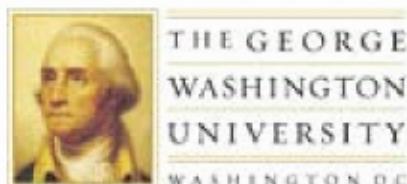


The Burger Court Opinion Writing Database

Brown v. Glines

444 U.S. 348 (1980)

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

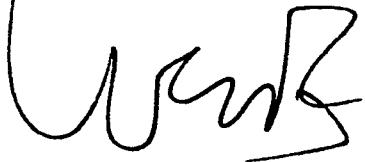
January 17, 1980

Re: 78-1006 - Brown v. Glines

Dear Lewis:

I join your January 15 draft.

Regards,



Mr. Justice Powell

Copies to the Conference

To: The Clerk of the Supreme Court
 Mr. Justice BRENNAN
 Mr. Justice BURGER
 Mr. Justice POWELL
 Mr. Justice MARSHALL
 Mr. Justice BLACKMUN
 Mr. Justice REHNQUIST
 Mr. Justice STONE

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78-1006 AND 78-599

Circulated 1/2/80
 Recirculated

Harold R. Brown, Secretary of Defense, et al., Petitioners,
 78-1006 *v.* Albert Edward Glines. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Secretary of the Navy et al., Petitioners,
 78-599 *v.* Frank L. Huff et al. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1980]

MR. JUSTICE BRENNAN, dissenting.

Since an affirmance on statutory grounds in Nos. 78-599 and 78-1006 does not command a Court, it is appropriate to express my view on the constitutional questions presented. I believe that the military regulations at issue are prohibited by the First Amendment; accordingly, I would hold them to be unconstitutional, and affirm the judgments of the two Courts of Appeals.

Two sets of military regulations are challenged. Respondents in *Huff* (No. 78-599) attack Navy and Marine Corps regulations that require prior approval by commanding officers before the origination, distribution or circulation of petitions or other written material on ships, aircraft, military installations and "anywhere within a foreign country." FMFO 5370.3. Respondent in *Glines* (No. 78-1006) challenges parallel Air Force regulations that require command approval before the distribution or posting of nonofficial printed material and for the circulation of petitions for signature.¹ AFR

¹ The Air Force regulations exempt from prior command approval the distribution of published material "through the United States mail or through official outlets, such as military libraries and exchanges." De-

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 14, 1980

RE: No. 78-1006 Brown v. Glines

Dear Potter:

Please join me in the dissenting opinion you
have prepared in the above.

Sincerely,

Brennan

Mr. Justice Stewart

cc: The Conference

STYLISTIC CHANGES

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

P. 1

3rd DRAFT

From: Mr. Justice Brennan

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: JAN 4 19

Nos. 78-1006 AND 78-599

Harold R. Brown, Secretary of
Defense, et al., Petitioners.
78-1006 *v.*
Albert Edward Glines.

On Writ of Certiorari to the
United States Court of Ap-
peals for the Ninth Circuit.

Secretary of the Navy et al.,
Petitioners,
78-599 *v.*
Frank L. Huff et al.

On Writ of Certiorari to the
United States Court of Ap-
peals for the District of Co-
lumbia Circuit.

[January —, 1980]

MR. JUSTICE BRENNAN, dissenting.

I join my Brother STEWART's dissent on statutory grounds in Nos. 78-599 and 78-1006. Since that opinion does not command a Court, it is appropriate to express my view on the constitutional questions presented. I believe that the military regulations at issue are prohibited by the First Amendment; accordingly, I would hold them to be unconstitutional, and affirm the judgments of the two Courts of Appeals.

Two sets of military regulations are challenged. Respondents in *Huff* (No. 78-599) attack Navy and Marine Corps regulations that require prior approval by commanding officers before the origination, distribution or circulation of petitions or other written material on ships, aircraft, military installations and "anywhere within a foreign country." FMFO 5370.3. Respondent in *Glines* (No. 78-1006) challenges parallel Air Force regulations that require command approval before the distribution or posting of nonofficial printed material and for the circulation of petitions for signature.¹ AFR

¹ The Air Force regulations exempt from prior command approval the distribution of published material "through the United States mail or through official outlets, such as military libraries and exchanges." De-

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice O'Conor
 Mr. Justice Stevens

From: Mr. Justice Stewart
 10 JAN 1980
 Circulated:

1st DRAFT

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 78-1006

Harold R. Brown, Secretary of
 Defense, et al., Petitioners, } On Writ of Certiorari to the
 v,
 Albert Edward Glines, } United States Court of Appeals for the Ninth Circuit.

[January —, 1980]

MR. JUSTICE STEWART, dissenting.

The Department of the Navy used to have a regulation mandating that every communication to a Member of Congress from anybody in the Navy had to be forwarded through official channels, if the communication "affect[ed] the Naval Establishment." See 97 Cong. Rec. 3776 (1951). Congress was informed about this regulation in 1951, and its reaction was to enact a statute that currently reads:

"No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." 10 U. S. C. § 1034.

Today, the Court holds that this statute does not in any way protect the circulation by servicemen on United States military bases of petitions addressed to Members of Congress. Specifically, the Court holds that the statute does not apply to a military regulation requiring that the content of petitions addressed to Members of Congress be precleared,¹ even when

¹ On their face, the regulations at issue strongly suggest that the content of prospective petitions may be considered by the commanding officer in determining whether or not to grant servicemen permission to circulate the documents. Air Force Reg. 35-15 (3)(a) (1970) requires that, in order to obtain permission to circulate any petition, a serviceman must submit to his commander "[a] copy of the material with a proposed plan

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 21, 1979

Re: No. 78-1006 - Brown v. Glines

Dear Lewis,

Please join me.

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 17, 1980

Re: No. 78-1006 - Brown v. Glines

Dear Lewis:

Please mark me as not participating in
this opinion.

Sincerely,

T.M.

T.M.

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 14, 1980

Re: No. 78-1006 - Brown v. Glines

Dear Lewis:

Please join me.

Sincerely,

HAB

Mr. Justice Powell

cc: The Conference

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

12-18-79

From: Mr. Justice Powell

DEC 19 1979

Circulated: _____

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-1006

Harold R. Brown, Secretary of Defense, et al., Petitioners,
 v.
 Albert Edward Glines, } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit,

[January —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case involves challenges to United States Air Force regulations that require members of the service to obtain approval from their commanders before circulating petitions on Air Force bases. The first question is whether the regulations violate the First Amendment. The second question is whether prohibiting the unauthorized circulation of petitions to Members of Congress violates 10 U. S. C. § 1034, which proscribes unwarranted restrictions on a serviceman's right to communicate with a Member of Congress.

I

The Air Force regulations recognize that Air Force personnel have the right to petition Members of Congress and other public officials. Air Force Reg. 30-1 (9) (1971). The regulations, however, prohibit "any person within an Air Force facility" and "any [Air Force] member . . . in uniform or . . . in a foreign country" from soliciting signatures on a petition without first obtaining authorization from the appropriate commander. *Ibid.*¹ They also provide that "[n]o member

¹ Air Force Reg. 30-1 (9) (1971) provides:

"Right of Petition. Members of the Air Force, their dependents and civilian employees have the right, in common with all other citizens, to

259

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

1-7-80

From: Mr. Justice Powell

2nd DRAFT Circulated: _____

Recirculated: Jan 7, 1980

SUPREME COURT OF THE UNITED STATES

No. 78-1006

Harold R. Brown, Secretary of Defense, et al., Petitioners,
 v.
 Albert Edward Glines.

On Writ of Certiorari to the
 United States Court of Appeals for the Ninth Circuit.

[January —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court. This case involves challenges to United States Air Force regulations that require members of the service to obtain approval from their commanders before circulating petitions on Air Force bases. The first question is whether the regulations violate the First Amendment. The second question is whether prohibiting the unauthorized circulation of petitions to Members of Congress violates 10 U. S. C. § 1034, which proscribes unwarranted restrictions on a serviceman's right to communicate with a Member of Congress.

II

The Air Force regulations recognize that Air Force personnel have the right to petition Members of Congress and other public officials. Air Force Reg. 30-1 (9) (1971). The regulations, however, prohibit "any person within an Air Force facility" and "any [Air Force] member . . . in uniform or . . . in a foreign country" from soliciting signatures on a petition without first obtaining authorization from the appropriate commander. *Ibid.*¹ They also provide that "[n]o member

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"Right of Petition. Members of the Air Force, their dependents and civilian employees have the right, in common with all other citizens, to

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

5-6

From: Mr. Justice Powell

1-15-80

Circulated: _____

Recirculated: JAN 15 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1006

Harold R. Brown, Secretary of Defense, et al., Petitioners,
 v.
 Albert Edward Glines.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit,

[January —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case involves challenges to United States Air Force regulations that require members of the service to obtain approval from their commanders before circulating petitions on Air Force bases. The first question is whether the regulations violate the First Amendment. The second question is whether prohibiting the unauthorized circulation of petitions to Members of Congress violates 10 U. S. C. § 1034, which proscribes unwarranted restrictions on a serviceman's right to communicate with a Member of Congress.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 6, 1980

MEMORANDUM TO THE CONFERENCE

Case held for No. 78-1006, Brown v. Glines

No. 78-1005, Brown v. Allen, has been held for Glines. This case involves a Navy regulation that requires crewmen to obtain command approval before circulating aboard ship a petition to members of Congress. The commander is to determine whether the material would pose "a clear danger to the loyalty, discipline or morale of military personnel" or "materially interfere with the accomplishment of a military mission." Pet. 3.

The respondents were crewmen on the carriers Midway and Hancock, based in California. As part of a "Stop Our Ships" movement associated with resistance to the Vietnam War, they proposed to circulate aboard ship petitions to Congress that protested the ships' assignments to the West Pacific. Commanders on both vessels denied permission to distribute the petitions. (One crewman on the Hancock was disciplined for circulating a petition anyway.) Crewmen on each ship then brought separate class actions, which were consolidated by the District Court. The District Court held that the Navy regulations violated both the First Amendment and 10 U.S.C. § 1034. After deciding that the cases were not moot even though most of the crewmen had been discharged, CA9 affirmed entirely on the basis of 10 U.S.C. § 1034. 583 F.2d 438 (1978). CA9 relied heavily on CADC's decision in Huff v. Secretary of the Navy, 575 F.2d 907 (1978), which we reversed in the per curiam (No. 78-599) that accompanied Glines.

I would grant the petition for certiorari, vacate the judgment of the Court of Appeals, and remand for further proceedings in light of Brown v. Glines. OK



L. F. P.
L. F. P., Jr.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

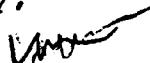
December 20, 1979

Re: 78-1006 - Brown v. Glines

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

Copies to the Conference

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

78-1006 - Brown v. Glines

From: Mr. Justice Stevens

Circulated: JAN 14 1980

MR. JUSTICE STEVENS, dissenting.

Recirculated: _____

The question whether 10 U.S.C. § 1034 includes a right to circulate petitions is not an easy one for me. I must confess that I think the plain language of the statute and its sparse legislative history slightly favor the Court's reading that it does not. Nevertheless, I agree with MR. JUSTICE STEWART'S construction of the statute for two reasons. First, in a doubtful case I believe a statute enacted to remove impediments to the flow of information to Congress should be liberally construed. Second, the potentially far-reaching consequences of deciding the constitutional issue^{1/} counsel avoidance of that issue if the "case can be fairly decided on a statutory ground."^{2/} MR. JUSTICE STEWART has surely demonstrated that that test is met here. I therefore respectfully dissent.

1/ For the reasons stated by MR. JUSTICE BRENNAN, I do not consider the constitutional question foreclosed by the Court's decision in Greer v. Spock, 424 U.S. 828. Nor do I view it as so easy as to justify the novel practice of deciding the constitutional question before addressing the statutory issue. Ante, at 1.

2/ "Our settled practice . . . is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground. 'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.' Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105. The more important the issue, the more force there is to this doctrine." University of California Regents v. Bakke, 438 U.S. 265, 411-412 (opinion of STEVENS, J.).

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

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JAN 15 '80

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1006

Harold R. Brown, Secretary of Defense, et al., Petitioners, v. Albert Edward Glines. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January —, 1980]

MR. JUSTICE STEVENS, dissenting.

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² "Our settled practice . . . is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground. 'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.' *Spector Motor Co. v. McLaughlin*, 323 U. S. 101, 105. The more important the issue, the more force there is to this doctrine." *University of California Regents v. Bakke*, 438 U. S. 265, 411-412 (opinion of STEVENS, J.).