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## ***DeFunis v. Odegaard*, 416 U.S. 312 (1974): A Case Study of the Interface between Cultural Development, Judicial Politics and Litigation Strategy**

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DeFunis v. Odegaard,  
416 U.S. 312 (1974)

**A CASE STUDY OF THE INTERFACE BETWEEN  
CULTURAL DEVELOPMENT, JUDICIAL POLITICS  
AND LITIGATION STRATEGY**

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**I. INTRODUCTION**

This article analyzes the litigation strategies and the Supreme Court's decision-making process in the first voluntary affirmative action case to reach the high court: *DeFunis v. Odegaard*, 416 U.S. 312 (1974). While *DeFunis* is most often remembered and cited for its contribution to the "mootness" doctrine, the decision also contains a wealth of information as to how the case's rich historical setting influenced the litigation strategies of the parties, and of the Court itself. Consequently, *DeFunis* provides a rare opportunity to study the interface between cultural development, judicial politics and litigation strategy.

In *DeFunis*, the plaintiff was denied admission to the University of Washington Law School, which discriminated in its admissions policies in favor of disadvantaged minority groups.<sup>1</sup> He sought and obtained an injunction from Washington Superior Court which enabled him to attend the law school.<sup>2</sup> Defendant Odegaard, the University president, appealed and the Washington Supreme Court reversed.<sup>3</sup> DeFunis then petitioned the Supreme Court for a writ of certiorari, and Justice Douglas stayed the judgment of the Washington Supreme Court pending the United

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<sup>1</sup> *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974).

<sup>2</sup> *See DeFunis*, 416 U.S. at 315.

<sup>3</sup> *See id.*

States Supreme Court's final disposition.<sup>4</sup> By virtue of this stay, DeFunis remained in law school and was in his final year by the time the U.S. Supreme Court heard the case.<sup>5</sup>

The historical background and setting of this case is quite rich. When Martin Luther King was assassinated in 1968, many institutions of higher learning responded to the national tragedy by opening their institutions to more African-Americans and establishing special remedial programs to tutor and then admit them.<sup>6</sup> These became the first voluntary affirmative action programs at the graduate and professional school level outside the South.<sup>7</sup>

*DeFunis* was the first voluntary affirmative action case to be granted certiorari by Supreme Court, and the nation took notice.<sup>8</sup> Both the media as well as numerous legal scholars considered it to be the most significant civil rights case since *Brown v. Board of Education*.<sup>9</sup> Literally hundreds of special interest groups on both sides of the issue participated in the filing of over thirty *amicus curiae* briefs addressing the constitutionality of such programs. However, despite all of this interest, the Supreme Court never reached the merits of the case, instead finding it moot.<sup>10</sup> As the author is confident this article will show, this appears to be more a function of judicial politics and litigation savvy than sound and consistent legal reasoning. This is not to suggest an opinion on the merits either way; the Supreme Court never addressed the merits of the issue and neither shall this article. Instead the article's focus will be the relationship among the cultural setting, the politics of the Supreme Court and the litigation strategies of the parties.

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<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> See generally, Hon. Constance Baker Motley, *Remarks At The Thurgood Marshall Commemorative Luncheon*, 62 BROOK. L. REV. 531.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Brown v. Board of Education*, 237 U.S. 483 (1954).

<sup>10</sup> See *DeFunis*, 416 U.S. at 315.

## II. BACKGROUND

In 1971, Marco DeFunis applied for admission as a first year student at the University of Washington Law School and was denied admission.<sup>11</sup> He subsequently brought a lawsuit in Washington State Supreme Court, on behalf of himself alone, claiming that the procedures and criteria employed by the Law School Admission Committee invidiously discriminated against him on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>12</sup>

At trial, DeFunis moved for the court to issue a mandatory injunction requiring the University to admit him as a member of the first-year class entering September 1971.<sup>13</sup> The trial court granted DeFunis' motion finding the University's affirmative action program unconstitutional<sup>14</sup> and DeFunis was accordingly admitted to the law school in the fall of 1971.<sup>15</sup>

On appeal, however, the Washington State Supreme Court reversed the judgment of the trial court and held that the law school admissions policy was constitutional.<sup>16</sup> At this time, DeFunis was in his second year at the law school.<sup>17</sup> The law school immediately informed DeFunis that he would be denied registration privileges for the second term of his second year and that he would have to reapply for admission.<sup>18</sup> In a last ditch effort to avoid this uncertain course, DeFunis petitioned the United States Supreme Court for a Writ of Certiorari. Justice Douglas, as Circuit Justice, stayed the judgment of the Washington State Supreme

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<sup>11</sup> *See id.* at 314.

<sup>12</sup> *See id.*

<sup>13</sup> *See id.*

<sup>14</sup> *See id.*

<sup>15</sup> *See DeFunis*, 416 U.S. at 314.

<sup>16</sup> *Id.*

<sup>17</sup> *See id.*

<sup>18</sup> *See id.* at 315.

Court pending their final disposition of the case.<sup>19</sup> By virtue of this stay, DeFunis remained in law school.<sup>20</sup>

### III. THE MOOTNESS BRIEFS

DeFunis had reached the first term of his third and final year in the fall of 1973 when the Supreme Court first considered his petition for certiorari.<sup>21</sup> Given that DeFunis was in his last year of law school, the court requested both parties to brief the mootness issue before the Court would decide whether to grant certiorari.<sup>22</sup> Neither party, however, chose to argue that the case was moot, at least not openly.

The University's mootness brief, while purporting to argue that the case was not moot, seemed to more effectively argue that it was indeed moot.<sup>23</sup> For example, in the brief's Statement of Facts, the University offered a preliminary argument addressing the mootness issue by paraphrasing the argument which it stated to the Washington State Supreme Court during oral arguments, where the mootness issue was also raised.<sup>24</sup> Essentially, this argument contended that if the Court restored discretion to the law school, the law school would cancel DeFunis' registration and require that he reapply for admission.<sup>25</sup> However, immediately following this paraphrase of the oral argument the brief states:

The above response is the short answer to this Court's question concerning mootness now, since

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<sup>19</sup> See *id.*

<sup>20</sup> See DeFunis, 416 U.S. at 315.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See Appellee's Opening Brief, DeFunis v. Odegaard, 416 U.S. 312, 314 (1974) (No. 73-235).

<sup>24</sup> Appellee's Opening Brief at B5-B6, DeFunis v. Odegaard, 416 U.S. 312, 314 (1974) (No. 73-235).

<sup>25</sup> See *id.*

all facts operative on May 15, 1972 are operative now (October 31, 1973).<sup>26</sup>

Following this the brief goes on to state in the next paragraph:

Counsel is advised by the Dean of the Law School (and we believe this Court should be advised) that if Mr. DeFunis registers for the spring semester under the existing order of this Court during the registration period from February 20, 1974 to March 1, 1974 that registration would not be canceled unilaterally by the university regardless of the outcome of this litigation.<sup>27</sup>

Read together (as they would be being only 13 lines apart), these two statements suggest that while the case is not moot as of October 31, 1973, it would become moot upon DeFunis' registration in late February of 1974.

As the University was likely aware, even if the Court were to grant certiorari, there would be little or no chance of a ruling prior to the end of registration period. In fact, it would be quite unusual for the Court to issue an opinion before April, over a full month after the case would admittedly become moot.

Given the proximity of these two statements to one another, the likelihood that their implications would be accidental and unrecognized by University counsel upon the proofreading of the brief, seems extraordinary.

Accordingly, as one would likely predict, the implications of these statements and their hypocritical inferences to the brief's thesis was not overlooked by the Supreme Court. In the Court's opinion, after recognizing that the respondents' brief contended that the case was not moot, in footnote two the Court stated:

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

FN2 *By contrast*, in their response to the petition for certiorari, the respondents had stated that DeFunis would complete his third year (of law school) and be awarded his JD degree at the end of the 1973-74 academic year, regardless of the outcome of this appeal. [Emphasis added]<sup>28</sup>

Apparently, the Court recognized that the University's brief volunteered information which undermined its arguments. In fact, it was this statement which the Court later primarily relied on in finding that the parties lacked a live controversy, and that the case was therefore moot.<sup>29</sup>

The question remains however; was the offering of such determinative information an act of litigation savvy, or instead a litigation blunder? After all, if the University would have just stuck to its original argument offered to the Washington State Supreme Court: that the University would cancel DeFunis' registration immediately upon restoration of its authority to do so, the University would have preserved the live controversy of the case at least until late May when DeFunis was scheduled to graduate.

In an attempt to answer this question, we must first look to the consequences of such an addition, in an effort to identify any benefits which would suggest a motive for the inclusion. If such a motive is present, it would be more likely that the inclusion was intentional. However, if no such motive could be identified, then it would be more likely that the inclusion was a litigation blunder.

As a preliminary matter, it is worth noting that DeFunis had no interest in a denial of certiorari. If such would have happened, the Washington State Supreme Court ruling would be restored and the University would admittedly cancel DeFunis' registration and require him to re-apply for admission. Clearly, this would not be in DeFunis' interest.

It would seem to follow logically that if denial of certiorari would be a defeat for DeFunis, then the same would be a victory

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<sup>28</sup> *Id.* at 314.

<sup>29</sup> *See* DeFunis, 416 U.S. at 317.

for the University, albeit not on the merits. In addition to DeFunis, however, the University too argued that the case was not moot (at least openly) and, consequently, for the Supreme Court to grant certiorari. This peculiar litigation strategy hints that the University's objectives were more complex than that of typical defendants, which usually surmount to the shortest path to a dismissal. Possibly, by arguing against finding the case moot, the University's intention was to appear eager to litigate the case on the merits. However substantively, the University's brief seemed to pray for a finding of mootness and, therefore, a denial of certiorari.

Certainly, the University's interests seemed to be best served by a denial of certiorari. Such a denial would restore the University's authority to cancel DeFunis' registration and require him to reapply for admission. More importantly though, it would also allow the University's continued application of voluntary affirmative action programs, which could be prohibited if the Supreme Court granted certiorari and then declared such programs unconstitutional. These advantages to arguing that the case was moot cause one to ponder why then the University would choose to offer an argument which would knowingly increase the odds of an unfavorable outcome for the University. As a careful analysis of this peculiar posture suggests, the answer may be a combination of political pressure and institutional pride.

To appreciate the strengths of this argument, it helps to review the setting at the time. When Martin Luther King was assassinated in 1968, many institutions of higher learning responded to that national tragedy by opening their institutions to more African Americans and by establishing special programs to tutor and then admit them.<sup>30</sup> These sorts of activities, which became known as voluntary affirmative action programs, were wide spread by October 1973, the time when the Supreme Court was considering DeFunis' writ of certiorari.<sup>31</sup>

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<sup>30</sup> See generally Hon. Constance Baker Motley, *Remarks At The Thurgood Marshall Commemorative Luncheon*, 62 BROOK. L. REV. 531.

<sup>31</sup> See *id.*



Consequently, the interest and attention placed on this case is difficult to underestimate. Both the media as well as numerous legal scholars considered it to be the most significant civil rights case since *Brown v. Board of Education*.<sup>32</sup> Eventually, twenty-six amicus curiae briefs were submitted in support of the University. Signatories to these briefs included the deans of over sixty-four law schools,<sup>33</sup> the American Association of Law Schools,<sup>34</sup> Yale University,<sup>35</sup> Harvard University,<sup>36</sup> University of Pennsylvania,<sup>37</sup> Massachusetts Institute of Technology,<sup>38</sup> The American Bar Association,<sup>39</sup> The NAACP,<sup>40</sup> the United Negro College Fund<sup>41</sup> and hundreds of other organizations. Yet none of these briefs argued that the case was moot.<sup>42</sup> This suggests that these influential organizations wanted a decision on the merits permitting affirmative action programs. Hence, the pressure was on the University to be the matriarch of the next advancement of civil rights, and the nation was watching.

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<sup>32</sup> *Brown v. Board of Education*, 237 U.S. 483 (1954).

<sup>33</sup> Amicus Curiae Brief for the Anti Defamation League of B'Nai B'rith and the American Federation of Labor and Congress of Industrial Organizations, *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974) (No. 73-235).

<sup>34</sup> Amicus Curiae Brief for the American Association of Law Schools, *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974) (No. 73-235).

<sup>35</sup> Amicus Curiae Brief for Yale University, *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974) (No. 73-235).

<sup>36</sup> Amicus Curiae Brief for Harvard University, *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974) (No. 73-235).

<sup>37</sup> Amicus Curiae Brief for University of Pennsylvania, *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974) (No. 73-235).

<sup>38</sup> Amicus Curiae Brief for the Massachusetts Institute of Technology, *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974) (No. 73-235).

<sup>39</sup> Amicus Curiae Brief for the American Bar Association, *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974) (No. 73-235).

<sup>40</sup> Amicus Curiae Brief for the NAACP, *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974) (No. 73-235).

<sup>41</sup> Amicus Curiae Brief for the United Negro College Fund, *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974) (No. 73-235).

<sup>42</sup> With the sole exception of Amicus Curiae Brief for the Center of Law and Education, Harvard University, *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974) (No. 73-235).

If the University were to argue at this time that the case was moot, it would likely be viewed as an act of litigation cowardice or reluctance to argue the merits. In the greater political picture, such could have been viewed as a sign of weakness in the movement to preserve and promote these programs. In the University's immediate picture, such could spell political embarrassment to the University and the law school. This is especially true considering the Supreme Court's historical vulnerability to the social movements of the day.

Moreover, the University of Washington Law School was then as is now, a well regarded educational institution. It stands to reason that if it saw fit to include voluntary affirmative action programs in its admission process, a significant portion of its faculty believed that such programs were of considerable social value. This, in conjunction with the natural pride and confidence which comes with being an esteemed university law school with many distinguished and talented legal advocates, would likely create an environment in favor of arguing such an important case on the merits.

Of course, the Washington State Attorney General, not the University Law School, was handling the litigation of this case. However, the University's brief on the mootness issue, which repeatedly states facts which "the law school Dean feels the Court should be aware of,"<sup>43</sup> demonstrates that the law school was not merely a silent party who's interests were being advocated. Instead the repeated focus on what "the law school Dean feels is important" suggests that the law school, including the faculty through their chairman the Dean, were influential in the formation of the litigation strategy.

Admittedly, while this theory may explain why the University felt compelled to argue the case was not moot, it does not explain why they would volunteer facts which undermined their argument. One explanation for this would be a fear that such programs are constitutionally indefensible despite their social

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<sup>43</sup> Appellee's Opening Brief at B5-B6, *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974) (No. 73-235).

utility. The University may have believed that though arguing that the case was moot would be a political *faux pas*, a finding by the Court that the case was moot would serve the University's interests by allowing it to continue affirmative action programs. To the contrary, an argument on the merits could corner the Court into addressing the historically weak constitutional grounds for permitting discrimination based on race. This could possibly lead the Court to find that affirmative action programs are unconstitutional. After all, up until that time the Supreme Court had risked much of its influence by initiating the dramatic end to segregation caused by its courageous stance in *Brown*<sup>44</sup> and the derivative end of legal discrimination based on race. Consequently, the Court may not be so willing to potentially undermine its progress and the principal of racial equality under law it took this country almost 200 years and countless lives to achieve by now endorsing and legalizing discrimination based on race, so long as the beneficiaries were members of the formerly aggrieved class.

These opposing interests may explain the peculiarities of the University's brief on the mootness issue. In fact, given what they knew of the Court's thinking on the issue at the time, in retrospect if the theories offered here are accurate, it is likely fair to characterize the University's litigation strategy as closer to genius, than blunder. Then again, it could just have been the mouse that roared.

#### IV. THE ORAL ARGUMENTS

The oral arguments in *DeFunis* are much like the final chapter in a mystery novel. They reveal many of the true struggles and objectives that were going on within the Court concerning this case. Moreover, just as the plot must be understood before the conclusion can be properly analyzed, to insightfully view the events within the oral arguments, and thereby judge the litigation strategies of the parties, a review of the setting in which they play out is also necessary.

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<sup>44</sup> *Brown v. Board of Education*, 237 U.S. 483 (1954).

On November 19, 1973 the Supreme Court granted certiorari to DeFunis.<sup>45</sup> However, it scheduled oral arguments to take place on February 26, 1974.<sup>46</sup> This date is significant because it is exactly halfway through DeFunis final registration period; beginning February 20, 1974 and ending March 2 of 1974.<sup>47</sup> Remember, the University admitted, in its Brief on the Mootness Issue,<sup>48</sup> that the case would become moot once DeFunis registered for his final law school semester because the University would not cancel his registration after that point regardless of the outcome of the lawsuit.

This makes this period the turning point of DeFunis' fate and the Court's options. If DeFunis registers for his final semester, the Court has a strong basis for finding that the case is moot. If DeFunis fails to register, however, then his next opportunity to register would not be until August of 1974, long after the Court's decision is duly expected. This would mean that the Court would lose its foundation for finding the case moot because DeFunis' ability to register would depend on the Court's decision in this case. The Court would likely then be cornered into a decision on the merits since it already granted certiorari and there was no other procedural issue.

While a ruling on the merits may not seem like such an undesirable resolution at first, history shows that not only was the bench split on the issue of affirmative action, but that many of the Justices were not willing to commit to a permanent position regarding the issue.<sup>49</sup> Although there were one or two who had strong opinions which were not tenuous, as revealed in Justice Marshall's personal case notes housed in the Library of Congress, many of the Justices believed that aggressive affirmative action programs had significant social value in the short term in order to

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<sup>45</sup> See *DeFunis*, 416 U.S. at 314.

<sup>46</sup> *Id.* at 315.

<sup>47</sup> See Appellee's Opening Brief at B5-B6, *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974) (No. 73-235).

<sup>48</sup> See *id.*

<sup>49</sup> See Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 GEO. L.J. 981 at 991-95 (1999).

expedite the closing of the gap between "White" and "Black" America.<sup>50</sup> However, these same Justices stated that their pro-affirmative action stance was only temporary and that it should be extinguished once it has served its purpose.<sup>51</sup> Several Justices actually agreed that affirmative action programs were constitutionally indefensible and that the Court should "leave the constitutional issue alone" until enough time has passed to permit them to measure the success of these programs.<sup>52</sup> Hence, the Court felt that the issue, while passing the ripeness test required by constitutional standing doctrines, was not ripe for the Court. Therefore, the majority of the Court was insistent on avoiding the merits of the case.<sup>53</sup>

Given the Court's preference to avoid the constitutional merits of the voluntary affirmative action programs, it seems that DeFunis would have an uphill climb to say the least. In hindsight, DeFunis may have stood the best chance by continually bringing the Court back to the constitutional dilemma; that the United States Supreme Court could not ignore or turn its back on the discrimination of an individual based on his race after all of their landmark decisions and progress in forbidding this very act. However, as the discussion of the events of the oral arguments will now reveal, the Court tactfully established the required facts for a finding that the case was moot, by controlling the focus and direction of the argument.

The first ten pages of the opening statement transcript contain DeFunis' recitation of the facts, handled by his counsel Mr. Joseph Diamond.<sup>54</sup> Diamond began by establishing DeFunis' qualifications as a law school applicant followed by a review of the

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<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974) (Douglas, J., dissenting).

<sup>54</sup> The Oral Arguments of Feb., 26, 1974, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (No. 73-235).

University's admittance criteria.<sup>55</sup> He established that the University gave preference to minorities by establishing a quota, and that but for this quota, DeFunis' qualifications would have earned his admission.<sup>56</sup> Through this the Court advanced questions to Diamond clarifying that DeFunis was not a member of a minority group, and that this in turn caused the University to deny him admission.<sup>57</sup> Diamond acknowledges that such was the case.<sup>58</sup>

Once these facts were established the Court moved the discussion to whether DeFunis had yet registered for his final semester.<sup>59</sup> Again, this suggests the Court's awareness of how DeFunis' failure to register could force a decision on the merits. Diamond, however, avoids giving a direct answer, stating instead that he is unsure if DeFunis has registered and that even if he had, only the Court's judgment in his favor could ensure that the University would not cancel his registration.<sup>60</sup> The Court then suggests that the same could be accomplished if it withheld a ruling until after he graduated.<sup>61</sup> At this point, Diamond's verbal fumbling suggests he was caught off guard.

Next, the Court instructed Diamond to find out if DeFunis has registered for his final semester yet and to inform the Court.<sup>62</sup> Thus, the Court's intentions become clearer by the minute. Diamond, however, avoids acknowledging the Court's request and seemingly begins an attempt to excuse himself from the task.<sup>63</sup> Clearly irritated by his waffling, the Court questions why he appears reluctant to follow their instruction.<sup>64</sup> Clearly rattled,

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<sup>55</sup> See The Oral Arguments of Feb. 26, 1974 at 3-10, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (No. 73-235).

<sup>56</sup> See *id.* at 11.

<sup>57</sup> See *id.* at 13.

<sup>58</sup> See *id.*

<sup>59</sup> See *id.* at 16.

<sup>60</sup> See The Oral Argument of Feb. 26, 1974 at 16-19, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (No. 73-235).

<sup>61</sup> See *id.* at 19-20.

<sup>62</sup> See *id.* at 16-19.

<sup>63</sup> See *id.*

<sup>64</sup> See *id.* at 19.

Diamond then states that he would, however, only after the Court's harsh tone.<sup>65</sup>

The Court then reminds Diamond that this case is not a class action.<sup>66</sup> This is significant because in contrast to a class action suit, here the Court needs only to find that DeFunis' interest in the litigation has expired to find the issue was moot. To the contrary, if the case was a class action suit, and any of the plaintiffs had an interest in the litigation, the Court could not find the issue moot. Apparently aware of this distinction, Diamond does state that he has two other students with nearly identical claims under his counsel.<sup>67</sup> However, the Court then stresses that nonetheless, DeFunis' case, as before the Bench, was not a class action suit.<sup>68</sup>

The Court then continues by requesting Diamond to verify that if the Court withheld an opinion finding the case moot until after DeFunis' graduation, that he would still qualify to take the bar examination of Washington State.<sup>69</sup> Diamond reluctantly reassures the Court that he would still be permitted to sit for the bar.<sup>70</sup> The Court then informs him that he is impinging on his rebuttal time, so he requests that the balance of his time be reserved for rebuttal.<sup>71</sup> Thus, he was never allowed an opportunity to assert the constitutional question.

Arguing for the University was Mr. Slade Gordon, the Attorney General of Washington State.<sup>72</sup> He begins by stating that he will disregard his planned opening statement given the Court's obvious concern regarding the mootness issue.<sup>73</sup> He states that he

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<sup>65</sup> See The Oral Argument of Feb. 26, 1974 at 19, DeFunis v. Odegaard, 416 U.S. 312 (1974) (No. 73-235).

<sup>66</sup> See *id.* at 20.

<sup>67</sup> See *id.*

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> See The Oral Argument of Feb. 26, 1974 at 20, DeFunis v. Odegaard, 416 U.S. 312 (1974) (No. 73-235).

<sup>71</sup> See *id.* at 24.

<sup>72</sup> See The Oral Arguments of Feb. 26, 1974, DeFunis v. Odegaard, 416 U.S. 312 (1974) (No. 73-235).

<sup>73</sup> See *id.*

believes the case is not moot, however, he reaffirms that the University will not seek to remove DeFunis from the student body, even if the Court were to affirm the Washington State Supreme Court's decision after he has registered.<sup>74</sup> With this the Court utilizes the remainder of the time posing questions concerning the law school's admissions process.<sup>75</sup>

Diamond's verbal fumbling, as recorded in the Court's transcript, strongly suggests that he was rattled by the direction in which the Court took the oral arguments. Understandably, he probably expected the focus of the Court's questions to deal with the policy concerns and constitutionality of voluntary affirmative action programs. After all, a complete explanation of the University's admission process was already in the record. Furthermore, the presumption that the merits would be the expected topic of argument is supported by the fact that the Supreme Court granted certiorari after the mootness issue had been briefed. Both parties likely reasoned that the Supreme Court must have gotten past the mootness issue, reasoning they would not have granted certiorari if they felt that the case was moot.

This said, Diamond still made no attempts to raise the equal protection issue. While certainly even the savviest attorney would understandably be somewhat nervous when addressing the Supreme Court, such is an explanation, not a justification.

In retrospect, it is clear that Diamond should have petitioned the Washington Supreme Court to reclassify the case as a class action lawsuit. This is especially true considering that he admitted during oral arguments that he had two other students with nearly identical claims under his counsel.<sup>76</sup> Moreover, the Supreme Court's request that both parties brief the mootness issue should have been sufficient notice that the mootness issue would be of great concern to the Court. This concern should have prompted Diamond to move to get the case classified as a class action then. Instead, they waited until the Supreme Court found the case moot

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<sup>74</sup> See *id.* at 24-27.

<sup>75</sup> See *id.* at 27-32.

<sup>76</sup> See *id.* at 20.



to attain a class action certification. However, at this late date, the Court would not grant certiorari again. Clearly, Diamond dropped the ball in this regard.

An interesting point worth noting is that in the oral arguments, Diamond reveals that the University was very resistant in revealing why DeFunis was not admitted to the law school other than to state that "other applicants were better qualified."<sup>77</sup> He went on to state that it was not until after the lawsuit was filed and discovery had commenced that they realized it was due to the affirmative action program.<sup>78</sup> These statements raise the question whether Diamond knew the nature and potential significance of the case when he accepted it. Apparently, he may not have been shopping for the perfect plaintiff to litigate the constitutionality of affirmative action. Instead, DeFunis may have been just another lawsuit within his practice, though surely not one he soon forgot.

To the contrary, Gordon, who submitted the University's mootness brief which seemed so surgically crafted, and with his quick minded decision to disregard his planned oral argument and follow the Court's lead, appears quite the savvy litigant. Whether his insertion of the 'registration date factor', which the Court wove into a foundation for a mootness ruling, was by accident or design, will likely never be known. However, in the end either luck or skill served him well.

## V. CONCLUSION

As the discussion demonstrates, the influence of politics was quite strong in this case. From the University who abandoned the conventional defense route of eagerly seeking dismissal at the earliest opportunity, to the Supreme Court which abandoned its then recent aggressive posture with regard to claims of discrimination, politics was controlling. To the contrary, only DeFunis sought a decision on the merits to the very end. Though

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<sup>77</sup> See The Oral Argument of Feb. 26, 1974 at 6, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (No. 73-235).

<sup>78</sup> See *id.* at 6-7.

he failed in that respect, in the grand scheme of the litigation he was successful in his main objective: to avoid being dismissed from the law school. Likewise, the University too achieved its objective by obtaining a ruling that would allow it to continue its voluntary affirmative action program while giving the perception that it aggressively was seeking a ruling on the merits.

Although this case failed to contribute the landmark decision in the field of constitutional law that many expected, it does offer a valuable lesson and rare insight in the field of constitutional litigation, an area where politics and litigation savvy match the influence of sound and consistent legal reasoning.

