# The Burger Court Opinion Writing Database

## *Paul v. Davis*

424 U.S. 693 (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 18, 1976

Re: 74-891 - Paul v. Davis

Dear Bill:

I join your March 4 proposed opinion.

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.

January 16, 1976

RE: No. 74-891 Paul v. Davis

Dear Bill:

I shall be circulating a dissent in due course in the above.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 74–891

| | |
|---|---|
| Edgar Paul, etc., et al., Petitioners, *v.* Edward Charles Davis, III. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. |

[March —, 1976]

MR. JUSTICE BRENNAN, dissenting.

I dissent. The Court today holds that police officials, acting in their official capacities as law enforcers, may on their own initiative and without trial constitutionally condemn innocent individuals as criminals and thereby brand them with one of the most stigmatizing and debilitating labels in our society. If there are no constitutional restraints on such oppressive behavior, the safeguards constitutionally accorded an accused in a criminal trial are rendered a sham, and no individual can feel secure that he will not be arbitrarily singled out for similar *ex parte* punishment by those primarily charged with fair enforcement of the law. The Court accomplishes this result by excluding a person's interest in his good name and reputation from all constitutional protection, regardless of the character of or necessity for the Government's actions. The result, which is demonstrably inconsistent with our prior case law and unduly restrictive in its construction of our precious Bill of Rights, is one in which I cannot concur.

To clarify what is at issue in this case, it is first necessary to dispel some misconceptions apparent in the Court's opinion. 42 U. S. C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

1, 12, 14-17, 23

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

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 3/17/76

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 74-891

Edgar Paul, etc., et al., Petitioners, v. Edward Charles Davis, III. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[March —, 1976]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL concur, dissenting.

I dissent. The Court today holds that police officials, acting in their official capacities as law enforcers, may on their own initiative and without trial constitutionally condemn innocent individuals as criminals and thereby brand them with one of the most stigmatizing and debilitating labels in our society. If there are no constitutional restraints on such oppressive behavior, the safeguards constitutionally accorded an accused in a criminal trial are rendered a sham, and no individual can feel secure that he will not be arbitrarily singled out for similar *ex parte* punishment by those primarily charged with fair enforcement of the law. The Court accomplishes this result by excluding a person's interest in his good name and reputation from all constitutional protection, regardless of the character of or necessity for the Government's actions. The result, which is demonstrably inconsistent with our prior case law and unduly restrictive in its construction of our precious Bill of Rights, is one in which I cannot concur.

To clarify what is at issue in this case, it is first necessary to dispel some misconceptions apparent in the Court's opinion. 42 U. S. C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 19, 1976

Re: No. 74-891, Paul v. Davis

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

February 10, 1976

No. 74-891 - Paul v. Davis

Dear Bill,

I have read with interest the exchange of correspondence between you and Lewis. Here, briefly, are my thoughts.

I would have no objection to the revised description of Monroe v. Papp suggested by Lewis. I do not share Lewis' concerns about Part III and indeed believe it is a necessary integral part of the opinion. I do, however, welcome your proposal to clarify, particularly in note 4 on page 16 and perhaps elsewhere in the text, the difference between "liberty" and "property" interests that Government cannot take away in the absence of procedural due process, and substantive constitutional rights and protections that Government must respect simply because they are constitutionally defined. In short, if you make the changes indicated in your letter to Lewis of February 10, you may count on my continuing support of your opinion.

Sincerely yours,

P. S.

Mr. Justice Rehnquist

cc: Mr. Justice Powell

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 4, 1976

Re: No. 74-891 - Paul v. Davis

If you will permit it, please join me in your dissenting opinion but show at the end of footnote 16 that I do not concur in that note.

Sincerely,

Byron

Mr. Justice Brennan

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 4, 1976

Re: No. 74-891 -- Paul v. Davis

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 9, 1976

Re: No. 74-891 - Paul v. Davis

Dear Bill:

Please join me.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Conference

February 9, 1976

No. 74-891 Paul v. Davis

Dear Bill:

I have been derelict in not getting in touch with you sooner about the above case. In light of our prior discussions, I am sure you know that basically I am with you. Apart from being generally behind with much of my work, I do have a couple of problems with your draft.

I have taken the liberty of "marking up" a copy so that you can more readily evaluate my concerns.

On page 7, you cite Monroe v. Pape with more enthusiasm than I can muster. Although I agree with its precise holding, Bill Douglas' free-swinging and wide-ranging dictum is the source of most of the open-ended resort to § 1983. In a proper case, and we have one pending involving exhaustion of administrative remedies, I hope the Court will consider confining Pape to its actual holding. With this in mind, would you be willing to revise the first couple of sentences in the first full paragraph on page 7 to read as follows:

> "In Monroe v. Pape, despite some wide-ranging dicta, the Court's decision turned on the fact that the complaint stated a cause of action under the Fourteenth Amendment because it alleged an unreasonable search and seizure. . . . etc."

Part III also troubles me, primarily - I suppose - because I am not at all certain as to its meaning or where it might lead. I believe Part III can be interpreted as saying that interests attain constitutional status only by virtue of having been initially "protected by state law" or

because "they are guaranteed in one of the provisions of the Bill of Rights". See p. 16 and note 4. In Griswold and Roe (to mention the prime examples) the Court has recognized that the due process clause "covers more than those freedoms explicitly named in the Bill of Rights" (Potter's concurring opinion in Roe, 410 U.S., at 168). Indeed, in Part IV of your opinion you recognize with respect to "personal privacy" that certain rights are "implicit in the concept of ordered liberty". (p. 19).

In any event, as I have rather agreed with most of John Harlan's dissenting opinion in Poe v. Ullman,* I would be more comfortable if Part III were omitted from your opinion.

I do not think this would detract from the opinion, or limit its precedential effect in cases where only a common law tort is involved. If you accept my suggestion, perhaps it would be desirable to add a concluding paragraph to Part II. I have attached a rider to page 16 which may serve this purpose.

I am sending a copy of this to Potter who has joined you.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: Mr. Justice Stewart

*Harlan wrote: "[T]he full scope of the liberty guaranteed by the due process clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." 367 U.S., at 543.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 21, 1976

No. 74-891 Paul v. Davis

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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: JAN 1 1976

Recirculated: _____

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 74-891

Edgar Paul, etc., et al., Petitioners, *v.* Edward Charles Davis, III. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari, 421 U. S. 909 (1975), in this case to consider whether respondent's charge that petitioners' defamation of him, standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U. S. C. § 1983 and the Fourteenth Amendment. For the reasons hereinafter stated, we conclude that it does not.

Petitioner Paul is the Chief of Police of the Louisville, Ky., Division of Police, while petitioner McDaniel occupies the same position in the Jefferson County, Ky., Division of Police. In late 1972 they agreed to combine their efforts for the purpose of alerting local area merchants to possible shoplifters who might be operating during the Christmas season. In early December petitioners distributed to approximately 800 merchants in the Louisville metropolitan area a flyer, which began as follows:

> "TO: BUSINESS MEN IN THE METROPOLITAN AREA
>
> "The Chiefs of The Jefferson County and City of Louisville Police Departments, in an effort to keep their officers advised on shoplifting activity, have approved the attached alphabetically arranged

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: 1-16-76

Recirculated: 1-21-76

3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 74-891

Edgar Paul, etc., et al., Petitioners, v. Edward Charles Davis, III. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari, 421 U. S. 909 (1975), in this case to consider whether respondent's charge that petitioners' defamation of him, standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U. S. C. § 1983 and the Fourteenth Amendment. For the reasons hereinafter stated, we conclude that it does not.

Petitioner Paul is the Chief of Police of the Louisville, Ky., Division of Police, while petitioner McDaniel occupies the same position in the Jefferson County, Ky., Division of Police. In late 1972 they agreed to combine their efforts for the purpose of alerting local area merchants to possible shoplifters who might be operating during the Christmas season. In early December petitioners distributed to approximately 800 merchants in the Louisville metropolitan area a flyer, which began as follows:

> "TO: BUSINESS MEN IN THE METROPOLITAN AREA
>
> "The Chiefs of The Jefferson County and City of Louisville Police Departments, in an effort to keep their officers advised on shoplifting activity, have approved the attached alphabetically arranged

P. 19

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: JAN 27 1976

4th DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 74-891

Edgar Paul, etc., et al., Petitioners, v. Edward Charles Davis, III. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari, 421 U. S. 909 (1975), in this case to consider whether respondent's charge that petitioners' defamation of him, standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U. S. C. § 1983 and the Fourteenth Amendment. For the reasons hereinafter stated, we conclude that it does not.

Petitioner Paul is the Chief of Police of the Louisville, Ky., Division of Police, while petitioner McDaniel occupies the same position in the Jefferson County, Ky., Division of Police. In late 1972 they agreed to combine their efforts for the purpose of alerting local area merchants to possible shoplifters who might be operating during the Christmas season. In early December petitioners distributed to approximately 800 merchants in the Louisville metropolitan area a flyer, which began as follows:

> "TO: BUSINESS MEN IN THE METROPOLITAN AREA
>
> "The Chiefs of The Jefferson County and City of Louisville Police Departments, in an effort to keep their officers advised on shoplifting activity, have approved the attached alphabetically arranged

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 10, 1976

Re: No. 74-891 - Paul v. Davis

Dear Lewis:

Thanks for your letter of February 9th, commenting on my draft circulating opinion in this case. I agree with the sentiments you express about the dicta in Monroe v. Pape; your draft language for the first couple of sentences in the first full paragraph on page 7 is not too outspoken for me, but since I have a maximum potential of five votes on the basis of the Conference discussion, I would not want to risk losing one of them if by expressing your sentiments somewhat more delicately that risk could be avoided. However, as of now I am willing to make the change as suggested.

I understand the concern you express about note 4 on page 16. Actually, that note is intended to address only those "liberty" and "property" interests that are procedurally guaranteed against deprivation by the state, and was not intended in any way to disparage Griswold, Roe, or any cases like them. I see upon re-reading the note, however, that I have not made that distinction clear, and would be more than happy to include in it language which meets your approval and conveys that message. As you note, in my Part IV I recognize the same doctrine.

I do not want to delete Part III of the opinion. It is an effort to rationalize the cases discussed there, which I think is quite consistent with the cases and which I also think is necessary if we are to avoid similar decisions like that of the Court of Appeals for the Sixth Circuit in this case. It deals only with interests that are procedurally guaranteed against deprivation, and I do not think that its text is at all inconsistent with John Harlan's dissenting opinion in Poe v. Ullman, 367 U.S., at 543. I would be glad to so indicate anywhere in the text, and it seems to me that the language which I suggest adding to footnote 4 on page 16 would be added insurance that the section is not taken in the way you think it might be.

I feel fairly confident that these cases which I discuss in Part III will be thrown at me in dissent, or if not there at least by commentators in criticizing the opinion. Since I think they are perfectly consistent with the result that we reach here, I think it adds some strength to the proposed opinion to explain why.

You are one of the five votes, and I obviously cannot afford to lose you. But I hope that the type of change I have suggested in Part III will satisfy any doubts you have, and still enable me to have what I think is an analytically sound opinion.

Sincerely,

Bill

Mr. Justice Powell

Copy to Mr. Justice Stewart

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

1/5

5th DRAFT

# SUPREME COURT OF THE UNITED STATES

## No. 74-891

| | |
|---|---|
| Edgar Paul, etc., et al., Petitioners, *v.* Edward Charles Davis, III. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. |

[January —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari, 421 U. S. 909 (1975), in this case to consider whether respondent's charge that petitioners' defamation of him, standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U. S. C. § 1983 and the Fourteenth Amendment. For the reasons hereinafter stated, we conclude that it does not.

Petitioner Paul is the Chief of Police of the Louisville, Ky., Division of Police, while petitioner McDaniel occupies the same position in the Jefferson County, Ky., Division of Police. In late 1972 they agreed to combine their efforts for the purpose of alerting local area merchants to possible shoplifters who might be operating during the Christmas season. In early December petitioners distributed to approximately 800 merchants in the Louisville metropolitan area a flyer, which began as follows:

> "TO: BUSINESS MEN IN THE METROPOLITAN AREA
>
> "The Chiefs of The Jefferson County and City of Louisville Police Departments, in an effort to keep their officers advised on shoplifting activity, have approved the attached alphabetically arranged

13

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: MAR 4 1976

Recirculated: _____

6th DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 74-891

Edgar Paul, etc., et al., Petitioners, v. Edward Charles Davis, III. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari, 421 U. S. 909 (1975), in this case to consider whether respondent's charge that petitioners' defamation of him, standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U. S. C. § 1983 and the Fourteenth Amendment. For the reasons hereinafter stated, we conclude that it does not.

Petitioner Paul is the Chief of Police of the Louisville, Ky., Division of Police, while petitioner McDaniel occupies the same position in the Jefferson County, Ky., Division of Police. In late 1972 they agreed to combine their efforts for the purpose of alerting local area merchants to possible shoplifters who might be operating during the Christmas season. In early December petitioners distributed to approximately 800 merchants in the Louisville metropolitan area a flyer, which began as follows:

> "TO: BUSINESS MEN IN THE METROPOLITAN AREA
>
> "The Chiefs of The Jefferson County and City of Louisville Police Departments, in an effort to keep their officers advised on shoplifting activity, have approved the attached alphabetically arranged

74-891

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 1, 1976

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Paul v. Davis, No. 74-891

There are two cases being held for Paul. In Cawley v. Velger, No. 75-812, the respondent is a former probationary officer with the New York City Police Department. In 1973, he was fired. Department officials gave no explanation of the reasons for his dismissal, and respondent was afforded no hearing on that decision. Respondent subsequently brought a § 1983 action in S.D.N.Y. seeking reinstatement and damages for the alleged deprivation of his procedural due process rights. The District Court concluded that respondent's probationary status established that he had no interest in continued employment under Board of Regents v. Roth, 408 U.S. 564 (1972), and Perry v. Sindermann, 408 U.S. 593 (1972), sufficient to trigger the protections of the Fourteenth Amendment. Respondent presented the alternative claim that the Department had "stigmatized" him so as to permit him to invoke the possible exception recognized in Roth, 408 U.S., at 573. Respondent relied upon the facts that subsequent potential employers who had, with his permission, investigated his personnel file with the NYPD apparently found derogatory information therein because they declined to hire respondent after initially being quite interested in doing so. The District Court rejected this claim also, holding that petitioners had not stigmatized respondent since they had done nothing to publicize or circulate whatever derogatory information might be in respondent's file to any prospective employers or to the community at large.

CA 2 reversed. Although not disagreeing with the District Court's finding that respondent had no protected

75-823

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 1, 1976

Re: 75-823 - Belcher v. Stengel

Dear Bill:

It seems to me that the problem presented by this case is not covered by either the holding of Paul v. Davis or the dictum on page 5 referring to the negligent killing by a sheriff.

The holding of Paul, as I understand it, is that the petitioner's interest in reputation was not an interest in liberty protected by the Fourteenth Amendment against state deprivation. In this case the interest is in "life" which surely is protected.

The dictum referring to negligence does not necessarily cover a case in which the defendant's conduct was willful, as the jury appears to have found here. I am therefore persuaded that a remand with instructions to reconsider in the light of Paul will give the Court of Appeals a most difficult assignment.

I might add that my concern about the confusion in this area stems partly from two rather controversial opinions which I wrote as a circuit judge (Bonner, 517 F.2d 1311, 1318; and Kimbrough, 523 F.2d 1057-1062). I might also add that the Seventh Circuit had on more than one occasion sustained a complaint or an indictment on the theory that the deliberate killing of a citizen by a police officer was a taking of life without due process of law. Hampton v. City of Chicago, 484 F.2d 602, 607; United States v. Robinson, 503 F.2d 208. Since the only issue clearly raised by the cert. petition is the state action issue, and since the Court of Appeals decided that issue correctly, I wonder if it would not be wiser simply to deny the petition.

Respectfully,

Mr. Justice Rehnquist

Copies to the Conference