

# The Burger Court Opinion Writing Database

## *United States v. Powell*

423 U.S. 87 (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

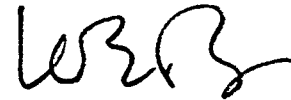
November 20, 1975

Re: 74-884 - U. S. v. Powell

Dear Bill:

I join you in your circulation of November 11.

Regards,



Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

November 19, 1975

RE: No. 74-884 United States v. Powell

Dear Bill:

I agree.

Sincerely,  
*[Handwritten signature]*

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

November 4, 1975

74-884, United States v. Powell

MEMORANDUM TO THE CONFERENCE

I shall in due course circulate a  
short separate opinion in this case.

P.S.  
/

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

By: [Signature], J.

Circulated: NOV 18 1975

1st DRAFT

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

## SUPREME COURT OF THE UNITED STATES

No. 74-884

United States, Petitioner, v. Josephine M. Powell.	}	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
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[December —, 1975]

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

I agree with the Court that the statutory provision before us is not unconstitutionally vague, because I think the provision has an objectively measurable meaning under established principles of statutory construction. Specifically, I think the rule of *ejusdem generis* is applicable here, and that § 1715 must thus be read specifically to make criminal the mailing of a pistol or revolver, or of any firearm as “capable of being concealed on the person” as a pistol or revolver.

The rule of *ejusdem generis* is applicable in a setting such as this unless its application would defeat the intention of Congress or render the general statutory language meaningless. See *United States v. Alpers*, 338 U. S. 680, 682; *United States v. Salem*, 235 U. S. 237, 249–251; *United States v. Stever*, 222 U. S. 167, 174–175. Application of the rule in the present situation entails neither of those results. Instead of draining meaning from the general language of the statute, an *ejusdem generis* construction gives to that language an ascertainable and intelligible content. And, instead of defeating the intention of Congress an *ejusdem generis* construction coincides with the legislative intent.

The legislative history of the bill on which § 1715 was

Justice  
Justice Douglas  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist

Stewart, J.

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

2nd DRAFT

Recirculated: NOV 21 1975

# SUPREME COURT OF THE UNITED STATES

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 6, 1975

Re: No. 74-884 - United States v. Powell

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

November 19, 1975

Re: No. 74-884 -- United States v. Josephine M. Powell

Dear Bill:

Please join me.

Sincerely,

*J.M.*  
T.M.

Mr. Justice Rehnquist

cc: The Conference



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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 12, 1975

Re: No. 74-884 - United States v. Powell

Dear Bill:

Please join me in your circulation of  
November 11.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

November 4, 1975

No. 74-884 U.S. v. Josephine Powell

Dear Bill:

Although I expect to join your opinion, I wonder if you would consider additions along the following lines:

Jo's namesake was convicted by a jury that was precisely and correctly (as I view it) instructed as to the elements of proof, including as one of the elements that the government must prove beyond a reasonable doubt that the "sawed-off shotgun described in the indictment is a firearm capable of being concealed on the person". See Instruction No. 8(i). Vagueness, as applied, is usually a jury question, and in this case there was substantial testimony to the effect that this weapon could be concealed on an average person. In short, it seems to me that the jury answered - under a proper instruction - the question which is central to this case.

To be sure, if the statute "forbids no specific or definite act" (Cohen Grocery Co.), then the Court should not have submitted the case to the jury. But as your opinion makes clear, the statute certainly was not facially void.

Although not controlling, I think I would mention the existence of the postal regulations. These do not define the substantive scope of the crime, but at least arguably they put a defendant - who wishes to mail a firearm - on notice that he may be violating the law.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 6, 1975

No. 74-884 United States v. Powell

Dear Bill:

Please join me.

Sincerely,

*Lewis*

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice ✓  
 Mr. Justice Douglas  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice Burger  
 Mr. Justice White  
 Mr. Justice Rehnquist

11/3/75

Recirculated ~~11/3/75~~

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

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United States,	} On Writ of Certiorari to the United
Petitioner,	
v.	
Josephine M. Powell,	States Court of Appeals for the
	Ninth Circuit.

[November —, 1975]

MR. JUSTICE REHNQUIST delivered the opinion for the Court.

The Court of Appeals in a brief *per curiam* opinion held that portion of an Act of Congress prohibiting the mailing of firearms "capable of being concealed on the person," 18 U. S. C. § 1715, to be unconstitutionally vague, and we granted certiorari to review this determination. — U. S. —. Respondent was found guilty of having violated the statute by a jury in the United States District Court for the Eastern District of Washington, and was sentenced by that court to a term of two years' imprisonment. The testimony adduced at trial showed that a Mrs. Theresa Bailey received by mail an unsolicited package from Spokane, Wash., addressed to her at her home in Tacoma, Wash. The package contained two shotguns, shotgun shells, and 20 or 30 hacksaw blades.

While the source of this package was unknown to Mrs. Bailey, its receipt by her not unnaturally turned her thoughts to her husband George, an inmate at nearby McNeil Island Federal Penitentiary. Her husband, however, disclaimed any knowledge of the package or its

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

11/3/75  
 11/5/75

2nd DRAFT

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74-884

Supreme Court of the United States

Memorandum

11-10, 19--

Harry —  
one of your clerks  
has suggested to one of  
mine that in USO Powell  
we take out the reference to  
Wurgbach & substitute  
another case because of  
W's possible connection  
w/ Taker. I think it is  
probably a good idea,

And since LFP & BRW  
 have already joined I  
 feel I would have to  
 discharge them about  
 the change. In doing so,  
 I would like to say, the  
 change has your approval,  
 & if make you would  
 probably join. May I  
 say so

Wm (WHR)

3rd DRAFT

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