

# The Burger Court Opinion Writing Database

*United States v. Albertini*

472 U.S. 675 (1985)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



7411  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

September 28, 1984

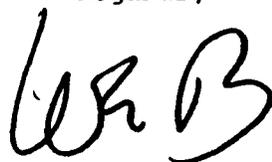
Re: 83-1624 - United States v. Albertini

Dear Sandra:

There are five votes to reverse this case summarily based on Spock and other cases.

Will you try a hand at a Per Curiam?

Regards,



Justice O'Connor

Copies to: ✓ Justice Blackmun  
Justice Powell  
Justice Rehnquist

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

CHAMBERS OF  
THE CHIEF JUSTICE

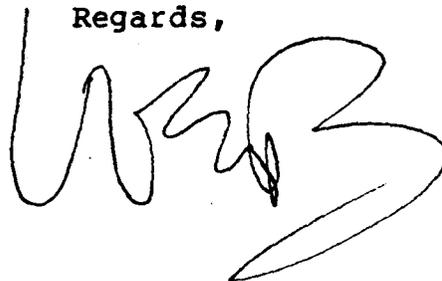
October 16, 1984

RE: No. 83-1624 - United States v. James Vincent  
Albertini

Dear Sandra:

I join.

Regards,



Justice O'Connor

Copies to the Conference

25:1A 81 130 48

2000

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

CHAMBERS OF  
THE CHIEF JUSTICE

May 16, 1985

Re: No. 83-1624 - United States v. Albertini

Dear Sandra:

I join.

Regards,

Justice O'Connor

Copies to the Conference

84 MAY 17 1985

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

November 1, 1984

MEMORANDUM TO THE CONFERENCE

No. 83-1624

United States v. Albertini

I have decided to change my vote  
from deny to grant in the above case.

Sincerely,

*But*

84 OCT 31 10:18

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

April 29, 1985

No. 83-1624

United States v. Albertini

Dear John,

I know that your vote was to vacate  
and Thurgood and mine to affirm in the  
above. I'm certainly open to persuasion  
to go your way. Would you mind taking  
the dissent?

Sincerely,

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

Justice Stevens

Copy to Justice Marshall

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 15, 1985

No. 83-1624

United States v. Albertini

Dear Sandra,

I'll await further writing in the  
above.

Sincerely,

Justice O'Connor

Copies to the Conference

59 MAY 19 6 15 PM '85

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

June 14, 1985

United States v. Albertini  
No. 83-1624

Dear John,

Please join me in your dissenting opinion in the  
above.

Sincerely,

*Bill*

Justice Stevens

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

NOV 14 1984  
November 14, 1984

12:59 AM '84

Re: 83-1624 -

United States v. Albertini

Dear John,

Your proposed additional question is  
fine with me.

Sincerely yours,



Justice Stevens

cc: Justice Brennan  
Justice Marshall

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 13, 1985

83-1614 - United States v. Albertini

Dear Sandra,

I agree.

Sincerely,

Justice O'Connor

Copies to the Conference

85 MAY 13 6 12 PM

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 14, 1984

Re: No. 83-1624 - United States v. Albertini

Dear John:

Your draft order seems OK to me.

Sincerely,

*JM*  
T.M.

Justice Stevens

cc: Justice Brennan  
Justice White

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 16, 1985

Re: No. 83-1624-U.S. v. Albertini

Dear Sandra:

I await the dissent.

Sincerely,

*Jm.*

T.M.

Justice O'Connor

cc: The Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 17, 1985

Re: No. 83-1624-U.S. v. James Vincent Albertini

Dear John:

Please join me in your dissent.

Sincerely,

*Jm.*  
T.M.

Justice Stevens

cc: The Conference

2

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

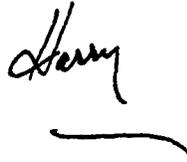
October 17, 1984

Re: No. 83-1624, United States v. Albertini

Dear Sandra:

Please join me in your proposed per curiam.

Sincerely,



RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL  
24 OCT 17 110 26  
Justice 'Connor  
The Conference

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5

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 23, 1985

Re: No. 83-1624, United States v. Albertini

Dear Sandra:

Please join me.

Sincerely,

*Harry*

Justice O'Connor

cc: The Conference

84 MAY 23 11 52

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

October 18, 1984

83-1624 UNITED STATES v. ALBERTINI

Dear Sandra:

Please join me in your per curiam for the Court.

Sincerely,

*L. F. P.*

84 OCT 18 11 52

Justice O'Connor

Copies to the Conference

LFP/vde

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

May 13, 1985

83-1624 United States v. Albertini

Dear Sandra:

I like your opinion and expect to join it. I do have a couple of suggestions that I would appreciate your considering.

On p. 11, I would be inclined to omit the first two sentences in the paragraph that begins on that page. I would not volunteer that prosecution under §1382 could have an incidental effect of limiting expression. This may invite challenges on this ground in other cases.

The last two sentences beginning at the bottom of p. 12 can be read as - in effect - overruling the third prong of the O'Brien test. I agree that the word "essential", if read literally, would make it extremely difficult to meet the test in some cases. I therefore welcome some interpretation of that part of O'Brien. You do have some good language on page 12 before you reach the last two sentences. Rather than a "head on" collision with O'Brien, what would you think of something along the following lines as a substitute for the last two sentences:

"Nor are such regulations invalid simply because there may be some incidental burden on speech where a neutral regulation clearly promotes a substantial government interest that would be achieved less effectively absent the regulation."

I would have preferred not to remand on the due process issue, as the CA may welcome the opportunity to find in favor of Albertini. As I recall, there was little discussion at Conference of the remand question although Byron and Bill Rehnquist did say they thought a remand was unnecessary. Your final paragraph does dispose of any argument that the military officials lack the power to exclude civilians from military bases by bar letters. I suppose there

could be a staleness issue as argued in respondent's brief. But I understand his argument to be a general one. I do not recall that he makes a claim that the bar letter was stale because of his particular situation. Although I would prefer not to remand, I would not dissent if you conclude a remand is necessary.

Sincerely,

Justice O'Connor

lfp/ss



CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

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

May 15, 1985

83-1624 United States v. Albertini

Dear Sandra:

Please join me.

Sincerely,

*Lewis*

Justice O'Connor

lfp/ss

cc: The Conference

25 46 12 6 19

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

October 16, 1984

Re: No. 83-1624 United States v. Albertini

Dear Sandra,

Please join me.

Sincerely,

*Wm*

Justice O'Connor

cc: The Conference

54:59 21 100 AB

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(12)

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 14, 1985

Re: 83-1624 - United States v. Albertini

Dear Sandra:

Please join me.

Sincerely,

*WHR*

Justice O'Connor

cc: The Conference

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REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

From: Justice Stevens

OCT 31 1984

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1st DRAFT

# SUPREME COURT OF THE UNITED STATES

UNITED STATES v. JAMES VINCENT ALBERTINI

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

No. 83-1624. Decided November —, 1984

JUSTICE STEVENS, dissenting.

In my opinion, the Court should not decide constitutional questions unless such adjudication is unavoidable. See *University of California Regents v. Bakke*, 438 U. S. 265, 411 (1978) (STEVENS, J., dissenting). There was a time when the Court regarded that doctrine as "more deeply rooted than any other in the process of constitutional adjudication." *Spector Motor Service, Inc. v. McLaughlin*, 323 U. S. 101, 105 (1944). Ironically, although this practice is especially prudent when First Amendment questions are raised,<sup>1</sup> the current fashion in such cases is to "plunge right into the constitutional analysis without pausing" to consider other possible grounds of decision.<sup>2</sup> Today the Court takes another plunge.

ND  
C90 Trip 1

The statutory question that the Court hurdles is whether respondent violated 18 U. S. C. § 1382 on May 16, 1981, when he entered Hickam Air Force Base. What the respondent did after entering the base is irrelevant. Only the terms of the letter barring reentry and the circumstances surrounding the subsequent entry are relevant to the statutory issue.

In March of 1972, respondent received a letter which directed him not to "reenter the confines of this installation

<sup>1</sup> See *Yates v. United States*, 354 U. S. 298, 319 (1957) ("[O]ur first duty is to construe this statute. In doing so we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked . . .").

<sup>2</sup> *Regan v. Time, Inc.*, — U. S. —, — (1984) (opinion of STEVENS, J., concurring in the judgment in part and dissenting in part); cf. *United States v. Grace*, 461 U. S. 171, 188-189 (1983) (STEVENS, J., concurring in part and dissenting in part).

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

NOV 14 1984

November 14, 1984

Re: 83-1624 - United States v. Albertini

Dear Bill, Byron, and Thurgood:

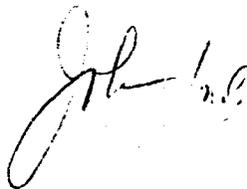
The following is a proposed draft order requesting the parties to argue the statutory question in this case:

"The petition for writ of certiorari is granted. In addition to the question presented in the petition, the parties are requested to address the following question:

"Whether the respondent's attendance at the 'open house' at Hickam Air Force Base on May 16, 1981, was the kind of reentry that Congress intended to prohibit in 18 U.S.C. §1382?"

I will await your suggestions before circulating the proposed order to the Conference.

Respectfully,



Justice Brennan  
Justice White  
Justice Marshall

*Your draft order seems OK to me*  
*WJ*

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

November 27, 1984

Memorandum to the Conference

Re: 83-1624 - United States v. Albertini

After conferring with Bill, Byron and Thurgood, the proposed draft order requesting the parties to argue the statutory question in this case is set forth below:

"The petition for writ of certiorari is granted. In addition to the question presented in the petition, the parties are requested to address the following question:

'Whether the respondent's attendance at the "open house" at Hickam Air Force Base on May 16, 1981, was the kind of reentry that Congress intended to prohibit in 18 U.S.C. §1382?' "

Respectfully,



84 NOV 29 10:53 AM '84

11/29/84  
2:10 PM

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

April 29, 1985

Re: 83-1624 - United States v. Albertini

Dear Bill:

I shall be happy to prepare the dissent.

Respectfully,



Justice Brennan

cc: Justice Marshall

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 15, 1985

Re: 83-1624 - United States v. Albertini

Dear Sandra:

As soon as I can get to it, I will prepare a dissent in this case.

Respectfully,



Justice O'Connor

Copies to the Conference

13:39 21 JAN 85

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

From: Justice Stevens

Circulated: JUN 13 1985

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*PS*  
*Please join me in your dissent*  
*JW*

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1624

UNITED STATES, PETITIONER *v.* JAMES  
VINCENT ALBERTINI

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

[June —, 1985]

JUSTICE STEVENS, dissenting.

In 1909 Congress enacted a new statute making it a federal crime to trespass on military bases in specified circumstances. That statute, now codified as 18 U. S. C. § 1382, provided:

“Whoever shall go upon any military reservation, army post, fort, or arsenal, for any purpose prohibited by law or military regulation made in pursuance of law, or whoever shall reenter or be found within any such reservation, post, fort, or arsenal, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.” 35 Stat. 1097.

In my opinion, Congress did not intend to punish a visit to a military reservation under the second clause of this statute when circumstances reasonably indicated that the visit was not prohibited but welcome.

In this case, the respondent was “removed as a trespasser from Hickam Air Force Base,” on March 2, 1972, and “ordered not to re-enter.”<sup>1</sup> The removal and order not to re-

<sup>1</sup>In addition to his removal from the base, the respondent received a two-paragraph form letter. The first paragraph reads as follows:

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STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES:

1, 8

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

From: Justice Stevens

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Recirculated: JUN 18 1985

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1624

UNITED STATES, PETITIONER *v.* JAMES  
VINCENT ALBERTINI

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

[June —, 1985]

JUSTICE STEVENS, with whom JUSTICE BRENNAN and  
JUSTICE MARSHALL join, dissenting.

In 1909 Congress enacted a new statute making it a federal  
crime to trespass on military bases in specified circum-  
stances. That statute, now codified as 18 U. S. C. § 1382,  
provided:

“Whoever shall go upon any military reservation,  
army post, fort, or arsenal, for any purpose prohibited  
by law or military regulation made in pursuance of law,  
or whoever shall reenter or be found within any such res-  
ervation, post, fort, or arsenal, after having been re-  
moved therefrom or ordered not to reenter by any offi-  
cer or person in command or charge thereof, shall be  
fined not more than five hundred dollars, or imprisoned  
not more than six months, or both.” 35 Stat. 1097.

In my opinion, Congress did not intend to punish a visit to a  
military reservation under the second clause of this statute  
when circumstances reasonably indicated that the visit was  
not prohibited but welcome.

In this case, the respondent was “removed as a trespasser  
from Hickam Air Force Base,” on March 2, 1972, and “or-

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

From: Justice Stevens

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Recirculated: JUN 21 1985

## SUPREME COURT OF THE UNITED STATES

No. 83-1624

UNITED STATES, PETITIONER *v.* JAMES  
VINCENT ALBERTINI

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

[June 24, 1985]

JUSTICE STEVENS, with whom JUSTICE BRENNAN and  
JUSTICE MARSHALL join, dissenting.

In 1909 Congress enacted a new statute making it a federal  
crime to trespass on military bases in specified circum-  
stances. That statute, now codified as 18 U. S. C. § 1382,  
provided:

“Whoever shall go upon any military reservation,  
army post, fort, or arsenal, for any purpose prohibited  
by law or military regulation made in pursuance of law,  
or whoever shall reenter or be found within any such res-  
ervation, post, fort, or arsenal, after having been re-  
moved therefrom or ordered not to reenter by any offi-  
cer or person in command or charge thereof, shall be  
fined not more than five hundred dollars, or imprisoned  
not more than six months, or both.” 35 Stat. 1097.

In my opinion, Congress did not intend to punish a visit to a  
military reservation under the second clause of this statute  
when circumstances reasonably indicated that the visit was  
not prohibited but welcome.

In this case, the respondent was “removed as a trespasser  
from Hickam Air Force Base,” on March 2, 1972, and “or-

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7/11

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

September 29, 1984

No. 83-1624 United States v. Albertini

Dear Chief,

I will be glad to try to draft a Per Curiam  
in this case.

Sincerely,



The Chief Justice

cc: Justice Blackmun  
Justice Powell  
Justice Rehnquist

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

From: **Justice O'Connor**

Circulated:                      OCT 16 1984

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

                      
No. 83-1624  
                    

**UNITED STATES v. JAMES VINCENT ALBERTINI**

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

[October —, 1984]

PER CURIAM.

Respondent James Vincent Albertini was charged with violating 18 U. S. C. § 1382 based on his reentry into a military reservation contrary to an order of the commanding officer. After a bench trial before the United States District Court for the District of Hawaii, respondent was convicted and sentenced to three months' imprisonment. The Court of Appeals for the Ninth Circuit reversed the conviction on the grounds that it violated the First Amendment. *United States v. Albertini*, 710 F. 2d 1410 (CA9 1983). After unsuccessfully petitioning for rehearing before the Court of Appeals, the Government filed a petition for certiorari.

The events giving rise to the Government's petition began in 1972, when respondent entered Hickam Air Force Base (Hickam) in Hawaii ostensibly to present a letter to the commanding officer. Instead, respondent and a companion obtained access to secret Air Force documents and destroyed them by pouring animal blood on them. Respondent was convicted of conspiracy to injure government property in violation of 18 U. S. C. §§ 371, 1361. He also received a "bar letter" from the commander of Hickam informing him that he was forbidden to "reenter the confines of this installation without the written permission of the Commander or an officer designated by him to issue a permit of reentry." 710 F. 2d, at 1413, n. 1; cf. *Greer v. Spock*, 424 U. S. 828, 838 (1976). Approximately nine years later, respondent, accord-

Stylistic Changes Throughout

and p. 3

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

From: **Justice O'Connor**

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

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* JAMES VINCENT ALBERTINI

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

No. 83-1624. Decided November —, 1984

PER CURIAM.

Respondent James Vincent Albertini was charged with violating 18 U. S. C. § 1382 based on his reentry into a military reservation contrary to an order of the commanding officer. After a bench trial before the United States District Court for the District of Hawaii, respondent was convicted and sentenced to three months' imprisonment. The Court of Appeals for the Ninth Circuit reversed the conviction on the grounds that it violated the First Amendment. 710 F. 2d 1410 (1983). After unsuccessfully petitioning for rehearing before the Court of Appeals, the Government filed a petition for certiorari.

The events giving rise to the Government's petition began in 1972, when respondent entered Hickam Air Force Base (Hickam) in Hawaii ostensibly to present a letter to the commanding officer. Instead, respondent and a companion obtained access to secret Air Force documents and destroyed them by pouring animal blood on them. Respondent was convicted of conspiracy to injure Government property in violation of 18 U. S. C. §§ 371, 1361. He also received a "bar letter" from the Commander of Hickam informing him that he was forbidden to "reenter the confines of this installation without the written permission of the Commander or an officer designated by him to issue a permit of re-entry." 710 F. 2d, at 1413, n. 1; cf. *Greer v. Spock*, 424 U. S. 828, 838 (1976). Approximately nine years later, respondent, according to his own testimony, entered a secured area at Camp Smith in Hawaii where he defaced Government property. For this action, the Commander of Hickam sent respondent

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
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Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

Circulated: MAY 10 1985

Recirculated: MAY 10 1985

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SDO  
~~I want the dissent~~  
JH

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1624

**UNITED STATES, PETITIONER v. JAMES  
VINCENT ALBERTINI**

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

[May —, 1985]

JUSTICE O'CONNOR delivered the opinion of the Court.

The question presented is whether respondent may be convicted for violating 18 U. S. C. § 1382, which makes it unlawful to reenter a military base after having been barred by the commanding officer. Respondent attended an open house at a military base some nine years after the commanding officer ordered him not to reenter without written permission. The Court of Appeals for the Ninth Circuit held that respondent could not be convicted for violating § 1382 because he had a First Amendment right to enter the military base during the open house. 710 F. 2d 1410 (1983). We granted certiorari, — U. S. — (1984), and we now reverse.

I

The events underlying this case date from 1972, when respondent and a companion entered Hickam Air Force Base (Hickam) in Hawaii ostensibly to present a letter to the commanding officer. Instead, they obtained access to secret Air Force documents and destroyed the documents by pouring animal blood on them. For these acts, respondent was convicted of conspiracy to injure Government property in violation of 18 U. S. C. §§ 371, 1361. Respondent also received a "bar letter" from the Commander of Hickam informing him that he was forbidden to "reenter the confines of this installation without the written permission of the Commander or an

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

May 14, 1985

No. 83-1624 United States v. Albertini

Dear Lewis,

✓ Thank you for your letter concerning the draft opinion in this case. I accept your first suggestion to omit the two sentences on page 11.

*no change. As expected,*  
With respect to the third prong of the O'Brien test, I do not think that the draft overrules anything that the Court held in O'Brien, but instead merely applies the analysis set forth in Clark v. Community for Creative Non-Violence, No. 82-1998 (June 29, 1984).

*SO'C relies on BRW's opinion & now he has joined SO'C*  
In Community for Creative Non-Violence, the Court held that a ban on sleeping in parks was a reasonable time, place, and manner regulation. Byron's opinion for the Court explained, "[i]f the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out." Slip op. 9.

The opinion then noted that the O'Brien analysis is no stricter than, if not identical to, analysis of time, place, and manner regulations. Id., at 10-11, and n. 8. Finally, Community for Creative Non-Violence rejected the suggestion that there were less-speech restrictive alternatives by noting that "[t]here is no gainsaying that preventing overnight sleeping will avoid a measure of actual or threatened damage to Lafayette Park and the Mall," id., at 11, and declaring that O'Brien does not substitute courts for the Park Service as managers of the parks.

? | The last two sentences beginning at the bottom of page 12 of the draft opinion, I believe, accurately reflect the O'Brien test as refined by Community for Creative Non-Violence. I would prefer to retain the language in the draft opinion, especially since Byron has already joined that version. If it would help to address your concerns, I would be willing to add a parenthetical

to the first citation on page 13 that would read "if the parks would be more exposed to harm without the sleeping ban than with it, the ban is safe from invalidation under the First Amendment," quoting Community for Creative Non-Violence, slip op. 9. P

OK On the due process issue, I am inclined to agree with your suggestion that there is no merit to respondent's claims and would be willing to deal with it if there were sufficient votes. Nonetheless, I thought that a majority at Conference preferred to leave open on remand the due process issue. The draft opinion rejects the broad claim that it is inherently violative of due process for a commanding officer to issue a bar letter of indefinite duration. Before CA9, respondent argued that due process barred application of the bar letter to him because he had previously been allowed onto the base and because other bar letters issued for Hickam were of limited duration. It is these contentions that I think remain open on remand, and perhaps the best reason for leaving them to CA9 is that they were not briefed by the parties before this Court.

I hope that this letter and the proposed changes answer your concerns about the draft opinion.

Sincerely,



Justice Powell

11-11-13

✓

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

From: Justice O'Connor

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1624

**UNITED STATES, PETITIONER v. JAMES  
VINCENT ALBERTINI**

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

[May —, 1985]

JUSTICE O'CONNOR delivered the opinion of the Court.

The question presented is whether respondent may be convicted for violating 18 U. S. C. § 1382, which makes it unlawful to reenter a military base after having been barred by the commanding officer. Respondent attended an open house at a military base some nine years after the commanding officer ordered him not to reenter without written permission. The Court of Appeals for the Ninth Circuit held that respondent could not be convicted for violating § 1382 because he had a First Amendment right to enter the military base during the open house. 710 F. 2d 1410 (1983). We granted certiorari, — U. S. — (1984), and we now reverse.

I

The events underlying this case date from 1972, when respondent and a companion entered Hickam Air Force Base (Hickam) in Hawaii ostensibly to present a letter to the commanding officer. Instead, they obtained access to secret Air Force documents and destroyed the documents by pouring animal blood on them. For these acts, respondent was convicted of conspiracy to injure Government property in violation of 18 U. S. C. §§ 371, 1361. Respondent also received a "bar letter" from the Commander of Hickam informing him that he was forbidden to "reenter the confines of this installation without the written permission of the Commander or an

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1  
p. 8  
Stylistic Changes Throughout

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

From: Justice O'Connor

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

Recirculated: JUN 14 1985 ✓

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

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UNITED STATES, PETITIONER *v.* JAMES  
VINCENT ALBERTINI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
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### I

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