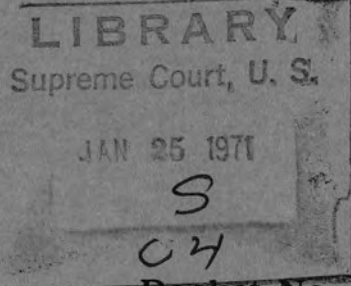


Supreme Court of the United States

OCTOBER TERM, 1970



In the Matter of:

----- x
WILLIAM WARD EHLERT,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent
----- x

Docket No. 120

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Date January 13, 1971

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C O N T E N T S

ARGUMENT OF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

WILLIAM WARD EHLERT,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

No. 120

Washington, D. C.,

Wednesday, January 13, 1971.

The above-entitled matter came on for argument at
1:25 o'clock p.m.

BEFORE:

WARREN E. BURGER, 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
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

PAUL N. HALVONIK, ESQ.,
San Francisco, California
Counsel for Petitioner

WILLIAM H. REHNQUIST, ESQ.,
Assistant Attorney General
Department of Justice
Washington, D. C.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 120, Ehlert vs. United States.

Mr. Halvonik, you may proceed whenever you are ready.

ARGUMENT OF PAUL N. HALVONIK, ESQ.,

ON BEHALF OF PETITIONER

MR. HALVONIK: Mr. Chief Justice and may it please the Court. Petitioner in this case is a conscientious objector. Being such, he quite naturally refused to submit to induction. He was tried for that offense, failure to submit to induction, was found guilty and --

Q Would you raise your voice slightly?

A Yes, Your Honor -- he was found guilty and was sentenced to two years in prison.

I observed that he was a conscientious objector. However that claim has never been passed on by his local board, and the reason for that is he did not become a conscientious objector until after he received his notice to report for induction. He couldn't have applied for the status before he was a conscientious objector, and at the time he became a conscientious objector, according to the local board, it no longer had jurisdiction to review his claim. And that, the government contends, is a correct reading of the Selective Service regulations of the Selective Service law, so that an objector, such as Ehlert, can never have his claim heard.

1 We think the government is misreading the regulation
2 because there is a regulation that provides for reopening of
3 classifications and reconsiderations by the local board if,
4 after an order to report for induction has been mailed, there
5 has been a change in the registrant's status resulting from
6 circumstances over which the registrant had no control, and we
7 contend that regulation is applicable here.

8 Q You mean his change in attitude was something
9 over which he had no control?

10 A Yes, Your Honor, but the Second Circuit and other
11 circuits, following the Gearey decision, called it crystalization
12 of conscience when that moment arrives when he decides that he
13 can do nothing else but not participate in war, when that
14 moment comes this crystalization is the circumstance over which
15 he has no control and which --

16 Q Well, did they say in those cases whether the
17 circumstance was one over which they had no control or the time
18 or both?

19 A Well, in terms of the time, which is after the
20 order to report for induction, the cases to which I refer all
21 say that the reopening occurs under 1625.2 and that language in
22 that regulation is that you have to reopen it if there were
23 circumstances over which the registrant had no control. The
24 theory of the majority below in the Ninth Circuit here is that
25 one does have control over his conscience and for that reason

1 the registrant wouldn't come within the regulations. I don't
2 think the government is currently -- at least not very enthusi-
3 astically -- supporting that view. The government seems to say
4 now that this isn't a circumstance within the meaning of the
5 statute.

6 They cite an authority for that and they seem to
7 claim that a circumstance has to be some sort of external event
8 that is verifiable. I think that is confusing with the circum-
9 stances within the meaning of the regulation. The circumstance,
10 I assume the regulation means approximate circumstance, that is
11 to say if one, after receiving notice to report for induction,
12 should be struck by an automobile and have a leg broken, the
13 circumstances that results in the reopening is not being struck
14 by an automobile but by having the broken leg. It is not the
15 external event, if you will --

16 Q Some of us on this end of the bench are having
17 great difficulty in hearing you.

18 A I will try to speak up.

19 Q Would you please?

20 A Another analogy might be, since the government
21 seems to be saying it has to be an event that is external and
22 verifiable, should a man actually receive an order to report for
23 induction become mentally incompetent, I think we would say that
24 there has been a circumstance over which he had no control which
25 had intervened and which required a reclassification. Now, there

1 would be nothing outside the man that we would look to to call
2 a circumstance. And yet, without torturing the language at
3 all, we would say that some circumstance had occurred that
4 changed the status and he was no longer competent, he was no
5 longer a person who fitted into the scheme of the manpower pool
6 for Selective Service.

7 Q I suppose it is clear that if he were in an auto-
8 mobile accident that cut his leg off, that under the regulation,
9 you and the government would agree, would be a circumstance be-
10 yond his control that would clearly affect his status under
11 Selective Service? But if he enrolled as a bona fide student
12 as an undergraduate in a bona fide college after receiving an
13 induction notice, that would clearly be something within his
14 control and would not justify reopening. You would both be
15 agreed on those two positions under the regulations?

16 A In both of those cases.

17 Q And the question is here whether a conscientious
18 objector -- a status of conscientious objection, which by
19 hypothesis crystalized or occurred after the induction notice,
20 falls into the one category or the other? Is that what this
21 case is about?

22 A That is partly what this case is about. I think
23 that that is the principal controversy at the moment. It seems
24 to me there is another problem here. If this sort of case in-
25 volving a conscientious objector, if we should conclude that

1 this is not a circumstance within the government's theory, that
2 this isn't the sort of case where this regulation applied, then
3 perhaps the regulation isn't authorized by Congress, because
4 Congress has said that nothing in this title shall require a
5 conscientious objector to serve, and the --

6 Q What does Congress say about divinity students,
7 for instance?

8 A I am not sure precisely if that is the same pro-
9 vision, but it would still be different -- would get to the
10 different point with any other classification other than the
11 conscientious objector could take advantage, as the government
12 suggested, of getting out once he gets in the army, and that
13 would apply to divinity students, I suppose, as well. But con-
14 scientious objectors --

15 Q I am thinking about a person who enrolled in a
16 divinity school after receiving his induction notice. Now, the
17 regulation as it is written would not allow him to --

18 A That is true. That is something over which he
19 definitely would have control.

20 Q He would have control, although the divinity
21 student I thought was expressly exempted by Congress from being
22 inducted.

23 A What you are suggesting there I think is that --
24 my emphasis here wasn't on whether he had control or not, con-
25 trol of the circumstances. And perhaps it wouldn't be

1 applicable to the divinity student either. I am not sure that
2 there is a real problem with cutting off any of these late
3 maturing claims. But it seems to me clearly the regulation it-
4 self contemplates a reopening when the claim is one that
5 couldn't have been made before and over which the man had no
6 control, and that is the precise case that we have here. At
7 least we have that facially in this application. We made a
8 prima facie case that he had late crystalization of his con-
9 scientious objector beliefs, and additionally has made a prima
10 facie case as conscientious objector, and in that situation we
11 contend there should be a reopening.

12 And I just want to emphasize additionally that if the
13 regulation is read that way, there is no forum for this man.
14 The government at certain points in the brief seems to suggest
15 that he has been dilatory. But this isn't just a late claim,
16 this is a late maturing claim. He couldn't have made the claim
17 before he received the order for reporting for induction be-
18 cause he was not in his conscience and in his mind a conscienti-
19 ous objector at that time.

20 Q Well, I gather that there is a good deal of dif-
21 ference of view between you and your brothers on the other
22 side as to whether or not there is a forum for this man. I
23 understood you to say there was no forum whatsoever if you
24 don't prevail in this case, and I understand it from the
25 government's brief that they concede and tell us and advise us

1 that his forum would be after induction when he asserts his
2 claim as a conscientious objector in the army and that the army
3 has basically the same standards as does the Selective Service
4 law with respect to conscientious objectors.

5 A But the difficulty --

6 Q Have I misunderstood the government's brief?

7 A I think you understand it precisely and the dif-
8 ficulty with that position is this Court noted in United States
9 -- in the Mulloy case, in the footnote quotation from United
10 States vs. Freeman, in Footnote 6, they are conscientious ob-
11 jectors, and Mr. Ehlert is one, who cannot submit for induction,
12 so that is the forum they can't reach. Their objection is to
13 any participation --

14 Q Except the statute doesn't protect those who can-
15 not submit to induction. Maybe the Constitution does, but the
16 statute talks about service, doesn't it, not induction?

17 A Yes. The statutory scheme is to permit a man to
18 follow his conscience and not submit to --

19 Q What did Congress write? It didn't say that
20 they are exempt from being inducted, did it?

21 A What Congress -- they have to do all kinds of
22 service, that is true. They are exempt from being inducted
23 into the armed forces, yes.

24 Q Inducted? Does it say so? I am talking about
25 the --

1 A Well, they can't be subjected to combatant train-
2 ing and service in the armed forces of the United States.

3 Q All right.

4 A Well, once one is inducted, that is what occurs.

5 Q Not if you immediately file, say, as a conscien-
6 tious objector, application, is he?

7 A The conscientious objector, however, a conscienti-
8 ous objector such as Ehlerst cannot submit to induction into the
9 armed forces --

10 Q Well, perhaps he can't but even if his objection
11 had been --

12 A We pointed out in our brief, Mr. Justice --

13 Q My point is that Congress doesn't protect the
14 conscientious objector from being inducted.

15 A I think it does, Your Honor.

16 Q In its words --

17 A We pointed out --

18 Q -- in the words that the Congress used.

19 A We pointed out in our brief, in our closing brief
20 here that the legislative history on the 1967 act shows that
21 there was originally provision in that act to provide the con-
22 scientious objectors first submitted to induction, and that was
23 specifically removed. And the point was made that, based on
24 this law, that there are people who cannot submit at all, and
25 that is what they are talking about.

1 Q Has not the military service allowed conscientious objector claims to be made within that framework even after
2 they had been in the combat zone and returned them to the
3 United States to process them?
4

5 A The military will. Of course, that is a claim
6 that matures after you are in the army. There is never a problem of going to the army forum.
7

8 Q I thought that was what Mr. Justice Stewart was
9 probing at, that there is another remedy available to him.

10 A But he can't reach the remedy because he can't
11 submit to induction, his conscience won't permit him to. But
12 even if he did, we are still not sure whether that would be the
13 case because the army regulation is designed to provide a
14 remedy for those who become conscientious objectors after they
15 enter service, and this man became one before the time for induction came.
16

17 Q Mr. Halvonik, I would like to join in Mr.
18 Justice Harlan's remark, do try to keep your voice up. It is
19 hard to hear you over here.

20 A Very good. I shall try again, Mr. Justice
21 Blackmun.

22 The only argument that I can see -- the government
23 essentially says that circumstances should not mean these kind
24 of circumstances, and I cannot see any reason for that and we
25 have tried to meet that in the brief and I have tried to meet

1 it here.

2 The only other argument the government has made in
3 favor of its construction is that it makes for efficiency, and
4 I think that is wrong. It may result in less burdens on the
5 local Selective Service Board, but that efficiency is not co-
6 terminous, they are not synonymous. In fact, sometimes they
7 are antagonistic.

8 If the Selective Service System doesn't want to look
9 at conscientious objector claims at all, just ignores them all,
10 the local boards won't have any hearings, I suppose that makes
11 life easier for them, but that doesn't make them more efficient
12 in their job, because it is their task to remove from the man-
13 power pool those people Congress says are not to serve, and
14 that is their job. And the construction the petitioner seeks
15 in this regulation promotes their doing their job and promotes
16 the theory that a man such as Ehlerth doesn't get to the induc-
17 tion center, doesn't have to refuse and make for efficiency
18 throughout the governmental system because the congressional
19 scheme is to keep conscientious objectors out before that
20 point so that they are not prosecuted and they are not going to
21 jail. That places the burden, shifts the burden, if we adopt
22 the government's theory, from the local board --

23 Q What would you say if the straight-forward regu-
24 lation was passed that, in the interest of clean-cut administra-
25 tion, efficient administration, all conscientious objector

1 claims had to be filed before a notice of induction is received?

2 A Well, that essentially is what the government is
3 saying the regulation says, and I would say that such a regula-
4 tion would not be authorized by Congress because it provides
5 -- because Congress says conscientious objectors shall not be
6 required to submit to be subject to combatant training and
7 service.

8 Now, it is quite different from the government regu-
9 lation that says if you are a conscientious objector before you
10 receive an order to report for induction and you don't tell us
11 until after, that you are cut off, that you slept on your rights.
12 That would raise some interesting questions, but that is not
13 this case. He didn't sleep on his rights. He wasn't a con-
14 scientious objector until he received an order to report for
15 induction.

16 Congress has said conscientious objectors should be
17 exempt. I don't see how they can adopt a regulation that
18 says --

19 Q Suppose Congress said when you receive your
20 order for induction you are inducted?

21 A I am not sure I understand. You mean you don't
22 have to go to a station somewhere, that you are inducted as
23 soon as you receive the order to report for induction?

24 Q What would happen to this case?

25 A Well, the difference in that I suppose would be

1 that his claim wouldn't have crystalized until he had been in-
2 ducted, after the point of induction, if that were the case.
3 Then I think a forum would still have to be provided for him
4 and the service would provide such a forum.

5 Q What forum? In the service or in the army?

6 A It would have to be in the service because, as
7 you define it, he is already inducted as soon as he gets the
8 notice, so he is immediately in the army. But I don't think
9 Congress would adopt such a system because nobody can refuse
10 to submit to induction under that theory.

11 Q Your client would take the position that he
12 didn't voluntarily get inducted?

13 A I think that is probably the case, yes.

14 Q Our big problem is this suddenly finding out
15 that he can't take the oath.

16 A Well, I think we find that in all kinds of ex-
17 periences in life, particularly in those where it is a combin-
18 ation of cognitive faculties, emotional faculties. To draw a
19 romantic analogy, I don't think you can woe yourself into love
20 with somebody, it may come at a moment, and then you can't
21 detach yourself very easily from it either, even though you
22 rationalize --

23 Q My point is not that he is a conscientious ob-
24 jector but he can't even take the oath in order to litigate
25 it. The advantage of taking the oath is waging war. Is that

1 his position?

2 A Well, his position was that he would not submit
3 to induction, Your Honor.

4 Q Regardless if nothing happened after that?

5 A Did anything happen after --

6 Q Suppose he was inducted and he started his CO
7 proceeding in the army and he stayed right there in town and
8 it was litigated and all, and he couldn't go through that.

9 A He couldn't become a member of the armed forces,
10 no.

11 Q He just couldn't?

12 A He just couldn't. And that is not only Mr.
13 Ehlert, that is a lot of religious sects -- a lot of religious
14 sects also adopt that philosophy.

15 Q Which religious --

16 A Jehovah's Witnesses, as far as I know.

17 Q Which religious sect says that when you get your
18 induction notice you don't like war, which sect is that?

19 A That is a different point than the one I was
20 trying to make, Mr. Justice Marshall.

21 Q Oh, I see.

22 A I was just saying that there are religious
23 sects that cannot submit to induction. There is no religious
24 sect that says when you decide at the last moment you don't go
25 to war, that is part of the philosophy, but it does hamper -- I

1 might point out, the United States Court of Appeals in the
2 Seventh Circuit, on January 5, adopted the construction that we
3 advance here in the Nordlof case. They reversed their previ-
4 ous position and joined the Second Circuit and other circuits
5 that have adopted the construction we contend for, and that
6 case involved a Jehovah's Witness, a man not being a Jehovah's
7 Witness before he received his order to report for induction,
8 and went through a period of talking with his wife and her
9 parents and hadn't decided he was a Jehovah's Witness yet, and
10 really didn't put it all together until after he received his
11 notice to report for induction, and then he talked some more
12 and he finally concluded that he was indeed a conscientious
13 objector. He didn't raise it until he got down to the induc-
14 tion center, and that is when he raised the point, and the
15 Seventh Circuit held, in a very scholarly opinion, that this
16 man was entitled to benefit of regulation section 1625.2.

17 Q What is the name of that case?

18 A It is United States vs. Nordlof, Mr. Justice
19 Douglas. It was decided on January 5?

20 Q Nordlof?

21 A Nordlof, N-o-r-d-l-o-f.

22 Q And he hadn't communicated with his Selective
23 Service Board at all until he got the induction notice?

24 A Until he got to the induction center.

25 Q Is the induction center an army establishment

1 or a Selective Service establishment?

2 A In this context the two circuits faced the ques-
3 tion and decided that it is an extension of Selective Service.

4 Q It is run by the United States Army, is it
5 not?

6 A Well, that may be but of course the government
7 contended for years that it was an exhaustion of remedies that
8 always occurred there if you didn't go through physicals or
9 something of that nature and so it was ruled as an extension of
10 Selective Service, and both the Second Circuit in Stafford and
11 now the Seventh Circuit in Nordlof have come to the conclusion
12 that they are extensions of the Selective Service System for
13 the purposes of reopenings where changes occur after the notice
14 to report for induction, and that is what is so strange because
15 it happens all the time in physicals, you know, physical exam-
16 inations are determined down there, even though the application
17 had been made before, it was determined at the Selective
18 Service induction center that the man isn't physically fit if
19 there has been a change, he is taken out of the -- he is given
20 a 1-Y or 4-F and is not inducted.

21 Anyways, I was saying that I don't think that our
22 construction at all produces any problems as far as the ef-
23 ficiency of the Selective Service is -- that the construction
24 that we seek in this regulation would result in Selective
25 Service System doing what its job is and not having

1 conscientious objectors in jails where none of the purposes of
2 penology are served, and on the other side the construction
3 that we seek provides nothing but forum for those who have
4 late maturing claims. And one thing we have to establish is
5 that their claim is late maturing under the construction we
6 seek. A man who has been dilatory or who slept on his rights
7 wouldn't get advantage of the rule we are seeking here. We
8 don't foreclose that possibility but as far as Ehlert is con-
9 cerned, it was a late maturing claim and we made a prima facie
10 case and that ought to be enough. And there is no reason and
11 no suggestion by Congress that conscientious objectors are to
12 be treated differently from other people who are deferred or
13 exempt under the draft, and yet that is what happened if you
14 accept the government's construction, because persons with
15 other sorts of claims, other sorts of changes of status, for
16 example somebody becoming the sole surviving son after an
17 order to report for induction, the government concedes that
18 their case can be reopened. There is no reason to think that
19 the conscientious objector shouldn't be reopened. Congression-
20 al history is clear that conscientious objectors are supposed
21 to be given the same sort of treatment as every other person
22 exempted --

23 Q On the other hand, you concede that a bona fide
24 undergraduate college student does not get a reopening if he
25 went to college after his induction notice, don't you?

1 A But that is a matter which is not beyond his
2 control, that is what we are talking about.

3 Q But you're talking -- you just told us that the
4 conscientious objectors are the only ones exempt from military
5 service who are treated this way. Certainly the college stu-
6 dent that goes to college after his induction notice is treated
7 this way.

8 A But he is treated that way because it isn't a
9 matter beyond his control, but everybody else -- but that is
10 the reason he is not treated the same. If students were
11 drafted at colleges and a man received his draft notice at
12 school after he received his draft notice to report for in-
13 duction, I would assume that he would be exempted, but it
14 doesn't happen that way, but it does happen that way with con-
15 scientious objectors. There is a moment in time --

16 Q He is drafted by his conscience or --

17 A Yes.

18 Q -- or by the Almighty or whatever?

19 A Precisely, of course that is the analogy of the
20 Jehovah's Witnesses here --

21 Q The Seventh Circuit has gone your route, hasn't
22 it?

23 A The Second Circuit has, Your Honor --

24 Q What others have?

25 A It is about evenly divided now. The government

1 said the weight of the circuits is with them, but I think it
2 is even now because of the Seventh switching. May I say that
3 the contrary construction goes back -- by contrary, the govern-
4 ment's construction -- goes back to United States vs. Schoebel
5 in the Seventh Circuit. That is where they all began, and
6 that case is now overruled in the Seventh Circuit.

7 And one other point I should make about the Nordlof
8 case is that while it is a decision by three members of the
9 panel in the Seventh Circuit, there is a notation, the footnote
10 that was circulated among all the members, and the majority
11 agree with them, that Schoebel should be expressly overruled.

12 If there are no further questions, I would like to
13 reserve the rest of my time for rebuttal.

14 MR. CHIEF JUSTICE BURGER: All right, Mr. Halvonik.

15 MR. HALVONIK: Thank you, Mr. Chief Justice.

16 MR. CHIEF JUSTICE BURGER: Mr. Rehnquist?

17 ARGUMENT OF WILLIAM H. REHNQUIST, ESQ.,

18 ON BEHALF OF RESPONDENT

19 MR. REHNQUIST: Mr. Chief Justice and may it please
20 the Court. Let me advert very briefly to the facts as they
21 appear to the government that bear on the appropriate decision
22 of this case.

23 On July 24, 1961, the petitioner registered for the
24 draft because he reached age 18. On January 17, 1964,
25 petitioner returned his classification questionnaire to the

1 local board, making no assertion to claim to conscientious
2 objection. On April 15, 1964, petitioner was ordered to report
3 for a physical examination on May 26, 1964. On June 16, 1965,
4 petitioner's induction notice was mailed to him, directing him
5 to report for induction on July 14, 1965. One day before the
6 date scheduled for his induction, on July 13, 1965, petitioner
7 mailed the letter to his local draft board stating that he was
8 a conscientious objector.

9 The petitioner was tried for violation of the applic-
10 able statute, convicted by the district court, and the judgment
11 was upheld by the Ninth Circuit in a split of 8-to-5 in that
12 court.

13 The questions raised by the petitioner go to the
14 proper interpretation of the regulation, whether the regula-
15 tion as interpreted by the court below was consistent with the
16 statute. The regulation, as is set forth in the brief, the
17 critical language is that reclassification after mailing of
18 induction notice is cut off in all cases unless it is based
19 on a claim of "change in the registrant's status resulting from
20 circumstances over which the registrant has no control." Then
21 the regulation as construed by the court below is designed to
22 exclude all post-notice of induction claims subject only to a
23 very narrow exception, and the exception requires two facets;
24 one must meet both facets to come within the exception.

25 The first is that there be a non-volitional change,

1 and the second is that it be a change resulting from circum-
2 stances over which the registrant had no control.

3 Now, there were two -- three opinions in the court
4 below agreeing with the result of affirmance of the conviction.
5 Judge Kilkenney, writing the court's majority opinion, stressed
6 the volitional nature of a change in conscientious belief.
7 Judge Dunaway, with the concurrence of three of the other
8 judges of the panel, who also concurred with Judge Kilkenney,
9 stressed the common sense and dictionary definition of the
10 word "circumstances" in the context used in the regulation,
11 concluding that as used the term referred to some event ex-
12 ternal or extraneous to the registrant and therefore that it
13 was unnecessary to engage in the debate that had gone on be-
14 tween the other circuits which had considered this matter as
15 to whether a change in conscience was volitional or not since,
16 regardless of that, such a change was not a circumstance as
17 used in those regulations. And both Judge Kilkenney and Judge
18 Dunaway relied also on the serious practical consequences of
19 a contrary construction as expounded by Judge Merrill for the
20 dissenters in reaching the result that they did.

21 Q Why hasn't the Selective Service System passed
22 a regulation that is free from these ambiguities?

23 A I can't answer that, Your Honor. There is no
24 doubt that this thing is something that can be reasonably
25 argued either way. I think that --

1 Q There is no question --

2 A Beg pardon?

3 Q I say there is no question as to its ambiguity.

4 A I see --

5 Q It is split between circuits, it can be read
6 either way.

7 A I do know that the Selective Service System is
8 presently in the process of a complete overhaul of its regula-
9 tions and hopefully this type of thing will be ultimately
10 eliminated. And I think also that, you know, not just in these
11 situations but in others, something, when you write it up here,
12 is perfectly clear, when you get a particular fact situation
13 to apply it to and all of a sudden there is an ambiguity you
14 didn't see there when you were writing it.

15 Q What was the date of the Second Circuit de-
16 cision?

17 A The first july case was 364 Fd. 2d, which would
18 place it, I suppose, four or five years ago.

19 Q And prior decisions how long?

20 A Oh, Schoebel was back in the fifties, I think.
21 But I believe Gearey was the first case that went the other
22 way, though I am not positive about that.

23 Q I think you're right.

24 A Yes.

25 Q Mr. Rehnquist, may I ask you a question. To

1 what extent do you rely on the so-called Department of Defense
2 directive?

3 A Well, we think it is an important factor in
4 this case, Mr. Justice Blackmun. We have not only set forth
5 the DOD regulation, we have checked within the past week with
6 the Office of General Counsel of the Army and received his
7 assurance that this type of claim is not considered on the
8 merits by the Selective Service System; is considered when
9 raised under the Army system.

10 Q Perhaps you can straighten me out as to the DOD
11 directive. The first sentence speaks of federal courts have
12 held that a claim to exemption must be interposed prior to
13 notice of induction and failure to make timely claim consti-
14 tutes a waiver. This I take it is the government's position
15 here.

16 Now, the second sentence seems to me to be internally
17 inconsistent. It says a request for discharge after entering
18 military service based solely on conscientious objection which
19 existed but was not claimed not prior to notice but prior to
20 induction -- is it internally inconsistent?

21 A If read literally, I suppose it is. I think
22 taken in context with the first sentence, Mr. Justice Blackmun,
23 that the focus is notice of induction rather than induction,
24 and that is the interpretation that the General Counsel of the
25 Army places on it.

1 Q It certainly doesn't say that, does it?

2 A It doesn't say it in so many words, no.

3 As you comment, Mr. Justice Stewart, in the cutting
4 off of a claim for a purely voluntary reason, the case of a
5 teacher who becomes a teacher after notice for induction --
6 now that has been upheld by the Third Circuit this past year
7 in a case called Scott vs. Volatile, which is the same case
8 that in September went the same way as the Second Circuit had
9 gone in Gearey. So to say, as petitioner does, that we treat
10 conscientious objectors in some invidious way that we don't
11 treat any other kind of claims for change in registration
12 just isn't so.

13 Q Well, it depends really, I think, on whether
14 you accept the proposition that a conscientious objector whose
15 objection crystalized post-induction notice is somebody who
16 comes under the regulation. If he is then you treat him dif-
17 ferently than you do the man who is hit by an automobile and
18 his leg cut off. If, on the other hand, you don't accept the
19 fact that he comes under the definition and it is quite right
20 that you treat him no different than you treat a man who goes
21 to divinity school after his notice of induction is sent,
22 isn't that it?

23 A Yes, and certainly if we treat him contrary to
24 the way the regulation says we should treat him, you don't
25 need any further argument, I suppose, to conclude that we're

1 doing wrong by it, but we say the regulation construed per-
2 fectly consistently with its language does cut off not just
3 conscientious objector claims but any claim that may be a
4 result of volition. And of course before notice to report
5 for induction, there are any number of things that one may
6 do volitionally to obtain exemptions. One may enter the
7 ministry, one may go to school, one may become a teacher --
8 these are barred and there has been no suggestion in any
9 court that has considered the point that they may not be
10 barred post-induction notice.

11 So that the unifying theme of the regulation is the
12 notion that not only is volitional move to obtain exemption
13 totally cut off with the mailing of the induction notice, but
14 that any one of those non-volitional types of claims which
15 are capable of ready verification by the local board, con-
16 sisting as it does of laymen meeting irregularly, the sole
17 surviving son exemption, a brother shot down in a plane,
18 something like that that can be verified with a letter or a
19 phone call, is something that can fully be disposed of by the
20 board one way or the other between the time of notice of in-
21 duction and the time of reporting for induction, which as near
22 as I can tell from these cases seems to have run during this
23 period of time from between three and four weeks.

24 A claim to a change in one's conscience, a change in
25 conscientious status requiring as it does both the

1 ascertainment of the present state of mind and a determination
2 of whether or not that is a change of the state of mind one
3 held prior to induction is a factual and terrific extraordinary
4 difficulty, and even had this petitioner mailed his claim the
5 day after he received his induction notice, the local board
6 would have had great difficulty passing on it prior to the time
7 of induction, deciding it one way or the other. And certainly
8 when he mails it on the day before he is scheduled to report
9 for induction, he assures the absolute impossibility of the
10 board being able to pass on it. In short, he assures himself,
11 regardless of the merits of his claim, regardless of the merits
12 of his conscientious objector claim or of his claim to change
13 of mind, of getting a postponement on the date set for induc-
14 tion, and in effect somebody who had a higher lottery number
15 who is not being called that month is put into the manpower
16 pool to replace him while his case remains in limbo for some
17 unascertainable period of time while the local board makes a
18 determination, if you follow the Gearey procedure, and we are to
19 adopt Gearey, as to whether in fact there has been a change of
20 status or not.

21 Q Mr. Rehnquist, don't necessarily do it now at
22 all, but I hope that you will, before you finish your argument,
23 state as clearly as you can the government's position with
24 respect to assuming the bona fideness of this conscientious
25 objector status. Just where and when can he assert the claim

1 and how would it be processed? You do it in your own order,
2 but I hope you will --

3 A Let me address it right now, if I may. The DOD
4 directive which we cite and the assurance we have from the
5 General Counsel of the Army as of this past week are that a
6 registrant whose claim is not passed upon on its merits or
7 rises post-induction notice isn't passed on on the merits by
8 the Selective Service board may be offered and considered under
9 the Army regulations as soon as the registrant is inducted.

10 Q And that would be before any combatant training
11 or service?

12 A My understanding is that as soon as that kind of
13 a claim is made in the Army, the man gets what is in effect a
14 desk job in a situation where he is not further processed into
15 the military system until there has been a disposition one way
16 or the other by his -- of his claim.

17 Q If he prevails, he gets discharged?

18 A If he prevails, he gets discharged. The peti-
19 tioner claims that since under his view of the statute it con-
20 fers a right of exemption on the conscientious objector and
21 does expressly authorize any regulation which may limit the
22 time in which that claim can be asserted, but the regulation
23 is here applied by the court below as inconsistent with the
24 statute and therefore unauthorized.

25 I think this claim proves too much and would cite at

1 least two points in support of that observation. There is no
2 express statutory authority in 6(j) for barring the assertion
3 of conscientious objector claims which have existed previous
4 to induction notice but haven't been asserted. And yet even
5 the courts which have gone the Gearey route have said that
6 this is a proper function of the regulation, that the man who
7 was always a conscientious objector but fails to assert it
8 until the time he received the induction notice can validly be
9 barred, and yet there is no statutory authority for that. It
10 is simply the application of a procedural rule that is
11 thoroughly designed to both permit reasonable processing of
12 these claims and to perpetuate a necessary ultimate cutoff
13 date and change it.

14 Q Well, that is waiver, I suppose, and, after all,
15 you can waive even constitutional rights. I suppose that
16 could be misunderstood in terms of waiver. You had an objec-
17 tion but you didn't make it.

18 A But, Mr. Justice Stewart, is waiver so signifi-
19 cantly different from a procedural cutoff? Neither of them are
20 expressly authorized by statute. Both of them are well recog-
21 nized in almost any system of procedural adjudication. Perhaps
22 waiver, because it is something that every lawyer responds to
23 almost instinctively with an affirmative notion, maybe waiver
24 is different. But I don't think it is -- it is completely
25 different, and I think the type of procedural thing we're

1 talking about here is by no means completely distinguishable.

2 The same section, 6(j) of the act, that confers the
3 right of conscientious objector exemption, also confers in
4 unqualified terms a right of appeal, and the precise language
5 is this: "Any person claiming exemption from combatant train-
6 ing and service, because of such conscientious objection,
7 shall if such claim is not sustained by the local board be en-
8 titled to an appeal through the appropriate appeal board."

9 In there I suspect even petitioner wouldn't contend
10 that the President, under his general authority to promulgate
11 rules, isn't entitled to set some time limit as in a ruling
12 which an appeal from an adverse decision of the local board
13 must be taken to the appeal board. Surely on the day before
14 you are due to report for induction you can't come in and say
15 well I have decided to appeal to the appeal board from the
16 local board's adverse ruling two years ago when I wasn't a
17 conscientious objector.

18 So it simply is an overly simplistic, to use an
19 overly used word, construction of the statute to say that
20 because it confers a right of conscientious objection. There
21 may be no procedural regulation governing how that right is to
22 be set forth or how it is to be processed. And as occurred
23 earlier in the colloquy between counsel and, I believe, Mr.
24 Justice Stewart, if you look at the section sentence by sen-
25 tence the only unqualified right conferred, even if you take

1 a literal reading, is the right to be exempt from combatant
2 training and service; the right to be exempt from induction is
3 conferred only upon those who are found by their local boards
4 to be conscientious objectors.

5 I don't think you can read either one of those
6 statute sentences literally to the exclusion of the others.
7 And I think that the overall result that you get from a fair
8 reading of the section is that there is a substantive right of
9 conscientious objection and that reasonable rules are per-
10 missible so long as they serve a legitimate end of the
11 Selective Service System and its administration and don't un-
12 reasonably restrict the right of the conscientious objector
13 claimant to assert his claim in that forum.

14 Q Are there any figures available, Mr. Rehnquist,
15 as to the number of these post-induction notice conscientious
16 objection claims?

17 A Mr. Justice Harlan, there are, and I regret to
18 say that the Selective Service System in the past year not only
19 may have been guilty of writing ambiguous regulations but has
20 been guilty of not keeping as much statistical information as
21 it should.

22 What we have is figures for August, September,
23 October and November of 1970, and this is the first time
24 Selective Service nationally began keeping these figures.
25 During this four-month period there was a total manpower call

1 of 42,000. During this same four-month period the total
2 number of registrants who asserted post-notice conscientious
3 objector claims was 2,695. In other words, the statement of
4 petitioner in his brief that the service will be easily able
5 to adjust to this insignificant insubstantial burden is
6 squarely at odds with these facts. 6.42 percent of the total
7 manpower call in the last four months was asserting post-
8 induction notice conscientious objector claim.

9 Q Not just conscientious?

10 A Not just conscientious objector claims but post-
11 notice conscientious objector claims. And if you take the
12 states with large metropolitan jurisdictions, the facts are
13 even more startling. California, which leads the Nation, had
14 a draft call during this period of time of 4,191, total men
15 called into the service. During that period in California,
16 490 persons asserted post-notice conscientious objection
17 claims.

18 If you take the ten states with the highest rate of
19 post-notice conscientious objector claims, the average rate of
20 those claims is 11.22 percent of the total men called into the
21 service in those states.

22 Q Do you have those ten states in your brief?

23 A Mr. Justice Black, I apologize and say we didn't
24 even have these figures at the time we wrote the brief. The
25 brief was submitted the first of --

1 Q But these had the most?

2 A California --

3 Q Do you know?

4 A California had the most, New York next, Michigan
5 Massachusetts, Washington, Connecticut, Colorado, Oregon,
6 Rhode Island and the District of Columbia, in that order.

7 Q Would you submit those?

8 A Yes, I would be happy to, Mr. Justice Harlan,
9 prepare perhaps a more detailed summary of the figures than I
10 have given here orally and file them with the court as soon as
11 possible.

12 Q One other thing, Mr. Rehnquist, to go back to
13 when I asked you about the forum available to a man situated as
14 this petitioner is, and you told us about the Army practice.
15 Did I understand you to say that you had a communication from
16 the Army within the last ten days or so?

17 A Yes.

18 Q Unless that is confidential or for some other
19 reason, would you make that available?

20 A It certainly isn't confidential, Mr. Justice
21 Stewart, and we will see to it, with the Court's permission, we
22 incorporate that in the same submission in which we incorporate
23 the statistics.

24 Q What is the procedure that the Army follows in
25 cases such as this?

1 A My understanding, Mr. Justice White, is that as
2 soon as the claim is presented the man is given what is gen-
3 erally referred to as a desk job or a headquarters type job so
4 that he will be available in the area of the either Army
5 center or --

6 Q Well, is he subjected to training or anything?

7 A No. The training, as I understand it, is de-
8 ferred completely until the man's --

9 Q What we are arguing about here then is whether
10 the government may validly under the statute force a change
11 of venue or a change of forum for the hearing of the conscien-
12 tious objector claim?

13 A Whether the affording of the Army forum rather
14 than the local board forum under the circumstances presented
15 here is consistent with the statute and the regulation.

16 Q Well, there is no claim that the forum is any
17 different -- that there is any difference between the forum,
18 is there?

19 A I know of no such claim.

20 Q I mean in terms of fairness or anything like
21 that. It is just a question of whether you have to be in-
22 ducted before you get your claim heard.

23 A So far as I know that is the only difference.

24 Q It is military though?

25 A It is a military forum, yes, Mr. Justice

1 Marshall.

2 Q I would assume that under the rules the army
3 does it.

4 A But I think the issues are the same and --

5 Q The same criteria, the same standards --

6 A So far as I know it is the same criteria and --

7 Q -- as Welsh vs. United States?

8 A -- and the same standards. I know from reading
9 a most recent directive that they are well aware of Welsh vs.
10 United States.

11 Q And by whom in the military is the claim con-
12 sidered?

13 A I can't give a real accurate answer, Mr.
14 Justice Brennan. I believe it is a series of interviews and
15 then there is an Army board which evaluates the material gain-
16 ed and in effect holds a hearing. I am not as competent as I
17 should be in the correctness of that response.

18 Q Suppose you could let us know that too?

19 A I would be happy to, if I might submit that
20 along with the other two --

21 Q Could a claimant, as soon as he is inducted,
22 after the board refuses to hear his late maturing CO claim,
23 could a claimant immediately file petition for habeas corpus?

24 A I think he would have to exhaust his adminis-
25 trative remedies.

1 Q If there is one.

2 A Yes, I have been going --

3 Q I was just saying it is one way or the other,
4 either there is administrative remedy or there isn't. If there
5 isn't, he could go to federal habeas.

6 A What you are saying makes sense to me but I
7 haven't examined that branch of the law and don't --

8 Q I mean if the board has refused to consider his
9 claim on the ground that it is late matured and it has now
10 passed beyond their jurisdiction, he ought to be able to pre-
11 sent it somewhere.

12 A Look at the man who does not -- who is a con-
13 scientious objector in 1964, gets an induction notice in 1965,
14 has never presented his claim, now the local board won't hear
15 his claim --

16 Q That's right.

17 A -- I am not at all sure that when he was in-
18 ducted he could necessarily resort to further habeas corpus.

19 Q I am not talking about him. I am talking about
20 late maturing of his claim.

21 A Well, I should think that he could resort to
22 habeas corpus.

23 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rehnquist.

24 MR. REHNQUIST: Thank you.

25 MR. CHIEF JUSTICE BURGER: Mr. Halvonik, you have

1 about seven minutes left.

2 ARGUMENT OF PAUL N. HALVONIK, ESQ.,

3 ON BEHALF OF PETITIONER - REBUTTAL.

4 MR. HALVONIK: Thank you, Mr. Chief Justice.

5 Let me first talk about these figures because I
6 hadn't heard them before either. I noted that --

7 MR. CHIEF JUSTICE BURGER: By the way, Mr. Halvonik,
8 you will have an opportunity to submit any response in the
9 way of commentary on the material that Mr. Rehnquist --

10 MR. HALVONIK: Very good. If I can also just com-
11 ment on some initial facts, which is that these figures
12 referred to post-notice claims. Again, the government hasn't
13 made the distinction between dilatory claims and late maturing
14 claims, and the government has continued throughout this liti-
15 gation to ignore that distinction and apparently it has been
16 gathering statistics, too, so they are not very helpful. But
17 the most remarkable thing I found about them was that
18 California is the place where they have the largest number of
19 these claims. California, where Ehlert is the law, not New
20 York, where Gearey is the law. Now, if that tells us anything,
21 it is at least that the rule that the petitioner is asking
22 for does not encourage late claims. It doesn't seem to have
23 any effect on the number of claims. They are going to be
24 there anyway and they are going to have to be dealt with,
25 and they will have to be dealt with either by prosecutors or

1 the Army or the Selective Service System.

2 Q I gather the government isn't now claiming
3 that a gentleman who doesn't present his claim because it
4 matured late isn't going to get his claim heard.

5 A Well, he is not going to be heard if he can't
6 submit to induction. The government does admit to that.

7 Q Oh, yes.

8 A And let me quote from footnote 6 in Mulloy
9 where this Court said, quoting the Seventh Circuit decision,
10 a sincere claim of conscientious objector status cannot turn
11 to the habeas corpus remedy to challenge the legality of his
12 classification because his religious belief prevents him from
13 accepting induction under any circumstances, the previously
14 recognized principles of this Court.

15 Q While we are talking about footnotes, I have
16 a question about Footnote 53 in your brief. I was puzzled and
17 rather intrigued to find that despite the decision in this
18 very case your client, Mr. Ehlert, you tell us that state
19 headquarters of the Selective Service System in Sacramento,
20 California has what you describe as a procedure for handling
21 conscientious objection claims in the manner urged by you in
22 Footnote 53 on page 28. Is there an explanation for that?

23 A That's true. We found this particular memo-
24 randum and we used it to demonstrate that it didn't look like
25 things were going to get too disrupted. It wasn't applicable

1 in Ehler's case because of course this occurred before the
2 memorandum was issued.

3 Q This memorandum was promulgated well after the
4 decision in this case, wasn't it?

5 A That's true.

6 Q Is there any explanation for that?

7 A I can't --

8 Q It puzzled me very much and I just wondered --

9 A It puzzles me too and we just found it and in-
10 cluded it but I don't know --

11 Q -- because the California Selective Service
12 apparently state-wide is doing exactly what you say the Selective
13 Service ought to do and it is doing it despite the decision of
14 this case in the Ninth Circuit --

15 A That's true.

16 Q -- which California, the last I knew about it --

17 A That is the way we understand it, but I have no
18 explanation for it and I assume that most of the boards are
19 following the directive but I can't be absolutely sure.

20 Let me again, on the habeas corpus, and besides the
21 client not being able to reach it in this case, there certainly
22 are conscientious objectors who can submit to induction and we
23 know that from the number of habeas petitions. But there are
24 these difficulties.

25 First of all, that is not the way to handle it. The

1 government keeps talking about efficiency, but the proper forum
2 for these kinds of questions is the local board. The government
3 office tells us about the merits of the local board. In the
4 Weller case they told the court that they have these people who
5 are from the area that are expert on passing on these questions
6 and they do it in a non-adversary manner and how fine it is.

7 Well, if it is that way petitioner ought to have the
8 opportunity to go to that forum. That is the forum Congress
9 wants it in. We also in our brief quoted, granted it is
10 from another context, but we think the principle is applicable
11 here, from O'Callahan, says unlike courts, it is the primary
12 business of armies and navies to fight or be ready to fight war
13 should the occasion arise. The trial of soldiers, to maintain
14 discipline, is merely incidental to an army's primary fighting
15 function. To the extent that those responsible for performance
16 of this primary function are diverted from it by the necessity
17 of trying cases, the basic fighting purposes of armies is not
18 served. How is the army served by taking these 2,000 cases or
19 however many they may be and providing that sort of remedy?
20 Granted there won't be that many because there are some who are
21 going to go to jail and the courts will be providing the forum
22 and they will be off to jail. But they will be getting some.
23 How will they be better equipped to handle it? Why is it more
24 efficient for them to handle it, and what about the courts?

25 We are talking about California and the number of late

1 claims there, but it seems some of those late maturing claims
2 should be reopened and some aren't going to submit to induction.
3 Believe me, the California federal courts don't need any more
4 Selective Service prosecutions and you can't avoid them there.
5 You certainly can't avoid it where it is a question of con-
6 science.

7 Q I suppose if you prevailed in this case, the re-
8 maining issues would have to go back on remand, wouldn't they,
9 as to the validity of this claim both with respect to late
10 maturation and sincerity and so forth?

11 A Well, it would have to go back to the board. I
12 would assume the conviction would be reversed, and Judge Zirpoli
13 indicated that at the trial --

14 Q Well, we wouldn't decide any of those questions
15 up here?

16 A Well, I should think that the conviction ought
17 to be reversed because he has made a prima facie claim. You
18 have to go back to the board, right, for determination.

19 Q Well, the government -- not in oral argument
20 that I have heard, but in its brief -- urges the court that
21 the conviction can be and should be affirmed even if we accept
22 your procedural theory, your procedural and constitutional
23 theory.

24 A I agree that he has to make a prima facie case.
25 Where we disagree with the government is that we think he has

1 made the prima facie showing. We think clearly under Welsh he
2 made the showing. The government emphasized throughout that he
3 kept saying "today," but he is talking about a nuclear age and
4 not a nuclear war and, to go back to this Court's decision in
5 the Vincelli case, this Court used "today" throughout. It is
6 the kind of wars we fight today, is what we are talking about.
7 That is the kind of war that my client can't fight in, a war
8 that would happen after 1945, a war that would happen since he
9 was two or three years old. Under his theory he wouldn't have
10 been a conscientious objector before he was three but since
11 then he would and for all time he would be a conscientious ob-
12 jector.

13 Q Because of the atomic bomb?

14 A Because of the atomic bomb. He is not saying he
15 won't participate in a nuclear war. He is saying he will not
16 participate in a war in a nuclear age and unfortunately he is
17 not going to get a chance at any other age.

18 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Halvonik.

19 MR. HALVONIK: Thank you very much.

20 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rehnquist.

21 The case is submitted.

22 (Whereupon, at 2:25 o'clock p.m., argument in the
23 above-entitled matter was concluded.)

24 - - -