

# The Burger Court Opinion Writing Database

## *Howe v. Smith*

452 U.S. 473 (1981)

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

May 29, 1981

RE: 80-5392 - Howe v. Smith

MEMORANDUM TO THE CONFERENCE:

Enclosed is typescript draft of the above.

One more to go! I will have CBS v. FCC on my return from the D.C. Circuit Conference.

I hope you will find something to read until then!

Regards,

A handwritten signature in dark ink, appearing to be "W. B. G.", written in a cursive style. The signature is positioned below the typed word "Regards,".

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

From: The Chief Justice

Circulated: MAY 30 1981

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

Howe v Smith -- #80-5392

CHIEF JUSTICE BURGER delivered the opinion on the Court.

The question presented by this case is whether a state may transfer a prisoner to federal custody pursuant to 18 U.S.C. § 5003 1/

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1/ 18 U.S.C. § 5003 provides in pertinent part:

(a) The Attorney General, when the Director [of the United States Bureau of Prisons] shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: Provided, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

\*\*\*\*

(c) Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed.

---

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

*stylistic*

*1, 2, 4, 5, 8, 9*

From: The Chief Justice

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

JUN 11 1981

1st PRINTED DRAFT Recirculated: \_\_\_\_\_

**SUPREME COURT OF THE UNITED STATES**

No. 80-5392

Robert Howe, Sr., Petitioner, } On Writ of Certiorari to  
v. } the United States Court  
William French Smith, Attorney } of Appeals for the Sec-  
General of United States, et al. } ond Circuit.

[June —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented by this case is whether a State may transfer a prisoner to federal custody pursuant to 18 U. S. C. § 5003<sup>1</sup> in the absence of a prior determination that the prisoner who is being transferred has a need for specialized treatment available in the federal prison system.

I

In December 1974, the Commissioner of Corrections for the State of Vermont announced that he would soon close the 187-

<sup>1</sup> 18 U. S. C. § 5003 provides in pertinent part:

“(a) The Attorney General, when the Director [of the United States Bureau of Prisons] shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: *Provided*, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

“(c) Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed.”

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

4, 8, 10 for stylistic changes

From: The Chief Justice

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

Recirculated: JUN 12 1981

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-5392

Robert Howe, Sr., Petitioner, v. William French Smith, Attorney General of United States, et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Sec- ond Circuit.
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[June —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented by this case is whether a State may transfer a prisoner to federal custody pursuant to 18 U. S. C. § 5003<sup>1</sup> in the absence of a prior determination that the prisoner who is being transferred has a need for specialized treatment available in the federal prison system.

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“(c) Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed.”

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

CHAMBERS OF  
THE CHIEF JUSTICE

June 15, 1981

MEMORANDUM TO THE CONFERENCE

CASES HELD FOR #80-5392, HOWE v SMITH

Three cases were held for Howe v Smith, each of which raise precisely the question presented in that case.

1) Hawaii et al v Medeiros (#80-1315)

While the petition for a writ of certiorari was pending in Howe, CA7 decided this case, then called Anthony v Wilkinson. For the most part, CA7 adhered to the view it had expressed in Lono v Fenton, 581 F2d 645, that § 5003 requires a showing of a state prisoner's need for specialized treatment as a condition precedent to transfer to the federal prison system. CA7 agreed with the government's contention that there may be instances in which conditions at federal maximum security facilities may be "treatment" for a prisoner in need of incarceration in maximum security surroundings, thereby satisfying one part of the Lono test. However, it concluded that, in the particular transfers at issue here, the United States and the states gave inadequate consideration to the Lono criteria prior and the transfer evaluation procedures did not comport with due process.

With our decision in Howe v Smith, we have repudiated the reasoning of the Lono case. I will vote to GVR in light of Howe.

> There is a response.

2) Beshaw v Fenton (#80-6354)

In this case, which arises out of the same agreement with the State of Vermont that was at issue in Howe, CA3 expressly followed the reasoning of CA2 in Howe. CA3 also rejected the petitioner's due process challenge to his transfer in light of Meachum v Fano, 427 U.S. 415. CA3 held that the petitioner had no liberty interest which required anything more than a finding that he was a security risk who could not be housed in any of Vermont's remaining facilities.

I will vote to DENY.

There is a response.

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

June 2, 1981

RE: No. 80-5392 Howe v. Smith

Dear Chief:

I agree.

Sincerely,

A handwritten signature in cursive script that reads "Bill".

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

June 1, 1981

Re: No. 80-5392, Howe v. Smith

Dear Chief,

Please add the following at the foot of your opinion for the Court in this case:

Justice Stewart dissents. He would vacate the judgment and remand the case to the District Court with directions to dismiss the complaint. He is of the view that, although the petitioner could have brought a habeas corpus action in the appropriate federal district court by virtue of 18 U.S.C. § 4001 (a), neither that statute nor any other authorized this independent civil action in the United States District Court for the District of Vermont.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 11, 1981

Re: 80-5392 - Howe v. Smith

Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice  
Copies to the Conference  
cpm

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 8, 1981

Re: No. 80-5392 - Howe v. Smith

Dear Chief:

Please join me.

Sincerely,

*J.M.*

T.M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 8, 1981

Re: No. 80-5392 - Howe v. Smith

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 1, 1981

80-5392 Howe v. Smith

Dear Chief:

Please join me.

Sincerely,

*Lewis*

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 1, 1981

Re: No. 80-5392 Howe v. Smith

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 2, 1981

Re: 80-5392 - Howe v. Smith

Dear Chief:

In this case I plan to write a very brief separate statement. I probably will concur in the judgment, but I do not read the statute as broadly as your opinion does.

Respectfully,



The Chief Justice

Copies to 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 Rehnquist

From: Mr. Justice Stevens

80-5392 - Howe v. Smith

Circulated: JUN 10 '81

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

JUSTICE STEVENS, concurring in the judgment.

As I read 18 U.S.C. § 5003(a), quoted ante, at 1, n. 1, it authorizes the Federal Government to take custody of state prisoners only "under certain circumstances in a limited category of cases."<sup>1</sup> The history of the legislation indicates that it was intended to authorize the use of federal "treatment facilities" that would not otherwise be available to the States for the custody and treatment of "those convicted State offenders who are in need of treatment."<sup>2</sup> The language of the statute is

<sup>1</sup> Those were the words used by the Chairman of the Senate Judiciary Committee in explaining the purpose of the bill that became § 5003. See 97 Cong. Rec. 13543 (1951).

<sup>2</sup> That is the language in the Report of the House Judiciary Committee. H.R. Rep. No. 1663, 82nd Cong., 1st Sess., 2 (1952) (House Report). That Report made it clear that the word "treatment" had been purposefully selected as a limitation upon the authority of the Bureau of Prisons to accept state prisoners into federal custody:

"Frequently, State officials request the Bureau of Prisons to undertake the custody, treatment, and training of State prisoners where specialized types of institutions and training programs are indicated but are not available in the States. These requests usually relate to juveniles and drug addicts,

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

PP. 1, 3

From: Mr. Justice Stevens

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

Recirculated: JUN 12 '81

1st PRINTED DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-5392

Robert Howe, Sr., Petitioner, <i>v.</i> William French Smith, Attorney General of United States, et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Sec- ond Circuit.
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[June —, 1981]

JUSTICE STEVENS, concurring in the judgment.

As I read 18 U. S. C. § 5003 (a), quoted *ante*, at 1, n. 1, it authorizes the Federal Government to take custody of state prisoners only "under certain conditions in a limited category of cases."<sup>1</sup> The history of the legislation indicates that it was intended to authorize the use of federal "treatment facilities," that would not otherwise be available to the States, for the custody and treatment of "those convicted State offenders who are in need of treatment."<sup>2</sup> The language of

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"Frequently, State officials request the Bureau of Prisons to undertake the custody, treatment, and training of State prisoners where specialized types of institutions and training programs are indicated but are not available in the States. These requests usually relate to juveniles and drug addicts, concerning whom many of the States are without satisfactory institutions and training programs. The Bureau of Prisons points out that it now has Federal facilities available, including medical and administrative personnel, to accommodate those State offenders that are in need of the various types of treatment that Federal institutions are providing.