The Burger Court Opinion Writing Database

Baird v. State Bar of Arizona

401 U.S. 1 (February 23, 1971)

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

February 8, 1971

Re: No. 15 - Baird v. State Bar of Arizona

Dear Harry:

Please join me in your dissent in the above.

Regards,

WEB

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE HUGO L. BLACK

October 20, 1970

MEMORANDUM TO THE CONFERENCE

Pursuant to the memorandum of the Chief Justice dated October 19th re: assignment list for the past week's cases, I am assigning Nos. 15 and 18 to myself.

Hugo L. Black

Hugo L. Black

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

From: Black, J.

SUPREME COURT OF THE UNITED STATES

Circulated: NOV 5 1970

No. 15.—October Term, 1970

Recirculated: _____

Sara Baird, Petitioner, v. State Bar of Arizona. | On Writ of Certiorari to the Supreme Court of Arizona.

[November —, 1970]

Mr. Justice Black delivered the opinion of the Court.

This is one of two cases now before us from two different States in which applicants have been denied admission to practice law solely because they refused to answer questions about their personal beliefs or their affiliations with organizations that advocate certain ideas about government.[1] Sharp conflicts and close divisions have arisen in this Court concerning the power of States to refuse to permit applicants to practice law in cases where bar examiners have been suspicious about applicants' loyalties and their views on Communism and revolution. This has been an increasingly divisive and bitter issue for some years, especially since Senator Joseph McCarthy from Wisconsin stirred up anti-Communist feelings and fears by his "investigations" in the early 1950's. One applicant named Raphael Konigsberg was denied admission in California and this Court reversed. *Konigsberg* v. *State of California,* 353 U. S. 252 (1957). The State nevertheless denied him admission a second time, and this Court then affirmed by a 5-to-4 decision. 366 U. S. 36 (1961). An applicant named Rudolph Schware was denied admission in New Mexico and this Court reversed, with five Justices agree-

[1] The other is No. 18, *In the Matter of the Application of Martin Stolar.* See also No. 49, *Law Students Civil Rights Research Council Inc.* v. *Wadmon.*

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

Memo changes throughout

SUPREME COURT OF THE UNITED STATES

Black, J.

No. 15.—October Term, 1970

Circulated: DEC 3 1970

Recirculated:

Sara Baird, Petitioner, v. State Bar of Arizona. | On Writ of Certiorari to the Supreme Court of Arizona.

[December —, 1970]

Mr. Justice Black delivered the opinion of the Court.

This is one of two cases now before us from two different States in which applicants have been denied admission to practice law solely because they refused to answer questions about their personal beliefs or their affiliations with organizations that advocate certain ideas about government.[1] Sharp conflicts and close divisions have arisen in this Court concerning the power of States to refuse to permit applicants to practice law in cases where bar examiners have been suspicious about applicants' loyalties and their views on Communism and revolution. This has been an increasingly divisive and bitter issue for some years, especially since Senator Joseph McCarthy from Wisconsin stirred up anti-Communist feelings and fears by his "investigations" in the early 1950's. One applicant named Raphael Konigsberg was denied admission in California and this Court reversed. *Konigsberg* v. *State of California,* 353 U. S. 252 (1957). The State nevertheless denied him admission a second time, and this Court then affirmed by a 5-to-4 decision. 366 U. S. 36 (1961). An applicant named Rudolph Schware was denied admission in New Mexico and this Court reversed, with five Justices agree-

[1] The other is No. 18, *In the Matter of the Application of Martin Stolar.* See also No. 49, *Law Students Civil Rights Research Council Inc.* v. *Wadmon.*

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

CHAMBERS OF
JUSTICE HUGO L. BLACK

January 11, 1971

Dear Harry,

No. 15 - Baird v. Arizona
No. 18 - In the Matter of the Application of
Martin Robert Stolar

I have your note suggesting that you expect to write a dissent in these case but that it has also been suggested that you withhold it until the Chief Justice has circulated an opinion in No. 79 - Connell v. Higginbotham, which the conference decided November 20, 1970.

I first circulated my opinions in these lawyers' cases on November 5, 1970 -- more than two months ago, and a dissent in No. 49, Law Students etc. v. Wadmond on November 30, 1970.

I think it would not be inappropriate, without criticizing anyone on the Court, to state that I believe we are further behind in handing down opinions at this time of year than we have ever been since I became a Justice, more than 33 years ago.

Sincerely,

Hugo L. Black

Mr. Justice Blackman

cc: Members of the Conference

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

CHAMBERS OF
JUSTICE HUGO L. BLACK

January 12, 1971

Dear Harry,

Thanks for your note of January 12th. I appreciate very much the extra work that was put on you by the number of cases in which you have had to cast the pivotal votes. Naturally it has been difficult for you and is time-consuming.

My note, as stated, was not intended as a criticism of you or anyone else on this Court. I have been bothered, however, by the great number of cases that we have pending and that have not been decided. There was a time at one period in this Court (I do not remember exactly the date) when there was a kind of unwritten rule that every member of the Court should write his dissents before he wrote the opinions that were assigned to him. I do not know whether that was a wise practice or not but I do believe that the tremendous inflow of business to this Court makes it necessary that we spend at least as much time in trying to dispose of opinions as we do with other Court affairs.

At any rate, if you obtained any idea of any kind or character that what I said was critical of you, please remove such thoughts from your mind.

Sincerely,

H. L. B.

Mr. Justice Blackmun

cc: Members of the Conference

Stylistic changes

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

5th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Black, J.

No. 15.—October Term, 1970

Circulated:

FEB 22 1971

Sara Baird, Petitioner, v. State Bar of Arizona. | On Writ of Certiorari to the Supreme Court of Arizona.

[February —, 1971]

Mr. Justice Black announced the judgment of the Court and delivered an opinion in which Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Marshall join.

This is one of two cases now before us from two different States in which applicants have been denied admission to practice law solely because they refused to answer questions about their personal beliefs or their affiliations with organizations that advocate certain ideas about government.[1] Sharp conflicts and close divisions have arisen in this Court concerning the power of States to refuse to permit applicants to practice law in cases where bar examiners have been suspicious about applicants' loyalties and their views on Communism and revolution. This has been an increasingly divisive and bitter issue for some years, especially since Senator Joseph McCarthy from Wisconsin stirred up anti-Communist feelings and fears by his "investigations" in the early 1950's. One applicant named Raphael Konigsberg was denied admission in California and this Court reversed. *Konigsberg* v. *State Bar,* 353 U. S. 252 (1957). The State nevertheless denied him admission a second time, and this Court then affirmed by a 5-to-4 decision. 366 U. S. 36 (1961). An applicant named Rudolph

[1] The other is No. 18, *In the Matter of the Application of Martin Stolar.* See also No. 49, *Law Students Civil Rights Research Council Inc.* v. *Wadmon.*

SUPREME COURT OF THE UNITED STATES

No. 15.—October Term, 1970

Sara Baird, Petitioner, *v.* State Bar of Arizona. | On Writ of Certiorari to the Supreme Court of Arizona.

[November —, 1970]

Mr. Justice Black delivered the opinion of the Court.

This is one of two cases now before us from two different States in which applicants have been denied admission to practice law solely because they refused to answer questions about their personal beliefs or their affiliations with organizations that advocate certain ideas about government.[1] Sharp conflicts and close divisions have arisen in this Court concerning the power of States to refuse to permit applicants to practice law in cases where bar examiners have been suspicious about applicants' loyalties and their views on Communism and revolution. This has been an increasingly divisive and bitter issue for some years, especially since Senator Joseph McCarthy from Wisconsin stirred up anti-Communist feelings and fears by his "investigations" in the early 1950's. One applicant named Raphael Konigsberg was denied admission in California and this Court reversed. *Konigsberg* v. *State of California,* 353 U. S. 252 (1957). The State nevertheless denied him admission a second time, and this Court then affirmed by a 5-to-4 decision. 366 U. S. 36 (1961). An applicant named Rudolph Schware was denied admission in New Mexico and this Court reversed, with five Justices agree-

[1] The other is No. 18, *In the Matter of the Application of Martin Stolar.* See also No. 49, *Law Students Civil Rights Research Council Inc.* v. *Wadmon.*

February 3, 1971

Re: No. 15 - Baird v. Bar of Arizona

Dear Harry:

Please join me in your dissent.

Sincerely,

J.M.H.

Mr. Justice Blackmun

CC: The Conference

February 3, 1971

Re: No. 15 - Baird v. Bar of Arizona

Dear Harry:

Please join me in your dissent.

Sincerely,

J.M.H.

Mr. Justice Blackmun

CC: The Conference

* P.S.: I add this suggestion (not included in the copies of my return that are being circulated) by way of a postscript. I hope you will eliminate the parenthetical material at the end of the first full paragraph on page 4. I think that proposition might have an unintended sweep (cf. In Re Ruffalo, 390 U.S. 544 (1968)), and it does not seem necessary for your opinion.

* only on HAB's copy

2nd DRAFT

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

Nos. 15, 18, & 49.—October Term, 1970

Sara Baird, Petitioner, v. State Bar of Arizona. (15)	On Writ of Certiorari to the Supreme Court of Arizona.
In the Matter of the Application of Martin Robert Stolar. (18)	On Writ of Certiorari to the Supreme Court of Ohio.
Law Students Civil Rights Research Council, Inc., et al., Appellants, v. Lowell Wadmond et al. (49)	On Appeal From the United States District Court for the Southern District of New York.

[February —, 1971]

Mr. Justice Harlan, concurring in No. 49, and dissenting in Nos. 15 and 18.

In joining Mr. Justice Stewart's opinion for the Court in the *Wadmond* case, No. 49, *ante*, —, and Mr. Justice Blackmun's dissenting opinions in the *Baird* and *Stolar* cases, Nos. 15 and 18, *ante*, — and —, I am constrained to add these remarks.*

My Brother Black's opinion announcing the judgments of the Court in the *Baird* and *Stolar* cases, and his dissenting opinion in the *Wadmond* case, could easily leave the impression that these three States are denying Bar admission to profesionally qualified candidates solely by reason of their membership in so-called subversive organizations, irrespective of whether that membership is born

*While petitioners in Nos. 15 and 18 have also sought to assert Fifth Amendment claims against self-incrimination, today's opinions have treated all the cases only in terms of First Amendment considerations, and I too shall proceed on that basis.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 10, 1970

RE: No. 15 - Baird v. State Bar of Arizona

Dear Hugo:

I agree with your opinion in the above case.

Sincerely,

W. J. B. Jr.

Mr. Justice Black

cc: The Conference

SUPREME COURT OF THE UNITED STATES

No. 15.—October Term, 1970

Sara Baird, Petitioner, *v.* State Bar of Arizona. } On Writ of Certiorari to the Supreme Court of Arizona.

[December —, 1970]

Mr. Justice Stewart, concurring.

The Court has held that under some circumstances simple inquiry into present or past Communist Party membership of an applicant for admission to the Bar is not as such unconstitutional. *Konigsberg* v. *State Bar,* 366 U. S. 36; *In re Anastaplo,* 366 U. S. 82.

Question 27, however, goes further and asks applicants whether they have ever belonged to any organization "that advocates overthrow of the United States Government by force or violence." Our decisions have made clear that such inquiry must be confined to knowing membership to satisfy the First and Fourteenth Amendments. See, *e. g., United States* v. *Robel,* 389 U. S. 258, 265–266; *Law Students Civil Rights Research Council* v. *Wadmond, post,* at 10–11. It follows from these decisions that mere membership in an organization can never, by itself, be sufficient ground for a State's imposition of civil disabilities or criminal punishment. Such membership can be quite different from knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals. See *Scales* v. *United States,* 367 U. S. 203, 228–230; *Law Students Civil Rights Research Council* v. *Wadmond, post.*

There is a further constitutional infirmity in Arizona's question 27. The respondent State Bar is the agency

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 8, 1971

Re: Nos. 15 & 18 - Baird v. Arizona and Stolar

Dear Harry:

Please join me in your dissenting opinion in these cases. I am also filing a short dissenting opinion.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to Conference

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

2nd DRAFT

From: White, J.

Circulated: 2-9-71

Recirculated:

SUPREME COURT OF THE UNITED STATES

Nos. 15 & 18.—OCTOBER TERM, 1970

Sara Baird, Petitioner,
15 v.
State Bar of Arizona.
} On Writ of Certiorari to the Supreme Court of Arizona.

In the Matter of the
18 Application of
Martin Robert Stolar.
} On Writ of Certiorari to the Supreme Court of Ohio.

[February —, 1971]

MR. JUSTICE WHITE, dissenting.

I am quite unable to join the opinions of the Court in these cases. It is my view that the Constitution does not require a State to admit to practice a lawyer who believes in violence and intends to implement that belief in his practice of law and advice to clients. I also believe that the State may ask applicants preliminary questions which will permit further investigation and reasoned, articulated judgment as to whether the applicant will or will not advise lawless conduct as a practicing lawyer.

Arizona has no intention of barring applicants based on belief alone. This my Brother BLACKMUN makes quite clear. Its inquiries were designed to ascertain whether an applicant expects actively to support illegal violence or espouses an activist role in implementing that idea.

Ohio takes much the same approach, and in my view both States are right. If as a preface to further questions, New York may ask whether an applicant is a knowing member of the Communist Party, although that fact alone would not be grounds for exclusion, see *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*,

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 23, 1970

Re: No. 15 - Baird v. State Bar of Arizona

Dear Hugo:

Please join me.

Sincerely,

T.M.

Mr. Justice Black

cc: The Conference

January 11, 1971

Re: No. 15 - Baird v. Arizona
No. 18 - In the Matter of the Application of
Martin Robert Stolar

Dear Hugo:

This will confirm the discussion at the conference which took place on January 8. It has been suggested (1) that I prepare a dissent for these cases and (2) that, however, I withhold any dissent until the Chief Justice has prepared his opinion in No. 79 - Connell v. Higginbotham. As soon as a draft of No. 79 is in circulation, I shall move along with No. 15 and No. 18.

Sincerely,

H. A. B.

Mr. Justice Black

cc: The Conference

15-18

January 12, 1971

Dear Hugo:

I have your note of January 11 concerning the bar admission cases and your observation that the Court is perhaps farther behind in handing down opinions this year than at any year since you have been on the Court. I have no way of measuring this, and it may well be true.

The receipt of your note persuades me that it is time for me to point out something I should have stated at Conference before now and which I had assumed was obvious. Some of us are inclined to forget, I suspect, that this term thus far has been a very difficult one for me personally, and for reasons which are applicable to me alone. I am not speaking of the transition from the court of appeals. I do have reference to the fact that there were 17 cases, according to my count, which were reargued this fall, and that 4 of these were argued for the third time. The members of the Court, other than myself, are fully familiar with these cases and undoubtedly long ago made up their minds as to their disposition. In addition, I find that opinions were written in most of the cases last spring and required only slight revision now.

I think that these 17 cases were much more difficult for me, as a newcomer, than for the rest of the Court so far as the 1970 Term is concerned. Further, I had necessarily assumed, because the cases went over, that the Court either was evenly divided as to the resolution of the cases or that they were divided as to the route by which decisions were to be reached. This made the cases weigh particularly on me for I felt that in many of them my vote might be the decisive one.

After Conference

As a result, I have taken what may appear to the rest of the Court to be an excessive amount of time on these particular matters. I merely remind the Justices that each of these cases is a new decision for me, and is not ground which I am covering for the second or even the third time.

Because the cases have been around so long, I have endeavored to give them some precedence over my own writing and over cases which are argued this fall for the first time. I think this is proper. Please bear in mind, when the "score card" is completed at the end of the year, I shall have fewer opinions than the rest of you because, for the rest of you, much of the work on these 17 cases was already done and many of the opinions were already in the files and required only last-minute polishing.

No. 60 - Peters v. Hobby, which relates to the "Dombrowski" group, was argued this fall for the first time and has produced much writing and much controversy. I think it is representative of what I have had to go through for all these consolidated cases. For the rest of you, fortunately, this is in the past. [illegible] there were 17 cases, according to my count, which were reargued this fall, and [illegible] of This note merely defends myself to a degree, and hopefully anticipates criticism which I feel might otherwise be directed coming as the year nears its close, and I will strive to [illegible] I perhaps should have made these remarks on some conference day rather than wait until you have printed and duly mailed the opinion now.

I think that these 17 cases [illegible] were difficult for me, as a newcomer, than for the rest of the Court as far as the 1958 Term is concerned. Further, I had accurately assumed, because the H.A.B. vote over, that the Court either was evenly divided as to the resolution of the cases or that they were divided as to the route by which Mr. Justice Black reached. This made the cases weigh particularly on me for I felt that in many of them my vote might be the decisive one.

cc: The Conference

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

2nd DRAFT

From: Blackmun, J.

Circulated: 2/1/71

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 15.—OCTOBER TERM, 1970

Sara Baird, Petitioner, v. State Bar of Arizona. } On Writ of Certiorari to the Supreme Court of Arizona.

[February —, 1971]

MR. JUSTICE BLACKMUN, dissenting.

This, for me, is not at all a case involving mere personal beliefs on the part of Sara Baird.

I have necessarily assumed, and I trust not erroneously, that *Konigsberg* v. *State Bar of California*, 366 U. S. 36, and *In re Anastaplo*, 366 U. S. 82, both decided on April 24, 1961, have remained good law despite the Court's then close division (Justice HARLAN and Justices Frankfurter, Clark, Whittaker, and STEWART in the majority; Justice BLACK, Chief Justice Warren, and Justices DOUGLAS and BRENNAN, dissenting). Neither case has ever been expressly overruled. Neither is now expressly overruled. In each of the cases the Court decided, at the very least, as MR. JUSTICE STEWART puts it in his separate concurrence here, that "under some circumstances simple inquiry into present or past Communist Party membership of an applicant for admission to the Bar is not, as such, unconstitutional."

I think the Court really decided more than that. I say this because (a) in *Konigsberg* the applicant had "reiterated unequivocably his disbelief in violent overthrow, and stated that he had never knowingly been a member of any organization which advocated such action," 366 U. S., at 39; (b) the Court stated that it thought it "clear that the Fourteenth Amendment's protection against arbitrary state action does not forbid a State from denying admission to a bar applicant so-

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 3, 1971

Re: No. 15 - Baird v. Arizona

Dear John:

Thank you for your note of February 3. I shall eliminate the parenthetical material which is the subject of your postscript.

Sincerely,

Harry

Mr. Justice Harlan

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

3rd DRAFT

SUPREME COURT OF THE UNITED STATES, J.

No. 15.—October Term, 1970

Circulated: _____

Recirculated: 2/9/71

Sara Baird, Petitioner, v. State Bar of Arizona. } On Writ of Certiorari to the Supreme Court of Arizona.

[February —, 1971]

Mr. Justice Blackmun, with whom The Chief Justice, Mr. Justice Harlan, and Mr. Justice White join, dissenting.

This, for me, is not at all a case involving mere personal beliefs on the part of Sara Baird.

I have necessarily assumed, and I trust not erroneously, that *Konigsberg* v. *State Bar of California,* 366 U. S. 36, and *In re Anastaplo,* 366 U. S. 82, both decided on April 24, 1961, have remained good law despite the Court's then close division (Justice Harlan and Justices Frankfurter, Clark, Whittaker, and Stewart in the majority; Justice Black, Chief Justice Warren, and Justices Douglas and Brennan, dissenting). Neither case has ever been expressly overruled. Neither is now expressly overruled. In each of the cases the Court decided, at the very least, as Mr. Justice Stewart puts it in his separate concurrence here, that "under some circumstances simple inquiry into present or past Communist Party membership of an applicant for admission to the Bar is not, as such, unconstitutional."

I think the Court really decided more than that. I say this because (a) in *Konigsberg* the applicant had "reiterated unequivocally his disbelief in violent overthrow, and stated that he had never knowingly been a member of any organization which advocated such action," 366 U. S., at 39; (b) the Court stated that it thought it "clear that the Fourteenth Amendment's