

# The Burger Court Opinion Writing Database

*Bowen v. American Hospital Association*  
476 U.S. 610 (1986)

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

CORRECTED

June 5, 1986

RE: No. <sup>84-</sup>~~85~~-1529- Bowen v. American Hospital

Dear John:

After our chat at lunch, I reviewed the opinions in the above, and what I thought I had seen earlier is not there.

I finally come to rest with a join in the judgment. Congress must certainly get back into this sensitive area, and collectively the several opinions will--I hope--help them analyze the situation.

Regards,



Justice Stevens

Copies to the Conference

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

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

January 27, 1986

No. 84-1529

Bowen v. American Hospital

Dear Byron and Sandra,

We three are in dissent in the  
above. Will you, Byron, take it on?

Sincerely,



Justice White

Justice O'Connor

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

March 24, 1986

No. 4-1529

Bowen v. American  
Hospital Association

Dear John,

I shall await the dissent in the  
above.

Sincerely,



Justice Stevens

Copies to the Conference

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

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

CHAMBERS OF  
JUSTICE W. J. BRENNAN, JR.

May 9, 1986

No. 84-1529

Bowen v. American Hospital  
Association, et al.

Dear Byron,

Please join me.

Sincerely,



Justice White

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 27, 1986

84-1529 - Bowen v. American Hospital

Dear Bill,

I shall be glad to take on a dissent in  
this case.

Sincerely yours,



Justice Brennan

cc: Justice O'Connor

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 31, 1986

84-1529 - Bowen v. American Hospital Ass'n

Dear John,

I should have indicated earlier that I shall be circulating a dissent in this case.

Sincerely yours,



Justice Stevens

Copies to the Conference

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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1st  
2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1529

OTIS R. BOWEN, SECRETARY OF HEALTH AND  
HUMAN SERVICES, PETITIONER *v.* AMERI-  
CAN HOSPITAL ASSOCIATION ET AL.

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

[May —, 1986]

JUSTICE WHITE, dissenting.

Section 504 of the Rehabilitation Act of 1973 forbids discrimination solely on the basis of handicap in programs or activities receiving Federal financial assistance. The issue before us is whether the Secretary of Health and Human Services has any authority under the Act to regulate medical treatment decisions concerning handicapped newborn infants. Relying on its prior decision in *United States v. University Hospital*, 729 F. 2d 144 (CA2 1984), the Court of Appeals held that the Secretary was without power in this respect and affirmed a decision of the District Court that § 504 does not extend so far and that the Secretary may not regulate such decisions in any manner.

Although it is my view that we granted certiorari to address this issue, the Court avoids it by first erroneously reading the decision below as enjoining only the enforcement of specific regulations and by then affirming on the basis that the promulgation of the regulations did not satisfy established principles of administrative law, a matter that the Court of Appeals had no occasion to, and did not, discuss. With all due respect, I dissent.

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

Pp. 1, 3, 6, 7, 10, 14, 16, 17, 18

From: **Justice White**

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1529

OTIS R. BOWEN, SECRETARY OF HEALTH AND  
HUMAN SERVICES, PETITIONER *v.* AMERI-  
CAN HOSPITAL ASSOCIATION ET AL.

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

[May —, 1986]

JUSTICE WHITE, with whom JUSTICE BRENNAN joins and with whom JUSTICE O'CONNOR joins as to Parts I, II, IV, and V, dissenting.

Section 504 of the Rehabilitation Act of 1973 forbids discrimination solely on the basis of handicap in programs or activities receiving Federal financial assistance. The issue before us is whether the Secretary of Health and Human Services has any authority under the Act to regulate medical treatment decisions concerning handicapped newborn infants. Relying on its prior decision in *United States v. University Hospital*, 729 F. 2d 144 (CA2 1984), the Court of Appeals held that the Secretary was without power in this respect and affirmed a decision of the District Court that § 504 does not extend so far and that the Secretary may not regulate such decisions in any manner.

Although it is my view that we granted certiorari to address this issue, the Court avoids it by first erroneously reading the decision below as enjoining only the enforcement of specific regulations and by then affirming on the basis that the promulgation of the regulations did not satisfy established principles of administrative law, a matter that the Court of Appeals had no occasion to, and did not, discuss. With all due respect, I dissent.

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

From: **Justice White**

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

Recirculated: MAY 27 1986

pp. 3, 8, 9

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1529

OTIS R. BOWEN, SECRETARY OF HEALTH AND  
HUMAN SERVICES, PETITIONER *v.* AMERI-  
CAN HOSPITAL ASSOCIATION ET AL.

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

[May —, 1986]

JUSTICE WHITE, with whom JUSTICE BRENNAN joins and with whom JUSTICE O'CONNOR joins as to Parts I, II, IV, and V, dissenting.

Section 504 of the Rehabilitation Act of 1973 forbids discrimination solely on the basis of handicap in programs or activities receiving Federal financial assistance. The issue before us is whether the Secretary of Health and Human Services has any authority under the Act to regulate medical treatment decisions concerning handicapped newborn infants. Relying on its prior decision in *United States v. University Hospital*, 729 F. 2d 144 (CA2 1984), the Court of Appeals held that the Secretary was without power in this respect and affirmed a decision of the District Court that § 504 does not extend so far and that the Secretary may not regulate such decisions in any manner.

Although it is my view that we granted certiorari to address this issue, the Court avoids it by first erroneously reading the decision below as enjoining only the enforcement of specific regulations and by then affirming on the basis that the promulgation of the regulations did not satisfy established principles of administrative law, a matter that the Court of Appeals had no occasion to, and did not, discuss. With all due respect, I dissent.

To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice [unclear]  
Justice [unclear]  
Justice [unclear]  
Justice [unclear]  
Justice [unclear]

From: Justice [unclear]

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p. 17

## SUPREME COURT OF THE UNITED STATES

No. 84-1529

OTIS R. BOWEN, SECRETARY OF HEALTH AND  
HUMAN SERVICES, PETITIONER *v.* AMERI-  
CAN HOSPITAL ASSOCIATION ET AL.

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

[June 9, 1986]

JUSTICE WHITE, with whom JUSTICE BRENNAN joins and  
with whom JUSTICE O'CONNOR joins as to Parts I, II, IV,  
and V, dissenting.

Section 504 of the Rehabilitation Act of 1973 forbids dis-  
crimination solely on the basis of handicap in programs or ac-  
tivities receiving federal financial assistance. The issue be-  
fore us is whether the Secretary of Health and Human  
Services has any authority under the Act to regulate medical  
treatment decisions concerning handicapped newborn in-  
fants. Relying on its prior decision in *United States v. Uni-  
versity Hospital*, 729 F. 2d 144 (CA2 1984), the Court of Ap-  
peals held that the Secretary was without power in this  
respect and affirmed a decision of the District Court that  
§ 504 does not extend so far and that the Secretary may not  
regulate such decisions in any manner.

Although it is my view that we granted certiorari to ad-  
dress this issue, the plurality avoids it by first erroneously  
reading the decision below as enjoining only the enforcement  
of specific regulations and by then affirming on the basis that  
the promulgation of the regulations did not satisfy estab-  
lished principles of administrative law, a matter that the  
Court of Appeals had no occasion to, and did not, discuss.  
With all due respect, I dissent.

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 20, 1986

Re: No. 84-1529-Bowen v. American Hospital Assoc.

Dear John:

Please join me.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 8, 1986

Re: No. 84-1529-Bowen v. American Hospital Assoc.

Dear John:

I am still with you.

Sincerely,

*T.M.*  
T.M.

Justice Stevens

cc: The Conference

(sent in envelope marked "Personal")

January 20, 1986

Re: No. 84-1529, Bowen v. American Hospital Association

Dear Chief:

I have concluded that I need not excuse myself in this case. I do think it would be better, however, if the case were not assigned to me to write. Perhaps you will agree.

Sincerely,

HAB

The Chief Justice

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 27, 1986

Re: No. 84-1529, Bowen v. American Hospital Association

Dear John:

Please join me.

Sincerely,

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

Justice Stevens

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 27, 1986

84-1529 Bowen v. American Hospital

Dear John:

Please join me.

Sincerely,

*Lewis*

Justice Stevens

lfp/ss

cc: The Conference

FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 25, 1985

Joseph Spaniol  
Clerk of the Court

Dear Joe:

I will not participate in the following case which will be argued in January:

84-1529 - Heckler v. American Hospital Association

Sincerely,



cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

March 13, 1986

Re: 84-1529 - Bowen v. American Hospital Assn.

Dear John:

In your next circulation, would you please note at the end of your opinion that Justice Rehnquist took no part in the consideration or decision of this case.

Sincerely,



Justice Stevens

cc: The Conference

80 MAR 14 11 14

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

Circulated: MAR 12 1986

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JA  
Blum

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1529

OTIS R. BOWEN, SECRETARY OF HEALTH AND  
HUMAN SERVICES, PETITIONER *v.* AMERI-  
CAN HOSPITAL ASSOCIATION ET AL.

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

[March —, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

This case presents the question whether certain regula-  
tions governing the provision of health care to handicapped  
infants are authorized by § 504 of the Rehabilitation Act of  
1973. That section provides, in part:

“No otherwise qualified handicapped individual . . .  
shall, solely by reason of his handicap, be excluded from  
the participation in, be denied the benefits of, or be sub-  
jected to discrimination under any program or activity  
receiving Federal financial assistance.” 87 Stat. 394, 29  
U. S. C. § 794.<sup>1</sup>

I

The American Medical Association, the American Hospital  
Association, and several other respondents<sup>2</sup> challenge the  
validity of Final Rules promulgated on January 12, 1984 by

<sup>1</sup>“Handicapped individual” is defined in § 7(7)(B) of the Act as “any per-  
son who (i) has a physical or mental impairment which substantially limits  
one or more of such person’s major life activities, (ii) has a record of such an  
impairment, or (iii) is regarded as having such an impairment.” 87 Stat.  
359, 29 U. S. C. § 706(7)(B).

<sup>2</sup>The respondents include the Hospital Association of New York State,  
the American College of Obstetricians and Gynecologists, The Association  
of American Medical Colleges, The American Academy of Family Physi-  
cians, and certain individual physicians.

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 8, 1986

MEMORANDUM TO THE CONFERENCE

Re: 84-1529 - Bowen v. American Hospital Association

In response to Byron's dissent, in addition to the changes in footnote 11 and the addition of footnotes 14 and 25 in the attached draft, I plan to add the following two thoughts.

(1) After the first word on page 13, a new footnote reading as follows:

JUSTICE WHITE answers that question without identifying the decisionmaker who has a duty to comply with §504. See post, at 7-8. His rather abstract discussion of the issue carefully avoids suggesting that parental decisions may violate §504, but fails to identify the other hypothetical decisionmakers that may be making the unlawful decisions he discusses.

(2) Second, a footnote 15 on page 18 reading as follows:

The dissent offers a third basis for federal regulation--the need to curtail discriminatory advice by biased physicians. See post, at 10-14. After observing that at least some handicapped infants have not been treated, the dissent identifies physician attitudes as a likely explanation and concludes that mandated informational notices were "presumably" designed to "foster an awareness by health care professionals of their responsibility not to act in a discriminatory manner with respect to medical treatment decisions for handicapped infants." Post, at 13.

The dissent's theory finds no support in the text of the regulation, the reasoning of the Secretary, or the briefs filed on his behalf in this Court. The regulations in general--and the informational notices in particular--do not purport to place any constraints on the advice that physicians may give their patients. Moreover, since it is now clear that parental decisionmaking is not covered by §504, see pp. 18-19, *infra*, the dissent's theory rests on the unstated premise that that section may prevent the giving of advice to do something which it does not itself prohibit. It is hardly obvious that the Rehabilitation Act of 1973 forbids physicians from "aiding and abetting" a parental decision which parents admittedly have a right to make. And if Congress did intend this counterintuitive result, one might expect an explanation from the Secretary as to how the hotlines and emergency on-site inspections contemplated by the Final Rules square with the constitutional doctrines on regulation, direct or indirect, of speech in general and of decisionmaking by health professionals in particular.

In reality, the Secretary neither found nor implied that physicians' predispositions against treating handicapped infants had resulted in parental refusals to consent to treatment. Indeed, he principally relied on attitudinal surveys for the converse proposition that regulation is necessary because parents refuse consent to treatment and physicians will "acquiesce in parental refus[als] to treat." 48 Fed. Reg. 30848. To the extent any theory may be discerned in the Secretary's two-column summary of physician surveys, it is that doctors would not correct "bad" parental decisions, not that they were responsible for helping them to make such choices in the first place. Moreover, even if the Secretary had relied on this evidence to insinuate that doctors imposed their own value judgments on parents by lobbying them to refuse consent, he never explains that the parental decisionmaking process is one in which doctors exercise the decisive influence needed to force such results. Compare 48 Fed. Reg. 30848, with post, at 10-11. The Secretary, in short,

has not even adumbrated a theory of "discrimination" remotely resembling the one invented by the dissent.

However the dissent's theory might fare if seriously arrived at by the Secretary after some thought and consideration, it is palpable that the Secretary has not made the essential connection between the evidence of physician attitudes and the regulatory choice made here. The requirement of reasoned decisionmaking would be an empty concept if courts could simply select evidence from the administrative record and supply the crucial connections between it and the regulatory choice made--to substitute their own thought processes for the cognition and expertise that are the substance of administrative decisionmaking.

Respectfully,

A handwritten signature in cursive script, appearing to be the name 'John'.



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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New material in n. 12

New nn. 10, 15, 16, 26

Footnotes renumbered

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1529

OTIS R. BOWEN, SECRETARY OF HEALTH AND  
HUMAN SERVICES, PETITIONER *v.* AMERI-  
CAN HOSPITAL ASSOCIATION ET AL.

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

[May —, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

This case presents the question whether certain regulations governing the provision of health care to handicapped infants are authorized by § 504 of the Rehabilitation Act of 1973. That section provides, in part:

“No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 87 Stat. 394, 29 U. S. C. § 794.<sup>1</sup>

### I

The American Medical Association, the American Hospital Association, and several other respondents<sup>2</sup> challenge the validity of Final Rules promulgated on January 12, 1984, by

<sup>1</sup>“Handicapped individual” is defined in § 7(7)(B) of the Act as “any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.” 87 Stat. 359, 29 U. S. C. § 706(7)(B).

<sup>2</sup>The respondents include the Hospital Association of New York State, the American College of Obstetricians and Gynecologists, the Association of American Medical Colleges, the American Academy of Family Physicians, and certain individual physicians.

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

Stylistic changes throughout and

pp. 12, 13, 14, 15, 18, 19, 20

From: **Justice Stevens**

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

Recirculated: MAY 22 1986

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1529

OTIS R. BOWEN, SECRETARY OF HEALTH AND  
HUMAN SERVICES, PETITIONER *v.* AMERI-  
CAN HOSPITAL ASSOCIATION ET AL.

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

[May —, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

This case presents the question whether certain regula-  
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“No otherwise qualified handicapped individual . . .  
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U. S. C. § 794.<sup>1</sup>

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<sup>2</sup>The respondents include the Hospital Association of New York State, the American College of Obstetricians and Gynecologists, the Association of American Medical Colleges, the American Academy of Family Physicians, and certain individual physicians.

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

stylistic changes throughout; p. 23

Footnote 10 previously on p. 13 moved to  
p. 22 (n. 20)

Footnote 16 previously on p. 19 moved to

p. 24 (n. 22)

Footnotes renumbered

4th DRAFT

From: Justice Stevens

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

Recirculated: JUN 3 1986

## SUPREME COURT OF THE UNITED STATES

No. 84-1529

OTIS R. BOWEN, SECRETARY OF HEALTH AND  
HUMAN SERVICES, PETITIONER v. AMERI-  
CAN HOSPITAL ASSOCIATION ET AL.

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

[June —, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

This case presents the question whether certain regula-  
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infants are authorized by § 504 of the Rehabilitation Act of  
1973. That section provides, in part:

“No otherwise qualified handicapped individual . . .  
shall, solely by reason of his handicap, be excluded from  
the participation in, be denied the benefits of, or be sub-  
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receiving Federal financial assistance.” 87 Stat. 394, 29  
U. S. C. § 794.<sup>1</sup>

### I

The American Medical Association, the American Hospital  
Association, and several other respondents<sup>2</sup> challenge the  
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<sup>1</sup>“Handicapped individual” is defined in § 7(7)(B) of the Act as amended,  
as “any person who (i) has a physical or mental impairment which substan-  
tially limits one or more of such person’s major life activities, (ii) has a  
record of such an impairment, or (iii) is regarded as having such an impair-  
ment.” 92 Stat. 2985, 29 U. S. C. § 706(7)(B).

<sup>2</sup>The respondents include the Hospital Association of New York State,  
the American College of Obstetricians and Gynecologists, the Association  
of American Medical Colleges, the American Academy of Family Physi-  
cians, and certain individual physicians.

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 1, 22, 36

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

From: Justice Stevens

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.

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

Recirculated: JUN 1

## SUPREME COURT OF THE UNITED STATES

No. 84-1529

OTIS R. BOWEN, SECRETARY OF HEALTH AND  
HUMAN SERVICES, PETITIONER *v.* AMERI-  
CAN HOSPITAL ASSOCIATION ET AL.

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

[June 9, 1986]

JUSTICE STEVENS announced the judgment of the Court and delivered an opinion in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE POWELL joined.

This case presents the question whether certain regulations governing the provision of health care to handicapped infants are authorized by § 504 of the Rehabilitation Act of 1973. That section provides, in part:

“No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 37 Stat. 394, 29 U. S. C. § 794.<sup>1</sup>

### I

The American Medical Association, the American Hospital Association, and several other respondents<sup>2</sup> challenge the

<sup>1</sup>“Handicapped individual” is defined in § 7(7)(B) of the Act as amended, as “any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.” 92 Stat. 2985, 29 U. S. C. § 706(7)(B).

<sup>2</sup>The respondents include the Hospital Association of New York State, the American College of Obstetricians and Gynecologists, the Association

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

March 14, 1986

No. 84-1529 Bowen v. American Hospital  
Association

Dear John,

I will wait for further writing in this  
case.

Sincerely,



Justice Stevens

Copies to the Conference

82 MAR 18 1986

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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:     MAY 8 1986    

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

    No. 84-1529    

OTIS R. BOWEN, SECRETARY OF HEALTH AND  
HUMAN SERVICES, PETITIONER *v.* AMERI-  
CAN HOSPITAL ASSOCIATION ET AL.

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

[May —, 1986]

JUSTICE O'CONNOR, dissenting.

I fully agree with JUSTICE WHITE's conclusion that the only question properly before us is whether the Court of Appeals correctly concluded that the Secretary has no power under 29 U. S. C. § 794 to regulate medical treatment decisions concerning handicapped newborn infants. I also agree that application of established principles of statutory construction and of the appropriate standard for judicial review of agency action leads inescapably to the conclusion that the Secretary has the authority to regulate in this area. Because, however, I see no need at this juncture to address the details of the regulations or to assess whether they are sufficiently rational to survive review under 5 U. S. C. § 706 (2)(A), I join only parts I, II, IV, and V of JUSTICE WHITE's dissent.