

# 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 White  
Mr. Justice Rehnquist  
Mr. Justice Stevens  
Mr. Justice Souter  
Mr. Justice Ginsburg  
Mr. Justice Breyer  
Mr. Justice Kagan  
Mr. Justice Alito  
Mr. Justice Thomas

From: Mr. Chief Justice

Circulation: APR 8 1976

Reproduction: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-489

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

[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 Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Burger  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

2nd DRAFT

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

**SUPREME COURT OF THE UNITED STATES**

APR 14 1976

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]

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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  
WILLIAM O. DOUGLAS

THE CHIEF JUSTICE

cc: The Conference

WB

To: The Chief Justice  
✓  
12-9-75

From: [illegible]

Circular: 12-9-75

Recirculation: [illegible]

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.

[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,<sup>1</sup> 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.<sup>2</sup> There-

<sup>1</sup> 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.

<sup>2</sup> 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 24, 27, 28, 29

Mo: 1966-07-14

## Future

Circular 11

Received at: 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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FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

pg 10, 11, 13, 16

Transmitted by \_\_\_\_\_

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3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 74-489

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

v.

[December —, 1975]

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✓  
CHAMBERS OF  
JUSTICE POTTER STEWART

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

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.S.*

Mr. Justice Brennan

Copies to the Conference

✓  
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,

*JM.*  
T.M.

Mr. Justice Brennan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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 the United States Court of Appeals for the Sec- ond Circuit.
et al., Petitioners,		
v.		
Michael T. Rose et al.		

[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-*

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\*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

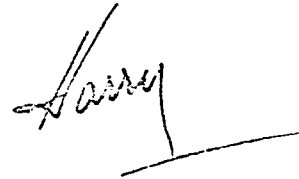
April 20, 1976

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,

A handwritten signature in dark ink, appearing to read "Harry", with a long horizontal line extending to the right.

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. Powell*

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,



The Chief Justice

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Black  
Mr. Chief Clerk  
Mr. Clerk

From Mr. Justice

Circuit Court, 423 19

Supreme Court, 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. 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.

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 A.

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

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-489

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