Supreme Court of the United States

October Term - 1968

In the Matter of:

CK FREDERICK McKART,
Petitioner;

vs.

ITED STATES OF AMERICA,
Respondent.

Docket No. 403

Place Washington, D. C.

Date February 27, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

*****

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

JACK FREDERICK McKART, Petitioner;	:	
vs.	:	No. 403
UNITED STATES OF AMERICA, Respondent.	:	

Washington, D. C.
February 27, 1969

The above-entitled matter came on for argument at 10:15 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

GEORGE C. PONTIKES, Esq.
11 S. LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioner

FRANCIS X. BEYTAGH, JR., Esq.
Assistant to the Solicitor General
Department of Justice
Washington, D. C. 20530

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 403, Jack McKart, Petitioner; versus the United States of America.

Mr. Pontikes, you may proceed.

ARGUMENT OF GEORGE C. PONTIKES, ESQ.

ON BEHALF OF PETITIONER

MR. PONTIKES: Good morning, Mr. Chief Justice.

May it please the Court: This matter comes before the Court on a writ of certiorari from the Sixth Circuit Court of Appeals, which affirmed a judgment on conviction for willfully and knowingly failing and neglecting to report for induction in violation of section 462, Title 50 Appendix.

The court below found, that is, the trial court, found that the petitioner could not raise a defense of invalid reclassification because he had not exhausted his administrative remedies. This position was affirmed by the Sixth Circuit Court of Appeals, and when the writ of certiorari was granted, as petitioner understood it, there were two questions to be presented before the Court.

One was whether or not petitioner was required to exhaust his administrative remedies under the circumstances; and the other is whether or not the interpretation of section 456(o) of Title 50 Appendix, namely, the sole surviving exemption provision, whether or not the interpretation of that provision by Selective Service was correct.

The facts in this case really are simple and are not in dispute.

The petitioner was born February 15, 1943. He was first classified by Local Board No. 9 of Butler County I-A on February 26, 1963. He was ordered for a pre-induction physical examination on March 23, 1964, the examination to take place April 21, 1964.

He did not respond to that examination, or didn't show up. He was then classified as a delinquent by his Local Board and on May 1, 1964 they ordered him to report for induction on May 11, 1964.

On May 10th he wrote a letter to the Board indicating that he disagreed with the whole concept of Selective Service and at that point the Board replied and asked him whether he wanted to apply as a conscientious objector. In later communications, he indicated that he did not.

The Board also inquired as to why he checked the box on his original classification questionnaire indicating that he was a sole surviving son. There was some additional correspondence and it came to light that his father had died as a navigator in the Air Force during World War II.

Thereupon, on July 27, 1964 he was classified IV-A by his Local Board. That classification remained in effect until February 14, 1966.

On January 30, 1966, Local Board No. 9 came into the

information that Jack McKart's mother had died, the petitioner's mother had died. That left McKart without a "family unit," meaning that he had no sisters and both of his parents were now deceased.

On the basis of that information, the Local Board contacted the State Director for Selective Service of Ohio, who determined that because there was no "family unit" the petitioner was no longer eligible for the sole surviving son exemption.

Therefore, he was reclassified on February 14, 1966. On February 24, 1966 he was ordered for another pre-induction physical examination on March 17, 1966. He is not respond and he wrote and told the Board he would not respond.

Thereupon, he was again classified as a delinquent and, as a delinquent, on March 31, 1966, he was ordered to report for induction on April 21, 1966.

The trial of this matter was held on May 16, 1967 where he was convicted by the lower court and given a sentence of three years in the custody of the Attorney General.

Now, Your Honors, before we proceed into the main question, I think, that is of interest to the Court, I want to say, first of all, we, as petitioners, understood that both the question of the exhaustion of the administrative remedies and the question of the correct interpretation of 456 was before the Court.

The respondent, the United States of America, has

chosen not to brief the question of whether or not Selective Service's interpretation of section 456 is correct. They have not argued that at all. We would, therefore, maintain that they have, in effect, conceded our position, but I will allow them to speak for themselves.

Therefore, I will deal exclusively with the exhaustion question. Further, I feel that this is a question that is of major importance in this case.

Let me start off by saying that contrary to --

Q The Court of Appeals never reached the merits?

A They did not, Your Honor, and neither did the District Court, because they felt it was not necessary, given the posture of the case.

We would like to make clear that we are not asking this Court to overrule its position in United States versus Falbo or Estep versus the United States.

The first part of the Government's brief treats our position as if we are asking the Court to overrule Falbo and Estep, and we are not.

Secondly, we do not think that the fact that the petitioner in this case was, in the words of the Government's brief, deliberately and flagrantly avoiding Selective Service and refusing to have anything to do with Selective Service, really has any bearing on the question of whether or not he had to exhaust his administrative remedies.

I think the question of whether or not he had to exhaust his administrative remedies is a question to be decided entirely apart from his own particular attitude toward Selective Service.

Now, then, as to the exhaustion question, I think first we have to take up the question of whether or not the petitioner had to appeal his original reclassification, and on that question our position is as follows:

First and foremost, if the classification or the reclassification on February 14, 1966 was based upon a completely erroneous interpretation of section 456, we would maintain that this was an act beyond the jurisdiction of Local Board No. 9. On that basis, as has often been said in this Court, there is no need to exhaust. This is an act beyond the jurisdiction of the Board. It is an act totally prohibited by the statute, and on that basis we would maintain, first of all, that there was no need for him to appeal.

Secondly, and concomitantly, we would say that this was a pure question of law; that is to say, the Local Boards and the State Appeal Boards are not competent to make legal judgments. I believe as recently as the case of Oestereich versus the Selective Service System, No. 46 in this Court, Justice Harlan very properly and very incisively pointed out that the nature of Selective Service Boards are such that they are not equipped to deal with judicial questions.

Q What about the appellant process within the system?

A I believe, Mr. Justice, that you will find that the Appeal Boards are made up of the same types of persons as the Local Boards are made up; in other words, if you take Local Boards, then the State Appeal Boards, and finally the National Selective Service Board, which is made up of three members, all three Boards do not have persons who have any judicial competence. They are not equipped to render any kind of judicial decisions whatsoever.

These are persons who are uncompensated. They hold no formal hearings. They require no legal briefs; and again, as Justice Harlan pointed out in his concurring opinion in Oestereich, no lawyers are allowed. In fact, they are specifically prohibited by Selective Service regulation to appear before the Local Boards.

On this basis, we would maintain that the Boards both cannot, in fact, make any judicial decisions; and furthermore, because they cannot, they generally do not, and follow --

Q Well, judicial decisions include findings of fact.

A Quite correct.

Q That is a judicial function, isn't it?

A That is a judicial function, I would agree. Perhaps the word "judicial" is a little bit broad for our position.

I would say they are not qualified to make interpretations of law, statutory constructions, or constitutional decisions. I would say that both are the types of judicial functions that they are not competent to engage in.

Q What makes these Boards, the Presidential Board, for example, different from an ordinary administrative agency? I suppose in an ordinary administrative agency, you would say that the agency should have first shot at even a pure question of interpretation of the statute.

A I would say so, Your Honor, but I think there you have an entirely different apparatus. You have, for example, an adversary process which you do not have in Selective Service. The Selective Service System is not intended to be an adversary process.

The reason it is not intended to be an adversary process is because it is geared to mobilize manpower in a short period of time, so it simply is not equipped, on that basis. Secondly, as part of the adversary process, you have lawyers appearing for both parties, for a number of parties, before an administrative agency. You don't have that in Selective Service.

Q I don't understand the difference in the first aspect of your argument where you stated that they didn't have jurisdiction, and the second that they were incompetent because this involves a question of law. What is the difference?

A Well, I would say that what we are saying is that

the act, the decision on their part to reclassify on February 14, 1966 was an act beyond their jurisdiction, because we contend that the petitioner was entitled to his sole surviving son exemption, even though his mother had died.

Our contention is to the statutory construction question, which is that that was a completely erroneous interpretation of the law and that, therefore, the reclassification was an act beyond their jurisdiction. That is our position.

Q That presupposes that we decide the statutory construction question here.

A That is correct.

Q I see.

Q What would you say if the statute said expressly that before one may raise a matter in a criminal case, he has to have exhausted his appellate remedies within the Selective Service System?

A If the statute made that requirement, I would say that --

Q Are you making a constitutional argument, or what?

A No. I am not making a constitutional argument here, Mr. Justice White.

Q You are making a statutory construction argument.

A We certainly are as to 456. We are arguing that --

Q You are making a statutory construction argument that the statute does not require exhaustion.

A We are further saying -- well, no, we are not saying --

Q What do you think the Court was doing in Falbo -- just saying you have to exhaust, or that the statute required you to exhaust?

A No, I think the decision in Falbo was based, if I may say, on two points: One was the fact that in Falbo, if the Court will recall, Nick Falbo was seeking a IV-D classification as a minister and this is essentially a factual question within the competency --

Q You think this was just a judicially imposed exhaustion doctrine, or was it a statutory construction case?

A I would say, myself, that it is a judicially imposed doctrine. The Selective Service law says that the decisions of the boards of Selective Service shall be final. That was the law up until July 1, 1967, at which time was added the now section 10(b)(3), which this Court has had occasion to construe recently, where it is said that there will be no review until there has been a response to an order to report for induction, either affirmatively or negatively, and then the review will only encompass the question of whether the Board had jurisdiction as a matter of basis in fact.

But there is no requirement to my knowledge within the Selective Service law that requires exhaustion. I would say that Falbo, if you will, judicially imposed the exhaustion

principle on the general grounds, applying to all administrative agencies. I don't think on that point -- that is, as to the appeal process -- they were drawing a distinction between Selective Service and other agencies.

Q You mean you don't think the Court was saying that Congress intended the registrant first to exhaust his remedies?

A In my recollection of the reading of the Falbo decision, Your Honor, I don't think that question specifically, as to the intent of Congress, was ever raised. I do feel that in Falbo the primary motivation of the Court, and the primary thinking of the Court, was based on its conception of the reason for Selective Service, the theory being that because there was mobilization, and this was a system to mobilize manpower, it was necessary that you require an exhaustion; and further, that you require a completion of the administrative process before there could be a defense raised in a criminal prosecution.

You will recall, Justice White, that prior to Falbo and Estep, the courts throughout the Nation read Selective Service as to allow no defense whatsoever to criminal prosecutions. So this was at that time an opening up of the original statutory scheme.

Our position as to the exhaustion is based --

Q You mean what was thought to be the statutory scheme.

A Correct; what was thought to be the statutory

scheme. I stand corrected.

Our position as to exhaustion is really based on the fact that, Number 1, this is a pure question of law, and coupled with the fact that the appellate exercise here would be a pure futility.

The National Director had already indicated his construction of statute 456. The State Director of Ohio had indicated his position. The Local Board had adopted these positions. For the petitioner to be required, under these circumstances, to engage in these appeals would have been pure futility.

The Government makes, or attempts to make, the argument that the State Appeal Board does have the duty under the requisite regulations and statutes to classify de novo. That is the theoretical duty; that is no question about that. But I would say, as we said in our reply brief, it would be a departure from reality for the Government to contend that as a practical matter this occurs when the issue is one of statutory construction.

If the issue were one of a factual determination, there might be grounds for disagreement between the National Director and the appellate processes, but where the Local Board, or the State Appeal Board, or even the National Appeal Board, is faced with the question of pure statutory construction which this case involves, then there is no question in my mind that in 99 out of 100 cases they will follow the National Director.

As a matter of fact, it was recognized by the Court in Sicarella versus the United States, where a State Appeal Board had before it a determination not by the National Director but by the Justice Department in its Conscientious Objector Sector, an opinion that Sicarella was not a conscientious objector because he was not opposed to theocratic war.

At that time the Court found that this was an error of law in the determination by the Justice Department, and then concluded that the Appeal Board probably followed this recommendation because it was an authoritative source and, thereby, reversed the conviction.

Certainly if a State Appeal Board is going to follow the Justice Department, it most certainly will follow the legal opinions of the National Director.

Q Is there any law or regulation that requires any of these boards to follow anybody else's directive other than their own?

A No, there is not. As a matter of fact, the theory of the law, Justice Marshall, is --

Q Well, the second question is, is it not true that on these boards there are lawyers?

A There may or may not be lawyers.

Q What do you mean, there may or may not? They are.

A Not as members necessarily.

Q I mean there are some.

A Well, on some, depending on who in the community --

Q I mean on this one. Who was on this board in Ohio? What was the make-up of it?

A I have absolutely no idea.

Q How can you assume that none of them are trained in the law?

A I can't assume that none of them are, Justice Marshall. I can say, however, that on the basis of the way in which the boards operate, and on the fact that they are required by regulation and statute to be broadly representative of the entire community, that --

Q Aren't lawyers a part of the community?

A Yes, I would very definitely say so.

Q You mean the law just doesn't require lawyers on the committee.

A That is right.

Q But it doesn't bar them.

A It doesn't bar them; no.

Q What does the Constitution require for this Court?

Q This only involved a filing of a piece of paper; right?

A You mean in terms of what, the appeal by the registrant?

Q Yes.

A That is right. That is correct.

Q And he didn't want to do that?

A No. He felt his moral convictions were such that he felt that he could not.

Q What moral conviction is this? I thought you were talking legal. Now you are talking moral?

A What I am saying is, you are asking me the reason why he didn't file his appeal. He felt that this would be co-operating with the system that he felt was evil.

Q Oh, so if you considered a system evil, you don't have to exhaust your administrative remedies?

A Oh, no; we are not saying that at all. We are saying you don't have to exhaust your administrative remedies because, as we have pointed out, this is a pure question of law. The agency had already made its determination and there was no question that the appeal process would be a futility.

Q It is sort of an afterthought, isn't it?

A No, I would say it is the reality of the experience of the agency.

Q Well, if it had been a fact decision, he still wouldn't have appealed, would he?

A No, that is true. But a fact decision is a different matter, as we have pointed out, and that is really the point at which this case is distinguished from the Falbo and Estep kind of rationale, the doctrines embodied in those cases. In those cases, both of them, the boards had to determine

whether or not a person was a minister, and this is essentially a factual determination to be made upon the evidence presented by the individual registrant.

Here, in the case of McKart, the matter is strictly one of interpretation of section 456; namely, was McKart to be deprived of his IV-A exemption because he had no family unit left. We would maintain that where that is the issue, and where the agency -- in this case Selective Service -- had already made up its mind that McKart was not entitled to the exemption, that for him to be required to go through the appeals process would have been a complete futility.

Now we go to the other aspect of the Government's position, which is that independent of McKart having failed to exhaust his administrative remedies, he ought to at least have been required to take a physical examination.

As to that, I call this Court's attention respectfully to its recent decision in Oestereich versus the Selective Service System where, in a case very similar to this one, the Court did not require Oestereich to take a physical examination. If the Court will read the decision carefully in the Oestereich decision, you will see that there Oestereich was not told that before he could obtain his remedy by way of civil relief, that he was required to go in and either fail or pass a physical examination.

As a matter of fact, as far as we can determine -- and I have checked the appendix in Oestereich; I haven't been able

to read the complete record -- but as far as I can determine, in the Oestereich decision, Oestereich never did take the physical examination.

I would say that if Oestereich is not required to take a physical examination as a precondition for giving him civil relief, then certainly I do not think that Jack McKart ought to be required to take a physical examination where it would otherwise be futile for him to exhaust his administrative remedies.

Secondly, I think the requirement in Selective Service law that a physical examination be taken loses its force in this kind of case. I think it has great force in the cases involving men like Falbo and Estep, where there are essentially factual determinations to be made by the boards. There I think the Court, in the interest of maintaining the speed and mobility of Selective Service, and in the interest of not flooding the courts with litigation, there is good reason for this Court to require the taking of a physical examination.

But in a case like McKart's, where the issue is one of statutory interpretation, I think there is a greater interest in having this Court determine the correct interpretation of the law. We are dealing here with the interpretation of Federal law and I would say there is a greater interest in having this Court determine the correct interpretation of the Federal law, and also because of the fact that these cases will occur less often, there is less danger of having the floodgates of litigation opened

I would say finally, in connection with this point, that it is, as we pointed out in our brief, an irony that Jack McKart should be ordered for a physical examination on the basis of a reclassification that we consider patently invalid, because without that reclassification, under the existing Selective Service regulations, he could not be required to take a physical examination.

He was not I-A and he was not shortly to be inducted, which are the only two grounds upon which a physical examination can be required. So on that basis it would strike us as being a most anomalous situation that he ought to be barred from raising the incorrect statutory interpretation by the fact that he did not take the physical examination which, in itself, could not have been required had the reclassification not been made.

I want to reserve some time for rebuttal. Thank you for your kind attention.

MR. CHIEF JUSTICE WARREN: Mr. Beytagh?

ARGUMENT OF FRANCIS X. BEYTAGH, JR., ESQ.

ON BEHALF OF THE RESPONDENT

MR. BEYTAGH: Mr. Chief Justice, may it please the Court:

At the outset, petitioner's argument strikes us as a somewhat curious one because he wants us to assume, as I understand it, that a question of statutory construction either has been or will be or should be necessarily decided in his favor.

Then he builds upon that assumption.

I should state that, as we pointed out in our brief, Footnote 10 of the Government's brief, it was not our intention to concede, as petitioner suggested, anything regarding the construction of the sole surviving son exemption; rather, as we pointed out, neither of the courts below reached this issue and it seems to us that, in light of that fact, and in light of the fact that it is a question of first impression on which no other court has passed, that it is not an appropriate issue that petitioner can assert and raise here.

Both of the courts below, as petitioner has noted, found it unnecessary to reach that issue because they decided the case on the exhaustion question.

I think that it is apparent, despite petitioner's strenuous efforts to avoid it, that what he really seeks here is an overruling of Falbo. He says that is not what he wants; that he has points in his case that are distinguishable from the situation involved in Falbo and Estep; and that, therefore, the Court doesn't have to reach the question of whether the Falbo doctrine is still good law.

It seems to us that, at the outset, the grounds the petitioner seeks as making his case a peculiar or unique one are readily answered. These grounds, as we understand it, are two: One is that the question involved here is a matter of law or statutory interpretation, and that the agencies of the Selective

Service System, as I take it, from the Local Board through the State Appeal Board, all the way up to the National Appeal Board, are either incompetent, unqualified, or for some other reason unable to pass on such question.

It seems to us that this is simply not reflective of the fact. The question was raised about whether there are any lawyers on Selective Service Appeal Boards. The answer to that is that the regulations themselves require that one member of each State Appeal Board be a lawyer.

As a matter of fact, as to the National Appeal Board, the Chairman himself is a lawyer. He is a Probate Judge.

Moreover, it is a little bit difficult to understand how you can say that certain issues are simply matters of law. Every question of classification involves questions of law, what the boards are seeking to do is, pursuant to the regulations in the statute as they interpret and construe them, to give each registrant the appropriate classification that Congress has determined that he should have.

They work against the background and in the framework of the Selective Service Act and the pertinent regulations. There is no other way they can operate.

Insofar as the statute itself is concerned, it is not silent on this subject. It says that Local Boards shall have the power within their respective jurisdictions to hear and determine, subject to the right of appeal to the Appeal Boards

herein authorized, all questions or claims with respect to the inclusion for, or exemption or deferment from training and service of all individuals within the jurisdiction of these boards.

There are similar provisions that relate to the de novo classification by the Appeal Board and the National Board.

So it seems to us that for several reasons, petitioner is not on sound ground when he suggests that matters of law are wholly without the competence of these boards. As a matter of fact, this Court in Cox versus the United States, in 332 U.S., noted that questions of classification are matters of law for the courts to decide, not the jury.

It seems to us that it is logical to conclude from that that when these Local Boards and the State Appeal Board and the National Appeal Board are passing on these questions, that necessarily they are involved in legal issues. I realize that there is a continuum that exists here. Some questions are more peculiarly factual in nature and some questions more appropriately legal in nature.

But what I am seeking to point out is that as a Local Board faces a question of classification, it has to face that issue against the backdrop of the Selective Service Act and the pertinent regulations. Those are laws insofar as I know and can determine. Therefore, to say that they have no competence to pass on these matters, it seems to me, is simply wrong.

Petitioner also suggests that on that point, as was

noted by Mr. Justice White, in conclusion on the point of passing on the question of statutory interpretation or law, it does seem to us that it is not inappropriate here to give the administrative agency charged with the administration of this Act a first opportunity to pass on an important statutory question.

Petitioner concedes that this question is one of first impression. The Act was amended in 1964. There is a great dearth of authority on the meaning of the sole surviving son exemption.

Q But this isn't a question of first impression with respect to other administrative agencies, I gather.

A I am unclear by what you mean by that.

Q It may be a question of first impression vis-a-vis the Selective Service System.

A Yes.

Q But certainly in other contexts, it is the usual rule, isn't it, that the administrative agency view should be obtained?

A That is what I am suggesting should obtain here; yes, Your Honor.

The question of first impression that I referred to is the statutory question of the proper construction of the sole surviving son exemption which, for the first time in 1964, included a reference to fathers, which it had not included before.

Q I misunderstood you.

A Nor do we see anything in the cases that indicates any distinction in this regard. We submit that, therefore, it is not inappropriate that the Falbo doctrine be construed to require that on all matters of classification, the administrative agencies and the administrative process be given an opportunity to consider these questions in the first instance.

They weren't given this opportunity here. Petitioner's position is simply that he didn't want to have anything to do with the Selective Service System. The record makes this clear. He repeatedly said that he just didn't want to have anything to do with it and wrote the Board and told them so.

He didn't claim sole surviving son exemption himself. The Board conferred it upon him.

Q Perhaps he just inadvertently mentioned that his father had been killed in World War II.

A He mentioned this, Your Honor, and the Board then responded and sent him a conscientious objector form because he had also indicated that perhaps he had some reasons for filing that sort of claim. He wrote back and said no, he didn't, and then wrote back and also said that he didn't even know if he was a sole surviving son, but his father had been killed in World War II.

The Board then proceeded to inquire further and obtained information that confirmed the fact that he was a sole surviving son because his father had been killed, as petitioner

stated.

Q And his mother was still then alive.

A And his mother was still then alive; yes, Your Honor.

Q Then there is the suggestion that the construction of the statute might depend upon whether or not there are other relatives alive -- grandmothers, grandfathers. Is it clear what the facts are in that respect?

A It is not wholly clear. It is clear, as I recall, that one set of grandparents is alive, and at least one grandparent on the other side is alive. I have no knowledge of the relevance of this and I have no way of knowing what relevance the Appeal Boards might --

Q Might give to it. But where does that information come from?

A There is some information in the record. There is testimony in this regard that was taken at trial.

Q At the criminal trial.

A At his trial, and it appears at pages 15 and 16 of the appendix. Now, the testimony was, as I recall, by his uncle at the criminal trial.

The other aspect of petitioner's position, that there is no need to reach the validity of the Falbo doctrine here, is that it would have been futile in any event to pursue his administrative remedies.

We think that is simply not accurate on the facts. The administrative remedies that were available to him were, in the first instance, an appeal to the State Appeal Board. Further, from that decision, an appeal to the National Appeal Board if (1) the State Appeal Board had been divided; or (2) even had it not been divided, he could have asked the State Director to take the case to the National Board on his behalf.

As the Court may recall, this is the situation that exists in the Clay case, and there has been a consistent position taken by the National and State Directors that questions of importance in the System will be taken to the National Board on behalf of registrants, even though they don't have an appeal as a right.

It seems to us that it would not have been futile here for petitioner to seek to exhaust his administrative remedies. He refers to the fact that advice was given by the National Director and the State Director to his Local Board in response to an inquiry to the effect that the pertinent section of the Act, section 60, should be construed as not allowing his statutory exemption under the circumstances.

Well, that is true. But it is also true that the National Director and the State Director are different people from the State Appeal Board, and certainly from the National Appeal Board. It is clear by statute that the National Appeal Board is an independent body, responsible only to the President,

and exercising the powers given to the President under the Act as his direct delegate. It is not responsible to the Selective Service System or to the Director in any way.

The State Appeal Boards similarly are not required to follow bulletins, advice, or whatever, given by the National Director or the State Director. They are required under the law to consider de novo the propriety of an individual's classification.

So it seems to us that the fact that informal advice was given by the National Director and the State Director on this matter is not convincing.

There is one other aspect that petitioner seeks to rely upon. The National Director promulgated an operation bulletin in August of 1964, shortly after the enactment of the amendment which included for the first time fathers within the category of those persons whose death may trigger the sole surviving son exemption.

That operation bulletin essentially took the position that petitioner here argues as to the substantive issue.

Q That the petitioner here what?

A That he argues on the substantive issue; that is, that the basic theory is one of preservation of lineage rather than of compassion, or comfort, or whatever.

It seems to us that this is not convincing, either. The very fact that the bulletin was withdrawn so promptly indicate

that there was considerable uncertainty on the part of the National Director, and moreover, all of the considerations that I have mentioned just previously regarding the respective roles of the National and State Directors and the State Appeal Board and the National Appeal Board are applicable here as well.

Q This conviction was for a failure to report for induction or failure to report for a pre-induction physical?

A Failure to report for induction.

Q With respect to the physical exams, the system is changed since the days of Estep and Falbo, has it not?

A That is correct.

Q In those days you didn't get any physical until you went down to report for induction; isn't that correct?

A That is correct. The system was changed, as I recall, late in World War II, shortly after Falbo. It may have been prior to Estep. It became clear that it just wasn't workable because you would get all these men down at the induction center and then --

Q Half of them would be unqualified.

A So the system since that time, with only minor changes, has been the one that they adopted then of pre-induction physicals roughly 60 to 90 days prior to the proposed induction date and then if a man passes it, he is given an order to report for induction. If he fails it, of course, he is classified IV-F.

Q Then at the time of induction there is another

physical, I suppose, to see if there has been any change.

A That is correct. That is pursuant to Army regulations, not Selective Service regulations.

Q That is an Army regulation.

A At the induction station; yes, Your Honor.

Petitioner here received two orders to report for pre-induction physicals. He reported for neither one of them. We point out that one aspect, at least, of the Falbo doctrine is that an individual potentially subject to the draft is required to appear for a physical examination simply because a result of that examination may be to preclude his induction.

Petitioner, by failing to report, failing to complete the administrative processing that is required, precluded any possibility of that aspect of the Falbo doctrine being relevant here.

We think, then, that petitioner's challenge has to be to the Falbo doctrine itself. That doctrine, as the Court well knows -- it referred to that doctrine, as we understand, with apparent approval in the Oestereich case, and Mr. Justice Harlan also referred to it in his concurring opinion in Oestereich.

Falbo and Oestereich were also cited in the recent Gabriel decision. That doctrine essentially is that administrative remedies provided within the Selective Service System must be exhausted by a registrant in order for him to be in a position to challenge his classification in court, should he fall

subsequently to report for induction.

The premise on which this doctrine is grounded is not one foreign to administrative law generally. It seems to us that it has peculiar applicability in the Selective Service context because the basic, underlying notion of the Selective Service System, as the Court recently in O'Brien noted, is the prompt mobilization of men when necessary in time of war or national emergency to serve the country.

We recognize that if Falbo is overruled, each and every registrant is not going to simply defy the system, as petitioner did here, and wait until he is prosecuted criminally in order to raise whatever claims he has as to the validity of his classification. But there will be some incentive in that regard provided, and in a time of national emergency, in a time of war, it seems to us that if Falbo is overruled, there are some real hazards presented to the effective operation of the system.

Q Didn't Falbo proceed on the assumption that this is what Congress intended by providing some finality to Selective Service decisions; that is, at least Congress intended to require exhaustion?

A I think it is clear from a reading of Falbo that that is exactly what the Court was doing -- attempting --

Q What section was that -- 11?

A It was attempting to construe -- I think, rather, the overall Act, because the reference is --

Q Is there some specific provision in the Act which refers to finality?

A Under section 10(b)(3), as amended, the Congress provided that such review, judicial 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.

Section 10(b)(3), as the Court noted in Oestereich and Gabriel, also contemplates that review should occur at that point in time in the process where it would avoid, as far as possible, the interruption of the processing of the system. In Oestereich, the Court found that Congress did not intend that the preclusion on pre-induction review be applicable in all situations. It said that where a specific statutory exemption that was clear and unequivocal and undisputed existed, that it read the Act as not requiring the registrant to go through the entire process before asserting his claim. Therefore, it found that pre-induction review was available.

Petitioner suggests that the position we take here is somehow inconsistent with Oestereich. We take exception to that. As I noted previously, the Court did refer in Oestereich, with apparent approval, to the exhaustion doctrine. The Court noted at the outset of the Oestereich opinion that Oestereich had taken his administrative appeals and lost.

Petitioner says that Oestereich was not required to

take a physical. Well, it seems to us that when you have a situation where pre-induction review is available, a somewhat different approach necessarily has to be taken as to what remedies need be exhausted. Oestereich exhausted those remedies that were relevant to the question of whether his entitlement to the statutory exemption existed or not.

Q Exhaustion can mean two rather separate things in this area, can it not?

A I think that is right. The exhaustion that we are referring to is the pursuit of administrative remedies prior to --

Q Which Oestereich did do.

A Which Oestereich did do.

Q At least the administrative remedies; and the other side of exhaustion is that you can't get pre-induction review.

A That is correct. It seems to us that the Court in Oestereich was simply construing the intendment of Congress regarding provisions that were apparently in some conflict. In Gabriel, the Court made clear that the general preclusion on pre-induction review was applicable and that there were only certain exceptions that would be permitted.

We recognize that there are certain limited exceptions that have been noted over the years to the exhaustion doctrine. Petitioner refers to a variety of these and notes the cases in

which they have been considered. I would just like to refer quickly to what these are.

One notion is that you don't have to exhaust when it is simply infeasible or impractical to do so. One individual in the Donato case was off on firefighting duty during the period in time during which he had to take his administrative appeal and the Court there said it should be excused, because it just wasn't practical for him to do so.

Another relates to a serious procedural irregularity within the system itself, in the Wills case, which the petitioner refers to at some length. As we read it, that is the basic ground on which the Court of Appeals said that it could excuse exhaustion. In the Wills case, the notice of delinquency was not sent to the registrant at the appropriate time, and, therefore, he was in a disadvantaged situation with respect to his classification because he wasn't apprised in a timely fashion.

That sort of procedural irregularity has also been allowed to excuse the exhaustion of administrative remedy.

In the Wolff case, the Court of Appeals for the Second Circuit discussed at some length the Falbo doctrine, the exhaustion of remedies doctrine in the Selective Service context and found it inapplicable where serious First Amendment questions were involved.

That involved an attempted delinquency reclassification of registrants for sitting in at a Draft Board in Ann Arbor,

Michigan, and the Court there found that questions that they raised under the First Amendment were comprehended under this Court's doctrine in Dombrowski versus Pfister and, therefore, an appropriate exception to the exhaustion rule could be permitted.

Another exception that has been noted has to do with whether the individual is aware of his administrative remedies, as will be developed at greater length in the subsequent case, DuVernay.

The procedure that is established here is one that seeks to make registrants amply aware of what rights they have. The Selective Service Classification Certificate itself we have reprinted in the appendix, pages 62 and 63. It sets out all the detailed procedures that need be taken and the time within which these procedures need to be followed.

I should note that subsequent to the operative facts in this case, the pertinent regulations have been amended so that now the registrant has 30 days instead of 10 days within which to take an appeal to the State Appeal Board, the feeling being that some of these cases relating to exceptional circumstances have perhaps resulted because of the short period of time that had previously been given.

We make a separate point of his failure to report for pre-induction physicals. As I noted, that is a precise aspect of the Falbo holding itself. Falbo, of course, was clarified

and confirmed in Estep. Those cases, bracketed together, stand for the exhaustion doctrine that we here rely upon, and the courts below relied upon. But it seems to us that it is a somewhat separate and different thing.

As the Court of Appeals in the Irons case recently noted, as we point out in our brief, large numbers of registrants are unfortunately found not to be physically fit when they take a physical. Had petitioner taken a physical, we have no way of knowing what his physical condition is, but he may well have been found not to be physically fit and, therefore, there would have been no occasion to reach any of the questions that he now seeks to present.

Q Did he receive a notice of the requirement to report for a physical examination?

A Yes, Your Honor. The record clearly reflects that. He was notified on each occasion where to report and when to report and he simply responded by saying that he did not want to have anything to do with the system.

Q Is it necessary to the proper functioning of the system that the Government do make actual getting into the Army a condition to take the physical examination?

A I think it is important, as Justice Stewart pointed out subsequent or shortly after Falbo, that the system was changed so that pre-induction physicals are now required. The purpose of that is so that each board will know ahead of

time what individuals it has available, physically qualified individuals available, to meet each monthly call as it occurs. So it seems to us that it is an important aspect of the system. Otherwise, the board has no way of knowing what this individual's situation or status is.

Therefore, we think there is an independent ground here. As petitioner notes, he wasn't charged with failure to report for a physical exam. We realize that. But in the context of the applicability of the exhaustion doctrine, our point simply is that this is another aspect that we think should be taken into account.

Q What is the chief disadvantage that you see would result should the petitioner here prevail?

A If petitioner prevails on the broad ground that the Falbo doctrine should be overruled and, therefore, that exhaustion of administrative remedies is no longer required, it seems to me that there are at least two principal disadvantages that would result.

One, the operation of the Selective Service System itself would be subject to serious disruption because individuals would not be required to pursue remedies through the system. This elaborate machinery that Congress and the President have established to consider and pass upon claims to classification could be deliberately and effectively bypassed. Indeed, that is what petitioner sought to do here, we think; simply deliberately

bypass this whole system.

Q Would that greatly delay you?

A It seems to us that it could very well create very serious delays and disruption because there would be no way of knowing if individuals did not pursue their administrative remedies and if individuals did not report for pre-induction physicals, from month to month those individuals who were available.

The system is set up not to put people in jail and to prosecute them for violations of the Act, but to properly classify and induct them into the service. It seems to us that the whole administrative machinery is directed toward that purpose of insuring a proper classification and insuring that there is a steady, continuous flow of manpower when needed for the Armed Services.

It seems to us that if the exhaustion doctrine is abandoned, that will be interfered with.

The other aspect, it seems to us, of this is simply that when the administrative agencies are bypassed, the load of litigation in the courts is commensurately increased. The courts are going to be forced to pass on these questions without any gloss of administrative interpretation or construction, and without screening and weeding out of cases that would be taken care of through following the administrative process.

Q In Falbo and Estep, they were dealing with a

section of the statute which is quoted in Estep, 10(a)(2), which says that "Decisions of local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe."

Would you say Falbo and Estep really construe this language to mean that at the very least, before you get judicial review, you should exhaust these appellate procedures that are prescribed by the President?

A I think that is essentially what the court did in those cases.

Q Is that section still in the statute and remains unchanged?

A As I recall, that section is part of a long provision that --

Q But that language is still in the statute?

A That is correct. It was, of course, amended, the whole long provision, 460(b)(3).

Q But this language was left identical.

A Yes, Your Honor. As a matter of fact, the Congress ratified this Court's construction of that language in the Falbo and Estep cases by providing that the no-basis-in-fact standard should be the one that is applied in judicial review here. That, of course, is the provision that, the language that Estep adopted in delineating the standard.

Q If that suggests that the exhaustion doctrine

under Falbo and Estep is simply an interpretation of a section that Justice White referred to, why isn't that the end of this case? Ordinarily, we don't overrule cases that turn on our interpretation of statutes that Congress can change overnight if it chooses to.

A I would like to think that that is the end of the case.

Q Why isn't it the end of the case?

A As I understand it, it is not the end of the case because over the years certain exceptions have been carved out to this doctrine, and petitioner suggests that his case fits within some of these exceptions.

Q I see.

A Our position is twofold: One, these exceptions are not applicable here; and in any event, the Falbo doctrine should be upheld.

MR. CHIEF JUSTICE WARREN: Mr. Pontikes?

REBUTTAL ARGUMENT OF GEORGE C. PONTIKES, ESQ.

ON BEHALF OF PETITIONER

MR. PONTIKES: Thank you.

May it please the Court, I just want to cover some of the matters that were raised by the Government.

Again, I must insist to the Court that we are not seeking to overrule the position taken by this Court in Falbo and Estep.

It seems to us fundamental that there is a crucial distinction to be drawn between the Falbo-Estep situation where a local board makes certain factual determinations, comes to a conclusion, and then there is a requirement that there be an exhaustion and the taking of a physical.

In that particular case, you do not have a question of pure statutory construction that you have in this case. There is no factual dispute in this case whatsoever. There is no factual decision that the system had to make at all. It was a pure question of law.

Further, as the courts have recognized, where an administrative process, or the taking of administrative appeals would be futile, then the aggrieved party is not required to take those administrative processes.

Now, for the Government to tell us here that the State Appeal Board is going to operate independently of the directions of the National Director is really to fly in the face of reality.

I call your attention to the Wolff case. Specifically in the case of Wolff, the Second Circuit Court of Appeals found that the national -- as you recall, in that case the registrants who filed the suit asking for pre-induction relief had not exhausted any administrative remedies whatsoever. They had been reclassified by their local boards, and they thereupon went in asking for a declaratory judgment to declare that their classifications were invalid and based upon unconstitutional considerations.

In Wolff, the Court found that the National Director had clearly stated his position and they found other conditions to indicate that the system had already made up its mind. We would say the same conditions apply here. The system had made up its mind, and for the Government to tell us now --

Q That is with respect to who is a sole surviving son.

A Correct. Very much, Justice Stewart. I would say that the possibilities of a State Appeal Board overturning or flying in the face of this construction of the statute would be, if not impossible, certainly practically impossible.

Secondly, as far as the case reaching the National Selective Service Appeal Board, I would point out to the Court that by the statistics of the Government itself, there were only 479 split decisions heard by the National Selective Service Appeal Board. A split decision is a decision where there is a dissent on a State Appeal Board. This is in the first six months of 1968.

In fiscal 1967, the State Appeal Boards heard 119,167 cases. So if you take those two figures and put them together, you get an idea of how possible it is, first of all, for this case ever to have reached the National Appeal Board.

Secondly, even though the cases indicate some disagreement with the National and State Director, there is no showing that the cases decided by the National Board were decided on

questions of legal interpretation of the statute. We would rather assume that they were questions in which there were factual determinations made in disagreement with the National Director and the State Director.

Q Does it have any bearing that all of the points that are being argued now, in the actuality of this situation, as far as your client is concerned, were purely beside the point? He just said he was washing his hands of the whole Selective Service System.

A That was the point that I made at the outset.

Q I realize that. Is that just an ad hominem argument, or has it got some bearing on this?

A I don't think the fact that the petitioner disliked the Selective Service or had moral convictions about its operations and felt compelled not to cooperate with it, that that fact has any bearing on whether he had to exhaust his administrative remedies, because it seems to me the question of exhaustion is dependent on issues that are wholly unrelated to his particular attitude.

Furthermore, as far as forcing some kind of compliance by not upholding the petitioner's position in this case, petitioner was not reading Supreme Court decisions. His decision not to cooperate was based wholly upon his own moral considerations. It had nothing to do with what might happen to him, so that is the reason I don't think the two are related at all, in

any sense, either practically or legally.

Q Let us assume that his mother was still alive but he just didn't do anything, didn't even inadvertently inform his Local Board that his father had been killed in World War II.

A All right. There I think we have the Pickens versus Cox situation.

Q What is that?

A Which is a sole surviving son drafted into the Army without giving any information to his board whatsoever, and thereupon, after court martial, seeking by way of habeas corpus to be released on the grounds that there was no jurisdiction to take him into the Army in the first place.

There I think the Pickens court rightly held that under those circumstances he had waived his right. I point out to the Court here --

Q Let us say even here, if he had not gotten so far as Mr. Pickens or Mr. Cox, whichever it was, but had simply refused to be inducted, had refused an induction order, and had then been criminally prosecuted, as your client was, and then had said, "Look, I am a sole surviving son." Then the Government would have responded, "Well, you didn't pursue any administrative remedies."

What would the story have been there?

A I think there it wouldn't be a question so much of exhaustion, but of the fact that he had completely waived his

right to even claim that exemption because he had not supplied the information at all.

Q Isn't this pretty close to that kind of a case in the light of my brother Harlan's question?

A I would say no, for the following reason: When he was asked to supply this information, he did not feel that this was a violation of his moral principles, so he did supply the information.

If you will look -- I don't have the exhibit number handy -- but you will note when he was sent a specific questionnaire asking for the name of his father, the date of death and other relevant information, all of this he readily supplied because he felt this was not a form of cooperation which would violate his moral position. So in that sense he did not waive it and, therefore, I don't really think the issue is in the case here.

Q What worries me is that you say you are absolutely certain that an appeal would be futile. Do you also say that it is absolutely certain that the examining doctors will find him physically fit?

A Certainly not, but this Court faced that same position in Oestereich, Justice Marshall, and there they did not require Oestereich to take a physical.

Q I just wanted to know whether you were going to go that far.

A No.

Thank you. My time is over.

(Whereupon, at 11:20 a.m. the argument in the above-entitled matter was concluded.)