

The Burger Court Opinion Writing Database

Department of Air Force v. Rose
425 U.S. 352 (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

December 10, 1975

Re: 74-489 - Department of the Air Force v. Rose

MEMORANDUM TO THE CONFERENCE:

I will be circulating a dissent in this case --
in due course.

Regards,



To: Mr. Justice Brennan
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice White
Mr. Justice Rehnquist
Mr. Justice Powell
Mr. Justice Stevens
Mr. Justice Clark
Mr. Justice Harlan

From: Mr. Chief Justice

circulated APR 3 1976

Revised 1976

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-489

Department of the Air Force | On Writ of Certiorari to
et al., Petitioners, | the United States Court
v. | of Appeals for the Sec-
Michael T. Rose et al. | ond Circuit.

[April —, 1976]

MR. CHIEF JUSTICE BURGER, dissenting.

If "hard cases make bad law," unusual cases certainly have the potential to make even worse law. Today, on the basis of a highly unusual request for information about a very unique governmental process, a military academy honor system, the Court interprets definitively a substantial and very significant part of a major federal statute governing the balance between the public's "right-to-know" and the privacy of the individual citizen.

In my view, the Court asks this case to carry far too much jurisprudential baggage. Consequently, the basic congressional intent to protect a reasonable balance between the availability of government information and the particular individual's right of privacy is undermined. In addition, district courts are burdened with a task which, in my view, neither the Constitution nor Congress ever contemplated.

This case does not compel us to decide whether the summaries at issue here are "personal files" or whether files so categorized are beyond the proviso of Exemption (6) that disclosure constitute "a clearly unwarranted invasion of personal privacy." Even assuming, *arguendo*, that the Government must show that the summaries are subject to the foregoing standard, it is quite

To: Mr. Justice BRENNAN
Mr. Justice BLACKMUN
Mr. Justice BROWN
Mr. Justice CHIEF JUSTICE
Mr. Justice COHEN
Mr. Justice MARSHALL
Mr. Justice POWELL
Mr. Justice REHNQUIST
Mr. Justice STEVENS

From: Mr. Justice

2nd DRAFT Circulated:

SUPREME COURT OF THE UNITED STATES APR 14 1976

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In my view, the Court makes this case carry too much jurisprudential baggage. Consequently, the basic congressional intent to protect a reasonable balance between the availability of information in the custody of the government and the particular individual's right of privacy is undermined. In addition, district courts are burdened with a task Congress could not have intended for them.

(1) This case does not compel us to decide whether the summaries at issue here are "personnel files" or whether files so categorized are beyond the proviso of Exemption (6) that disclosure constitute "a clearly unwarranted invasion of personal privacy." Even assuming, *arguendo*, that the Government must show that the summaries are subject to the foregoing standard, it is quite

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

October 10, 1975

Dear Chief:

I have talked with Justice Brennan
about No. 74-489, Dept. of Air Force
v. Rose and he will write the opinion
in this case.

W.W

WILLIAM O. DOUGLAS

THE CHIEF JUSTICE

cc: The Conference

WB

To: The City of Toledo
Subject: Toledo
Date: 1980
Time: 10:00 AM
Address: Toledo, Ohio
Phone: (419) 226-1234
Fax: (419) 226-1235
Email: toledo@city.toldeo.oh.us
Website: www.toldeo.oh.us
Comments: Toledo, Ohio

From [About](#)

Circulation 12-9-

Recruitment

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-489

Department of the Air Force et al., Petitioners, v. Michael T. Rose et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[December —, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondents, student editors or former student editors of the New York University Law Review researching disciplinary systems and procedures at the military service academies for an article for the Law Review,¹ were denied access by petitioners to case summaries of honor and ethics hearings, with personal references or other identifying information deleted, maintained in the United States Air Force Academy's Honor and Ethics Code Reading Files, although Academy practice is to post copies of such summaries on 40 squadron bulletin boards throughout the Academy and to distribute copies to Academy faculty and administration officials.² There-

Respondent Michael T. Rose, a graduate of the United States Air Force Academy and then a First Lieutenant in the Air Force, was the student editor charged with preparing the study. It finally appeared as a book, Rose, "A Prayer for Relief: The Constitutional Infirmities of the Military Academies' Conduct, Honor and Ethics Systems" (NYU 1973). Respondents Lawrence P. Pedowitz and Charles P. Diamond were, at the time this suit was filed, respectively the former and current Editor-in-Chief of the Review.

² Academy officials, upon respondent Rose's request for documents, gave him copies of the Honor Code, the Honor Reference Manual, Lesson Plans, Honor Hearing Procedures and various other ma-

See Pages 26, 27, 24, 25

To: The White House

Mr. President's Office

The Oval Office

The Cabinet Room

The Roosevelt Room

The Map Room

The East Room

The Rose Garden

The South Portico

The North Portico

FBI

Circumstances

Recirculation: 12-11-71

2nd DRAFT**SUPREME COURT OF THE UNITED STATES****No. 74-489**

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 et al., Petitioners, | the United States Court
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Aug. 10, 11, 13, 15

1972-1973. The first year of the study, the mean age of the 1000 subjects was 21.5 years (SD 2.5) and the mean age of the 1000 controls was 21.5 years (SD 2.5).

Circumflex:

Recirculated: 12/17/11

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-489

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[December —, 1975]

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

CHAMBERS OF
JUSTICE POTTER STEWART

December 15, 1975

74-489 - Dept. of Air Force v. Rose

Dear Bill,

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

Sincerely yours,

P. J. B.

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 12, 1975

Re: No. 74-489 - Department of the Air Force v.
Rose

Dear Bill:

I'll go along.

Sincerely,



Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 16, 1975

Re: No. 74-489, Department of the Air Force v.
Michael T. Rose

Dear Bill:

Please join me.

Sincerely,

J.M.
T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 22, 1975

Re: No. 74-489 - Department of the Air Force v. Rose

Dear Bill:

I am, of course, waiting for the dissent in this case.

Sincerely,



Mr. Justice Brennan

cc: The Conference

April 13, 1976

Re: No. 74-489 - Department of the Air Force v. Rose

Dear Bill:

Herewith, as I promised, is a copy of what I am sending to the printer. It may or may not be at all helpful to you. If it is, or could be made so, please let me know.

Sincerely,

HAB

Mr. Justice Rehnquist

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

From: Mr. Justice Blackmun

Circulated: 4/15/76

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-489

Department of the Air Force | On Writ of Certiorari to
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[April —, 1976]

MR. JUSTICE BLACKMUN, dissenting.

There is something mildly distasteful for me, and unseemly, when the beneficiary of a system attacks it after he has reaped its substantial benefits and enjoyed an undergraduate education at great public expense.* Respondent, and former Lieutenant, Rose is a graduate of the United States Air Force Academy. After having matriculated at a law school, he sought to use the Honor Code system and its underlying case summaries as the subject of a law review article, with such public notice as that would bring to him, and as the subject of his now published book.

We are here concerned with the Freedom of Information Act, 5 U. S. C. § 552, and with two of the exemptions provided by § 552 (b). The Court in the very recent past, has not hesitated consistently to provide force to the congressionally mandated exemptions. See *FAA Administrator v. Robertson*, 422 U. S. 255 (1975); *Renego-*

*The General Accounting Office estimates that the cost per 1975 graduate of the United States Air Force Academy exceeds \$100,000. The Assistant Secretary of Defense for Manpower and Reserve Affairs places the figure at \$89,800. The difference apparently is due to GAO's inclusion of certain items the Air Force feels are not part of the basic costs of educating a cadet. Assistant Secretary's Memorandum dated 20 January 1976.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

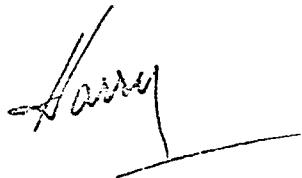
April 20, 1976

Re: No. 74-489 - Department of the Air Force v. Rose

Dear Bill:

I think it makes no difference to your opinion, but I have decided to eliminate, in my dissent, the first paragraph and the footnote that appears on page 1.

Sincerely,



Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 16, 1975

No. 74-489 Department of the Air Force
v. Rose

Dear Bill:

Please join me.

Sincerely,

L. C.

Mr. Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 12, 1976

Re: No. 74-489 - Department of the Air Force v. Rose

Dear Chief:

After several of our recent decisions in which we have turned down constitutional claims to privacy, e.g., Paul v. Davis, United States v. Watson, I have some difficulty with the first part of your dissenting opinion in this case. If you could divide it by Roman numerals, so that the part beginning with the first full paragraph on page 4 were Part II, I will file a short dissenting statement indicating my agreement with that part.

Sincerely,

W.W.

The Chief Justice

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Black
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice
Mr. Justice

From: Mr. [redacted]

Attn: [redacted]

APR 19

RECORDED - INDEXED - SERIALIZED - FILED

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SUPREME COURT OF THE UNITED STATES

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[April —, 1976]

MR. JUSTICE REHNQUIST, dissenting.

Although this case requires our consideration of a claim of a right to "privacy," it arises in quite a different context than some of our other recent decisions such as *Paul v. Davis*, — U. S. —, decided In that case custodians of public records chose to disseminate them, and one of the subjects of the record claimed that the Fourteenth Amendment to the United States Constitution prohibited the custodian from doing so. Here the custodian of the records, petitioner Department of the Air Force, has chosen not to disseminate the records, and his decision to that effect is being challenged by a citizen under the Freedom of Information Act. That Act, as both the Court's opinion and the dissenting opinion of the CHIEF JUSTICE point out, requires the federal courts to balance the claim of right of access to the information against any consequent "clearly unwarranted invasion of personal privacy." For the reasons stated in Part II of the dissenting opinion of the CHIEF JUSTICE, I agree that the Act did not contemplate virtual reconstruction of records under the guise of excision of a segregable part of the record. I therefore dissent from the Court's affirmance of the judgment of the Court of Appeals in this case.

Re: 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 R.

Circulated: _____

Re-circulated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

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