

# The Burger Court Opinion Writing Database

## *Polk County v. Dodson*

454 U.S. 312 (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

PERSONAL

November 10, 1981

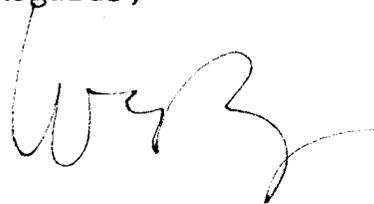
Re: No. 80-824, Polk County, et al. v. Dodson

Dear Lewis:

I am in general agreement with your November 9 draft opinion. I suggest, however, one small problem. On p.5 you state that cert was granted to resolve a conflict over whether public defenders act under color of state law. Cert was also granted to resolve a conflict over what degree of immunity a public defender would be entitled if the defender acts under color of state law. Would it not be helpful to state in a footnote that it is not necessary to reach the immunity question because of the Court's determination that a public defender does not act under color of state law.

*yes*

Regards,



Justice Powell

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

CHAMBERS OF  
THE CHIEF JUSTICE

November 16, 1981

Re: No. 80-824 - Polk County v. Dodson

Dear Lewis:

I join and may send along a brief concurrence.

Regards,



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

CHAMBERS OF  
THE CHIEF JUSTICE

November 16, 1981

Re: No. 80-824 - Polk County v. Dodson

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Regards,



Personal P.S. It is, of course a matter of personal choice and individual style whether to name a dissenting judge whose dissent is being vindicated. From discussions with countless judges, state and federal, over a period of 25 years, I adopted the practice of not doing so. Reason: judges told me it tended to impair relations within the court being reversed. I have occasionally named a writing judge who was being affirmed, when I thought his work was exceptionally good.



050824A 17-NOV-81 Drb

To: Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: The Chief Justice

Circulated: NOV 17 1981

Decirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 80-824

POLK COUNTY, ET AL., PETITIONERS *v.*  
RUSSELL RICHARD DODSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT

[November —, 1981]

CHIEF JUSTICE BURGER concurring:

I join the Court's opinion, but it is important to emphasize that in providing counsel for an accused the governmental participation is very limited. Under *Gideon v. Wainwright*, 372 U. S. 335 (1963), and *Argersinger v. Hamlin*, 407 U. S. 25 (1972), the government undertakes only to provide a professionally qualified advocate wholly independent of the government. It is the independence from governmental control as to how the assigned task is to be performed that is crucial. The advocate, as an officer of the court which issued the commission to practice, owes an obligation to the court to repudiate any external effort to direct how the obligations to the client are to be carried out. The obligations owed by the attorney to the client are defined by the professional codes, not by the governmental entity from which the defense advocate's compensation is derived. Disciplinary Rule 5-107(B) of the ABA Code of Professional Responsibility\* succinctly

\* See, e. g., ABA Code Of Professional Responsibility, Canon 5 (1976): "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Ethical Consideration 5-1 explains this Canon:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

See also ABA Standards For Criminal Justice, *The Prosecution Function* Ch 3, *The Defense Function* Ch 4 (2d ed. 1980).

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Supreme Court of the United States  
Washington, D. C. 20543CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

November 10, 1981

RE: No. 80-824 Polk County v. Russell Dodson

Dear Lewis:

You may recall that at conference my view was that the defender was obviously a state employee but that the question in the case focused on whether his functioning as counsel was conduct "under color of state law" within section 1983. Some parts of your opinion might be read as inconsistent with that approach. For example:

Page 5, last sentence of first paragraph. I don't think I'd "assume" that the assignment of the defender "occurred under color of state law." While I agree it is "easy to see the hand of the state in this action"; I would close the sentence with something like "but this does not constitute action under color of state law within the meaning of 1983."

Page 5, next to last sentence in last paragraph. I would suggest that the sentence read, "But the Courts of Appeals are agreed that a lawyer representing a client is not, by virtue of being an officer of the court, for that reason a state actor acting "under color of state law" amenable to suit under section 1983.

Page 7, first sentence of carryover paragraph. I would substitute "under color of state law" for "state actors".

Page 9, note 13. I would revise the sentences beginning "He urges us to hold, etc." to read as follows: "He urges us to hold on this theory that public defenders act under color of state law within the meaning of section 1983. We cannot do so. In both Burton and Moose Lodge the question was whether state action was present. That is not the question presented in this case. Here the public defender is concededly a state employee but based upon our factual inquiry into the professional obligation and functions of a public defender we find that in her representation of Dobson the defender did not act under color of state law."

W. Brennan

I'd like very much to be able to join your opinion if you could accommodate these difficulties of mine. But if you prefer not to, I could put them in a short concurrence.

Sincerely,

Justice Powell

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

November 13, 1981

RE: No. 80-824 Polk County v. Dodson

Dear Lewis:

I am happy to join your recirculation of  
November 12.

Sincerely,



Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 10, 1981

Re: 80-824 - Polk County v. Dodson

Dear Lewis,

Please join me.

Sincerely yours,



Justice Powell

Copies to the Conference

cpm

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 8, 1981

Re: No. 80-824 - Polk County v. Dodson

Dear Lewis:

Please join me.

Sincerely,



T.M.

Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 16, 1981

Re: No. 80-824 - Polk County v. Dodson

Dear Lewis:

As you have surmised, I shall be writing a dissent in this case. It will be around within just a few days.

Sincerely,



Justice Powell

cc: The Conference

*Desk - To make corresponding changes if necessary*  
Supreme Court of the United States  
Washington, D. C. 20543  
November 23, 1981

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

Re: No. 80-824 - Polk County v. Dodson

Dear Lewis:

I am making some stylistic changes in my dissent and am altering the page references to your opinion in order to conform with the recirculation of November 23. I am also making one change that will affect your new footnote 18. I call this to your attention so it will not be overlooked in the volume of paper that is circulating these days. My own recirculation will be around shortly.

Sincerely,



Justice Powell

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

0\$0824F 11/19/81 spw

From: Justice Blackmun

Circulated: NOV 21 1981

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

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 80-824

POLK COUNTY, ET AL., PETITIONERS *v.*  
RUSSELL RICHARD DODSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT

[November —, 1981]

JUSTICE BLACKMUN, dissenting.

One perhaps should be particularly circumspect when he finds himself in solitary dissent. See *Commissioner v. "Americans United" Inc.*, 416 U. S. 752, 763 (1974) (dissenting opinion). On careful reflection, however, I am convinced that my position is a valid one, and I therefore set forth my views in opposition to those of the Court.

When a full-time state employee, working in an office fully funded and extensively regulated by the State and acting to fulfill a state obligation, violates a person's constitutional rights, the Court consistently has held that the employee acts "under color of" state law, within the meaning and reach of 42 U. S. C. § 1983. *entirely to* Because I conclude that the Court's decision in this case is not consistent with its prior rulings on the meaning of "under color of" state law, and because the Court charts new territory by adopting a functional test in determining liability under the statute, I respectfully dissent.

I

The Court holds for the first time today that a government official's "employment relationship" is no more than a "relevant factor" in determining whether he acts under color of state law within the meaning of § 1983. *Ante*, at 8. Only

STYLISTIC CHANGES  
4/10

0\$0824F rev. 11/23/81 spw

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Blackmun

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

Recirculated: NOV 24 1981

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80-824

POLK COUNTY, ET AL., PETITIONERS v.  
RUSSELL RICHARD DODSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT

[November —, 1981]

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0\$0824G, 11-7-81, rev. Wilma

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

Circulated: NOV 9 1981

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1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80-824

POLK COUNTY, ET AL., PETITIONERS *v.*  
RUSSELL RICHARD DODSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT

[November —, 1981]

JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether a public defender acts "under color of state law" when representing an indigent defendant in a state criminal proceeding.

## I

This case arose when the respondent Russell Richard Dodson filed a *pro se* complaint in the United States District Court for the Southern District of Iowa. Dodson brought the action in federal court under 42 U. S. C. § 1983. As the factual basis for his lawsuit Dodson alleged that Martha Shepard, an attorney in the Polk County Offender Advocate's office, had failed to represent him adequately in an appeal to the Iowa Supreme Court.<sup>1</sup>

A full-time employee of the County, Shepard had been assigned to represent Dodson in the appeal of a conviction for robbery. After inquiring into the case, however, she moved

<sup>1</sup> According to findings made in the District Court, "[t]he Offender Advocate is the independent creation of the Polk County Board of Supervisors. It or one of its lawyers is appointed by the court to represent indigent defendants. It has a salaried lawyer director and several full time salaried lawyers. It is fully funded by Polk County." *Dodson v. Polk County*, 483 F. Supp. 347, 349, n. 2 (SD Iowa 1979). The office handles about 2,500 cases per year.

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

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From: Justice Powell

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-824

**POLK COUNTY, ET AL., PETITIONERS v.  
RUSSELL RICHARD DODSON**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT

[November —, 1981]

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Stylistic changes throughout

9, 10, 11, 12-13

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

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Recirculated: NOV 23 1981

0\$0824G, 11/21/81, rev. Wilma

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 80-824

POLK COUNTY, ET AL., PETITIONERS *v.*  
RUSSELL RICHARD DODSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT

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December 28, 1981

MEMORANDUM TO THE CONFERENCE

Cases Heretofore Held for 80-824 Polk County v. Dodson

The following cases were held for the decision in 80-824 - Polk County v. Dodson. There are five cases. I would Deny each of them.

80-5896, Hall v. Quillen. In this case the Court of Appeals for the Fourth Circuit dismissed § 1983 claims against the court-appointed lawyer who represented petitioner and the court-appointed physician who examined him in a civil commitment proceeding. The court found that neither "acted under color of state law." Although Polk County involved a public defender rather than a court-appointed attorney, its rationale would support the decision of the Court of Appeals. So would dictum in Ferri v. Ackerman, 444 U.S. 193, 204 (1979). The court-appointed doctor is not clearly covered by the reasoning of Polk County, which distinguished cases assuming that physicians in state institutions acted under color of state law. See slip op., at 7-8. But Polk County distinguished those cases on the basis that the institutional physicians had "custodial and supervisory," as well as purely medical, functions. Id., at 7. Polk County therefore is not inconsistent with the decision of this case. Because petitioner alleges no non-distinguishable conflict in cases presenting § 1983 actions against physicians, I recommend a denial.

No. 80-6303, Shaw v. Bernholz. The petitioner in this case alleges that his court-appointed attorneys violated his civil rights, not in a criminal trial, but in a civil action. Polk County, like Ferri v. Ackerman, strongly suggests that an attorney representing a client does not act

under color of state law. In addition, this case presents jurisdictional difficulties. I recommend a denial.

No. 80-6313, Butler v. Brasswell. The petitioner presents the single issue whether his court-appointed lawyer acted under color of state law. I recommend a denial.

No. 80-6546, Stigall v. Cardwell. This case also involves a § 1983 suit against a court-appointed attorney. I recommend a denial.

No. 80-6820, Orpiano v. Parker. This is another case from the Court of Appeals for the Fourth Circuit, which again dismissed a § 1983 action against a court-appointed defense attorney. I recommend a denial.

L.F.P., Jr.

SS

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 11, 1981

Re: No. 80-824 Polk County, et al. v. Dodson

Dear Lewis:

Please join me.

Sincerely,



Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

November 10, 1981

Re: 80-824 - Polk County v. Dodson

Dear Lewis:

Please join me.

Respectfully,



Justice Powell

Copies to the Conference

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



CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

November 10, 1981

*She has  
joined*

No. 80-824 Polk County v. Dodson

Dear Lewis,

While I join in your opinion in this case, I do have two concerns which you might consider.

On page 8 of the opinion, in the second full paragraph, you state that the public defender is "not amenable to administrative direction in the same sense as other employees of the state." I believe we should candidly acknowledge that there are circumstances when administrative or legislative actions of the state, the county, or the office of the public defender itself, may substantially influence the decisions of an individual public defender either to plead or try cases, or to pursue or seek dismissal of appeals. Under such circumstances the individual public defender may act "under color of state law" and be subject to a §1983 action. Despite the similarity of duties of private counsel and the public defender under the Canons of Ethics, public defenders are more subject to state control. They do not have the freedom to adjust their caseload.

Footnote 17 states that "to impose §1983 liability for a lawyer's good faith representation of an indigent prisoner would" create disincentives to provide post-conviction assistance. I believe it would be preferable to drop the term "good faith representation" and refer to a lawyer's "performance of traditional functions as counsel to a defendant in a criminal proceeding." The opinion does not reach the immunity issue. If it did, the question of good faith action would be relevant.

Sincerely,

*Sandra*

Justice Powell

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

November 10, 1981

No. 80-824 Polk County v. Dodson

Dear Lewis,

Please join me in your opinion in the  
referenced case.

Sincerely,



Justice Powell

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