Supreme Court of the United States

October Term, 1968

In the Matter of:

RAYMOND JOSEPH DuVERNAY, Petitioner; vs. UNITED STATES OF AMERICA, Respondent.	**Docket No.** 814

Place Washington, D. C.

Date February 27, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

RAYMOND JOSEPH DuVERNAY,

Petitioner;

vs. No. 814

UNITED STATES OF AMERICA,

Respondent.

Washington, D. C.
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The above-entitled matter came on for argument at 11:20 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, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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Department of Justice
Washington, D. C.

P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 814, Raymond Joseph DuVernay, Petitioner; versus the United States.

Mr. Smith?

ARGUMENT OF BENJAMIN E. SMITH, ESQ.

ON BEHALF OF PETITIONER

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

This is an appeal from the Fifth Circuit by a young black Selective Service registrant from a conviction in the Eastern District of Louisiana for refusal to be inducted.

I might say for the benefit of the Court that this particular registrant went all the way through the system up to the point of where he was asked to be inducted, and he said that he was not going to be inducted.

He was then charged by indictment and, of course, tried for this offense in Federal Court and was convicted. The thing that happened was that his defense for the criminal charge was that black people had been excluded from his Selective Service Board, and in the midst of the trial of the case below, we discovered that the Chairman of this black person's board was the President of the United Ku Klux Klans of America, a man named Jack Helm.

At the same time, we found out in the process of trying the case that the defendant had been denied an appeal by

his board when he tried to tell them that he had a hardship deferment. It turned out that he and his mother were the sole support of themselves and six brothers and sisters.

When the Fifth Circuit decided this case, it said that the defenses were foreclosed because he had failed to exhaust his administrative remedies below.

But I say to you that that can't possibly be, because the boards below, the board in Louisiana, Board No. 42, was perfectly incompetent to determine whether or not it was properly composed, whether its Board Chairman should have been the Chairman, or whether the Board should have been dissolved because of the fact that Negroes were excluded from service on the Board.

These are constitutional issues which the Board has no jurisdiction over, and which could not be raised before the Board and would have to be necessarily raised before the court.

If we follow Judge Thornberry's opinion in the Circuit, it would necessarily mean that these serious constitutional issues could never be raised because we know they can't be raised before the Board. The Government, in its brief here, agrees with us on that point. They cannot, then, under the Thornberry opinion, out of the Circuit, be raised in the Federal Court. We know that that is impossible. If we cannot raise it in Federal Court, it simply means that this defendant would then go to jail for five years, in this case, without ever having been able to raise these serious constitutional questions in any court of

competent jurisdiction.

I think Mr. Justice Murphy, when he wrote the concurring opinion in Estep, put it very well. He said that if, at some point, these remedies are not available, then what is going to happen is that these people are going to -- it violates due process.

"To sustain the conviction of the two petitioners" -- and this was Estep -- "in these cases would require adherence to the proposition that a person may be criminally punished without ever being afforded the opportunity to prove that the prosectuion is based on an invalid administrative order. That violates the most elementary and fundamental concepts of due process of law."

Actually, I think what we are trying to do is raise a constitutional issue, the fact that Negroes were excluded from the Board; that the Chairman was a Klansman; that he was denied an appeal.

The fact that these facts were not raised in the Board below, in the Draft Board, is absolutely irrelevant. They would not have anything to do with this classification. If he had waived a right that related to classification and we were up here talking about classification, that would be one thing.

But we are not talking about this man's classification. We are talking about his constitutional rights; talking about the composition of that Draft Board.

What would be the effect, I ask the Court, of saying

to this particular defendant, "You can never raise those issues in the Board, and you can never raise those issues in this Court"? What would be the effect on the Selective Service System, because the Selective Service System itself is based upon the fairness of the system, and presumably upon the knowledge by the country that the system operates in a fair manner; that it reflects the qualities of life in America; that it reflects the characteristics of the community where the people live who have to serve; that they are drafted by their friends and neighbors.

Here we find draft boards -- and we all know it in Louisiana -- where not one Negro had ever served, and they had an open Klansman on the Board and they knew it, but they didn't do anything about it until after this case, when they got rid of him.

But the confidence of the country would be shaken in these boards if we can't raise these issues. I say that we are required to do it. We can't be foreclosed to do it. The Circuit opinion in this regard has got to be overruled. I can't see how the system can survive, knowing, where the country knows, that it is an illegal system, that it operates in open violation of the Thirteenth and Fourteenth Amendment.

What does the Government say in defense of this? They say, "Well, this is like a malapportioned legislature. This is really not too bad, you know."

But actually what they are saying, and it would violate

the separation of powers if we came in and tried to reform the system this way, or raise this question. They don't want this question raised before this Court.

What they are saying is that the Executive can be just as unconstitutional as he wants to and he can get away with it. The Thirteenth and Fourteenth Amendment applies to everybody but the Executive. It doesn't apply to him.

Now let's talk about the practical effect of a young, black militant, and the record shows that that is what the case was here. This was a young man, who had been over to Mississippi, who had involved himself in the marches in Mississippi, had been arrested for civil rights activities, had gone down and tried to join the Army at one point, and they wouldn't take him because he had been arrested for civil rights activity, and they had the arrest on his record.

But he is good enough to be drafted, and he is good enough to be drafted by a Board with the President of the United Ku Klux Klan on it.

What kind of consideration is he going to get from that kind of a Board? Nothing. If he has an appeal he wants to make to that Board, if he has a reconsideration of his case to be made to that Board, and he did in this case, what do you think that Board is going to think about him?

You read the minutes in this record of how the Board treats policemen, firemen, people who come in there who work for

Union Carbon & Carbide who have people going for them.

He comes in with his mother and says, "For the first time in my life I have a good job. I work for the Poverty Agency. I make $275 a month. I give $70 every two weeks to my mother."

This is what he needed to do. This is what he was telling them was happening. Do you think the Board paid any attention to that?

Twice even his employer went down and said, "Look, he is working with the poor in the City of New Orleans. It is more important, we think, for him to work in the lower Ninth Ward with the black poor than it is for him to be drafted."

No. No.

Q Did the Board have the power to do anything at the time that he brought that to their attention?

A Mr. Justice Stewart, 1625.2 says that the Board has discretion to reopen after a notice of induction is issued. We all know that. The Government would say "You are powerless." That is not true.

If you look in the minutes of the Board that we put in our brief, they had a policeman come in there after induction, and you know what they did?

Q Delayed his induction.

A They wrote to the State Director and asked him to order the induction delayed.

Q But they didn't reclassify him.

A They didn't reclassify him. But it is just a backhanded way of giving him a deferment.

Q I know.

A But they have the power to reopen the case if they find circumstances over which this defendant had no control.

Q Had no control. But you are not alleging that, are you?

A Yes, sir. I say in the brief --

Q What circumstances over which he had no control?

A The way I put it -- you know, take it or not -- but I think it is valid: I say -- I think I have put it on page 33 -- I say they reopened this case, Mr. Justice Stewart. I say they reopened it when they took that first letter of April 27th. That is DuVernay #3, or something like that.

I say that they did do this and in all likelihood the Board made the perfectly reasonable assumption that a 20-year-old youth who finds himself with the first real steady job in his life will be compelled by his conscience to support his mother and six brothers and sisters. The mother had been deserted by his father many years before.

I say that this was a change in circumstances of this young man, and it was in effect because he had to support these children; that it was beyond his control. I see nothing unreasonable in that interpretation of 1625.2.

Certainly we have to recognize that he was impelled to

a certain course of action and he was fulfilling his responsibilities to his family. I say when that sort of thing happens, and he goes right through every remedy -- we don't have a Falbo problem; we don't have an Estep problem -- we have as much right to exert Thirteenth and Fourteenth Amendment principles as Wolff did First Amendment principles in his case.

They are no less dear to us, and no less important.

Q This Ku Klux Klan leader was a member of the Board, I guess what -- Chairman of the Board?

A He was Chairman.

Q At the time your client was reclassified I-A; is that right?

A And he was also Chairman when my client was going up there and asking for this exemption.

Q He was. I saw some little difference of opinion about that in the briefs; that he had left by the time your --

A My recollection is -- I may be wrong -- but I am pretty sure that he was there. I remember him leaving.

Q Well, it is a matter of fact, although you were not allowed to show that, were you? Did you make an offer of proof?

A I didn't make an offer of proof. They cut me off in the questioning. I guess I should have, but I didn't. That was it. I was prepared to show not only that he was a Ku Kluxer and everybody knew it, but he didn't even live in New Orleans,

effectively he didn't. I didn't raise that, so I can't argue it, but we all knew it.

Q He didn't what? I didn't get that.

A He didn't even live around there. He lived over in Bogalusa, over there in Washington Parish. That is where his Klan activities were.

Q Under the statute, as I understand it, members of the Draft Board have to be residents of the county; is that right?

A That is right. He was out in -- he maintained a residence there --

Q Of course, in Louisiana you have parishes, not counties.

A Well, it is the same thing. A parish is a county. We use "parish". It is a county.

He maintained a residence in New Orleans Parish, but also, his main business, and where he lived, was with those Ku Kluxers over in Bogalusa.

Q But you are not --

A I didn't get to that. I was foreclosed. I was ready to go after him, but I wasn't given the opportunity.

Now, the Government makes a whole lot of business about this failure to postpone or to appeal this I-A classification of January 16, 1966. Of course, I just call the Court's attention to the fact that that is really irrelevant here, because when

he got classified in January from I-A to II-S, he had nothing to appeal from. He was properly classified in I-A at that time. He was a young man who had dropped out of school; he was not supporting anybody. So there was no need to appeal. So that can't be said to be a reason below. It doesn't relate at all to the composition of this Board.

Then I have to point out to the Court most respectfully that this man had no way of knowing who his Chairman was, what his activities were. He had no way of knowing whether that Board was segregated or whether it had any Negroes on it or not.

He asked to go before the Board, and at one time he was tentatively promised a chance to go before that Board, but they took it back and wouldn't let him go, so he has never even laid eyes on the Board.

So I say again, how could he know? We didn't know half of this case until we started discovering it in the criminal trial. There was no way we could get the information ahead of the criminal trial. I subpoenaed those records in the middle of the trial, they bring them in, and you see how this Board operates. They couldn't even remember whether they vote on these cases or not. I don't think they do.

I think the whole thing is of a piece. It was a Board unconstitutionally made up. It was a Board, because of its unconstitutional character, unable to function as the system says it has to function in this case. It is clear from the results

that the Board achieved in this case was not the kind of a board that we ought to have sitting on these kinds of cases; that the system had somehow or other been mismanaged, and that the result is what you might expect -- a perfectly valid hardship deferment botched up and a young man being sent to jail for five years.

That, to me, is indicative of what happens when the constitutional structures are ignored in the composition of these boards. No Governor in the State of Louisiana in the last 25 years has ever recommended a Negro to serve on any of these boards, and we all know it.

Judge Christianberry, who tried this case, he knew it. He knew the board was all white. He said so. Had we been able to get more records, we could have gone further back than five years. That was all the records they had available to him.

So I say to the Court we can't waive something we don't know about, and we can't waive something that is constitutional. We can't be held to be able to be put in jail by these kinds of boards when we are raising constitutional issues and the court below is saying simply, "Well, if you don't dot every 'i' and cross every 't' and be very technical with the way you handle yourself before these boards, then you are going to go to jail and you are going to go to jail even though that board is no more competent to send that boy to the Army than it would be to send this Court somewhere." Just an incompetent board entirely.

In the Government's brief they say he is supposed to read all these regulations. He is supposed to read the Code of Federal Regulations which says certain things about the way he is supposed to handle his hardship deferment. He is supposed to tell the Board about it. Ten days after he gets the job he is supposed to tell them and if he doesn't tell them, he waives it.

How in the heck is he going to know whether it is 10 days from the paycheck, 10 days from the day he gives the money to his mother. He goes in there and tells the Board about it. But what does he get? He gets this kind of a Board giving him a fast shuffle, and that is what he got.

So I respectfully submit to the Court that we cannot be held to waive constitutional issues. This man has got to be given his day in court, and he has got to be able to get up and tell that judge effectively, "Look, this is a bad board. It is a lily white board. It doesn't understand my problems. It is incompetent to sit on my case. It has a bad chairman. They denied me an appeal."

He cannot waive those kinds of issues. It is unconscionable for a system to say to this man, "You are going to jail, and you are going to go to jail and you can't raise constitutional issues about it. You are going to go now, and you are going to go for five years."

Q Could the Board be removed by quo warranto proceedings? I understand you to say it is a wholly void board.

A I suspect it could be. I think the Government got rid of Helm after this, right away.

Q Got what?

A Got rid of Mr. Helm, the Chairman. They got him off that Board after this case was over, and I guess you could go by quo warranto and remove him.

But you see, we didn't even know what kind of board we were working with, Mr. Justice Black, until we got right in the middle of the trial. There is no way for these registrants -- you see, it is the responsibility of the system to police these boards, not the responsibility of the registrants. But we did more good in exposing this kind of thing, I think, in this case than the whole system had done for years down there. They just didn't care.

Q On a wholly illegal board, would all the people who had been drafted in the Army be illegally in the Army?

A Well, I think if I were a black man who got drafted by this Board No. 42, I would go see a lawyer. I think he ought to. If he has something he really wanted to raise to that Board, and tried to, he wasn't going to get a fair shake.

He doesn't have to show that he didn't get a fair shake. I think you just show that that Board was what it was.

Q How is it appointed?

A They are suggested to the President by the Governor of the State.

Q They are appointed by the President.

A They are appointed by the President of the United States. I think they serve a term, or they serve at his pleasure. I am not altogether sure.

But there just weren't any Negroes who had any political pull to get on any of these boards down there. That is exactly what was happening. They were playing local politics with it.

Q What is the exact state of the record on your attempt to show the composition of this board?

A The state of the record is this: At the time of the hearing on the motion to quash the indictment, Mr. Justice Harlan, I started asking questions about whether any blacks ever served on the Board. I was cut off by objections, and then I got the U. S. Attorney, who was with me there trying the case, to admit in open court, before Judge Christenberry, that there had been no Negroes who had served on that Board for the last five years, as far as he knew. Judge Christenberry then took judicial notice of the fact that all the members of the Board were white.

Then he denied my motion to quash the bill of indictment. That is the state of the record on that issue.

Q What about the Chairman of the Board being a Ku Klux Klanner?

A On the trial of the case, after August 30, 1966,

in the course of interrogating the then Chairman of the Board, Mr. Lizana, I asked him if he was the Chairman and he said "Yes." I said, "Did you replace Mr. Helm?" He said yes, he did. I said, "Was this the same Mr. Helm that had been accused of Ku Klux Klan activities?"

At that point I got my objections from the Government and Judge Christenberry upheld the objection. I then went on to do as best I could under the circumstances and establish that Mr. Helm was the Chairman at the time of the original classification. I don't know whether I established when he left the Board or not.

On page 43 of the record you will find what I just described to you, Mr. Justice Harlan. I said, "As a matter of fact, wasn't he the same Mr. Helm that had been accused of being a member of the Ku Klux Klan?"

"I object to the question, if the Court please. It has no relevancy."

"Objection sustained."

Mr. Helm was a member of the Board when Mr. DuVernay was originally classified. I think he was. Wait a minute.

Right. According to the record, it showed he was.

I think some of the minutes of the Board that we put in evidence here show that Helm was Chairman in some other instances, but I am not sure --

Q Well, we can check.

A I think that is all I had to say, unless the Court has any further questions. I will reserve the rest of my time for rebuttal, Mr. Chief Justice.

MR. CHIEF JUSTICE WARREN: Mr. Martin?

ARGUMENT OF JOHN S. MARTIN, ESQ.

ON BEHALF OF RESPONDENT

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

I find myself in somewhat of a quandry in the way to approach the argument in this case, because it seems to me that petitioner has ignored what is really crucial to the case that is before this Court, and that is the vital role that is played in the Selective Service System by the provision embodied in the regulations that once a notice of induction is sent to a registrant, the Local Board is precluded from reviewing that registrant's classification unless it finds that there has been a change in circumstances since the time that notice was mailed.

Q Unless what?

A Unless there has been a change in the registrant's circumstances.

To review briefly the facts here, petitioner, ho had been a student, dropped out of school in December of 1965. On January 19, 1966 he was reclassified I-A. On January 28, 1966 he was ordered to report for a physical examination on February 23rd.

He did not appear on that day because he says that he overslept. The physical was rescheduled for a date March 14th. He appeared on that day, was found physically acceptable for service, and was then, on April 13, 1966 ordered to report for induction on May 20th.

Petitioner contends -- here, as of January 19, 1966, the day he was classified I-A, there was no other classification in which he could be put. He says that he wasn't working. The record is not clear on that. He started to work sometime in January, according to the record, but the exact date was never clarified.

But petitioner's position is that that classification was correct. I would clarify one point here: that is the only time, as far as we know, from anything in the record, that Mr. Helm, who is the man they claim was the Klansman, had any connection with the case. All of the minutes of the Board meetings after that date indicate that he was not present, and it had been our assumption that he had gone off the Board in some intervening time.

But in any event, petitioner says that January classification was correct. So therefore, the time the Board issued its notice to report for induction, April 13th, on all the information before it, petitioner was rightfully classified I-A and he was, therefore, found physically acceptable and he was, therefore, a proper person to be ordered to report for induction

He was so ordered.

All of the information which petitioner now contends show that he was entitled to a deferment either because of the hardship that would be involved to his mother and brothers and sisters by his induction, or because of his occupation, none of this information was brought to the Board's attention prior to the time that notice to report for induction was sent, although petitioner conceded at the trial, and I think concedes here, that these facts did exist prior to the time the notice to report for induction was sent.

So it is clear we have here a situation which totally fits within the exact provision of 1625.2 where there has not been a change in circumstances of the registrant subsequent to the mailing of the notice to report for induction and, therefore the Board is precluded by the regulations from reopening the classification.

It is the Government's contention here that petitioner's failure to bring to the Board's attention the fact relating to his hardship claim, or his claim for an occupational deferment at a time when the Board could have considered the merits of those claims, was, in fact, a failure to exhaust his administrative remedies which, therefore, precluded the courts from passing on the validity of his classification at the time he was ordered to report for induction and the time he failed to submit to induction.

Q Mr. Martin, may I ask when, with relation to the time between the date he was ordered for induction and the date that he was to be inducted does he allege that his condition changed?

A Mr. Chief Justice, he alleges no change. He concedes that there was no change after he received his notice to report for induction.

Q When does he claim the change?

A He says that the change occurred between January 19, 1966, the day he was classified I-A, and April 13, 1966, the day the Board issued its order to report for induction. But at no time during that period when this change occurred, according to petitioner, did petitioner go to the Board and say "There has been a change in my circumstances. The classification which you gave me, I-A, was right at the time, but now there are other factors which I think show that I am entitled to either a hardship or occupational deferment."

Had he done so, the Board, under the regulations, could have considered the facts, and if they found that the facts, if true, would warrant the classification which he was suggesting he was entitled to, if they said, "On the facts you present, if they are true, there would be a hardship and we could give you that classification," then the Board could have reopened his classification, considered the facts, made its investigation, and I think it is important here to point out that if the Board

was considering that classification, they would have had available to them several things they could have gotten. Not only could they examine the petitioner and his mother, but they could have consulted local welfare agencies to determine --

Q Now this is all before April 13, I gather, that you are now addressing yourself to.

A That is right. What I am saying --

Q Is it your position, do I understand you correctly, that if these are the changed circumstances on which the petitioner relies, they are not available to him after April 13th because it is only the changes in circumstances which occurred after that date over which he had no control which would permit the Board to do anything at all about it? Is that it?

A That is correct. That is our position. That is what the regulations provide.

What I am saying here simply is that if before the time of the notice to report for induction, he had informed the Board of these changes in circumstances, they may have, they could have taken some action. They could have investigated the claim. They could have called on welfare agencies in the area to give some indication of what support there would be for the brothers and sisters.

Q Well, I gather your point is that at that juncture the boards would have had authority, power, jurisdiction, call it what you will, to do something about it.

A That is correct.

Q But after April 13 they had no authority, power, or whatever, to do anything as to circumstances which developed before April 13th; is that it?

A That is correct, Mr. Justice, and that is the basic position we are urging: that once that notice to report for induction came, the I-A classification was proper and there was no basis on which it could have been challenged. Therefore, the court below was right that there had been a failure to exhaust his administrative remedies by not bringing to the Local Board's attention at a seasonable time those factors which he claimed authorized a change in his classification.

I think that this regulation is an important and vital one within the framework of the Selective Service System. I think it embodies a principle, the necessity of which is self-evident: that there has to come a time in the Selective Service System when those who are charged with meeting draft quotas on a month-to-month basis, can know with assurance that a classification is final and that a person classified I-A at that particular time will, in fact, be available to report for induction on the date scheduled if he is mailed a notice to report for induction.

It seems evident if the Local Board has to have 100 men to report for induction on May 20th, they have to go through their list, find those people classified I-A, look at their

file and make sure that classification is proper, and then send to those 100 people a notice to report for induction.

If, after that notice to report for induction is sent, those 100 people each come in and say, "Now wait a minute. There are other claims I want to make as to my classification; I want a deferment for hardship because of my occupation," et cetera, then the Board would have no way of guaranteeing that it would meet its commitment to the military service of this country to provide 100 men to be inducted.

I think this is why this regulation is vital. It is why I think it is a reasonable regulation within the Selective Service System. I think it is also interesting to note that this cut-off date is not only the time a notice to report for induction is sent is one that is not only embodied in the regulations but it is one that Congress itself recognized in enacting the statute.

It provided in section 6(a) of the Act that any person who prior to the issuance of orders for him to report for induction enlists or accepts appointment in the Ready Reserve shall be deferred. The Congress recognized with respect to Reservists also. Yes, there is an interest in deferring Reservists, but there has to come a time when the classification is final and people can be ordered up and expected to report, and Congress in the statute, as in the regulations, set that time as when the notice to report for induction is mailed to the registrant.

So I think that if that regulation is, as we submit, a constitutional one, authorized by the statute, then the Local Board at the time Mr. DuVernay came to present his claims was precluded from acting on those claims and, therefore, he cannot now contend that the action of the Board in denying those claims was improper.

It was, in fact, proper. It had a basis in fact. His classification was based on the facts as of the time the notice to report for induction was sent to him and the Board, acting pursuant to the regulation, could do nothing else but maintain that classification.

Q What was the last date upon which he could make an application for reclassification?

A I think had he come in any time prior to the time he was sent his notice to report for induction, the Board could have considered the claim.

Q That was January 19th.

A He was sent the notice to report for induction April 13th. He was classified I-A on January 19th.

Q Yes.

A He was sent the notice to report on April 13th. I think anywhere, anytime within those two dates, had he come in, the Board would have had power to consider his claim.

I think it should be pointed out that the regulations provide and, in fact, it appears on the back of the classification

card which the registrant is sent. Every registrant, when he is classified, receives at the time -- this is at the time petitioner was classified, he received a card like this, which is the Classification Certificate here, and right on the back of the classification is printed the notice that "You are required to have this notice on your possession."

Then the card says, and I am quoting: "The law requires you to notify your Local Board in writing of every change in your address, physical condition, occupational, marital, family, dependency, and military status, and of any other fact which might change your classification within 10 days after it occurs."

So petitioner was under an obligation under the Selective Service regulations to report to his Local Board these changes which he now claims made him eligible for deferment.

Q Can I ask you if that specifically answers his contention by this question: What he says is that the Board was not a valid board. It wasn't a valid board, as I understand it, when it classified him. It wasn't a valid board thereafter.

I am not indicating any belief about which is right, whether he can raise it this way, but if he can raise it at all, what difference does it make if this invalid board had a regulation that he must present something to it in order to raise it at a particular time? How does that escape the question he is presenting to us?

A I think, Mr. Justice, it operates in this way: His basic contention is that "I was improperly classified." He says, "I was improperly classified because of the racial composition of the Board."

What we are saying first is, let us assume that he is correct; that he was improperly classified; that the Board was -- strike "improperly classified." Let us assume that he is right.

Q Well, his contention is that he was improperly classified by an illegal board and, therefore, he hadn't been classified at all and there is no basis for them ordering him to present himself.

A What I am saying in response to that is two things: One, that if accept that the Board was improperly constituted, that is, that Negroes were excluded, for the purpose of argument, still there is patent, on the record, the fact that there was no improper classification, because he concedes that he was properly classified I-A. He concedes that the fact giving rise to his claim of deferment occurred prior to the time that he was ordered to report for induction, and under the regulations, once he was ordered to report for induction, there was nothing the Board could do.

Q But he says that he was ordered by a board that was no board, because he treats it, since he says there had been no Negroes on it at all, as an invalid board and one which cannot act at all.

A I don't think that necessarily would follow. I think that, for example, I doubt that if a white man were classified by this Board, the court --

Q That might be true, but don't you have to get to his issue? How can we decide the case without getting to his issue?

A I think there is one way you can do it: Look to see if there is any possibility that the racial composition of this Board could have affected his classification. We submit that on the facts as presented by the record there was no way --

Q But he wasn't allowed to put in his proof.

A Well, he was not.

Q How does he raise his constitutional question on all the premises you are suggesting to the Court? How does he raise his constitutional claim?

A The only area of proof from which he was at all excluded was this offer of proof that this particular member of the Board was a member of the Klan. Thatwas cut off by objection which was sustained.

As I say, that was the only thing in the record, and the record is clear who was participating in these various meetings.

Q Suppose he says, "I was classified by no board at all." Is that a claim that the Government argues should have been first made before an Appeals Board, a Presidential Board,

and that in any event, his failure to do that, as I guess he did; he made no attempt to go to the Appeals Board -- his failure to do that bars his having it as a defense in the criminal prosecution?

A I think we would contend that by failure to proceed through even --

Q Even with a claim like that, that this was no valid board at all?

A That is right, because the appeal -- basically, what he is claiming is somehow "My classification is wrong," and that if he had taken the case to a higher board, then that board could, by changing the classification --

Q So you say that even as to a claim like that, the Falbo rationale applies.

A That is correct; that he could go a step higher if he had properly pursued his remedies.

Q One, he didn't tell them of the altered facts; and Number 2, that if he had made that claim, it being a constitutional claim, the Board would have had no power to pass on its own qualifications.

A That is correct, but I think this brings into play --

Q Yes, but that would have been true even if his initial classification. They didn't have any power to classify him in the first place I-A. Certainly he could have appealed

his I-A classification on January 13th on the grounds that, "I am misclassified by a racially discriminatory board."

A That is true.

MR. CHIEF JUSTICE WARREN: We will recess now.

(Whereupon, at 12:00 Noon the argument in the above-entitled matter was recessed, to reconvene at 12:30 p.m. the same day.)

(The argument in the above-entitled matter resumed at 12:30 p.m.)

MR. CHIEF JUSTICE WARREN: Mr. Martin, you may continue your argument.

FURTHER ARGUMENT OF JOHN S. MARTIN, ESQ.

ON BEHALF OF RESPONDENT

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

Before the luncheon recess we were discussing the question that if we assume for a moment that there may have been racial discrimination in the composition of the Board, why the courts should not have considered that claim on the merits.

I think our answers to that are twofold: One, I think what we are saying in the first instance is that this was a Board, not looking to the racial composition for a moment, it was a duly appointed board according to the procedures set forth in the statute and the regulations and it was acting.

I think it would be our submission on this point that in order for the action of that board to be held invalid because of possible racial discrimination, there would have to be some indication, or at least a suggestion, that the board's action could have been improperly motivated, but that does not appear in this record.

It is conceded that the classification was proper. It is conceded the facts weren't brought to the board's attention

when they should have been. Under the regulations, nothing more could have been done by the Local Board after it sent out the notice to report for induction.

So that, in effect, it is clear on this record that racial considerations could have had no effect upon his classification.

Q They were choked off, Mr. Martin. They weren't given an opportunity to prove it.

A No, I don't think so. That is not true.

Q It isn't?

A The only thing at all in this record where they were choked off was in showing that the member of the Board -- and the only question asked at the time petitioner was classified I-A -- wasn't the head of the Board a member of the Ku Klux Klan. Objection. Sustained. That was the only question asked on which there was any cutting off. So all you have is the cutting off of the fact that at the time this man was classified I-A, a classification which he concedes, and argues, in fact, was the only one he could have obtained, there was a member on the Board who was a member of the Ku Klux Klan.

So I think it is apparent that even if that is true, that petitioner's classification at that time could not have been affected by racial considerations because he concedes there was no other classification in which he could have been put.

Q Mr. Martin, you said before lunch that in any

event, that was the claim that should have been taken, in the first instance, to the Appeal Board or the National Board. How do you answer Mr. Smith's suggestion, "Well, how could we at that time? We didn't know the facts. We didn't discover the facts until the time of the criminal trial?" How do you answer that?

A I think the basic answer to that claim is what I am suggesting: that there has to be, if there is any aspect of racial discrimination come into play, some basis for suggesting that the classification could have been affected by the racial composition of the Board.

Q I shouldn't think you would need much to prove that if you had a Chairman who was a member of the Ku Klux Klan, would you?

A Well, I think you would need to show that it affected this particular registrant. I think it would be clear, Mr. Justice Brennan, for example, that if a white man had appeared before the Board, had been denied a deferment --

Q Well, there was evidence, as I understand it, that white police officers, after they got notices of induction, had no difficulty getting postponements that were tantamount to -- as I understand it; is that right?

A There was one instance in which the Board, in the minutes, which reflected the fact that the Police Department made a request to the Board that it defer, for occupational grounds, a man who had been ordered to report for induction.

What the Board did in that case was to say that they could not reopen. But they sent a letter to the State Director, who does have the power to reopen a classification any time, suggesting to him that he might want to exercise his authority to open any time the classification so that this claim could be considered. That is all that was done. The Board did not itself reopen it.

Q Why couldn't they have done that with this man?

A They could have done that with this man. This man could have done it himself, though. It really doesn't make a great deal of difference in that case.

Q How would you expect a normal colored man of very little education to know all these regulations and know all of the composition of the boards and know that the Governor of that State had never appointed a Negro to any of these hundreds and hundreds of members who are there all the time, how would you expect him to know that before he got into a trial and had the advice of counsel?

A I think there are a couple of things to be said in answer to that. The first thing that has to be said is really the basis of the whole claim. There just is no record supporting the statements the counsels made that they were for all time for discrimination against Negroes throughout the State.

Q You know that is true, don't you?

A I don't. It may be. I just don't know the facts.

Q You weren't even in these cases interested to find out if those things were true?

A All I know, Mr. Chief Justice --

Q Is that a fact? You were never interested to find out if those things were true, even though it was argued in this case?

A I did not find out exactly what the racial composition of this --

Q I didn't say exactly.

A -- what the composition was; no, I did not.

Q It is common knowledge that that is true, isn't it?

A I am sure there is common knowledge that there have been discriminations in the South that have been practiced by government officials, it has been practiced by --

Q What about in the North on their appointments?

A I think there have been throughout. It is unfortunate that that is so. But I do think in a sense the Selective Service System has, at least to some extent, an ability to deal with that question.

It does seem to me, in one sense, that -- and this, I think, leads to something else -- he says, "How did anybody know the kind of people on the Board?" Well, if you take your assumption, Mr. Chief Justice, that this is common knowledge that white government officials do not recommend for appointment in the

South members of the colored race --

Q What can a poor, 18-year-old Negro of limited education do? How can you expect him to do something about this until he is really in trouble, until they order him inducted?

A I think what you can say is: One, that he somehow has to be affected by this; that he has to be misclassified in some way. It seems to me a Negro is no different from a white man in the situation that if he goes before a particular board and is properly classified --

Q There isn't a Negro in the whole State on any board.

A I think there are differences, yes. A Negro will be greatly affected if he has a valid claim for deferment which he presents at a proper time and the board doesn't grant him his deferment because they are racially motivated.

But I think that there has to be -- and this is where I was saying that the Negro was no different from the white man in this situation -- who is properly classified, there is no reason to change his classification and he is then ordered to report for induction; that both the white man and the Negro in the same situation have not been prejudiced. There has been no racial discrimination enacted against them.

Q How about the policeman you told us about? He got remedy from going to the Board. Why couldn't they have done the same thing for this poor fellow who did have a mother and

six children to help support?

A I think, Mr. Chief Justice, at least on the record, some facts that indicate here why perhaps the Board did not feel it appropriate to take the steps in regard to this registrant. Although his claim was for hardship, that was not the first claim he made after he came in. He made a claim which seems to me to refute his hardship claim.

After he received the notice to report for induction, he came in two days later with the notice to report for induction in his hand and he said, "I want a student deferment. I am going back to school in the fall. I dropped out, but I am going back to school." I think this indicates that his intention at that time was not to continue to support his mother and the children.

Q Is it your position, then, that they didn't do anything for him because it wasn't equitable, or because they didn't have any power? Now which is it? It is one of the two.

A I think basically under the regulations they don't have the power. What they could do is what he could do for himself. They could ask the State Director to reopen his classification. I think that is something that he could have done if he felt that he was improperly classified.

Q Could I put another question here? Supposing Mr. Smith had made a formal proffer of proof at the trial which included, among other things, that none of these factors that he

might have alleged, whatever they might be, were within his knowledge or the knowledge of the draftee at the time of the I-A induction notice, and that proffer of proof had been ruled out on the ground that there had been no exhaustion.

What would have been the Government's position then?

A I think the Government's position would have been, Mr. Justice, that unless there was some reason to find the possibility of prejudice -- let us assume, for example, a Negro registrant who comes in is improperly classified I-A. He should clearly be entitled, let us say, to a student deferment. I think there you may say, "All right, you can't hold it against him that he didn't know that Negroes were excluded from his board."

But I think you still have to go a step further and say, "But doesn't he in any event, even though he doesn't know why he was improperly classified, doesn't he, if he is claiming -- and the claim is still basically an improper classification -- have to resort to the machinery which the Selective Service statute and regulations sets up to correct improper classification?

He can take that to an Appeal Board, and if he is unsuccessful there he can either, if it is a split decision, take it to the Presidential Appeal Board, or either the State Director or the National Director can take that decision to the Presidential Appeal Board.

I think this is something that is important also to

consider. Let us assume for a minute a man who is improperly classified, who knows that -- a Negro who knows that Negroes have been excluded from his board. What can he do? Counsel said and we agreed that perhaps the constitutional question could not be decided by the Appeal Board. But what could be done is, the classification could be decided.

If the appellant in his statement said, "I was classified I-A when I should have been II-S, and the reason I was classified was because the Local Board was prejudiced against me because I was a Negro," that fact as to the reason for misclassification can be brought to the Appeal Board's attention so they will focus on the classification and realize that there is this possibility that they have to carefully scrutinize the case to determine whether or not I-A is the proper classification for this registrant.

Q That is a de novo proceeding?

A Yes, that is a de novo proceeding.

Q You mean in such a proceeding they will take all kinds of evidence?

A I am sorry. They are bound by the record, although he can make a statement that accompanies the record and that is a part of the facts that they can consider.

Basically, all they have to find is that a prima facie case has been made out before the Local Board. If he alleges the reason that he was denied his application was that they were

just prejudiced against him, this is something that he can bring to the Appeal Board's attention and they can take into their mind in determining whether the classification is proper.

I think that is basically what we are talking about. Is this man's classification proper at the time he is ordered to report for induction, and if it is so, it seems to me it is no different than a man who is convicted by a court in the South in which, over a period of years, no Negroes have been appointed to the Bench.

Q Let's say that everything you say is true, there never has been one, there is not one now. What is the proper remedy to raise that question? Can you do it in the criminal case, or do you have to treat that board as wholly void? I think that is the basic question.

A I think that you have to look at the board as any other body appointed by the Executive, whether it be the court or an administrative agency.

Q In other words, you think it is the same as though they had been elected that way, legally appointed or elected, except that the result is that whoever is doing it willfully declined to appoint any colored people. What would you do?

A I think that you still, in that type of situation, in that it is different from a jury, which by the Constitution is required to represent a cross-section of the community, I

think that it is a different situation. In all those cases you have to look very carefully to determine did this man suffer because the person or the body that passed upon his application, if it is a case in court where the Judge has acted for racial motives --

Q In other words, you think you wouldn't have to treat him as a de facto officer. You think it could be raised by this method?

A I think that the board is a de facto board. It is operating. I think what has to be shown in these circumstances --

Q Suppose it is shown. Let us assume that it is shown. What I am getting at is, does the Government admit that this question can be raised by attacking the board outright and saying, "We will not consider any of their actions valid," or should that be raised in some other fashion?

A What I am suggesting is that it can only be raised upon some showing that there was, in fact, a defect in the classification.

Q In other words, you say that if there is a defect in the classification, if it is wrong, that it can be raised.

A If there is a defect in the classification and the questionas to the propriety of that classification was raised properly through the Selective Service System.

Q Why couldn't that be done with reference to all

officers appointed by the President?

A I think that is true. I think it is the same as looking, through the Constitution, at the acts of a court that is appointed. I don't think you look to see whether, in determining a racial discrimination problem, you don't look to see whether or not the President has ever appointed a Negro to a particular court. You have to look and see, did the judge in this court act --

Q You are saying to treat the appointment as valid.

A That is right.

Q He is there.

A He is there, but did he act --

Q Yet, if they made some kind of a legal error, the court could revise it.

A Absolutely.

Q But you are not saying, are you, that we have got to let it be raised in connection with every appointee of the President?

A Absolutely not. That is exactly what I am saying, that you have to treat the people as validly there. What you do try and determine is whether or not they have acted out of racial motives, and where there is no evidence that they acted for that reason, that the classification is valid. And also, that when there is an improper classification, that classification has to be brought through the system where it can also be

corrected before it can be brought into court.

MR. CHIEF JUSTICE WARREN: Mr. Smith?

REBUTTAL ARGUMENT OF BENJAMIN E. SMITH, ESQ.

ON BEHALF OF PETITIONER

MR. SMITH: I only have a few things I want to talk about in connection with what has been said, Mr. Chief Justice.

I think that it ill becomes the Government to get up here and say that there has been no prejudice in this case and that there has to be shown to be prejudice. We know very well from the jury cases that have come before this Court and others that if we show a pattern and practice of exclusion of black people from juries, we don't have to show prejudice. It is built right into the system; that it is there.

The jury cases don't make you go out and show that you would have gotten a better break from a properly constituted jury. We don't have to show that in this case, but it is all over the record that we did get that kind of treatment, and I will tell you why.

This man was not only classified by a bad board, but when he tried to get his hardship deferment, it was still the same white board that said no.

Look at the record, the way the clerk writes the letters. "No." "No." "We can't help you." The employer goes down. "No, we can't help you."

I know what was happening. That white board was

sitting there as Southern white men. They didn't know this young black militant Southerner's problems. They didn't know anything about the kind of life he led. They didn't know anything about what his family life had been. They didn't give him any benefit of not knowing how to read the Federal Register. They said "No."

But the cops come in, the police come in. I know Roth. He comes in there -- and it is on page 39 in my brief -- and this is what they say about Roth, the policeman. "Request for deferment filed by the Department of Police on behalf of William T. Roth" -- and they give his number -- "scheduled for induction" -- he was under a notice of induction, just like this man is -- "presently in attendance at the Police Academy" -- it is a footnote on page 39 -- "was acted on by the Board."

That means they are acting on it after 1625.2. The induction had gone out.

"The Board concurred in granting the deferment, thereby requesting the State Director to cancel registrant's induction."

Q You mean we are to read that as an official action of the Board, not on a finding of something that happened after the notice of induction went out, and that something being something beyond the control of the registrant, but they just acted on the request and deferred him themselves, asking the State Director to cancel the induction, but the action, you are telling

us, was the action of the Board; is that it?

A Yes, sir. It says right here, "The Board concurs in granting the deferment."

Q You can't tell, because it is ambiguous, but this might well have been a change for reasons beyond his control; that is, he was called to attend the Police Academy for training.

A I know the man. He volunteered to attend the academy.

Q Well, I don't, and we just can't tell from this footnote.

A You can't tell from here, but he is a policeman in training and the Police Department needed him, so they went in and -- right now, this Board knew what the problems of the police were, Mr. Justice Stewart, and that was why they did it.

Q The Board might have been exceeding its powers in that case, too, under the regulations.

A It might have been. It might have been.

But at the same time, they say 1625.2 is so important a regulation this Court has to preserve it. Well, if it is so important, why don't they tell these registrants about it? Why don't they write them a book and tell them, "Look, if you don't go in there in 10 days, you are forever foreclosed."

This guy didn't know that when he went to work and started supporting those kids that he had to tell them within 10 days or he would never be able to do it again. It wasn't

written in the sky. That little card, if he had even looked at it, it didn't really say what happens if you don't do it after the 10 days.

Why couldn't they just simply say, "All right, you come in, you got it, and that is it." They didn't do it. The fact is that the kind of board he had was just exactly the kind of prejudice we are talking about here. This is the prejudice. They didn't understand his problem.

Q The Selective Service Boards are in all cases appointed by the President of the United States on the advice of the Governors of the respective States?

A Yes.

Q There is no other way that they become members?

A Not to my knowledge, Mr. Justice Stewart.

Q Is this also true of the Appeals Board, the State Appeals Board?

A Yes, I think that is true, too.

Q Recommended by the Governor and appointed by the President of the United States.

A Yes, sir.

Going into this question you raised, Mr. Justice White, about whether you could raise this question on appeal, it is answered by what I think has been said by the Justices of the Court. He didn't know, and I wouldn't have known, really. If he had taken an appeal to raise this question of composition of

the Board, he didn't know anything about that and he couldn't be expected to know anything about that.

It would have been a futile business anyway, because that Appeals Board is not going to knock out its own -- it is a constitutional defense. It has to be raised in a court of law, even though there might be lawyers on the Board. It doesn't make any difference.

Q You mean no constitutional questions are ever raised in an administrative proceeding and passed upon?

A Well, I guess they are. I don't know. But I would think it is most appropriate --

Q You know they are, don't you?

A Yes, sir; they are. But mainly what the boards are here for is to use their expertise in classification and at the same time I think it is going to be very difficult, and sort of unrealistic, to simply say to the Board, "Look, you are badly constituted. Wipe yourself out," in effect. They are not going to do that.

Thank you very much.

(Whereupon, at 1:00 p.m. the argument in the above-entitled matter was concluded.)