 74-1269, Kelley v. Johnson

Dear Bill,

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

Sincerely yours,

P.S.  
✓

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 17, 1976

Re: No. 74-1269 - Kelley v. Johnson

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

March 29, 1976

Re: No. 74-1269 - Kelley v. Johnson

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 THURGOOD MARSHALL

March 8, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 74-1269 -- Kelley v. Johnson

In due course I will circulate a dissent in  
this case.

*T.M.*  
T. M.

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: MAR 23 1976

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

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 74-1269

Eugene R. Kelley, Commis-  
 sioner of the Suffolk  
 County Police  
 Department,  
 Petitioner,  
 v.  
 Edward Johnson, etc.

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

[March —, 1976]

MR. JUSTICE MARSHALL, dissenting.

In treating the constitutionality of Suffolk County's regulation limiting the length of a policeman's hair, the Court calls "open" the question "whether the citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance. . . ." *Ante*, at 6-7. Assuming, but only for purposes of this opinion, that there is such an interest, the Court holds that the regulation in question bears a rational connection to a police force's purpose of promoting the safety of persons and property. *Id.*, at 9-10. I find wholly unacceptable the proposition that the Constitution may offer no protection whatsoever against comprehensive governmental regulation of what citizens may or may not wear. Nor do I find the rationales offered by the Court as justifications for the regulation in this case persuasive enough to support a finding of constitutionality. Accordingly, I respectfully dissent.

## I

The use of governmental edict to regulate the dress and appearance of an entire society is not unknown to



*Pages 1-5 and footnote numbering*

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: \_\_\_\_\_

Recirculated: MAR 26 1976

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 74-1269

Eugene R. Kelley, Commis-  
sioner of the Suffolk  
County Police  
Department,  
Petitioner,  
v.

Edward Johnson, etc.

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

[March —, 1976]

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

The Court today upholds the constitutionality of Suffolk County's regulation limiting the length of a policeman's hair. While the Court only assumes for purposes of its opinion that "the citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance . . ." *ante*, at 6-7, I think it clear that the Fourteenth Amendment does indeed protect against comprehensive regulation of what citizens may or may not wear. And I find that the rationales offered by the Court to justify the regulation in this case are insufficient to demonstrate its constitutionality. Accordingly, I respectfully dissent.

## I

*omission*

As the Court recognizes, the Fourteenth Amendment's guarantee against the deprivation of liberty "protects substantive aspects of liberty against unconstitutional restrictions by the State." *Ante*, at 6. And we have observed that "[l]iberty under law extends to the full range of conduct which the individual is free to pursue." *Bolling v. Sharpe*, 347 U. S. 497, 499 (1954). See also

✓  
Page 6 & stylistic changes

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: \_\_\_\_\_

Recirculated: APR 1 1976

8rd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 74-1269

Eugene R. Kelley, Commis-  
sioner of the Suffolk  
County Police  
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v.  
Edward Johnson, etc.

On Writ of Certiorari to  
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[March —, 1976]

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

The Court today upholds the constitutionality of Suffolk County's regulation limiting the length of a policeman's hair. While the Court only assumes for purposes of its opinion that "the citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance . . ." *ante*, at 6-7, I think it clear that the Fourteenth Amendment does indeed protect against comprehensive regulation of what citizens may or may not wear. And I find that the rationales offered by the Court to justify the regulation in this case are insufficient to demonstrate its constitutionality. Accordingly, I respectfully dissent.

## I

As the Court recognizes, the Fourteenth Amendment's guarantee against the deprivation of liberty "protects substantive aspects of liberty against unconstitutional restrictions by the State." *Ante*, at 6. And we have observed that "[l]iberty under law extends to the full range of conduct which the individual is free to pursue." *Bolling v. Sharpe*, 347 U. S. 497, 499 (1954). See also

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 9, 1976

Re: No. 74-1269 - Kelley v. Johnson

Dear Bill:


As you know, I am somewhat defensive about the citation of Roe v. Wade as a substantive due process decision. We discussed this recently in connection with the final page of your third draft of Paul v. Davis. The same tendency appears again on page 6 of the draft in this case. I am particularly concerned with the citing of Potter's concurring opinion in Roe v. Wade, when Bill Douglas' concurring opinion in the same case (as well as in the companion, Doe v. Bolton), 410 U.S., at 212 n. 4, taking issue with Potter, is not cited.

May I therefore respectfully suggest that the citations of Roe v. Wade and of Potter's concurrence, where they appear in the second full paragraph on page 6, both be omitted. The remaining cites should serve the purpose you have in mind.

The citation of Roe in the next succeeding paragraph has my approval, although, of course, if my above suggestion is accepted, you will then wish to add the volume and page number.

If the change I suggest is accepted, I shall join the opinion. If not, I shall concur only in the result and then, perhaps, write.

Sincerely,



Mr. Justice Rehnquist

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 15, 1976

Re: No. 74-1269 - Kelley v. Johnson

Dear Bill:

Please join me in your recirculation of March 11.

Sincerely,

*Harry*

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 15, 1976

Re: No. 74-1269 - Kelley v. Johnson

Dear Bill:

Please join me in your recirculation of March 11.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

[ Postscript to Justice Rehnquist only ]

P. S. I suppose that John should be noted as not participating.

H. A. B.

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

From: Mr. Justice Powell

Circulated: 3/24/76

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

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 74-1269

Eugene R. Kelley, Commis-  
 sioner of the Suffolk  
 County Police  
 Department,  
 Petitioner,  
 v.

Edward Johnson, etc.

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

[March —, 1976]

MR. JUSTICE POWELL, concurring.

I concur in the opinion of the Court and write to make clear that, contrary to the concern expressed in the dissent, I find no negative implication in the opinion with respect to a liberty interest within the Fourteenth Amendment as to matters of personal appearance. See *Poe v. Ullman*, 367 U. S. 497, 541-543 (1961) (Harlan, J., dissenting). When the State has an interest in regulating one's personal appearance, as it certainly does in this case, there must be a weighing of the degree of infringement of the individual's liberty interest against the need for the regulation. This process of analysis justifies the application of a reasonable regulation to a uniformed police force that would be an impermissible intrusion upon liberty in a different context.

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

15  
 2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-1269

Eugene R. Kelley, Commis-  
 sioner of the Suffolk  
 County Police  
 Department,  
 Petitioner,  
 v.

Edward Johnson, etc.

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

[March —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The District Court for the Eastern District of New York originally dismissed respondent's complaint seeking declaratory and injunctive relief against a regulation promulgated by petitioner limiting the length of a policeman's hair. On respondent's appeal to the Court of Appeals for the Second Circuit, that judgment was reversed, and on remand the District Court took testimony and thereafter granted the relief sought by respondent. The Court of Appeals affirmed, and we granted certiorari, 421 U. S. 987 (1975), to consider the constitutional doctrine embodied in the rulings of the Court of Appeals. We reverse.

### I

In 1971 respondent's predecessor, individually and as president of the Suffolk County Patrolmen's Benevolent Association, brought this action under the Civil Rights Act of 1871, 42 U. S. C. § 1983, against petitioner's predecessor, the Commissioner of the Suffolk County Police

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

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 74-1269

Eugene R. Kelley, Commissioner of the Suffolk County Police Department,  
 Petitioner,

v.

Edward Johnson, etc.

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

[March —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The District Court for the Eastern District of New York originally dismissed respondent's complaint seeking declaratory and injunctive relief against a regulation promulgated by petitioner limiting the length of a policeman's hair. On respondent's appeal to the Court of Appeals for the Second Circuit, that judgment was reversed, and on remand the District Court took testimony and thereafter granted the relief sought by respondent. The Court of Appeals affirmed, and we granted certiorari, 421 U. S. 987 (1975), to consider the constitutional doctrine embodied in the rulings of the Court of Appeals. We reverse.

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P. 6

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

From: Mr. Justice P. [unclear]

Circulated: [unclear]  
 MAR 11 1976  
 Incirculated: [unclear]

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-1269

Eugene R. Kelley, Commis-  
 sioner of the Suffolk  
 County Police  
 Department,  
 Petitioner,  
 v.  
 Edward Johnson, etc.

On Writ of Certiorari to  
 the United States Court  
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 Circuit.

[March —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The District Court for the Eastern District of New York originally dismissed respondent's complaint seeking declaratory and injunctive relief against a regulation promulgated by petitioner limiting the length of a policeman's hair. On respondent's appeal to the Court of Appeals for the Second Circuit, that judgment was reversed, and on remand the District Court took testimony and thereafter granted the relief sought by respondent. The Court of Appeals affirmed, and we granted certiorari, 421 U. S. 987 (1975), to consider the constitutional doctrine embodied in the rulings of the Court of Appeals. We reverse.

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

From: Mr. Justice Rehnquist

Circulated: \_\_\_\_\_

Recirculated: MAR 24 1976

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-1269

Eugene R. Kelley, Commissioner of the Suffolk County Police Department, Petitioner,

v.

Edward Johnson, etc.

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

[March —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The District Court for the Eastern District of New York originally dismissed respondent's complaint seeking declaratory and injunctive relief against a regulation promulgated by petitioner limiting the length of a policeman's hair. On respondent's appeal to the Court of Appeals for the Second Circuit, that judgment was reversed, and on remand the District Court took testimony and thereafter granted the relief sought by respondent. The Court of Appeals affirmed, and we granted certiorari, 421 U. S. 987 (1975), to consider the constitutional doctrine embodied in the rulings of the Court of Appeals. We reverse.

### I

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 14, 1976

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Kelley v. Johnson, No. 74-1269

There are two cases being held for Kelley.

Kirwan v. Romano, No. 74-1622

Appellee New York state policeman brought a § 1983 action to enjoin that part of the State Police Manual regulating the length and style of hair, sideburns, and mustaches. A three-judge court was convened, to which appellant state police superintendent argued that the regulation was rationally related to several department interests: safety (use of gas masks, vision in firing a weapon, etc.), esprit de corps, and public confidence and cooperation. Citing CA 2's opinion in Kelley, the District Court, by 2-1 vote, found none of the rationales persuasive and concluded that the regulation simply required uniformity for uniformity's sake. A permanent injunction was entered against the regulation.

Since the regulation, the analysis, and the result here are for all purposes identical to those considered in Kelley, I will vote for a one-line reversal:

"In light of our opinion in Kelley v. Johnson, \_\_\_\_ U.S. \_\_\_\_ (1976), the judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with that opinion."