

# The Burger Court Opinion Writing Database

*Regan v. Time, Inc.*

468 U.S. 641 (1984)

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

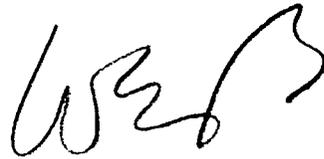
January 5, 1984

Re: 82-729 - Regan v. Time, Inc.

Dear Byron:

You can treat me as a "join" on this case.

Regards,

A handwritten signature in black ink, appearing to be 'WJW', written in a cursive style.

Justice White

Copies to the Conference

*M*

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

November 15, 1983

No. 82-729

Regan v. Time, Inc.

Dear Thurgood, Lewis and John,

We four are in dissent in the  
above. I'll be glad to try my hand at  
the dissent.

Sincerely,

*Bill*

Justice Marshall

Justice Powell

Justice Stevens

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

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SUPREME COURT, U.S.  
JUSTICE BRENNAN

December 8, 1983

'83 DEC -8 A10:47

No. 82-729

Regan v. Time, Inc.

Dear Byron,

I'll be circulating a dissent in  
part in the above in due course.

Merry Christmas.

Sincerely,



Justice White

Copies to the Conference

Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

Circulated: MAY 14 1984

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

*WJE*  
*1-1-1*  
*7-7-7*

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-729

DONALD T. REGAN, SECRETARY OF THE  
TREASURY, ET AL. v. TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

[May —, 1984]

JUSTICE BRENNAN, concurring in part and dissenting in part.

Title 18 U. S. C. § 474 ¶ 6 makes it a federal crime to use pictures of money for any purpose whatsoever, even in the absence of an unlawful intent, and without regard to whether such pictures, or the materials used to make them, might be employed fraudulently. Recognizing that this flat ban sweeps within it a substantial amount of legitimate expression posing virtually no risk of counterfeiting, Congress enacted 18 U. S. C. § 504, which exempts from the ban illustrations of the currency "for philatelic, numismatic, educational, historical or newsworthy purposes in articles, books, journals, newspapers, or albums," provided such illustrations meet certain restrictions as to form and preparation.

In my view, these two statutes as currently written work together to effect a significant abridgement of expression. And, given the extensive and detailed criminal regulation of counterfeiting found in other parts of Title 18, the two provisions only marginally serve the government's concededly highly important interest in preserving the integrity of the currency. The Court today does not expressly reject either of these conclusions. Indeed, it recognizes that Congress' obvious and exclusive intent—to permit only those illustrations of currency with "philatelic, numismatic, educational, historical or newsworthy purposes" and to ban all others—

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 17, 1984

729  
Re: Regan v. Time, No. 82-940

Dear Byron:

Thank you for your letter. In response to the changes you will be making in your opinion in the above, I will slightly revise my dissent to give greater emphasis to the following points:

1. From the outset of this litigation, both parties to this case and the District Court have proceeded on the clearly correct assumption that the "purposes" and "publications" language in §504 establish a single, inseparable standard for obtaining an exemption from the ban against currency illustrations. Our decision must address that issue of statutory construction since we obviously should determine the scope of a statutory standard under review before evaluating its constitutionality. By striking down the "publications" requirement and then stating that "[t]he validity of the publication requirement, standing alone, is . . . of only academic interest to Time," opinion at 7, the Court necessarily decides that the latter requirement can "stand alone."

2. A further reason why we must determine the severability and constitutionality of the "publications" requirement is that, without that provision, the "color" and "size" requirements cannot sensibly remain in force, consistent either with the plain language of the statute or with clearly expressed congressional intent. Those requirements are, in the words of the statute, "conditions" which apply to "[i]llustrations permitted by the foregoing provisions of this section"--to wit, illustrations "for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspaper, or albums." Furthermore, the history of §504, from its beginnings in the 1920s to recent amendments, demonstrates unequivocally, in my view, that the whole point of this exemption from the longstanding flat ban was to permit illustrations with the specified purposes and no others. (One of the numerous indications of this intention is the portion of the quotation at the top of page 4 of your memo that you did not underline: "Paragraph (1) of section 504 . . . as it would be amended by the bill, will specifically permit such illustrations for numismatic, educational, historical, and newsworthy purposes. . .").

3. I do not suggest that a color requirement would be necessarily invalid and I doubt a size requirement could possibly be unconstitutional. (The latter operates narrowly on a single dimension; the former works to prohibit a range of expression far beyond that with which the government is legitimately concerned.) Instead, I contend that, assuming arguendo that the color and size requirements are severable, the former does not satisfy the standards for a narrowly tailored viewpoint-neutral abridgement of speech in the context of the statutory scheme left standing by the Court's decision. The argument that the color requirement prevents the illegitimate use of plates was not just "[in]adequately expressed in the 1958 legislative history," your memo at 4-- it was not expressed at all either there or anywhere else in the legislative history from the time the color requirement was first introduced in 1923. The only basis for that post hoc rationalization is a statement made "by a party to this litigation submitted to Congress three days after that party had filed its notice of appeal in this Court and concerning legislation that has not been reported out of committee, much less passed by either House of Congress." Dissent, n. 26. Given the technical questions involved, this Court is in a poor position to accept at face value the government's unsupported assertions--made for the first time in this litigation in its brief on the merits in this Court.

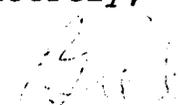
In any event, neither Time's pictures nor its plates can possibly be used for any counterfeiting purposes. See generally H. Simon, *Color in Reproduction* 59-65 (1980). Conversely, the statutory scheme upheld by the Court does absolutely nothing to prevent individuals with illegitimate motives from using widely available printing facilities to manufacture illustrations that might more plausibly be used for counterfeiting. (It is also worth noting that the front side of bills are predominantly in black-and-white.). This danger--the legitimate and compelling government interest at stake in this case--is fully served by the numerous provisions of Title 18 that make it a crime to make or pass materials that really look like currency. See dissent, nn. 9, 24. Any further marginal purpose that might be achieved by the color requirement can certainly be accomplished without prohibiting pictures in orange, pink, and purple.

4. With respect to the overbreadth issue, (a) the Wagner case does not exhaust Time's argument that the statute is "'susceptible of sweeping and improper application,'" Bigelow v. Virginia, 421 U.S. 809, 816 (1975), see Brief for Appellee 5-6, see also dissent at n. 19; (b) even if it did, the very existence of the Wagner decision, together with the decision in this case, is likely to induce one class of potential speakers--political poster artists like Gale Wagner--to refrain from protected activity, cf., Erznoznik v. City of Jacksonville, 422 U.S. 205, 217 (1975); (c) as your own citation to Time's brief

demonstrates, p. 41 n. 29, appellee did not in fact contend below "that it had standing to challenge the publication requirement because of the overbreadth doctrine," memo at 6; instead, it argued that §504 as a whole--which until then had not been understood to have severable "purposes" and "publications" requirements--was overbroad; (d) the precise factual support for Time's overbreadth argument notwithstanding, we have an independent obligation to evaluate the statute's scope, see cases cited in dissent at n. 18; and (e) "where[, as here,] the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack," Members of the City Council v. Taxpayers for Vincent, \_\_\_ U.S. \_\_\_, \_\_\_ (1984).

I will try to have a second draft giving greater emphasis to these points around early next week.

Sincerely,

  
W.J.B., Jr.

Justice White  
Copies to the Conference

82 APR 11 11:28

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MAY 11 1982

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 1, 5, 17, 26, 29, 30, 31

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

From: **Justice Brennan**

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

Recirculated: MAY 24 1984

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-729

DONALD T. REGAN, SECRETARY OF THE  
TREASURY, ET AL. *v.* TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

[May —, 1984]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

Title 18 U. S. C. § 474 ¶ 6 makes it a federal crime to use pictures of money for any purpose whatsoever, even in the absence of an unlawful intent, and without regard to whether such pictures, or the materials used to make them, might be employed fraudulently. Recognizing that this flat ban sweeps within it a substantial amount of legitimate expression posing virtually no risk of counterfeiting, Congress enacted 18 U. S. C. § 504, which exempts from the ban illustrations of the currency "for philatelic, numismatic, educational, historical or newsworthy purposes in articles, books, journals, newspapers, or albums," provided such illustrations meet certain restrictions as to form and preparation.

In my view, these two statutes as currently written work together to effect a significant abridgement of expression. And, given the extensive and detailed criminal regulation of counterfeiting found in other parts of Title 18, the two provisions only marginally serve the government's concededly highly important interest in preserving the integrity of the currency. The Court today does not expressly reject either of these conclusions. Indeed, it recognizes that Congress' obvious and exclusive intent—to permit only those illustrations of currency with "philatelic, numismatic, educational, historical or newsworthy purposes" and to ban all others—

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

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SUPREME COURT, U.S.  
JUSTICE MARSHALL

'84 JUN 26 10:18 June 25, 1984

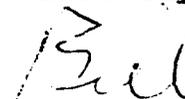
MEMORANDUM TO THE CONFERENCE

Re: Regan v. Time  
No. 83-729

The construction of the "purposes" requirement of §504 advanced in John's opinion certainly came as something of a surprise since no one--including the Government--had previously suggested that the phrase "for philatelic, numismatic, educational, historical, or newsworthy purposes" essentially adds nothing to the phrase "in articles, books, journals, newspapers, or albums." I find that interpretation impossible to square with the plain language of the statute, as well as its legislative history. For instance, if the "purposes" language exempts any illustration in which money is not used for counterfeiting purposes, as John suggests, opinion at 7, I cannot understand why Congress found it necessary also to exempt the use of currency for advertising purposes.

In short, admirable as is John's effort to construe the statute to avoid constitutional questions, I remain convinced that we cannot do so here without "'perverting the purpose of [the] statute' ... or judicially rewriting it." Aptheker v. Secretary of State, 378 U.S. 500, 515-516 (1964). See also Welsh v. United States, 398 U.S. 333, 354 (1970); Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933). Accordingly, I intend to add to my opinion a brief discussion of what I think the "purposes" requirement means and why I agree with the plurality that that requirement is unconstitutional. In view of Lewis's opinion and the changes Byron has made in the prevailing opinion, I will probably drop from my opinion most of the rest of the points I have made except for my conclusion that, without the purposes requirement, the rest of the statute cannot stand consistent with congressional intent. I will try to have these changes completed within the next couple of days.

Sincerely,

  
WJB, Jr.

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

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SUPREME COURT U.S.  
JUSTICE MARSHALL

'84 JUN 28 AM 1:07

June 28, 1984

Re: Regan v. Time  
No. 83-729

Dear Byron:

This will confirm that I join Part IIA of your opinion in the above.

The attached draft contains a few substantive changes as marked, as well as modifications throughout that reflect the final lineup in the case. On Henry Lind's advice, I refer to your opinion as "the opinion of JUSTICE WHITE." Henry informs me that, because the Court is equally divided on the severability question on which you and I are at issue, this nomenclature is more accurate than would be the term "plurality opinion."

Assuming that neither you nor John make any further revisions to which I might want to respond, I am ready when you are.

Sincerely,



WJB, Jr.

Justice White  
Copies to the Conference

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

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SUPREME COURT, U.S.  
E. MARSHALL  
STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 5, 6, 17, 26, 31, 32  
84 JUN 22 1984

From: Justice Brennan

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

Recirculated: JUN 22 1984

## SUPREME COURT OF THE UNITED STATES

No. 82-729

DONALD T. REGAN, SECRETARY OF THE  
TREASURY, ET AL. *v.* TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

[June 29, 1984]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

Title 18 U. S. C. § 474 ¶6 makes it a federal crime to use pictures of money for any purpose whatsoever, even in the absence of an unlawful intent, and without regard to whether such pictures, or the materials used to make them, might be employed fraudulently. Recognizing that this flat ban sweeps within it a substantial amount of legitimate expression posing virtually no risk of counterfeiting, Congress enacted 18 U. S. C. § 504, which exempts from the ban illustrations of the currency "for philatelic, numismatic, educational, historical or newsworthy purposes in articles, books, journals, newspapers, or albums," provided such illustrations meet certain restrictions as to form and preparation.

In my view, these two statutes as currently written work together to effect a significant abridgement of expression. And, given the extensive and detailed criminal regulation of counterfeiting found in other parts of Title 18, the two provisions only marginally serve the government's conceded highly important interest in preserving the integrity of the currency. The Court today does not expressly reject either of these conclusions. Indeed, eight Justices recognize that Congress' obvious and exclusive intent—to permit only those illustrations of currency with "philatelic, numismatic, educational, historical or newsworthy purposes" and to ban all oth-

Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

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 JUSTICE

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 '83 DEC -7 A9:58

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-729

DONALD T. REGAN, SECRETARY OF THE TREASURY ET AL., APPELLANTS *v.* TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[December —, 1983]

JUSTICE WHITE delivered the opinion of the Court.

The Constitution expressly empowers Congress to “provide for the Punishment of counterfeiting the Securities and current Coin of the United States.” U. S. Const., Art. I, § 8, cl. 6. Pursuant to that authority, Congress enacted two statutes that together restrict the use of photographic reproductions of currency, 18 U. S. C. § 474 ¶ 6, and 18 U. S. C. § 504. The Federal District Court for the Southern District of New York held that those two statutes violate the First Amendment. The Government asks us to overturn that judgment.

I

Title 18 U. S. C. § 474 was enacted during the Civil War years to combat the surge in counterfeiting caused by the great increase in Government obligations issued to fund the war and the unsettled economic conditions of the time. See *United States v. Raynor*, 302 U. S. 540, 544-546 (1938). The sixth paragraph of that section provides criminal liability for anyone who “prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any . . . obligation or other security [of the United States] or any part thereof. . . .” 18 U. S. C. § 474 ¶ 6.<sup>1</sup>

<sup>1</sup> Congress first made it a crime to “print, photograph, or in any other

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

From: **Justice White**

- Stylistic and Section IIB -

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JAN 6 1984

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-729

DONALD T. REGAN, SECRETARY OF THE TREASURY ET AL., APPELLANTS *v.* TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[January —, 1984]

JUSTICE WHITE delivered the opinion of the Court.

The Constitution expressly empowers Congress to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States." U. S. Const., Art. I, § 8, cl. 6. Pursuant to that authority, Congress enacted two statutes that together restrict the use of photographic reproductions of currency. 18 U. S. C. § 474 ¶ 6, and 18 U. S. C. § 504. The Federal District Court for the Southern District of New York held that those two statutes violate the First Amendment. The Government asks us to overturn that judgment.

### I

Title 18 U. S. C. § 474 was enacted during the Civil War years to combat the surge in counterfeiting caused by the great increase in Government obligations issued to fund the war and the unsettled economic conditions of the time. See *United States v. Raynor*, 302 U. S. 540, 544-546 (1938). The sixth paragraph of that section provides criminal liability for anyone who "prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any . . . obligation or other security [of the United States] or any part thereof. . . ." 18 U. S. C. § 474 ¶ 6.<sup>1</sup>

<sup>1</sup> Congress first made it a crime to "print, photograph, or in any other

Justice Brennan  
 ✓ Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

OF LEGAL OPINIONS THROUGHOUT.

SEE PAGES: 12

From: **Justice White**

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*3d*  
 2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-729

DONALD T. REGAN, SECRETARY OF THE TREASURY ET AL., APPELLANTS *v.* TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[January —, 1984]

JUSTICE WHITE delivered the opinion of the Court.

The Constitution expressly empowers Congress to “provide for the Punishment of counterfeiting the Securities and current Coin of the United States.” U. S. Const., Art. I, §8, cl. 6. Pursuant to that authority, Congress enacted two statutes that together restrict the use of photographic reproductions of currency. 18 U. S. C. §474 ¶6, and 18 U. S. C. §504. The Federal District Court for the Southern District of New York held that those two statutes violate the First Amendment. The Government asks us to overturn that judgment.

I

Title 18 U. S. C. §474 was enacted during the Civil War to combat the surge in counterfeiting caused by the great increase in Government obligations issued to fund the war and the unsettled economic conditions of the time. See *United States v. Raynor*, 302 U. S. 540, 544-546 (1938). The sixth paragraph of that section provides criminal liability for anyone who “prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any . . . obligation or other security [of the United States] or any part thereof. . . .” 18 U. S. C. §474 ¶6.<sup>1</sup>

<sup>1</sup> Congress first made it a crime to “print, photograph, or in any other

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JUSTICE MARSHALL

CHAMBERS OF  
JUSTICE BYRON R. WHITE

'84 MAY 17 A9:38

May 17, 1984

Regan v. Time, Inc., No. 82-729

Dear Bill:

In response to your opinion circulated May 14, I am making the following additions to my opinion. First, the following footnote will be added on page 7.

"The dissent seems to believe that we hold that the publication requirement can constitutionally be used to prohibit non-publishers from ever using photographic reproductions of currency since much of the discussion in the dissent concerns the constitutionality of the publication requirement. Dissent, at 18-30. As clearly stated above, and as we reiterate here, we express no opinion as to the validity of the publication requirement since Time has failed to show that that requirement affects its conduct in any way. It may well be that a person could not constitutionally be prohibited from using a reproduction which conformed with every portion of the statute other than the publication requirement. But that is an issue which must be raised by someone who has been prohibited from using such a reproduction for that reason.

The dissent also seems to suggest that we should decide whether the publication requirement is invalid on the basis that it is inextricably intertwined with the unconstitutional purposes requirement. However, Time has not made that argument. Time argues that the publication requirement is unconstitutional because it is vague and overbroad, not that it should be struck down because Congress would never have included

the requirement in the statute in the absence of the purposes requirement. Given the fact that we hold that, even in the absence of both the purposes and publication requirements, the color and size requirements can constitutionally be applied to *Time*, *infra*, at , and that *Time* has made no showing that the validity of the publications requirement by itself is of any interest to it, we see no need to reach out and decide the latter issue on our own."

Second, at an appropriate point on page 9, the following footnote will be added.

"The dissent seems to misconceive the premise upon which our argument is premised as it goes to great lengths to establish that the publication requirement and the purposes requirement "are so completely intertwined as to be plainly inseverable ...." Dissent, at 17. See *id.*, at 6-18. Our severability argument proceeds on the premise that both the purposes and publication requirements are unconstitutional. Thus, our entire discussion is directed at whether the color and size requirements can survive on their own. This discussion is not, as the dissent states, "extensive dicta," dissent, at 16 n. 13. The severability of the color and size requirements is the only issue essential to our decision since those are the only requirements which we uphold in this decision. As we have repeatedly stressed, *supra*, at & n. , we do not decide whether the publication requirement is constitutional. This is not because we conclude that Congress would have wanted the publication requirement to stand in the absence of the purposes requirement, but rather because the validity of that requirement makes no difference to *Time*, the only party who has challenged the statute."

Third, this rather lengthy footnote will be inserted at the bottom of page 11.

"The dissent seems to agree that the purposes requirement does not significantly advance

Congress' express interest in easing the Treasury Department's administrative burden. Dissent, at 17, n. 13. Similarly, it does not dispute our conclusion that the statute can serve the other purpose expressed by Congress - to ensure that the exception would not permit counterfeiters to circumvent the law - even in the absence of the purpose requirement. Instead, the dissent seems to argue that Congress had some other, paramount interest in mind when it enacted the statute and that that interest cannot be achieved once the purposes requirement is struck down. This overriding congressional interest, according to the dissent, is to "permit illustrations for purposes Congress considered worthwhile." Dissent, at 14. However, the dissent is unable to cite anything in the legislative history of the 1958 amendment that indicates that Congress' overriding concern in expanding the purposes requirement was to promote certain worthwhile activities. There is no discussion in the legislative history concerning which activities were considered to be most worthwhile or why some activities were more worthwhile than others. Instead, the statute referred to illustrations for numismatic, educational, historical, and newsworthy purposes only because those were the types of activities for which the Treasury Department had received exemption requests in the past.

The Treasury Department receives numerous requests for special permission to use illustrations of paper money ... for various legitimate purposes. Publishers of textbooks often desire to use illustrations of United States savings bonds and postal money orders, for example in school textbooks. Collectors of old paper money likewise wish to use illustrations in articles relating to their issue and in collector's catalogs. Historians similarly want to use illustrations of paper money to picture currency in circulation during a particular historical period. Newspapers quite often publish pictures of paper money or checks in connection with news articles, usually because of ignorance of the statutory prohibitions against the use of such illustrations.

....

Paragraph (1) of section 504 ... as it would be amended by the bill, will specifically permit such illustrations for numismatic, educational, historical, and newsworthy purposes and will obviate the necessity of obtaining special permission from the Secretary of the Treasury in each case where the use of such illustrations is desired." S. Rep. No. 2446, supra, at 5-6; H.R. Rep. No. 1709, supra, at 3-4.

While the legislation undoubtedly benefits those who engage in the listed activities, there is no indication that Congress enacted the legislation out of special concern for such individuals. Instead, as Time itself points out, Congress apparently acted "in response to the Treasury Department's desire to be rid of an administrative nuisance." Respondent's Brief, at 8. As noted above, that interest and the other interest expressed by Congress when it enacted the amendment can adequately be served even in the absence of the purposes requirement."

Fourth, a footnote to the following effect will be added on page 13.

"The dissent argues that the color restriction is invalid because one of the interests served by this restriction - prohibiting counterfeiters from gaining access to color negatives and plates and from having an instant alibi for possessing those items - was not adequately expressed in the 1958 legislative history. Dissent, at 28 n. 26. Although, Congress never expressly articulated this specific interest when it enacted the legislation in 1958, it did state that in imposing the size and color restrictions, it was relying heavily on the Treasury Department's opinion that the restrictions would adequately ensure that the statutory exception would not "facilitate counterfeiting." S. Rep. No. 2446, supra, at 5-6; H.R. Rep. No. 1709, supra, at 3. The dissent does not dispute that this interest is furthered to by the color requirement's effect of limiting the availability of negatives and plates to would-be counterfeiters. Instead, it argues that the particular negatives and plates used by Time would

be of little assistance to counterfeiters and that the asserted interest is adequately served by other provisions of the statute. Dissent, at 29 n. 26. Neither of these arguments is persuasive.

First, in determining whether a time, place, and manner regulation substantially serves the state's interest, the effectiveness of the regulation should not be measured solely by the adverse consequences of exempting a particular plaintiff from the regulation. Clark v. Community for Creative Non-Violence, U.S. (1984); Heffron, 452 U.S., at 652-653. If Time is exempted from the color requirement, so must all others who wish to use such reproductions. While Time may consistently use negatives and plates that are of little use to counterfeiters, there is no way of ensuring that others will adhere to that practice.

Second, the fact that the government's interest is served to some degree by the requirement that the negatives and plates be destroyed after their final use does not render the color requirement superfluous. During the time that the negatives and plates are in existence for legitimate purposes, they can still be used for counterfeiting purposes, possibly by the same individuals who are creating the legitimate reproductions. Thus, even the dissent is forced to admit that the color requirement serves this interest "marginally." Dissent, at 28 n. 26. Coupled with the other interest served by the color requirement - to prevent the unwary from being deceived by otherwise legitimate reproductions - we believe that the government's interest in the increased deterrence provided by the color requirement in this respect is sufficient to override whatever interest Time might have in printing the reproduction in color."

Finally, the following paragraph will be added at the end of footnote 7 on page 8.

"The dissent maintains that we misconstrue the overbreadth doctrine by focusing on the one prior instance in which the statute was arguably applied in an unconstitutional manner. Dissent, at 25. However, we cite only the one example because that is the only example brought to our attention by Time. It is important to remember that the overbreadth doctrine operates as an

exception to the normal rules of standing. Thus, it is up to the party invoking the doctrine to "demonstrate a realistic danger that the ordinance will significantly compromise recognized First Amendment protections of individuals not before the Court." City Council of Los Angeles v. Taxpayers for Vincent, U.S. , (1984). The dissent states that we should remand the case to provide Time with an opportunity to make that showing, suggesting that Time had no idea that such a showing would be required. Dissent, at 20 n. 17. This ignores the fact that it was Time, not the Court, which first argued that it had standing to challenge the publication requirement because of the overbreadth doctrine. See Respondent's Brief, at 41 n. 29."

Sincerely



Justice Brennan

cc: The Conference

Stylistic changes and  
pp. 7-10, 12-13, 15-16

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

From: Justice White

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

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JUSTICE MARSHALL

'84 MAY 22 P 2:01

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-729

DONALD T. REGAN, SECRETARY OF THE  
TREASURY, ET AL. *v.* TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

[May —, 1984]

JUSTICE WHITE delivered the opinion of the Court.

The Constitution expressly empowers Congress to “provide for the Punishment of counterfeiting the Securities and current Coin of the United States.” U. S. Const., Art. I, § 8, cl. 6. Pursuant to that authority, Congress enacted two statutes that together restrict the use of photographic reproductions of currency. 18 U. S. C. § 474 ¶ 6, and 18 U. S. C. § 504. The Federal District Court for the Southern District of New York held that those two statutes violate the First Amendment. The Government asks us to overturn that judgment.

### I

Title 18 U. S. C. § 474 was enacted during the Civil War to combat the surge in counterfeiting caused by the great increase in Government obligations issued to fund the war and the unsettled economic conditions of the time. See *United States v. Raynor*, 302 U. S. 540, 544-546 (1938). The sixth paragraph of that section provides criminal liability for anyone who “prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any . . . obligation or other security [of the United States] or any part thereof. . . .” 18 U. S. C. § 474 ¶ 6.<sup>1</sup>

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<sup>1</sup> Congress first made it a crime to “print, photograph, or in any other

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

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 7, 9-10, 15, 16

From: Justice White

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5th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-729

DONALD T. REGAN, SECRETARY OF THE  
TREASURY, ET AL. v. TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

[May —, 1984]

JUSTICE WHITE delivered the opinion of the Court.

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<sup>1</sup> Congress first made it a crime to “print, photograph, or in any other

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84 MAY 25 P 1:19

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JUSTICE MARSHALL

'84 JUN 26 P2:53

- Stylistic changes throughout  
- and pp. 1, 17

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

From: Justice White

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6th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-729

DONALD T. REGAN, SECRETARY OF THE  
TREASURY, ET AL. *v.* TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

[June —, 1984]

JUSTICE WHITE announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join.

The Constitution expressly empowers Congress to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States." U. S. Const., Art. I, § 8, cl. 6. Pursuant to that authority, Congress enacted two statutes that together restrict the use of photographic reproductions of currency. 18 U. S. C. § 474 ¶ 6, and 18 U. S. C. § 504. The Federal District Court for the Southern District of New York held that those two statutes violate the First Amendment. The Government asks us to overturn that judgment.

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JUSTICE MARSHALL

'84 JUN 29 A9:19

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 82-729

DONALD T. REGAN, SECRETARY OF THE  
TREASURY, ET AL. *v.* TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

[July 3, 1984]

JUSTICE WHITE announced the judgment of the Court and delivered the opinion of the Court with respect to Part II-A, and an opinion with respect to Parts II-B, II-C, and II-D, in which THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join.

The Constitution expressly empowers Congress to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States." U. S. Const., Art. I, § 8, cl. 6. Pursuant to that authority, Congress enacted two statutes that together restrict the use of photographic reproductions of currency. 18 U. S. C. § 474 ¶ 6, and 18 U. S. C. § 504. The Federal District Court for the Southern District of New York held that those two statutes violate the First Amendment. The Government asks us to overturn that judgment.

### I

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 8, 1983

Re: No. 82-729-Regan v. Time

Dear Byron:

I await the dissent.

Sincerely,

*T.M.*

T.M.

Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 16, 1984

Re: No. 82-729-Regan v. Time

Dear Bill:

Please join me in your opinion.

Sincerely,

*J.M.*

T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 29, 1983

Re: No. 82-729, Regan v. Time, Inc.

Dear Byron:

This is a difficult case for me, particularly in view of the fact I have been assigned to write the opinion in No. 82-766, Secretary of State of Maryland v. Munson Co. As with so many others, I shall wait to see what Bill Brennan has to say in his forthcoming dissent.

Sincerely,



Justice White

cc: The Conference

Supreme Court of the United States

Washington, D. C. RECEIVED  
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JUSTICE MARSHALL

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 26, 1984

'84 JUN 26 10:18

Re: No. 82-729, Regan v. Time, Inc.

Dear Lewis:

Please join me in your opinion concurring in part  
and dissenting in part in this case.

Sincerely,



Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

December 9, 1983

82-729 Regan v. Time, Inc.

Dear Byron:

I will await Bill Brennan's dissent. This is a  
troublesome case for me.

Sincerely,



Justice White

lfp/ss

cc: The Conference

05/26

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

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'84 MAY 30 A9:56

From: Justice Powell

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**SUPREME COURT OF THE UNITED STATES**

No. 82-729

DONALD T. REGAN, SECRETARY OF THE  
TREASURY, ET AL. v. TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

[May —, 1984]

JUSTICE POWELL, concurring in part and dissenting in part.

I agree with the reasoning and the holding of the Court that the "purposes" requirement contained in § 504 is unconstitutional. I do not agree with the Court's conclusion that "the policies Congress sought to advance by enacting § 504 can be effectuated even though the purpose requirement is unenforceable." *Ante*, at 11. As Part II, B, (1) of JUSTICE BRENNAN's opinion explains, the plain language and legislative history of § 504 confirm that Congress enacted that provision for the sole purpose of exempting, from the otherwise comprehensive ban on likenesses of the currency, illustrations that serve specifically identified purposes. The "purposes" clause, therefore, is essential to the statutory plan. If that clause is unconstitutional, as the Court, in my view, properly holds that it is, the entire statute is invalid. I agree with JUSTICE BRENNAN that the Court "errs in simply deleting the crucial statutory language and using the words that remain as the raw material for a new statute of its own making." *Ante*, at 15.

In sum, I believe that the "purposes" clause of § 504 is unconstitutional, and that Congress would not have enacted the remaining provisions of § 504 without that clause. I, therefore, would simply invalidate § 504 and would not reach the

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pp. 1, 2

To: The Chief Justice  
Justice Brennan  
Justice White  
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84 JUN 27 A9:48

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**SUPREME COURT OF THE UNITED STATES**

No. 82-729

DONALD T. REGAN, SECRETARY OF THE  
TREASURY, ET AL. *v.* TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

[June —, 1984]

JUSTICE POWELL, with whom JUSTICE BLACKMUN joins,  
concurring in part and dissenting in part.

I agree with the reasoning and the holding of the Court that the "purposes" requirement contained in § 504 is unconstitutional. I do not agree with the Court's conclusion that "the policies Congress sought to advance by enacting § 504 can be effectuated even though the purpose requirement is unenforceable." *Ante*, at 11. As Part II, B, (1) of JUSTICE BRENNAN's opinion explains, the plain language and legislative history of § 504 confirm that Congress enacted that provision for the sole purpose of exempting, from the otherwise comprehensive ban on likenesses of the currency, illustrations that serve specifically identified purposes. The "purposes" clause, therefore, is essential to the statutory plan. If that clause is unconstitutional, as the Court, in my view, properly holds, the entire statute is invalid. I agree with JUSTICE BRENNAN that the Court "errs in simply deleting the crucial statutory language and using the words that remain as the raw material for a new statute of its own making." *Ante*, at 15.

JUSTICE STEVENS, in his opinion concurring in the judgment, advances strong policy arguments in favor of upholding the color and size restrictions. See, *ante*, pp. 8-10. Under my view of the case, I do not reach this issue. I note further

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 8, 1983

Re: No. 82-729 Regan v. Time, Inc.

Dear Byron:

Please join me.

Sincerely,



Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

December 8, 1983

Re: 82-729 - Regan v. Time, Inc.

Dear Byron:

Since I was doubtful about this case at conference, I will wait to see what Bill has to say in his dissent.

Respectfully,

A handwritten signature in dark ink, appearing to be 'JW', written in a cursive style.

Justice White

Copies to the Conference

To: The Chief Justice  
Justice Brennan  
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Justice Marshall  
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Justice O'Connor

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From: Justice Stevens

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## SUPREME COURT OF THE UNITED STATES

No. 82-729

DONALD T. REGAN, SECRETARY OF THE  
TREASURY, ET AL. *v.* TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

[June —, 1984]

JUSTICE STEVENS, concurring in the judgment.

Time's challenge to the constitutionality of the prohibition against making any likenesses of currency might proceed on either of two quite different theories. First, even if Time's ability to communicate is adequately protected by the rather complex exception for publications that contain pictures complying with color and size limitations, the prohibition against communications that do not come within the exception is so broad—or so poorly defined—that the entire statute is invalid. Second, without considering the potential impact of the statute on third parties, the restrictions are invalid, in whole or in part, as they apply to Time. Given that this statute contains an express exception for expression which may fully accommodate Time's First Amendment rights, I think the Court should begin its analysis by evaluating the impact of the statute on the litigant before the Court before it confronts any question concerning the statute's impact on third parties.

I also think that the Court should decline Time's invitation to plunge right into the constitutional analysis without pausing to determine whether, and to what extent, a fair construction of the statute would protect Time's legitimate interests and also avoid the unnecessary adjudication of constitutional questions. Most of the Treasury Department's criticism of Time's use of pictures of currency—and I believe

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84 JUN 28 P 1:08  
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SEE PAGES: 1, 7, 8, 12, 13

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Justice Rehnquist  
Justice O'Connor

From: Justice Stevens

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## SUPREME COURT OF THE UNITED STATES

No. 82-729

DONALD T. REGAN, SECRETARY OF THE  
TREASURY, ET AL. *v.* TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

[June 29, 1984]

JUSTICE STEVENS, concurring in the judgment in part, and  
dissenting in part.

Time's challenge to the constitutionality of the prohibition against making any likenesses of currency might proceed on either of two quite different theories. First, even if Time's ability to communicate is adequately protected by the rather complex exception for publications that contain pictures complying with color and size limitations, the prohibition against communications that do not come within the exception is so broad—or so poorly defined—that the entire statute is invalid. Second, without considering the potential impact of the statute on third parties, the restrictions are invalid, in whole or in part, as they apply to Time. Given that this statute contains an express exception for expression which may fully accommodate Time's First Amendment rights, I think the Court should begin its analysis by evaluating the impact of the statute on the litigant before the Court before it confronts any question concerning the statute's impact on third parties.

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

December 13, 1983

No. 82-729 Regan v. Time, Inc.

Dear Byron,

Please join me.

Sincerely,



Justice White

Copies to the Conference