

The Burger Court Opinion Writing Database

Bowen v. Michigan Academy of Family Physicians

476 U.S. 667 (1986)

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





CHAMBERS OF
THE CHIEF JUSTICE

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

June 4, 1986

85-225 - Bowen v. Mich. Academy of Family Physicians

Dear John:

I join.

Regards,

Justice Stevens

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 5, 1986

RE: No. 85-225 - Bowen v. American Hospital

Dear John:

After our chat at lunch, I reviewed the opinions in the above, and what I thought I had seen earlier is not there.

I finally come to rest with a join in the judgment. Congress must certainly get back into this sensitive area, and collectively the several opinions will--I hope--help them analyze the situation.

Regards,



Justice Stevens

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 20, 1986

Bowen v. Michigan Academy of Family Physicians
No. 85-225

Dear John,

I will be happy to join your opinion in this case, but I do have one request. The first sentence of the paragraph that begins on page 12 rejects respondents' reading of Salfi and Ringer, but states that it is not necessary to decide how far these cases go. I myself am not fully convinced even that respondents' position is wrong. Since, as you state, we need not and do not interpret those cases, could you simply delete this sentence?

Sincerely,

Justice Stevens



CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

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

May 22, 1986

No. 85-225

Bowen v. Michigan Academy
of Family Physicians, et al.

Dear John,

Please join me.

Sincerely,

Justice Stevens

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 14, 1986

85-225 - Bowen v. Michigan Academy
of Family Physicians

Dear John,

I shall not dissent in this case.

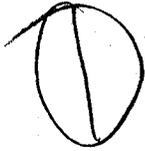
Sincerely yours,



Justice Stevens

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 14, 1986

Re: No. 85-225-Bowen v. Michigan Academy of Family
Physicians, et al.

Dear John:

Please join me.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

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W

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 19, 1986

Re: No. 85-225, Bowen v. Michigan Academy
of Family Physicians

Dear John:

Please join me.

Sincerely,



Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 23, 1986

85-225 Bowen v. Michigan Academy

Dear John:

Please join me.

Sincerely,

Lewis

Justice Stevens

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 10, 1985

Joseph Spaniol
Clerk of the Court

Dear Joe:

I will not participate in the following case, which
will be argued in January:

85-225 - Heckler v. Michigan Academy of Family
Physicians

Sincerely,



cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**
MAY 13 1986

Circulated: _____

Recirculated: _____

1 PS
Please join me
JOS

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-225

OTIS R. BOWEN, SECRETARY OF HEALTH AND
HUMAN SERVICES, ET AL., PETITIONERS *v.* MICHIGAN
ACADEMY OF FAMILY PHYSICIANS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[May —, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

The question presented in this case is whether Congress, in either § 1395ff or § 1395ii of Title 42 of the United States Code, barred judicial review of regulations promulgated under Part B of the Medicare program.

Respondents, an association of family physicians and several individual doctors, filed suit to challenge the validity of 42 CFR § 405.504(b), which authorizes the payment of benefits in different amounts for similar physicians' services. The District Court held that the regulation contravened several provisions of the statute governing the Medicare program:

"There is no basis to justify the segregation of allopathic family physicians from all other types of physicians. Such segregation is not rationally related to any legitimate purpose of the Medicare statute. To lump MDs who are family physicians, but who have chosen not to become board certified family physicians for whatever motive, with chiropractors, dentists, and podiatrists for the purpose of determining Medicare reimbursement defies all reason." 502 F. Supp. 751, 755 (ED Mich. 1980).

Because it ruled in favor of respondents on statutory grounds, the District Court did not reach their constitutional

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Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 15, 1986

Re: No. 85-225 - Bowen v. Michigan Academy
of Family Physicians

Dear Sandra:

In response to your concern that part I of my circulating draft is at odds with Block v. Community Nutrition Institute, 467 U.S. 340 (1984), I have added the following two passages.

First, I have appended to the end of the first paragraph in footnote 3 on page 4 the following sentence:

Of course, this Court has "never applied the 'clear and convincing evidence' standard in the strict evidentiary sense"; nevertheless, the standard serves as "a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." Block v. Community Nutrition Institute, 467 U.S. 340, 350-351 (1984).

Second, I have added a footnote to follow the citation to Block v. Community Nutrition Institute at the end of the first paragraph on page 5:

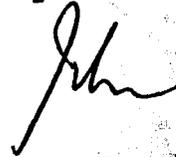
"The congressional intent necessary to overcome the presumption may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it, see, e.g., Ludecke v. Watkins, 335 U.S. 160 (1948), or from the collective import of legislative and judicial history behind a

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particular statute, see, e.g., Heikkila v. Barber, 345 U.S. 229 (1953). More important for purposes of this case, the presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole. See, e.g., Morris v. Gressette, 432 U.S. 491 (1977); Switchmen v. National Mediation Board, 320 U.S. 297 (1943).⁸ Block v. Community Nutrition Institute, 467 U.S., at 349.

I hope these two additions will satisfy your concern. If they do not, please let me know.

Respectfully,



Justice O'Connor

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pp. 4, 5, 6, 14

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: 5/16/86

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-225

OTIS R. BOWEN, SECRETARY OF HEALTH AND
HUMAN SERVICES, ET AL., PETITIONERS *v.* MICHIGAN
ACADEMY OF FAMILY PHYSICIANS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[May —, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

The question presented in this case is whether Congress, in either § 1395ff or § 1395ii of Title 42 of the United States Code, barred judicial review of regulations promulgated under Part B of the Medicare program.

Respondents, an association of family physicians and several individual doctors, filed suit to challenge the validity of 42 CFR § 405.504(b) (1985), which authorizes the payment of benefits in different amounts for similar physicians' services. The District Court held that the regulation contravened several provisions of the statute governing the Medicare program:

"There is no basis to justify the segregation of allopathic family physicians from all other types of physicians. Such segregation is not rationally related to any legitimate purpose of the Medicare statute. To lump MDs who are family physicians, but who have chosen not to become board certified family physicians for whatever motive, with chiropractors, dentists, and podiatrists for the purpose of determining Medicare reimbursement defies all reason." 502 F. Supp. 751, 755 (ED Mich. 1980).

Because it ruled in favor of respondents on statutory grounds, the District Court did not reach their constitutional

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: _____

Recirculated: MAY 22 1986

8-5, 12

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-225

OTIS R. BOWEN, SECRETARY OF HEALTH AND
HUMAN SERVICES, ET AL., PETITIONERS *v.* MICHIGAN
ACADEMY OF FAMILY PHYSICIANS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[May —, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

The question presented in this case is whether Congress, in either § 1395ff or § 1395ii of Title 42 of the United States Code, barred judicial review of regulations promulgated under Part B of the Medicare program.

Respondents, an association of family physicians and several individual doctors, filed suit to challenge the validity of 42 CFR § 405.504(b) (1985), which authorizes the payment of benefits in different amounts for similar physicians' services. The District Court held that the regulation contravened several provisions of the statute governing the Medicare program:

"There is no basis to justify the segregation of allopathic family physicians from all other types of physicians. Such segregation is not rationally related to any legitimate purpose of the Medicare statute. To lump MDs who are family physicians, but who have chosen not to become board certified family physicians for whatever motive, with chiropractors, dentists, and podiatrists for the purpose of determining Medicare reimbursement defies all reason." 502 F. Supp. 751, 755 (ED Mich. 1980).

Because it ruled in favor of respondents on statutory grounds, the District Court did not reach their constitutional

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

From: Justice Stevens

Circulated: _____

Recirculated: MAY 28 1986

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-225

OTIS R. BOWEN, SECRETARY OF HEALTH AND
HUMAN SERVICES, ET AL., PETITIONERS *v.* MICHIGAN
ACADEMY OF FAMILY PHYSICIANS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June —, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

The question presented in this case is whether Congress, in either § 1395ff or § 1395ii of Title 42 of the United States Code, barred judicial review of regulations promulgated under Part B of the Medicare program.

Respondents, who include an association of family physicians and several individual doctors, filed suit to challenge the validity of 42 CFR § 405.504(b) (1985), which authorizes the payment of benefits in different amounts for similar physicians' services. The District Court held that the regulation contravened several provisions of the statute governing the Medicare program:

"There is no basis to justify the segregation of allopathic family physicians from all other types of physicians. Such segregation is not rationally related to any legitimate purpose of the Medicare statute. To lump MDs who are family physicians, but who have chosen not to become board certified family physicians for whatever motive, with chiropractors, dentists, and podiatrists for the purpose of determining Medicare reimbursement defies all reason." *Michigan Academy of Family Physicians v. Blue Cross and Blue Shield of Michigan*, 502 F. Supp. 751, 755 (ED Mich. 1980).

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 14, 1986

85-225 Bowen v. Michigan Academy of Family Physicians

Dear John,

As presently written, I cannot join your opinion for the Court in this case because I believe its discussion of the presumption of reviewability under the APA is at odds with Block v. Community Nutrition Institute, 467 U.S. 340 (1984). Your opinion emphasizes that courts should restrict access to judicial review "only upon a showing of clear and convincing evidence", Circulating Draft 4, without mentioning Block's caveat that "[t]his Court has ... never applied the 'clear and convincing evidence' standard in the strict evidentiary sense Rather, the Court has found the standard met, and the presumption favoring judicial review overcome, whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" 467 U.S., at 350-351. This omission creates a risk that courts engaging in preclusion analysis will mistakenly employ the clear and convincing evidence standard as a "rigid evidentiary test" rather than as "a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." Id., at 351.

In addition, your discussion of the circumstances in which the presumption of judicial review can be overcome seems to me, notwithstanding the inclusion of the phrase "inter alia", Circulating Draft 5, to convey the impression that, ordinarily, express language or specific legislative history must indicate congressional intent to preclude review before the presumption can be rebutted. Block holds, however, that "the presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole." 467 U.S., at 349. For example, such an inference may be drawn, as was done in Block itself,

where "a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons", while making no provision for review of those issues "at the behest of other persons." Ibid. I regard this category of cases in which the statutory scheme as a whole creates an inference that Congress intended to preclude review as an important one, and one which this Court articulated very recently. Indeed in Part II of your opinion you appear to rely in part on inferences drawn from the statutory scheme that suggest judicial review is available. Circulating Draft 7-8.

If you are willing to make changes to your opinion to accommodate these concerns, I would be glad to make specific suggestions to that end. If not, I shall write separately, at least in part.

Sincerely,



Justice Stevens

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 19, 1986

Re: 85-225, Bowen v. Michigan Academy of Family
Physicians

Dear John,

I appreciate the additions you have made to your opinion, and have only one additional request. On page 5, at the end of the second sentence in text, I hope you will consider adding the following: "or where 'the congressional intent to preclude judicial review is fairly discernible in the statutory scheme.' Block v. Community Nutrition Institute, 467 U.S. 340, 349, 351 (1984)." With this and your other changes, I will join your opinion.

Sincerely,



Justice Stevens

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 28, 1986

No. 85-225 Bowen v. Michigan Academy

Dear John,

Please join me.

Sincerely,

Justice Stevens

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