

# The Burger Court Opinion Writing Database

*Key v. Doyle*

434 U.S. 59 (1977)

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 9, 1977

Re: 76-1057 - Key v. Doyle

Dear Potter:

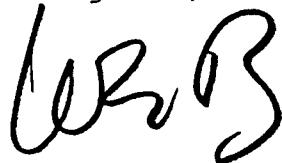
I found this case very close and it is even the more so after the two careful opinions have been developed.

I prefer the result you reach but I find Byron's analysis unanswerable.

I therefore come down finally to join Byron and add this:

"I join the dissenting opinion in this close case, mindful of what was said in Cohens v. Virginia, 19 U.S. at 404 (1921). Cohens v. Virginia was an early guideline in which the Court said: 'It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'"

Regards,



Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

November 10, 1977

Dear Byron:

Re: 76-1057 Key v. Doyle

Given my often expressed aversion to unnecessary concurring opinions, on further reflection I have decided to drop my concurring opinion in this case.

Regards,

*WB*

Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

November 11, 1977

MEMORANDUM TO THE CONFERENCE:

As agreed at Conference, the following opinion  
will be announced next week:

Monday, November 14, 1977

76-1057 - Key v. Doyle - PS

Absent dissent, we will proceed.

Regards,

WEB

cc: Mr. Cornio

Wm Brown  
10/77

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

November 3, 1977

RE: No. 76-1057 Key v. Doyle

Dear Potter:

Please join me.

Sincerely,

*Bill*

Mr. Justice Stewart

cc: The Conference

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

From: Mr. Justice Stewart

Circulated: OCT 24 1977

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

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-1057

John W. Key et al., Appellants, } On Appeal from the District  
v. } of Columbia Court of  
Michael M. Doyle et al. } Appeals.

[October —, 1977]

MR. JUSTICE STEWART delivered the opinion of the Court.

Sally Lipscombe French died 20 days after executing a will leaving most of her estate to certain churches in the District of Columbia. Section 18-302 of the D. C. Code voids religious devises and bequests made within 30 days of death.<sup>1</sup> Prevented by this statutory provision from carrying out the terms of the will, the respondent as executor sought instructions in the Probate Division of the Superior Court of the District of Columbia. Both that court and the District of Columbia Court of Appeals held the statute unconstitutional.<sup>2</sup> The

<sup>1</sup> D. C. Code § 18-302 states:

"A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order or denomination, or to or for the support, use, or benefit thereof, or in trust therefor, is not valid unless it is made at least 30 days before the death of the testator."

This provision originated in the Organic Act of 1801, 2 Stat. 103, c. 15, § 2. It was amended by Congress as recently as 1965. 79 Stat. 688 (1965).

<sup>2</sup> The Superior Court opinion is unpublished. The opinion of the Court of Appeals appears, at 365 A. 2d 621 (1976).

Stressing that the statute "is directed only to religious groups and practitioners," the Superior Court held the statute to be "an invalid infringement of the free exercise of religion provisions of the First Amendment" and "invalid as a denial of due process guaranteed by the Fifth Amendment."

The D. C. Court of Appeals invalidated the statute only under the

✓ changes 1, 4, 6, 8

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

From: Mr. Justice Stewart

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

2nd DRAFT

Recirculated: OCT 28 1977

## SUPREME COURT OF THE UNITED STATES

No. 76-1057

John W. Key et al., Appellants, | On Appeal from the District  
v. | of Columbia Court of  
Michael M. Doyle et al. | Appeals.

[October —, 1977]

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To: \_\_\_\_\_  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Stewart

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

Recirculated: OCT 31 1977

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-1057

John W. Key et al., Appellants, | On Appeal from the District  
v. | of Columbia Court of  
Michael M. Doyle et al. | Appeals.

[October —, 1977]

MR. JUSTICE STEWART delivered the opinion of the Court.

Sally Lipscombe French died 20 days after executing a will leaving most of her estate to certain churches in the District of Columbia. Section 18-302 of the D. C. Code voids religious devises and bequests made within 30 days of death.<sup>1</sup> Prevented by this statutory provision from carrying out the terms of the will, the appellee as executor sought instructions in the Probate Division of the Superior Court of the District of Columbia. Both that court and the District of Columbia Court of Appeals held the statute unconstitutional.<sup>2</sup> The

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Stressing that the statute "is directed only to religious groups and practitioners," the Superior Court held the statute to be "an invalid infringement of the free exercise of religion provisions of the First Amendment" and "invalid as a denial of due process guaranteed by the Fifth Amendment."

The D. C. Court of Appeals invalidated the statute only under the

ALL PAGES: 8, 1

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

From: Mr. Justice Stewart

Circulated: NOV 3 1977

Recirculated:

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-1057

John W. Key et al., Appellants, | On Appeal from the District  
v. | of Columbia Court of  
Michael M. Doyle et al. | Appeals.

[October —, 1977]

MR. JUSTICE STEWART delivered the opinion of the Court.

Sallye Lipscomb French died 20 days after executing a will leaving most of her estate to certain churches in the District of Columbia. Section 18-302 of the D. C. Code voids religious devises and bequests made within 30 days of death.<sup>1</sup> Prevented by this statutory provision from carrying out the terms of the will, the appellee as executor sought instructions in the Probate Division of the Superior Court of the District of Columbia. Both that court and the District of Columbia Court of Appeals held the statute unconstitutional.<sup>2</sup> The

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Stressing that the statute "is directed only to religious groups and practitioners," the Superior Court held the statute to be "an invalid infringement of the free exercise of religion provisions of the First Amendment" and "invalid as a denial of due process guaranteed by the Fifth Amendment."

The D. C. Court of Appeals invalidated the statute only under the

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

October 26, 1977

Re: No. 76-1057 - Key v. Doyle

Dear Potter:

I shall shortly circulate a dissent in  
this case.

Sincerely,



Mr. Justice Stewart

Copies to Conference

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

From: Mr. Justice White

1st DRAFT

Circulated: 10-28-77

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

SUPREME COURT OF THE UNITED STATES

No. 76-1057

John W. Key et al., Appellants, | On Appeal from the District  
 v. | of Columbia Court of  
 Michael M. Doyle et al. | Appeals.

[October —, 1977]

MR. JUSTICE WHITE, dissenting.

In *Palmore v. United States*, 411 U. S. 389 (1973), this Court held that provisions of the District of Columbia Code enacted by the U. S. Congress were not "state laws" within the meaning of 28 U. S. C. § 1257 (2) and that a decision of the D. C. Court of Appeals upholding such provisions was reviewable in this Court only on certiorari. Today, this Court holds that an act of Congress relating exclusively to the District of Columbia is also not a "statute of the United States" within the meaning of 28 U. S. C. § 1257 (1). Thus, even where the D. C. Court of Appeals strikes down such a congressional enactment on federal constitutional grounds, there is no right of direct appeal to this Court, review being limited to this Court's discretionary acceptance of a writ of certiorari. Because I believe that this holding is inconsistent with the prior decisions of this Court and contrary to the congressional scheme determining Supreme Court jurisdiction, I dissent from the majority opinion.

I

In the early years of the judicial system, all cases from the federally created court in the District of Columbia involving more than a specified jurisdictional amount were appealable to the United States Supreme Court.<sup>1</sup> In 1885, the jurisdic-

<sup>1</sup> See 2 Stat. 105-106 (1801) (judgments of the Circuit Court of the District of Columbia in excess of \$100 could be reviewed by appeal or writ of error); 3 Stat. 261 (1816) (raising jurisdictional amount to

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 3, 4, 7, 8

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

From: Mr. Justice White

2nd DRAFT

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

Recirculated: 11-1-77

## SUPREME COURT OF THE UNITED STATES

No. 76-1057

John W. Key et al., Appellants, | On Appeal from the District  
v. | of Columbia Court of  
Michael M. Doyle et al. | Appeals.

[October —, 1977]

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

*2.1*  
3rd DRAFT

From: Mr. Justice White

SUPREME COURT OF THE UNITED STATES

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

No. 76-1057

Recirculated: 11-3-77

John W. Key et al., Appellants, | On Appeal from the District  
v. | of Columbia Court of  
Michael M. Doyle et al. | Appeals.

[October —, 1977]

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN |  
and MR. JUSTICE POWELL join, dissenting. |

In *Palmore v. United States*, 411 U. S. 389 (1973), this Court held that provisions of the District of Columbia Code enacted by the U. S. Congress were not "state laws" within the meaning of 28 U. S. C. § 1257 (2) and that a decision of the D. C. Court of Appeals upholding such provisions was reviewable in this Court only on certiorari. Today, this Court holds that an act of Congress relating exclusively to the District of Columbia is also not a "statute of the United States" within the meaning of 28 U. S. C. § 1257 (1). Thus, even where the D. C. Court of Appeals strikes down such a congressional enactment on federal constitutional grounds, there is no right of direct appeal to this Court, review being limited to this Court's discretionary acceptance of a writ of certiorari. Because I believe that this holding is inconsistent with the prior decisions of this Court and contrary to the congressional scheme determining Supreme Court jurisdiction, I dissent from the majority opinion.

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PP 1 E 5

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

From: Mr. Justice White

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

4th DRAFT

Recirculated: 11-11-77

## SUPREME COURT OF THE UNITED STATES

No. 76-1057

John W. Key et al., Appellants, | On Appeal from the District  
v. | of Columbia Court of  
Michael M. Doyle et al. | Appeals.

[November —, 1977.]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL join, dissenting.

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 1, 1977

Re: No. 76-1057, Key v. Doyle

Dear Potter:

Please join me.

Sincerely,

*J.M.*

T.M.

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

October 27, 1977

Re: No. 76-1057 - Key v. Doyle

Dear Potter:

I shall await the dissent.

Sincerely,

*HAB*

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

October 31, 1977

Re: No. 76-1057 - Key v. Doyle

Dear Byron:

Please join me in your dissent.

Sincerely,

*Harry A. Blackmun*

Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

October 27, 1977

No. 76-1057 Key v. Doyle

Dear Potter:

In accord with my vote at the Conference, I will  
await Byron's dissent.

Sincerely,



Mr. Justice Stewart

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 2, 1977

No. 76-1057 Key v. Doyle

Dear Byron:

Please join me in your dissenting opinion.

Sincerely,



Mr. Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

October 26, 1977

Re: No. 76-1057 - Key v. Doyle

Dear Potter:

Please join me.

Sincerely,

WW

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

October 26, 1977

Re: 76-1057 - Key v. Doyle

Dear Potter:

Please join me.

Respectfully,



Mr. Justice Stewart

Copies to the Conference