The Burger Court Opinion Writing Database

Fein v. Selective Service System Board No. 7 of Yonkers

405 U.S. 365 (1972)

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

March 16, 1972

Re: No. 70-58 - Fein v. Selective Service System Local #7

Dear Harry:

Please join me in your opinion.

Regards,

Mr. Justice Blackmun

cc: The Conference

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–58

Oliver T. Fein, Petitioner,
v.
Selective Service System Local Board No. 7, Yonkers, N. Y., et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[October —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

This case involves a construction of § 10 (b)(3) [1] of the Selective Service Act, 50 U. S. C. § 460 (b)(3), which, if construed and applied as it was below, raises serious constitutional issues. I would construe it and apply it so as to avoid those infirmities.

Section 10 (b)(3) purports to defer judicial review of Selective Service system classification decisions to the defense of a criminal prosecution for failure to report for induction. It represents a congressional response to the concern that widespread and pre-induction review of Selective Service classification decisions would seriously impede the ability of the System to process manpower for the Armed Forces. See Remarks of Senator Russell, 113 Cong. Rec. 15426, June 12, 1967. We held in *Oestereich*

[1] Section 10 (b)(3) reads in pertinent part as follows:

"No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–58

Oliver T. Fein, Petitioner,
v.
Selective Service System Local Board No. 7, Yonkers, N. Y., et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

3/15/72

[March —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

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8th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–58

Oliver T. Fein, Petitioner,
v.
Selective Service System Local Board No. 7, Yonkers, N. Y., et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

I

Today the Court approves a construction of § 10 (b) (3) of the Military Selective Service Act of 1967, 50 U. S. C. App. § 460 (b) (3) [1] which raises serious questions of procedural due process. Doctor Fein was classified as a conscientious objector by his local board. The State Director appealed, but gave no reason for this extraordinary action.[2] The Appeal Board then reclassified Dr. Fein I–A. It, too, gave no reasons.

We explained the nature of the "hearing" required by

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[2] Except the somewhat cryptic statement that "it is our opinion that the registrant would not qualify for a I–O classification as a conscientious objector."

WOD
Rein
3/18/72

SUPREME COURT OF THE UNITED STATES

No. 70–58

Oliver T. Fein, Petitioner,
v.
Selective Service System Local Board No. 7, Yonkers, N. Y., et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 21, 1972]

MR. JUSTICE DOUGLAS, dissenting.

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Wm Douglas
Oct 71
Rein
70-58
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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 15, 1972

RE: No. 70-58 - Fein v. Selective Ser. System

Dear Harry:

I agree with your Memorandum in the above.

Sincerely,

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 15, 1972

Re: 70-58 - Fein v. Sel. Serv. System

Dear Thurgood,

Please add my name to your dissenting opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

B

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 9, 1972

Re: No. 70-58 - Fein v. Selective Service System

Dear Harry:

Please join me.

Sincerely,

BRW

Mr. Justice Blackmun

Copies to Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–58

Oliver T. Fein, Petitioner,
v.
Selective Service System Local Board No. 7, Yonkers, N. Y., et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March —, 1972]

MR. JUSTICE MARSHALL, dissenting.

I dissent. Today's holding seriously cuts back *Oestereich* v. *Selective Service Board,* 393 U. S. 233 (1968), to establish a principle which serves no sensible purpose. If *Oestereich* is to be preserved, it must be rooted in a principle which permits pre-induction review in this case as well.

As the majority correctly observes, our decision in *Oestereich* foreclosed any further argument that § 10 (b) (3) constitutes an absolute bar to pre-induction judicial review [redacted] "No one, we believe, suggests that Section 10 (b)(3) can sustain a literal reading." *Id.*, at 238. Having thus adopted in *Oestereich,* and reaffirmed in *Breen* v. *Selective Service Board,* 396 U. S. 460 (1970), an interpretation of the Act which permits pre-induction review in some cases, we need decide today only whether Dr. Fein raises that sort of exceptional claim appropriate for pre-induction review.

The majority apparently holds that pre-induction review is available only where a registrant's "claimed status is . . . factually conceded and thus [is] assured by the statute upon objective criteria." Op. 10. I confess that I do not altogether understand these key words in the majority's test. But I fathom enough to conclude

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–58

Oliver T. Fein, Petitioner,
v.
Selective Service System Local Board No. 7, Yonkers, N. Y., et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March —, 1972]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE STEWART joins, dissenting.

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice B[illegible]
Mr. Justice S[illegible]
Mr. Justice Wh[illegible]
Mr. Justice Blac[illegible]n
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 70–58

Recirculated: MAR 18 1972

Oliver T. Fein, Petitioner, *v.* Selective Service System Local Board No. 7, Yonkers, N. Y., et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 21, 1972]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE STEWART joins, dissenting.

I dissent. Today's holding reinterprets *Oestereich* v. *Selective Service Board,* 393 U. S. 233 (1968), to establish a principle which serves no sensible purpose. If *Oestereich* is to be preserved, it must be rooted in a principle which permits pre-induction review in this case as well.

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

3/8/72

No. 70–58

Oliver T. Fein, Petitioner, *v.* Selective Service System Local Board No. 7, Yonkers, N. Y., et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March —, 1972]

Memorandum of MR. JUSTICE BLACKMUN.

Petitioner Oliver T. Fein is a doctor of medicine. In February 1969 he filed this pre-induction suit in the United States District Court for the Southern District of New York. Jurisdiction was asserted under the federal-question statute, 28 U. S. C. § 1331, under the civil rights statute, 28 U. S. C. § 1343, and under the federal-officer statute, 28 U. S. C. § 1361. Fein challenged, on due process grounds, the constitutionality of his selective service appeal procedures and sought declaratory and injunctive relief that would prevent his induction into military service. The defendants are Fein's local board at Yonkers, New York, the Appeal Board for the Southern District, the State Selective Service Director, and the National Appeal Board.

In an unreported memorandum decision the District Court dismissed the complaint for want of jurisdiction. A divided panel of the Second Circuit affirmed. 430 F. 2d 376 (1970). Certiorari was granted, 404 U. S. 953 (1971), so that this Court might consider the important question whether § 10 (b)(3) of the Military Selective Service Act of 1967, 50 U. S. C. App. § 460

pp. 13, 14, editorial changes

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Blackmun, J.

Circulated: _____

Recirculated: 3/13/72

SUPREME COURT OF THE UNITED STATES

No. 70–58

Oliver T. Fein, Petitioner, *v.* Selective Service System Local Board No. 7, Yonkers, N. Y., et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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B

pp. 1, 14

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Blackmun, J.

Circulated:

Recirculated: 3/16/72

SUPREME COURT OF THE UNITED STATES

No. 70–58

Oliver T. Fein, Petitioner, *v.* Selective Service System Local Board No. 7, Yonkers, N. Y., et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March —, 1972]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 22, 1972

70-58

MEMORANDUM TO THE CONFERENCE

Re: No. 70-5056 - St. Clair v. Selective Service Local Board
No. 71-316 - Blatt v. Local Board No. 116
No. 71-448 - Morgan v. Melchar

These three cases appear on page 9 of the March 24 conference list. Each was held for No. 70-58, Fein v. Selective Service System Local Board.

None of the three is precisely the same as Fein. Blatt presented a claim for medical deferment and, in my view, his procedural arguments are substantially weaker than Fein's. Morgan presented a hardship claim based upon his alleged obligations to a divorced wife and small son and to a new wife he later married.

I suspect that had Fein prevailed in his case, Blatt and Morgan still might not prevail in theirs. Nevertheless, my tentative reaction is that Blatt's case and Morgan's case should be remanded for reconsideration in the light of Fein.

St. Clair is something else again. He claimed deferment as a conscientious objector. He refused to submit to induction and was indicted. The District Court dismissed the indictment on the ground that there was no basis in fact for the board's refusal of a 1-O classification, but "without prejudice to new proceedings for defendant's induction by the Selective Service System." 293 F. Supp. 337. St. Clair later appeared before the local board. The board adhered to its

1-A classification. The registrant received a new order to report for induction. He then sued for injunctive relief.

In a sense, therefore, St. Clair's case is also pre-induction. In a sense, because of the prior proceeding, it is not. My tentative reaction, in the light of Fein, is to deny cert, but I would not be averse to a remand for reconsideration in the light of Fein. Others of you may feel that the case is sufficiently different so that it requires full-dress treatment.

H.A.B.