The Burger Court Opinion Writing Database

DeFunis v. Odegaard

416 U.S. 312 (1974)

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 14, 1974

PERSONAL

Re: No. 73-235 - DeFunis v. Odegaard

Dear Lewis:

I share some, but not all, of your concern about "mooting" a case after it is argued. There are several answers that will satisfy the thoughtful but not the emotional critics.

1. If we must decide a case because we grant Cert, that places four Justices in a position to force the Court to issue advisory opinions. The "tail" can't be allowed to wag the "dog" to that extent.

2. We have cases that become moot between a grant and oral argument or final decision.

3. Not infrequently we DISIG, and the mootness holding shares with such dismissal the opportunity to see a case fully exposed.

The critics who would condemn us for a decision in favor of DeFunis will doubtless be exorcized by a mootness holding. It all depends on which student "is being gored."

Regards,

WEB

Mr. Justice Powell

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

CHAMBERS OF
THE CHIEF JUSTICE

March 14, 1974

PERSONAL

Re: No. 73-235 - DeFunis v. Odegaard

Dear Lewis:

I share some, but not all, of your concern about "mooting" a case after it is argued. There are several answers that will satisfy the thoughtful but not the emotional critics.

1. If we must decide a case because we grant Cert, that places four Justices in a position to force the Court to issue advisory opinions. The "tail" can't be allowed to wag the "dog" to that extent.

2. We have cases that become moot between a grant and oral argument or final decision.

3. Not infrequently we DISIG, and the mootness holding shares with such dismissal the opportunity to see a case fully exposed.

The critics who would condemn us for a decision in favor of DeFunis will doubtless be exorcized by a mootness holding. It all depends on which student "is being gored."

Regards,

Mr. Justice Powell

bc: Mr. Justice Blackmun

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

CHAMBERS OF
THE CHIEF JUSTICE

March 14, 1974

Re: 73-235 - DeFunis v. Odegaard

MEMORANDUM TO THE CONFERENCE:

Potter Stewart has agreed to draft a per curiam opinion dismissing the appeal in the above case as moot.

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

March 26, 1974

Re: No. 73-235 - DeFunis v. Odegaard

Dear Potter:

Please join me in your Per Curiam opinion in the above case.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

Files circ. 11-13-73

1st DRAFT

SUPREME COURT OF THE UNITED STATES

MARCO DE FUNIS ET AL. *v.* CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON, ET AL.

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 73-235. Decided November —, 1973

MR. JUSTICE DOUGLAS, dissenting.

This is an appeal from the Washington Supreme Court brought by a student at the Law School of the University of Washington. The appellant was initially rejected for admission at the law school after being placed upon the school's "waiting list." He then brought this action in state court, contending that, because of a law school policy of giving favorable treatment to applicants from minority groups, he was denied the equal protection of law. The appellant is white. The state trial court granted appellant relief, and issued an injunction commanding the law school to admit him. Because of this order he was admitted. Subsequently the Washington Supreme Court reversed the trial court, sustaining against the federal constitutional challenge the law school's admissions policy. I stayed the mandate of the Washington Supreme Court pending disposition of this appeal, and the appellant has therefore remained enrolled at the law school, where he is now completing his final year. 28 U. S. C. § 1257 (2) provides for appellate jurisdiction in this Court of state court decisions sustaining the validity of a state "statute" against a federal constitutional challenge. But putting aside the question of whether the law school's admissions policy is a state "statute" for this purpose, see *Hamilton* v. *Regents*, 293 U. S. 245 (1934), we could treat the papers as a petition for certiorari and grant review on that basis. 28 U. S. C. § 2103. This is the course I would follow.

WOD
rein.
11-13

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

MARCO DE FUNIS ET AL. *v.* CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON, ET AL.

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 73-235. Decided November —, 1973

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

This is an appeal from the Washington Supreme Court brought by a student at the Law School of the University of Washington. The appellant was initially rejected for admission at the law school after being placed upon the school's "waiting list." He then brought this action in state court, contending that, because of a law school policy of giving favorable treatment to applicants from minority groups, he was denied the equal protection of law. The appellant is white. The state trial court granted appellant relief, and issued an injunction commanding the law school to admit him. Because of this order he was admitted. Subsequently the Washington Supreme Court reversed the trial court, sustaining against the federal constitutional challenge the law school's admissions policy. I stayed the mandate of the Washington Supreme Court pending disposition of this appeal, and the appellant has therefore remained enrolled at the law school, where he is now completing his final year. 28 U. S. C. § 1257 (2) provides for appellate jurisdiction in this Court of state court decisions sustaining the validity of a state "statute" against a federal constitutional challenge. But putting aside the question of whether the law school's admissions policy is a state "statute" for this purpose, see *Hamilton* v. *Regents*, 293 U. S. 245 (1934), we could treat the papers as a petition

file
cir
4-5-74

8th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-235

Marco DeFunis et al., Petitioners, *v.* Charles Odegaard, President of the University of Washington. | On Writ of Certiorari to the Supreme Court of Washington.

[March —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

I agree with MR. JUSTICE BRENNAN that this case is not moot, and because of the significance of the issues raised I think it is important to reach the merits.

I

The University of Washington Law School received 1601 applications for admission to its first-year class beginning in September 1971. There were spaces available for only about 150 students, but in order to enroll this number the school eventually offered admission to 275 applicants. All applicants were put into two groups, one of which was considered under the minority admissions program. Thirty-seven of those offered admission had indicated on an optional question on their application that their "dominant" ethnic origin was either Black, Chicano, American Indian, or Filipino, the four groups included in the minority admissions program. Answers to this optional question were apparently the sole basis upon which eligibility for the program was determined. Eighteen of these 37 actually enrolled in the law school.

In general, the admissions process proceeded as follows: An index called the Predicted First Year Average (Aver-

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

10th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-235

Printed: 4-16

Circulated: 4-16

Recirculated: _____

Marco DeFunis et al., Petitioners, v. Charles Odegaard, President of the University of Washington.

On Writ of Certiorari to the Supreme Court of Washington.

[March — 1974]

MR. JUSTICE DOUGLAS, dissenting.

I agree with MR. JUSTICE BRENNAN that this case is not moot, and because of the significance of the issues raised I think it is important to reach the merits.

The University of Washington Law School received 1601 applications for admission to its first-year class beginning in September 1971. There were spaces available for only about 150 students, but in order to enroll this number the school eventually offered admission to 275 applicants. All applicants were put into two groups, one of which was considered under the minority admissions program. Thirty-seven of those offered admission had indicated on an optional question on their application that their "dominant" ethnic origin was either Black, Chicano, American Indian, or Filipino, the four groups included in the minority admissions program. Answers to this optional question were apparently the sole basis upon which eligibility for the program was determined. Eighteen of these 37 actually enrolled in the law school.

In general, the admissions process proceeded as follows: An index called the Predicted First Year Average (Aver-

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-235

Marco DeFunis et al.,
Petitioners,
v.
Charles Odegaard, President of the University of Washington.

On Writ of Certiorari to the Supreme Court of Washington.

[March —, 1974]

MR. JUSTICE DOUGLAS, dissenting

I agree with MR. JUSTICE BRENNAN that this case is not moot, and because of the significance of the issues raised I think it is important to reach the merits.

The University of Washington Law School received 1601 applications for admission to its first-year class beginning in September 1971. There were spaces available for only about 150 students, but in order to enroll this number the school eventually offered admission to 275 applicants. All applicants were put into two groups one of which was considered under the minority admissions program. Thirty-seven of those offered admission had indicated on an optional question on their application that their "dominant" ethnic origin was either Black, Chicano, American Indian, or Filipino, the four groups included in the minority admissions program. Answers to this optional question were apparently the sole basis upon which eligibility for the program was determined. Eighteen of these 37 actually enrolled in the law school.

In general, the admissions process proceeded as follows. An index called the Predicted First Year Average (Aver-

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 13, 1973

RE: No. 73-235 DeFunis v. Odegaard, etc.

Dear Bill:

Please join me in your dissenting opinion in the above.

Sincerely,

Bill

Mr. Justice Douglas

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-235

Circulated: 3-27-

Recirculated: _____

Marco DeFunis et al., Petitioners, v. Charles Odegaard, President of the University of Washington. } On Writ of Certiorari to the Supreme Court of Washington.

[April —, 1974]

MR. JUSTICE BRENNAN, dissenting.

I respectfully dissent. Several months of the school term remain and petitioner may not receive his degree despite respondents' assurances that petitioner will be allowed to complete this term's schooling regardless of our decision. Any number of unexpected events—illness, economic necessity, even academic failure—might prevent his graduation at the end of the term. Were that misfortune to befall, and were petitioner required to register for yet another term, the prospect that he would again face the hurdle of the admissions policy is real, not fanciful; for respondents warn that "Mr. DeFunis would have to take some appropriate action to request admission for the remainder of his law school education, and *some discretionary action by the University on such request would have to be taken.*" Appellees-respondents' Memorandum on the Question of Mootness pp. 3–4 (emphasis supplied). Thus, respondents' assurances have not dissipated the possibility that petitioner might once again have to run the gantlet of the University's allegedly unlawful admissions policy. The Court therefore proceeds on an erroneous premise in resting its mootness holding on a supposed inability to render any judgment that may affect one way or the other petitioner's completion of his law studies. For surely if we were to reverse

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-235

Circulated: _____

Recirculated: 3-28-7

Marco DeFunis et al., Petitioners, *v.* Charles Odegaard, President of the University of Washington. } On Writ of Certiorari to the Supreme Court of Washington.

[April —, 1974]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL concur, dissenting.

I respectfully dissent. Several months of the school term remain, and petitioner may not receive his degree despite respondents' assurances that petitioner will be allowed to complete this term's schooling regardless of our decision. Any number of unexpected events—illness, economic necessity, even academic failure—might prevent his graduation at the end of the term. Were that misfortune to befall, and were petitioner required to register for yet another term, the prospect that he would again face the hurdle of the admissions policy is real, not fanciful; for respondents warn that "Mr. DeFunis would have to take some appropriate action to request admission for the remainder of his law school education, and *some discretionary action by the University on such request would have to be taken.*" Appellees-respondents' Memorandum on the Question of Mootness pp. 3–4 (emphasis supplied). Thus, respondents' assurances have not dissipated the possibility that petitioner might once again have to run the gantlet of the University's allegedly unlawful admissions policy. The Court therefore proceeds on an erroneous premise in resting its mootness

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-235

Marco DeFunis et al.,
Petitioners,
v.
Charles Odegaard, President of the University of Washington.

On Writ of Certiorari to the Supreme Court of Washington.

[April —, 1974]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL concur, dissenting.

I respectfully dissent. Several months of the school term remain, and petitioner may not receive his degree despite respondents' assurances that petitioner will be allowed to complete this term's schooling regardless of our decision. Any number of unexpected events—illness, economic necessity, even academic failure—might prevent his graduation at the end of the term. Were that misfortune to befall, and were petitioner required to register for yet another term, the prospect that he would again face the hurdle of the admissions policy is real, not fanciful; for respondents warn that "Mr. DeFunis would have to take some appropriate action to request admission for the remainder of his law school education, and *some discretionary action by the University on such request would have to be taken.*" Appellees-respondents' Memorandum on the Question of Mootness pp. 3–4 (emphasis supplied). Thus, respondents' assurances have not dissipated the possibility that petitioner might once again have to run the gantlet of the University's allegedly unlawful admissions policy. The Court therefore pro-

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-235

Marco DeFunis et al., Petitioners, v. Charles Odegaard, President of the University of Washington.

On Appeal from the Supreme Court of Washington.

[March —, 1974]

PER CURIAM.

In 1971 the petitioner, Marco DeFunis, applied for admission as a first-year student at the University of Washington Law School, a state-operated institution. The size of the incoming first-year class was to be limited to 150 persons, and the Law School received some 1,600 applications for these 150 places. DeFunis was eventually notified that he had been denied admission. He thereupon commenced this suit in a Washington trial court, contending that the procedures and criteria employed by the Law School Admissions Committee invidiously discriminated against him on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

DeFunis brought the suit on behalf of himself alone, and not as the representative of any class, against the various respondents, who are officers, faculty members, and members of the Board of Regents of the University of Washington. He asked the trial court to issue a mandatory injunction commanding the respondents to admit him as a member of the first-year class entering in September of 1971, on the ground that the Law School

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-235

Marco DeFunis et al., Petitioners, *v.* Charles Odegaard, President of the University of Washington.	On Writ of Certiorari to the Supreme Court of Washington.

[March —, 1974]

PER CURIAM.

In 1971 the petitioner, Marco DeFunis, applied for admission as a first-year student at the University of Washington Law School, a state-operated institution. The size of the incoming first-year class was to be limited to 150 persons, and the Law School received some 1,600 applications for these 150 places. DeFunis was eventually notified that he had been denied admission. He thereupon commenced this suit in a Washington trial court, contending that the procedures and criteria employed by the Law School Admissions Committee invidiously discriminated against him on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution

DeFunis brought the suit on behalf of himself alone, and not as the representative of any class, against the various respondents, who are officers, faculty members, and members of the Board of Regents of the University of Washington. He asked the trial court to issue a mandatory injunction commanding the respondents to admit him as a member of the first-year class entering in September of 1971, on the ground that the Law School

V P7

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-235

Marco DeFunis et al., Petitioners, *v.* Charles Odegaard, President of the University of Washington. } On Writ of Certiorari to the Supreme Court of Washington.

[March —, 1974]

PER CURIAM.

In 1971 the petitioner, Marco DeFunis, applied for admission as a first-year student at the University of Washington Law School, a state-operated institution. The size of the incoming first-year class was to be limited to 150 persons, and the Law School received some 1,600 applications for these 150 places. DeFunis was eventually notified that he had been denied admission. He thereupon commenced this suit in a Washington trial court, contending that the procedures and criteria employed by the Law School Admissions Committee invidiously discriminated against him on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

DeFunis brought the suit on behalf of himself alone, and not as the representative of any class, against the various respondents, who are officers, faculty members, and members of the Board of Regents of the University of Washington. He asked the trial court to issue a mandatory injunction commanding the respondents to admit him as a member of the first-year class entering in September of 1971, on the ground that the Law School

√ p. 5

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-235

Marco DeFunis et al., Petitioners, *v.* Charles Odegaard, President of the University of Washington,	On Writ of Certiorari to the Supreme Court of Washington.

[March —, 1974]

PER CURIAM.

In 1971 the petitioner, Marco DeFunis, applied for admission as a first-year student at the University of Washington Law School, a state-operated institution. The size of the incoming first-year class was to be limited to 150 persons, and the Law School received some 1,600 applications for these 150 places. DeFunis was eventually notified that he had been denied admission. He thereupon commenced this suit in a Washington trial court, contending that the procedures and criteria employed by the Law School Admissions Committee invidiously discriminated against him on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

DeFunis brought the suit on behalf of himself alone, and not as the representative of any class, against the various respondents, who are officers, faculty members, and members of the Board of Regents of the University of Washington. He asked the trial court to issue a mandatory injunction commanding the respondents to admit him as a member of the first-year class entering in September of 1971, on the ground that the Law School

P 5

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-235

Marco DeFunis et al., Petitioners, v. Charles Odegaard, President of the University of Washington,	On Writ of Certiorari to the Supreme Court of Washington.

[March —, 1974]

PER CURIAM.

In 1971 the petitioner, Marco DeFunis, applied for admission as a first-year student at the University of Washington Law School, a state-operated institution. The size of the incoming first-year class was to be limited to 150 persons, and the Law School received some 1,600 applications for these 150 places. DeFunis was eventually notified that he had been denied admission. He thereupon commenced this suit in a Washington trial court, contending that the procedures and criteria employed by the Law School Admissions Committee invidiously discriminated against him on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

DeFunis brought the suit on behalf of himself alone, and not as the representative of any class, against the various respondents, who are officers, faculty members, and members of the Board of Regents of the University of Washington. He asked the trial court to issue a mandatory injunction commanding the respondents to admit him as a member of the first-year class entering in September of 1971, on the ground that the Law School

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 27, 1974

Re: No. 73-235 - DeFunis v. Odegaard

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Brennan

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 28, 1974

Re: No. 73-235 -- DeFunis v. Odegaard

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 21, 1974

Dear Potter:

Re: No. 73-235 - DeFunis v. Odegarrd

Please join me in the per curiam you have prepared for this case.

Sincerely,

Harry

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 11, 1974

No. 73-235 DeFunis v. Odegaard

Dear Chief:

The vote at the Conference on the issue of mootness was 4 to 4. I passed, to afford an opportunity for more mature consideration on my part.

As the docket sheets will show, I voted consistently to moot this case on the three occasions when we considered the petition for certiorari. Five of us remained of the opinion that the case was moot even after we had requested and received memoranda from counsel on the mootness issue, and counsel for both parties had argued to the contrary.

Having taken the case, received briefs from numerous parties and heard argument, I am troubled now by a disposition which does not address the merits. Of course, this has happened many times before. Yet, this case has attracted national interest and it is predictable that the Supreme Court, as an institution, will be criticized for taking a course of action which will be viewed by many as a means of avoiding a truly "sticky wicket". The extent and tone of the institutional criticism is likely to be exacerbated if we split 5 to 4 on the mootness question.

The foregoing considerations prompted me to reexamine the arguments - in addition to the institutional ones - against mootness. They add up pretty much, despite being able to find authority for almost any position on mootness, to theoretical assumptions about what might happen: e.g., the Board of Trustees of the University might repudiate the Dean of the Law School's representation (through counsel) that

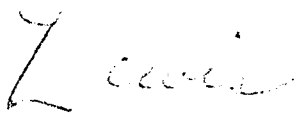
DeFunis will be allowed to graduate even if the decision below is revers
I find it difficult to accept this as a real possibility.

If, as I believed, the case was substantially moot when we granted cert, it certainly is today. DeFunis has now registered for the final term. The Dean of the Law School has given what I think fairly may be construed as assurance that the University of Washington will not withhold DeFunis' degree if he completes his work satisfactorily

Because DeFunis did not bring a class action that would have enabled a subsequent plaintiff to join as a representative party and take up his position, the case will be undeniably dead under any theory of mootness known to me when DeFunis takes his degree in June.

Accordingly, I have decided - although with great reluctance under the circumstances - to vote as I previously have: that the case is moot.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 21, 1974

No. 73-235 DeFunis v. Odegaard

Dear Potter:

Please join me in your Per Curiam.

Sincerely,

Mr. Justice Stewart

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 21, 1974

Re: No. 73-235 - DeFunis v. Odegaard

Dear Potter:

Please join me in the per curiam you have prepared.

Sincerely,

WHR

Mr. Justice Stewart

Copies to the Conference