

The Burger Court Opinion Writing Database

Cornelius v. NAACP Legal Defense & Education Fund, Inc.

473 U.S. 788 (1985)

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

April 22, 1985

Re: No. 84-312 - Devine v. NAACP Legal Defense

Dear Sandra:

I agree with your "memorandum" dated April 9, 1985.

Regards,

A handwritten signature in black ink, appearing to read "LOBB", written over the typed name "Justice O'Connor".

Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

April 22, 1985

Re: No. 84-312 - Devine v. NAACP Legal Defense

Dear Sandra:

Please treat this as an assignment of this case
to you.

Regards,

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

Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

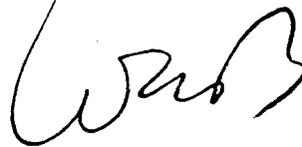
June 21, 1985

Re: No. 84-312 - Devine v. NAACP Legal Defense &
Educational Fund

Dear Sandra:

I join.

Regards,



Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 15, 1985

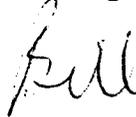
No. 84-312

Devine v. NAACP Legal Defense

Dear Harry,

I have read Sandra's proposed opinion in the above and am unable to go along. My recollection is that you and I agreed at Conference that the Court of Appeals should be affirmed. If you are still of that view, would you be willing to undertake the dissent in the above?

Sincerely,



Justice Blackmun

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 15, 1985

No. 84-312

Devine v. NAACP Legal Defense

Dear Sandra,

I'll await further writing in the
above.

Sincerely,



Justice O'Connor

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 19, 1985

No. 84-312

Cornelius v. NAACP Legal Defense
and Educational Fund, Inc., et al.

Dear Harry,

Please join me.

Sincerely,



Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 12, 1985

84-312 - Devine v. NAACP Legal Defense

Dear Sandra,

I could go along with your memorandum in
this case.

Sincerely yours,



Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 15, 1985

Re: No. 84-312, Devine v. NAACP Legal Defense

Dear Bill:

I shall be willing to undertake the dissent in this case.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a long horizontal flourish extending to the right.

Justice Brennan

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 15, 1985

Re: No. 84-312, Devine v. NAACP Legal Defense

Dear Sandra:

I shall undertake a dissent in this case.

Sincerely,

A handwritten signature in cursive script, appearing to read "Larry", with a horizontal line underneath.

Justice O'Connor

cc: The Conference

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HAB

June 18, 1985

Re: No. 84-312, Cornelius v. NAACP Legal Defense

Dear Sandra:

The enclosed has gone to the printer this afternoon. I send you a xerox copy, however, to save you one day's time.

Sincerely,

HAB

Justice O'Connor

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

From: **Justice Blackmun**

Circulated: JUN 19 1985

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-312

LORETTA CORNELIUS, ACTING DIRECTOR, OFFICE
OF PERSONNEL MANAGEMENT, PETITIONER *v.*
NAACP LEGAL DEFENSE AND EDUCATIONAL
FUND, INC., ET AL.

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

[June —, 1985]

JUSTICE BLACKMUN, dissenting.

I agree with the Court that the Combined Federal Campaign (CFC) is not a traditional public forum. I also agree with the Court that our precedents indicate that the Government may create a "forum by designation" (or, to use the term our cases have adopted,¹ a "limited public forum") by allowing public property that traditionally has not been available for assembly and debate to be used as a place for expressive activity by certain speakers or about certain subjects. I cannot accept, however, the Court's circular reasoning that the CFC is not a limited public forum because the Government intended to limit the forum to a particular class of speakers. Nor can I agree with the Court's conclusion that distinctions the Government makes between speakers in defining the limits of a forum need not be narrowly tailored and necessary to achieve a compelling governmental interest. Finally, I would hold that the exclusion of the several respondents from the CFC was, on its face, viewpoint-based discrimination. Accordingly, I dissent.

¹See, e. g., *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U. S. 37, 48 (1983); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 655 (1981).

1-20c
STYLISTIC CHANGES
PP 1, 13

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

From: Justice Blackmun

Circulated: _____

Recirculated: JUN 25 1985

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-312

LORETTA CORNELIUS, ACTING DIRECTOR, OFFICE
OF PERSONNEL MANAGEMENT, PETITIONER *v.*
NAACP LEGAL DEFENSE AND EDUCATIONAL
FUND, INC., ET AL.

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

[June —, 1985]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins,
dissenting.

I agree with the Court that the Combined Federal Campaign (CFC) is not a traditional public forum. I also agree with the Court that our precedents indicate that the Government may create a "forum by designation" (or, to use the term our cases have adopted,¹ a "limited public forum") by allowing public property that traditionally has not been available for assembly and debate to be used as a place for expressive activity by certain speakers or about certain subjects. I cannot accept, however, the Court's circular reasoning that the CFC is not a limited public forum because the Government intended to limit the forum to a particular class of speakers. Nor can I agree with the Court's conclusion that distinctions the Government makes between speakers in defining the limits of a forum need not be narrowly tailored and necessary to achieve a compelling governmental interest. Finally, I would hold that the exclusion of the several re-

¹See, e. g., *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U. S. 37, 48 (1983); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 655 (1981).

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 29, 1985

84-312 Devine v. NAACP Legal Defense Fund

Dear Sandra:

Please add at the end of the next draft of your opinion that I took no part in the consideration or decision of the above case.

Sincerely,



Justice O'Connor

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

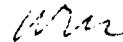
April 11, 1985

Re: No. 84-312 Devine v. NAACP

Dear Sandra,

I have reviewed your "memorandum" (which is actually a very carefully thought out draft opinion) in this case, and I would be willing to join you and two others in making it an opinion for the "bobtailed" Court. If I were writing for myself alone, I would not find it necessary to go into such an elaborate analysis in order to justify what the government did here, but my recollection of the conference discussion is that the four of us who voted to affirm were not in complete agreement on our reasoning.

Sincerely,



Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 30, 1985

Re: No. 84-312 Devine v. NAACP Legal Defense and
Educational Fund

Dear Sandra,

Please join me.

Sincerely,

wm

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 11, 1985

Re: 84-312 - Devine v. NAACP Legal Defense

Dear Sandra:

Although I am presently inclined to agree that a remand for further proceedings is appropriate, I am not persuaded that the record as presently developed justifies a summary judgment for the defendants on the issues that you discuss in Part C at pages 19-24 of the typewritten memorandum. I also am inclined to believe that the forum is better characterized as a limited public forum than a nonpublic forum as you conclude at the end of Part B, although I am not sure that the characterization of the forum is really dispositive.

As presently advised, I am therefore inclined to await further writing.

Respectfully,



Justice O'Connor

Copies to the Conference

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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 24 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-312

LORETTA CORNELIUS, ACTING DIRECTOR, OFFICE
OF PERSONNEL MANAGEMENT, PETITIONER *v.*
NAACP LEGAL DEFENSE AND EDUCATIONAL
FUND, INC., ET AL.

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

[June —, 1985]

JUSTICE STEVENS, dissenting.

The scholarly debate between JUSTICE O'CONNOR and JUSTICE BLACKMUN concerning the categories of public and quasi-public fora is an appropriate sequel to many of the First Amendment cases decided during the past decade.¹ As is true of the Court's multi-tiered analysis of equal-protection cases, however, I am somewhat skeptical about the value of this analytical approach in the actual decisional process. See *City of Cleburne v. Cleburne Living Center*, — U. S. —, — (1985) (STEVENS, J., concurring). At least in this case, I do not find the precise characterization of the forum particularly helpful in reaching a decision.

¹ As two commentators noted:

"Public forum analysis appears to be increasing in importance. The doctrine traces back to a famous dictum of Justice Roberts and received further attention from Professor Kalven almost twenty years ago, but it was almost never used in Supreme Court opinions until recently. The phrase 'public forum' has appeared in only thirty-two Supreme Court decisions. Only two of these decisions were rendered prior to 1970 and thirteen of the thirty-two have been in the 1980's." Farber and Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219, 1221-1222 (1984)(footnotes omitted).

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 9, 1985

No. 84-312 Devine v. NAACP Legal Defense

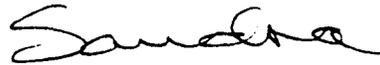
MEMORANDUM TO THE CONFERENCE

Attached is a suggested approach to the Devine v. NAACP case. It was assigned for a memorandum and it is circulated in typed form only. If there are at least three who can go along, I will circulate it as a printed draft with any corrections.

I have concluded the government created only a nonpublic forum for the Combined Federal Campaign. I suggest leaving open on remand the issue of whether there was any actual viewpoint discrimination.

As I understand it, neither Lewis nor Thurgood are participating in this case.

Sincerely,



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

From: Justice O'Connor

Circulated: APR 9 1985

Recirculated: _____

April 9, 1985

To: The Conference

From: Justice O'Connor

MEMORANDUM

Re: No. 84-312 Devine v. NAACP Legal Defense and Educational Fund, Inc.,

This case requires us to decide whether the Federal Government violates the First Amendment when it excludes legal defense and political advocacy organizations from participation in the Combined Federal Campaign (CFC or Campaign), a charity drive aimed at Federal employees. The United States District Court for the District of Columbia held that the respondent organizations could not be excluded from the CFC, and the Court of Appeals affirmed. 727 F.2d 1247 (1984). We granted certiorari, _____ U.S. _____ (1984), and we now reverse.

Changes from the manuscript
on pp 3, 12, 13, 15, 18, 19
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**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-312

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER *v.* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL.

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

[April —, 1985]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the Federal Government violates the First Amendment when it excludes legal defense and political advocacy organizations from participation in the Combined Federal Campaign (CFC or Campaign), a charity drive aimed at federal employees. The United States District Court for the District of Columbia held that the respondent organizations could not be excluded from the CFC, and the Court of Appeals affirmed. 727 F. 2d 1247 (1984). We granted certiorari, — U. S. — (1984), and we now reverse.

I

The CFC is an annual charitable fund-raising drive conducted in the federal workplace during working hours largely through the voluntary efforts of federal employees. At all times relevant to this litigation, participating organizations confined their fund-raising activities to a 30-word statement submitted by them for inclusion in the Campaign literature.¹

¹ Effective September 17, 1984, the Office of Personnel Management (OPM) has revised its regulations in an effort to comply with the decisions below. See 49 Fed. Reg. 32735. The new regulations have changed the eligibility criteria at issue in this case and certain operational features of the Campaign. OPM expressly reserved the right to modify the rules in

*Stylistic changes throughout
change on p14, p23*

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. 84-312

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER *v.* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL.

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

[May —, 1985]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the Federal Government violates the First Amendment when it excludes legal defense and political advocacy organizations from participation in the Combined Federal Campaign (CFC or Campaign), a charity drive aimed at federal employees. The United States District Court for the District of Columbia held that the respondent organizations could not be excluded from the CFC, and the Court of Appeals affirmed. 727 F. 2d 1247 (1984). We granted certiorari, 469 U. S. — (1984), and we now reverse.

I

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¹Effective September 17, 1984, the Office of Personnel Management (OPM) has revised its regulations in an effort to comply with the decisions below. See 49 Fed. Reg. 32735. The new regulations have changed the eligibility criteria at issue in this case and certain operational features of the Campaign. OPM expressly reserved the right to modify the rules in

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Stylistic changes throughout
changes on pp 10-11, 13, 16, 19, 24

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

From: **Justice O'Connor**

Circulated: _____

Recirculated: _____ **JUN 22 1985**

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-312

LORETTA CORNELIUS, ACTING DIRECTOR, OFFICE
OF PERSONNEL MANAGEMENT, PETITIONER *v.*
NAACP LEGAL DEFENSE AND EDUCATIONAL
FUND, INC., ET AL.

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

[June —, 1985]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the Federal Government violates the First Amendment when it excludes legal defense and political advocacy organizations from participation in the Combined Federal Campaign (CFC or Campaign), a charity drive aimed at federal employees. The United States District Court for the District of Columbia held that the respondent organizations could not be excluded from the CFC, and the Court of Appeals affirmed. 727 F. 2d 1247 (1984). We granted certiorari, 469 U. S. — (1984), and we now reverse.

I

The CFC is an annual charitable fund-raising drive conducted in the federal workplace during working hours largely through the voluntary efforts of federal employees. At all times relevant to this litigation, participating organizations confined their fund-raising activities to a 30-word statement submitted by them for inclusion in the Campaign literature.¹

¹Effective September 17, 1984, the Office of Personnel Management (OPM) has revised its regulations in an effort to comply with the decisions below. See 49 Fed. Reg. 32735. The new regulations have changed the eligibility criteria at issue in this case and certain operational features of the Campaign. OPM expressly reserved the right to modify the rules in