The Burger Court Opinion Writing Database

Breen v. Selective Service Local Board No. 16

396 U.S. 460 (1970)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

January 22, 1970

Re: No. 65 - Breen v. Selective Service Local Board #16

Dear Potter:

I join in your concurring opinion.

W.E.B.

W. E. B.

Mr. Justice Stewart

cc: The Conference

SUPREME COURT OF THE UNITED STATES

No. 65.—October Term, 1969

Timothy J. Breen, Petitioner, *v.* Selective Service Local Board No. 16, Bridgeport, Connecticut, et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1970]

Mr. Justice Black delivered the opinion the Court.

This case raises a question concerning the right of a young man ordered to report for induction into the Armed Forces to challenge the legality of that order prior to reporting for duty. Petitioner Breen, while enrolled in the Berkeley School of Music in Boston, Massachusetts, was given a II–S student deferment by his local draft board, and deferred from military service pursuant to the provisions of the Military Selective Service Act of 1967, 50 U. S. C. App. § 451 *et seq.* (Supp. IV). According to an agreed stipulation of facts, in November 1967, he surrendered his draft registration card to a minister at a public gathering "for the sole purpose of protesting United States involvement in the war in Vietnam." Shortly thereafter his local draft board declared he was "delinquent" for failing to have his draft card in his possession and at the same time reclassified him I–A—available for military service.[1] He appealed this reclassification to the appropriate Selective Service Appeals Board, and while that appeal was pend-

[1] This reclassification was undertaken pursuant to 32 CFR § 1642.12.

SUPREME COURT OF THE UNITED STATES

No. 65.—OCTOBER TERM, 1969

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STYLISTIC CHANGES THROUGHOUT.

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

No. 65.—OCTOBER TERM, 1969

Timothy J. Breen, Petitioner,
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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January 26, 1970]

MR. JUSTICE BLACK delivered the opinion the Court.

This case raises a question concerning the right of a young man ordered to report for induction into the Armed Forces to challenge the legality of that order prior to reporting for duty. Petitioner Breen, while enrolled in the Berkeley School of Music in Boston, Massachusetts, was given a II–S student classification by his local draft board, and deferred from military service pursuant to the provisions of the Military Selective Service Act of 1967, 81 Stat. 100, 50 U. S. C. App. § 451 *et seq.* (Supp. IV). According to an agreed stipulation of facts, in November 1967, he surrendered his draft registration card to a minister at a public gathering "for the sole purpose of protesting United States involvement in the war in Vietnam." Shortly thereafter his local draft board declared he was "delinquent" for failing to have his draft card in his possession and at the same time reclassified him I–A—available for military service.[1] He appealed this reclassification to the appropriate Selective Service Appeal Board, and while that appeal was pend-

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

CHAMBERS OF
JUSTICE HUGO L. BLACK

February 16, 1970.

MEMORANDUM FOR THE CONFERENCE

Re: CASES HELD FOR No. 65-
Breen v. Selective Service Board

Six cases, all involving delinquency inductions after the registrants turned in their draft cards, were held for the decision in Breen v. Selective Service Board (No. 65 O. T. 1969). While there are some factual and legal differences in the cases, as outlined hereafter, I think they all are the same insofar as the issue of pre-induction review is concerned. In each case the plaintiff alleged that his delinquency induction was illegal and in each case the lower courts held that § 10(b)(3) of the Military Selective Service Act of 1967 precluded pre-induction judicial review. In light of our decisions in Breen, and Gutknecht v. United States, No. 71, 1969 Term, I think pre-induction judicial review should not have been denied in any of the cases, and all should therefore be reversed.

No. 70- KOLDEN v. SELECTIVE SERVICE

Petitioner held a graduate student deferment. The Act provides that "the President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment . . . of any or all categories of persons . . . whose activity in graduate study . . . is found to be necessary to the maintenance of the national health, safety, or interest." 50 U.S.C. App. § 546(h)(2). Under this authority the President provided that graduate students entering their second or subsequent year of post-baccalaureate study on October 1, 1967, could continue to be deferred for certain periods. 32 C.F.R. § 1622.26. Petr on Oct. 1, 1967, was entering his third year of graduate study and would apparently have continued to be deferred for some time as a student except for his delinquency.

This case differs from Breen in that the deferment is one granted by administrative regulation rather than explicit provisions of the Act itself. To me this is an immaterial difference since in both cases the registrant would, but for his delinquency, have been deferred.

NO. 73 - CHAIKIN v. SELECTIVE SERVICE SYSTEM

Petr here held an undergraduate student deferment explicitly provided by § 6(h)(1) of the Act and thus was in exactly the same situation as Breen. His case is directly controlled by Breen and therefore should be reversed.

NO. 164 - FAULKNER v. LAIRD

Petr here held a II-A occupational deferment, but in September 1967 returned to graduate study and sought a II-S since he was entering his second year of graduate work. His case is thus like No. 70 and it also should be reversed.

NO. 183 - OSHER v. SELECTIVE SERVICE LOCAL.

Petr here held a graduate student deferment and the SG notes that his case is identical to that of Kolden, No. 70.

NO. 331 - KRAUS v. SELECTIVE SERVICE SYSTEM

Petr was a 32-year old father of three. The Act provides that the President may defer, under such rules and regulations as he may prescribe, those persons "in a status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable . . . ." 50 U.S.C. App. § 456(h)(2). The applicable regulation provides that any registrant "who has a child or children with whom he maintains a bona fide family relationship" shall be deferred, with certain exceptions not here applicable. This case, like No. 70, involves a deferment granted by regulation rather than statute, but is otherwise the same as Breen and should be reversed.

NO. 449 ANDERSON v. HERSHEY

This case involves a number of registrants of various classifications who were ordered to report for induction. Some were in the I-A category, available for induction, but apparently were in a priority group that would not have resulted in their induction at the time they were actually called. This group is like Gutknecht, except that this case involves pre-induction judicial review while Gutknecht was a criminal prosecution.

Some were classified as undergraduate students and their case is exactly like Breen. Some were physically deferred, having been found qualified for service only in time of war or national emergency. The Act in such a case provides that the President may, by regulation, provide for the deferment of "those persons found to be physically, mentally, or morally defective." 50 U.S.C. App. § 456(h)(2). Petitioners here were found defective under the applicable regulations. Like No. 70 the only difference here is that the deferment was by regulation rather than the specific language of the statute.

Finally, one plaintiff was given a II-A dependency deferment. His case is like No. 331.

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As indicated there is no significant difference for me in any of these factual circumstances since in each case the man would not have been indicted but for his delinquency in turning in his draft card. Thus I would find it appropriate to grant certiorari in all cases and summarily reverse and remand, relying on the opinions in Breen and Gutknecht. The Conference may feel, however, that the differences in these cases could be material. In such a case I would be inclined to grant and hear arguments on one of the cases involving a regulatory deferment.

Respectfully,

Hugo L. Black

WB

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

From: Black, J.

No. 65.—OCTOBER TERM, 1969

Circulated: JAN 14 1970

Recirculated:

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QV

[January —, 1970]

MR. JUSTICE BLACK delivered the opinion the Court.

This case raises a question concerning the right of a young man ordered to report for induction into the Armed Forces to challenge the legality of that order prior to reporting for duty. Petitioner Breen, while enrolled in the Berkeley School of Music in Boston, Massachusetts, was given a II–S student deferment by his local draft board, and deferred from military service pursuant to the provisions of the Military Selective Service Act of 1967, 50 U. S. C. App. § 451 *et seq.* (Supp. IV). According to an agreed stipulation of facts, in November 1967, he surrendered his draft registration card to a minister at a public gathering "for the sole purpose of protesting United States involvement in the war in Vietnam." Shortly thereafter his local draft board declared he was "delinquent" for failing to have his draft card in his possession and at the same time reclassified him I–A—available for military service.[1] He appealed this reclassification to the appropriate Selective Service Appeals Board, and while that appeal was pend-

[1] This reclassification was undertaken pursuant to 32 CFR § 1642.12.

To: The Ch[illegible]
Mr. Justice [illegible]
Mr. Justice Harlan
Mr. Justice [illegible]
Mr. Justice Stewart
Mr. [illegible]
Mr. Justice [illegible]
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

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To: The Chief Justice
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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 18, 1970

Dear Hugo:

Re: No. 70 - Kolden v. Selective Service
No. 73 - Chaikin v. Selective Service
No. 164 - Faulkner v. Laird
No. 183 - Osher v. Selective Service
No. 331 - Kraus v. Selective Service
No. 449 - Anderson v. Hershey

In these cases I have gone over your Memorandum and reconsidered the petitions, and in each case I agree with your recommendation to grant certiorari and summarily reverse and remand on Breen and Gutknecht.

W. O. D.

Mr. Justice Black

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

From: Harlan, J.

No. 65.—October Term, 1969

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Recirculated:

[January —, 1970]

MR. JUSTICE HARLAN, concurring.

While I fully agree with today's holding that pre-induction review is available to the petitioner here, and subscribe to much of the Court's opinion, I would rest the holding on a different footing.

The Court's opinion, as in *Oestercich* v. *United States,* 393 U. S. 233 (1968), appears to make the availability of pre-induction review turn on the lawfulness of the draft board's action, or to put it another way, on the certainty with which the reviewing court can determine that the registrant would prevail on the merits if there were such judicial review of his classification. On the other hand, under the test put forward in my concurring opinion in *Oestereich,* 393 U. S. 239–245, the availability of pre-induction review turns not on what amounts to an advance decision on the merits, but rather on the nature of the challenge being made.

In *Oestereich,* I thought pre-induction review of a registrant's claim that the delinquency procedure employed by the board was "invalid on its face," 393 U. S., at 241, was necessary to avoid "serious constitutional problems," 393 U. S., at 243. I pointed out that judicial scrutiny of such a claim did not require a court to review "factual and discretionary decisions" pertaining to a board's classification of a particular registrant, and con-

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[January 26, 1970]

Mr. Justice Harlan, concurring.

While I fully agree with today's holding that pre-induction review is available to the petitioner here, and subscribe to much of the Court's opinion, I would rest the holding on a different footing.

The Court's opinion here, as in *Oestereich* v. *United States,* 393 U. S. 233 (1968), appears to make the availability of pre-induction review turn on the lawfulness of the draft board's action, or to put it another way, on the certainty with which the reviewing court can determine that the registrant would prevail on the merits if there were such judicial review of his classification. On the other hand, under the test put forward in my concurring opinion in *Oestereich,* 393 U. S. 239–245, the availability of pre-induction review turns not on what amounts to an advance decision on the merits, but rather on the nature of the challenge being made.

In *Oestereich,* the registrant sought pre-induction review of claims that the delinquency procedure employed by the board was "not authorized by any statute," was "inconsistent with his statutory exemption," and was "facially unconstitutional," 393 U. S., at 239. I pointed out that judicial scrutiny of such legal contentions, unlike the review of "factual and discretionary decisions" pertaining to a board's classification of a

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[January —, 1970]

Mr. Justice Brennan, concurring.

In *Oestereich* v. *Selective Service Board,* 393 U. S. 233 (1968), I joined Mr. Justice Stewart's dissent expressing the view that § 10 (b)(3) was designed to permit judicial review of draft classifications only in connection with criminal prosecutions or habeas corpus proceedings. 393 U. S., at 245. But continued adherence to that construction is foreclosed by the Court's holding in that case that § 10 (b)(3) did not preclude pre-induction judicial review of the case of a registrant entitled to a statutory exemption. Therefore, because I too "fail to see any relevant practical or legal differences between exemptions and deferments," I join the opinion of the Court.

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MR. JUSTICE BRENNAN, concurring.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
~~Mr. Justice Fortas~~
Mr. Justice Marshal

1

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[January —, 1970]

Mr. Justice Stewart, concurring in part.

For the reasons expressed by Mr. Justice Brennan, I join the opinion of the Court insofar as it holds that the District Court had jurisdiction to entertain the petitioner's suit and should have granted him the injunction he sought. I do not, however, join the Court's opinion insofar as it holds that the delinquency regulations have not been authorized by Congress. See *Gutknecht* v. *United States, ante,* p. —— (concurring opinion).

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Mr. Justice Stewart, with whom The Chief Justice joins, concurring in part.

For the reasons expressed by Mr. Justice Brennan, I join the opinion of the Court insofar as it holds that the District Court had jurisdiction to entertain the petitioner's suit and should have granted him the injunction he sought. I do not, however, join the Court's opinion insofar as it holds that the delinquency regulations have not been authorized by Congress. See *Gutknecht* v. *United States, ante,* p. —— (concurring opinion).