

The Burger Court Opinion Writing Database

Zuber v. Allen

396 U.S. 168 (1969)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



October 20, 1969

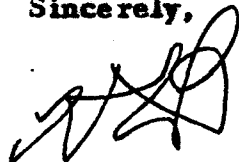
Dear John:

I spent Saturday and Sunday studying the milk cases on which we voted last Friday, Zuber et al v. Allen, Nos. 25 and 88. I regret to say that my study of the cases has greatly shaken my view as expressed in conference that the cases should be affirmed. This does not mean that I am not still open to conviction but I think it fair to say that I doubt if any argument will persuade me to vote the other way.

Under these circumstances, I am following your suggestion and assigning the cases to you. I must say, however, that it seems to me that practically all of the arguments that have any persuasive force are gainst affirmance except the decision of the Court of Appeals in these cases and in Blair v. Freeman, 370 F. 2d 229.

Consequently, I am assigning the cases to you because you have given the matter much more study than I have.

Sincerely,



Hugo L. Black

Mr. Justice Harlan

cc: Mr. Justice Douglas ✓
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White

10213
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

November 17, 1969

MEMORANDUM FOR THE CONFERENCE

Re: Nos. 25 and 52 - Zuber v. Allen, etc.

In due course I shall circulate a dissent
in the above cases.

Respectfully,

ALB.

Hugo L. Black

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SUPREME COURT OF THE UNITED STATES

Nos. 25 AND 52—OCTOBER TERM, 1969

Frederick T. Zuber et al.,
Petitioners,

25 v.

Russell Allen et al.

Clifford M. Hardin, Sec-
retary of Agriculture,
Petitioner,

52 v.

Russell Allen et al.

On Writs of Certiorari to the
United States Court of Ap-
peals for the District of
Columbia Circuit.

[November —, 1969]

MR JUSTICE BLACK, dissenting.

The central question in this case is whether a provision in the Secretary of Agriculture's Boston milk market regulation which provides that farmers close to Boston will receive a higher price for their milk than farmers farther away is valid under the Agricultural Marketing Act of 1937, 7 U. S. C. § 601 et seq. The majority concludes that this higher payment can be sustained only if it represents "compensation for rendering an economic service." *ante*, at 14-15, and then holds that since the Secretary has not provided such an economic justification for this payment, it is invalid. The effect of affirming the judgment below is that challenged payments which have been placed in a special fund since June 1967 and now amount to over \$8,000,000 will be distributed to all farmers selling milk in the Boston market instead of only those located near Boston. This represents a drastic change in the distribution of the income from the sale of milk since only the nearby farmers have received these additional payments for at least 30 years. My study of the legislative history con-

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1-3, 6-8, 10-12

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Black
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: Black, J.

Nos. 25 AND 52—OCTOBER TERM, 1969

Circulated: _____

Recirculated: 12-2-69

Frederick T. Zuber et al.,
Petitioners,
25 v.
Russell Allen et al.
Clifford M. Hardin, Sec-
retary of Agriculture,
Petitioner,
52 v.
Russell Allen et al.

On Writs of Certiorari to the
United States Court of Ap-
peals for the District of
Columbia Circuit.

[December —, 1969]

MR. JUSTICE BLACK, with whom MR. JUSTICE WHITE
joins, dissenting.

The central question in this case is whether a provision in the Secretary of Agriculture's Boston milk market regulation which provides that farmers close to Boston will receive a higher price for their milk than farmers farther away is valid under the Agricultural Marketing Act of 1937, 7 U. S. C. § 601 et seq. The majority concludes that this higher payment can be sustained only if it represents "compensation for rendering an economic service," *ante*, at 18, and then holds that since the Secretary has not provided such an economic justification for this payment, it is invalid. The effect of affirming the judgment below is that challenged payments which have been placed in a special fund since June 1967 and now amount to over \$8,000,000 will be distributed to all farmers selling milk in the Boston market instead of only those located near Boston. This represents a drastic change in the distribution of the income from the sale of milk since only the nearby farmers have received these additional payments for at

10

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p3., n. 1.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

Nos. 25 AND 52—OCTOBER TERM, 1969

From: Black, J.

Frederick T. Zuber et al.,
Petitioners,
25 v.
Russell Allen et al.
Clifford M. Hardin, Sec-
retary of Agriculture,
Petitioner,
52 v.
Russell Allen et al.

On Writs of Certiorari to the
United States Court of Ap-
peals for the District of
Columbia Circuit.

Circulated: _____
DEC 4 1969

Recirculated: _____

[December —, 1969]

MR. JUSTICE BLACK, with whom MR. JUSTICE WHITE
joins, dissenting.

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regulation which provides that farmers close to Boston
will receive a higher price for their milk than farmers
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market instead of only those located near Boston. This
represents a drastic change in the distribution of the
income from the sale of milk since only the nearby
farmers have received these additional payments for at

November nineteenth
1969

Dear John:

Re: Nos. 25 and 52

I am willing to acquiesce in
your opinion in these cases.

William O. Douglas

Mr. Justice Harlan

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
✓ Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Thomas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

Harlan, J.
Circulated: **NOV 14 1969**

Nos. 25 AND 52—OCTOBER TERM, 1969

Recirculated: _____

Frederick T. Zuber et al.,
Petitioners,
25 v.
Russell Allen et al.
Clifford M. Hardin, Sec-
retary of Agriculture,
Petitioner,
52 v.
Russell Allen et al.

On Writs of Certiorari to the
United States Court of Ap-
peals for the District of
Columbia Circuit.

[November —, 1969]

MR. JUSTICE HARLAN delivered the opinion of the Court.

This action was brought by respondent Vermont dairy farmers, "country" milk producers, seeking a judgment invalidating as contrary to the Agriculture Marketing Act of 1937, as amended, 7 U. S. C. § 601 *et seq.* (1968), the so-called farm location differential provided for by order of the Secretary of Agriculture.¹ The effect of that

¹ The Secretary has promulgated comprehensive regulations to govern the marketing of milk, 7 CFR § 1002.00 *et seq.* (1969), pursuant to the Agricultural Marketing Act. The provisions relevant to this case are set forth in Part I of this opinion, pp. 8-9, *infra*.

The action was originally brought against the Secretary only. Petitioners Zuber et al, nearby farmers, unsuccessfully sought leave to intervene before the District Court in support of the Secretary's regulations. When judgment was rendered against the Secretary, petitioners sought leave to intervene for the purposes of appeal. Leave was granted and the Secretary also decided to take an appeal. The parties have devoted a good deal of energy to disputing what constitutes the record in this case. Petitioners at various times have

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Pp. 10-17, extensive revision
incorporating old 18-19
style changes throughout

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
✓ Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

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SUPREME COURT OF THE UNITED STATES

Per: Harlan, J.

Nos. 25 AND 52—OCTOBER TERM, 1969

Circulated: _____
Recirculated: DEC 1 1969

Frederick T. Zuber et al.,
Petitioners,

25 v.

Russell Allen et al.

Clifford M. Hardin, Sec-
retary of Agriculture,
Petitioner,

52 v.

Russell Allen et al.

On Writs of Certiorari to the
United States Court of Ap-
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[November —, 1969]

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P. 3, 6, 9, 10-11, 12, 13, 23, 24, 25

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

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SUPREME COURT OF THE UNITED STATES

Nos. 25 & 52.—OCTOBER TERM, 1969

From: Harlan, J.

Circulated: _____
Recirculated **DEC 5 1969**

Frederick T. Zuber et al.,
Petitioners,
25 v.
Russell Allen et al.
Clifford M. Hardin, Sec-
retary of Agriculture,
Petitioner,
52 v.
Russell Allen et al.

On Writs of Certiorari to the
United States Court of Ap-
peals for the District of
Columbia Circuit.

[December —, 1969]

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

Nos. 25 & 52.—OCTOBER TERM, 1969

From: Harlan, J.

Circulated: _____

Recirculated: DEC 8 1969

Frederick T. Zuber et al.,
Petitioners,

25 v.
Russell Allen et al.

Clifford M. Hardin, Sec-
retary of Agriculture,
Petitioner,

52 v.
Russell Allen et al.

On Writs of Certiorari to the
United States Court of Ap-
peals for the District of
Columbia Circuit.

[December 9, 1969]

MR. JUSTICE HARLAN delivered the opinion of the
Court.

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constitutes the record in this case. Petitioners at various times have
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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR. November 28, 1969

RE: Nos. 25 & 52 - Zuber & Harden v. Allen

Dear John:

This is a close case and Hugo has certainly cogently stated the other side. Nevertheless, on balance I come out your way. Please join me.

Sincerely,


W. J. B. Jr.

Mr. Justice Harlan

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 17, 1969

Nos. 25 & 52 - Zuber v. Allen

Dear John,

I am glad to join the opinion you have
written for the Court in this case.

Sincerely yours,

PS
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Mr. Justice Harlan

Copies to the Conference

ALL MANUSCRIPTS FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

November 28, 1969

Re: Nos. 25 & 52 - Zuber v. Allen

Dear Hugo:

Please join me in your very
good dissent.

Sincerely,

B.R.W.

Mr. Justice Black

cc: Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 3, 1969

Dear Hugo:

This concerns the modification in footnote 1 to your opinion in Zuber. I have no objections to the first two sentences of the footnote but I have qualms about the rest of it. Perhaps a substitute for the last two sentences somewhat along the following lines would be satisfactory to you:

The Court is poorly equipped to pass judgment on the economic validity or invalidity of this price, surely not as well equipped as the Secretary and the economists who advise him. It is the Secretary, not this Court, to whom Congress has delegated the task of fixing the price of milk and of making the underlying economic judgments.

Sincerely,



Mr. Justice Black