Supreme Court of the United States

OCTOBER TERM 1970

In the Matter of:

VINCENT FRANCIS McGEE, JR.,

Petitioner.

vs.

UNITED STATES OF AMERICA

Respondent.

362

Docket No.

Place Washington, D. C.

Date February 23, 1971

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

VINCENT FRANCIS McGEE, JR., Petitioner	:	
vs.	:	No. 362
UNITED STATES, Respondent	:	

Washington, D.C.
Tuesday, February 23, 1971

The above entitled matter came on for argument at 11:30 a.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:

ALAN H. LEVINE, ESQ.
New York City
On Behalf of Petitioner

WILLIAM BRADFORD REYNOLDS, ESQ.
Office of the Solicitor General
Washington, D.C.
On Behalf of the Respondent

******

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 362, McGee against the United States.

Mr. Levine.

ARGUMENT OF ALAN H. LEVINE, ESQ.

ON BEHALF OF PETITIONER

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

This case is before you on Writ of Certiorari to the Second Circuit. Petitioner seeks review of convictions on 4 counts, under the Military Selective Service Act, 1967.

The chief question presented by this petition is the question left open in McKart v. the United States. It presents the pure question of whether, where a registrant presents a claim for consciencious objection, and that claim is denied, without a basis in fact, as the Second Circuit conceeds here, it was so denied, where therefore the classicication the I-A classification, and the induction order, were illegal, is he barred from challenging that classification and induction order in judicial review?

In answering that question "no", we will assert two basic propositions. One, that the exhaustion of administrative remedies doctrine is inappropristely applied, where, as McKart suggested, its effect is not merely to delay judicial review,

but is to deny it completely.

And we will defend secondly, the proposition that if exhaustion of administrative remedies is to be applied so harshly, it must be applied with Congressional mandate. And that the Military Selective Service Act of 1967 to the contrary does not limit judicial review, in defense to a criminal prosecution, but in fact guarantees judicial review in defense to a criminal prosecution.

Petitioner at the time of induction was a full time student at Union Theological Seminary. He had registered for the draft in August of 1961, in New York City, he had advised his local board at that time that he was preparing for the ministry.

In August, 1964, he enrolled in the University of Rochester and the next month was given a II-S deferment, for all practical purposes kept that deferment until September 1967.

In February 1966, while still at the University of Rochester and still possessing a II-S classification, he applied for consciencous objector status, pursuant to regulations, the local board deferred consideration of that application until he was no longer entitled to a lower classification.

In March of 1966, he got a letter from the local board to that effect, that they would defer consideration of his C.O. classification.

In April of 1967, he was still at Rochester, still possessing a II-S, Petitioner wrote the President of the United States. He enclosed in that letter remnants of a torn and burnt draft card.

Q Now was he convicted of some criminal act in conneciton with that?

A He was not, nor was he indicted in the indictments under review here. Subsequent to the trial in this case, he was indicted on 2 counts of destroying a draft card. Those cases have not come to trial, Your Honor.

Q That question isn't forced, at all?

A It is not, Your Honor.

He wrote the President in April, 1968, and he advised the President that he would probably be entitled to a theological deferrment, nevertheless, he said, "I must sever every link with violence and war." He expressed, again quoting, "fundamental belief that men must build and not destroy, love and not hate." As a result he said that he could no longer cooperate with the Selective Service System.

In June of 1967, upon his graduation from Rochester, he was sent a current information questionnaire. SSS Form 127. He returned that questionnaire unopened and said that he would return all future correspondence unopened.

In September, 1967, he was classified I-A, despite his pending C.O. application. He returned that I-A classificatior

card.

Q Now that C.O. application that you just characterized as pending, is one that was filed while he was a student at the University of Rochester?

A That's right. In March of 1966---

Q --- 3 years earlier, 3½years earlier?

A No, this was in September 1967 that I;m talking about.

Q A year and a half, approximately.

A Right.

Q And at that time the board had indicated that since he had a II-S student deferment, there was no need for them to consider the C.O. application?

A In March of 1966. The board chairman testified at trial somewhat ambiguously, and as a result of his testimony, as to what the board did in March 66, and September, 67, that led Judge Feinberg to conclude that in fact the board had never considered the application on its merits.

That in September of 1967, according to the board chairmans testimony, they had just reaffirmed their earlier decision.

Q Why did they send him the information form?

A Presumably because they were aware from his earlier request for a II-S that he was going to graduate.

Q And if he had responded to that form there

would have been a place to talk about his current status, I suppose.

(No respnnse)

Q If it was a current information form.

A It was a current information form.

Q As to what status he might be claiming, or---

A Well, the board had before it his claim as to conscientious objection.

Q Well, that was a year and a half ago, yes.

A It was a year and a couple of months before it, that's corrent, Your Honor.

Q If he had answered it, he would have then automatically been claiming a CO.---

A If he had told the board at that time that he was no longer entitled to a II-S, presumably, in the coutse of normal procedures, the board would have considered his CO applicaiton at that time. This current information questionnaire does not contain feference to conscientious objection.

He would have advised them, "I've graduated, I'm entitled, I'm no longer entitled to II-S" therefore the board would have seen in his file that he had a pending CO application.

Presumably, according to the board chairmans somewhat ambiguous testimony, that is what they did, in September of 1967.

They considered his entire file, and his CO application. As I said, Judge Feinberg thinks that they did not consider his application on the merits atall, the trial judge, however, found that as a matter of fact, at the close of the trial that the application had been considered.

Q And rejected.

A Pardon?

Q And rejected.

A And rejected. That's correct.

Petitioner did not appeal that classification. Later that month, he enrolled in Union Theological Seminary. In Owtober of 1967 he was ordered to---

Q Did he recieve his I-A classification, i.e. did he not send it back unopened?

A He did sent it back unopened, Your Honor.

Q So he didn't even know that he'd been classified I-A, is that right?

A Presumably he did not. He sent back the I-A unopened, later that month enrolled in Union Theological Seminary.

In October of 1967 he was sent an order to report for physical examination. He returned that order unopened. He was ordered to report for induction in January of 1968. He filled out a number of forms at that time giving a variety of different kinds of information at that time. He took a complete physical

examination.

Q So he did open that envelope.

A Pardon?

Q He did open that envelope?

A He did open that envelope. He reported as ordered to report, he gave the required informetion, he took the required physical examination, passed the physical examination, and refused to submit to induction.

Q Now, that was the physical examination given at the, by the Selective Service, or by the military?

A It's given by the Military for the Selective Service. It's given at the Armed Forces Entrance and Examining Station.

q At the time of induction, ---, or quite a while before?

A No, this was at the time of induction.

His file was then forwarded to the United States Attorney, significantly, with a recommendation by the Selective Service that he be indicted only on 2 counts, refusal of induction and failure to possess his notice of classification.

Q Is there any indication why he changed his mind regarding how he would deal with mail addressed to him by his draft board?

A Why he opened the---

Q He sent several of them back, including his

I-A classification, sent back unopened.

A I---

Q And then when there arrived other communication, one directing him to report for physical examination he not only opened the communication but complied with it. Is there any indication of why?

A Not from the record Your Honor. I did not represent Petitioner at the time, perhaps he spoke to legal counsel at that time, I donnot know and the record does not indicate.

Despite the recommendation of Selective Service, that he be prosecuted on 2 counts, in February of 1968 the government sought and obtained a 4 count indictment.

The first count was for refusal of induction.

The second was for refusal to take the physical examination.

The third was for failure to possess the notice of classification.

The fourth, for failure to submit the information requested on the classification form.

Q Incidentally, these notices of classification and to report for a physical, are they in sealed envelopes or are they post cards?

A They are generally in envelopes, I believe, Your Honor.

Petitioner was found guilty in January of 1969, on all 4 counts, sentenced to 2 year concurrent sentences on each count. In March of 1970, the Second Circuit upheld the convictions, Judge Feinberg dissented.

The three judges in the Second Circuit conceeded that there was no basis in fact for the board to deny Petitioners conscientious objector claim. Nevertheless, they said that because he failed to exhaust his appeal remedies within Selective Service, they would declide to review the classification.

We point out first that the 1967 Military Selective Service Act provides for review of classificaitons, "as a defense to a criminal prosecution". It does not qualigy that right, it does not conditioniit, on exhausing administrative remedies. It says rather that it can be raised, review can be had after a registrant has responded to an order to report for induction.

It's important to note, Your Honors, that the Congress had before it the entire question of judicial review, it is not an inadvertance that this aspect of judicial review is stated as it is. They had it before it, they considered the question of judicial review and limited only pre-induction review. The question before this Court in Oestereich.

As the Senate Armed Services Committed said, "If the registrant does not submit to induction, he may raise as a defense to a criminal prosecution the issue of the legality

of the classification.

The effect of that Act is to guarantee judicial review in a criminal prosecution. The Second Circuit conceeded that Petitioner was unlawfully classified, implicitly it conceeded that he was sent to jail for 2 years, or has been ordered to jail for 2 years for violating an illegal order.

Q The Court of Appeals theory, concession as you call it, that your client had been erroneously classified is based on the conscientious objector claim rather than on the attendance at a theological school, as I understand it.

A That is correct. They deal with that claim and I will touch on it briefly, but the major issue and the issue upon which Judge Feinberg relied in dissent was the conscientious objector issue.

Q What, there is some question, I suppose, about whether his mere attendance at the Union Theological Seminary is sufficient, is not sufficient under the law, not mere attendance at a theological seminary, is it?

A Well, let me say briefly, Your Honor, that the Congressional mandate for ministerial deferrments under six G is---

Q Divinity school deferrments?

A That's right. Is mandatory. He shall be deferred assuming hemeets certain qualifications, that's full time attendance, under the direction of a recognized church.

Q And studying to become a---

A That is correct.

Now, McGee presented, not directly to his board, but it can be inferred from the record that the board had notice of the fact that he was attending Union Theological Seminary. He did not request the deferrment, some cases have suggested that it's not necessary. We point out the difference of the language of 6-G and the language providing for student deferments which requires an affirment of request by the registrant.

The language fof 6-G is "shall be deferred".

Q Not for mere attendamse, though. I thought you and I had agreed.

A Under---

Q We can --- a man who is just likes to dabble around philosophically and has plenty of time and money so he goes to various theological schools in order to increase his knowledge of comparitive religions, and with no intent ever of becoming a minister.of the gospel, of a pastoral leader, but simply wants to increase his intellectual, philosophical and religious knowledge.

That man would n't be subject to statutory deferrment, would he?

A Absloutely not, Your Honor.

Q And so our record shows that that is the purpose of this fellow, or client, excuse me, in attending, I

mean so far as the record shows we don't know whether this was his purpose.

A Well, the trial court found that he was in full time attendance and that he was pursuing a degree leading to study for the priesthood.

What the trial court did not find is that he was there under the direction of a recognized church since Union Theological Seminary is not itself under the direction of a church, which is non sectarian.

There is no evidence according to the trial judge, in the record, that he was there under the direction of a recognized church.

Q And that's a statutory requirement?

A That is a statutory requirement.

Q And that's the necessary--

A That's right. Now we do suggest in our brief that Selective Service Procedures under such circumstances authorize a board to look into the basis for a deferrment and in fact mandate that they do so, and they have certain preliminary information.

The major point to which I would like to address myself on the exhaustion question is that it is a doctrine of judicial convenience to be applied flexibly that has its origin in affirmative litigation, where a plaintiff comes in seeking releif and there are still administrative remedies to be

exhausted.

Professor Davis tells us it is a doctrine concerned with the timing of judicial review and that it is not imposed where it is absolutely and completely denying relief as it would here.

And even when used in affirmative litigation there are recognized exceptions so that it would not be applied too harshly. We point in our brief to Justice Frankfurters opinion in Republic Utilities Commission v. United Fuel case, where it would in effect, impose irreparable injury on a litigant. That is a recognized exception to the exhaustion rule. That is an exception which we urge would apply here.

Q You take the same position, I take it, if he had never presented his CO claim at all to his local draft board?

A No, we would not.

Q Why not?

A We make a distinction, in our brief,---

Q Then why not?

A Because I believe the act requires minimally primary jurisdiction of the local board. We urge a distinction, as does Davis in his treaty between primary jurisdiction and exhaustion.

You are entitled to review of your classification, if your classification is not supported by any facts, then a court

could not properly go into anything that was not before the local board.

McGee here, by concession of the Second Circuit did present to the local board what was necessary to support his classification. We don't quarrel with the fact that he has the burden of prooving his classification.

We only say that he met that burden.

Q But you do say that he had to proove to his draft board, too?

A That's correct. And we suggest here that he did proove that---

Q But he didn't have to proove it to some Appellate Court.

A That's right. That he is entitled in Court to judicial review of his classification, his classification was determined by the local board, and was determined here without a basis in fact.

The effect of the application of the exhaustion rule in this case, and in criminal cases generally, is to work a very substantial denial of a right in a criminal prosecution. The difference between the applicaiton of that rule in an affirment of a defensive case was elaborated on by Chief Judge Magruder in two cases cited in our brief, the Smith and McCrillis cases, and there the judge said that we do not have to a apply the exhaustion rule in the defensive context, it is a

judge-made rule and we only have to, when it is mandated by Congress, and the Court there dealt with the two major precedents in this Court upon which exhaustion has been premised, namely Yakus and Myers vs. Bethlehem Shipbuilding.

And the Court there said those were specifically cases in which Congress had mandated the exhaustion prior to judicial review. Here, as we said before, there was no mandate Congressional mandate to that effect and in fact, the Congressional mandate is th the contrary, that it authorized judicial review.

That brings us to McKart. McKart, we submit, reflects that general suspicion of the exhaustion remedy. It draws the distinctions between affirmative and defensive context. It points out that in the defensive context it is an exceedingly harsh doctrine and should be imposed there only where it clearly outrays the interests of the registrant in having a right to assert a defense to a criminal prosecution.

The major interest to be served here is whether or not other registrants are going to be read by the relaxation of the exhaustion rule in this case, to forego their administrative remedies and come into court and defend a criminal prosecution.

The McKart court suggests that maybe there is a difference between the legal issue presented there and the CO claim. The CO claim, we submit, is a legal issue, you take, as the Court does, any basis in fact case before it, an undisputed set

of facts and apply them to a legal standard. It is the same issue which confromts this Court whether or not there is exhaustion. There is no different burden.

The question then, is are other registrants going to do what McGee did? Recognizing, as we must, that what McGee did, he did for, out of reasons of moral scruples.

But will other registrants do it for tactical reasons? And the governments response to this is crucial and I think deserves special attention. The government says, "If we let McGee decline to appear before his local board, as he did here, decline to appeal his administrative remedies, then the well counseled registrant is going to submit a bare Form 150, will provide on its face no basis for denial, it will not have a great deal of documentation, it will simply be the Form 150"---

Q And the Form 150 is the Conscientious Objectors form?

A It is, Your Honor. At that point he will be classified presumably I-A by his board, told that he has a right to a personal appearance, not that he must personally appear. McGee was not told he must personally appear, only that he had a right to appear. Refuse to appear, told that he has a right to appeal, and refuse to appeal. He will then refuse induction and have perfect defense before the Court. There will be no basis in fact upon which a Court could uphold the I-A

classification.

We suggest a couple of things. One, McGee didn't just make out a primae facaie case before his local board---

Q Well don't you think in your hypothetical case there would be plenty of basis in fact for the support of a I-A classification if the man had not submitted anything to support the conscientious objector---

A Well the governments thesis is that he would simply submit a Form 150, perhaps with supporting letters if they could be obtained, of course, there one has to assume perhaps a certain impropriety in obtaining those letters if it was not a bona fide claim.

But the governments thesis in any case is as bare a submission as possible. And---

Q Then if the submission was that minimal, material submitted with it, there would be plenty of basis in fact for a I-A classification, wouldn't there?

A I---

Q If there wasn't enough to support a Conscientious objector classification.

A I submit that there would be. We submit in our brief that there would be substantial basis in fact for denying his claim, and if the Form 150 was considered by the board to be inadequate, it left them in doubt, we have a pretty well stated claim here but we want to see him to test his sin-

erity, the remedy is simple, we attach in our reply brief, New York City Form 44, which says, call on the registrant, and there's a space there for the local board to check off, send it to the registrant, say, you are ordered to appear before the local board to discuss your claim.

That is the simple remedy available to the board in cases where they find themselves in doubt. If they are not in doubt , their obligaiton is to classify I-O. They can't simply have vague doubts, Dickenson and --- teach us that there must be affirmative evidence.

Now it might be affirmative evidence that he fails to present a clear and accurate picture and if the board has doubts, as I suggest, he can be called in.

Q Are you suggesting that the board has an obligation to call him in, before they rule, if he has submitted all the material that he wishes to submit?

A No. We suggest that under current Selective Service procedures, the board has put itself, and the system has put itself in the position of classifying without a personal appearance. The sequence is that you submit your claim, you are classified, then you have your right to personal appearance.

Now if that's the way the Selective Service system wants to classify, they can. And when you submit your Form 150, if it's a good claim, they're obliged to give you your classification. If it is an inadequate claim, then either you have not

met your burden of prooving your entitlement to the claim, and the board then is obliged to state its reasons why it, you have not met your claim.

Or if the board then is left in doubt, then since the registrant has made out his primae facaie case, it is up to the board then to find some affirmative evidence, and if it needs a personal appearance, then it can order that personal appearance.

Q I'm at a loss, Mr. Levine, to understand the point that I thought you were going at. A well counseled registrant could play games with the board.

A That's the governments point.

Q Yes. Well you were merely referring to the goveunments point.

A I'm sorry, Your Honor, that is the major response to which the government advances to our suggestion that registrants will not look at this courts decision in McGee, assuming its favorable to McGee and say, "Hey, there's a good out for us, we'll simply fail to appear, fail to exhaust, and defend in a criminal prosecution."

We submit that the best way still to get a classification is to go through the Selective Service System, and that the only people who don't, and if one looks throught the exhaustion cases, the only ones who don't are the very rare people like McGee, and there seems to have been in reported

cases only one other, who conscientiously disasociated himself from the system, or those who are ignorant.

Q We'll resume after lunch.

A Thank you.

(Whereupon argument in the above entitled matter was adjourned, to be resumed at 1:00 p.m. the same day.)

AFTERNOON SESSION

1:00 p.m.

MR. CHIEF JUSTICE BURGER: Mr. Levine, I believe you were in the process of---

ARGUMENT OF ALAN. H. LEVINE, ESQ.

ON BEHALF OF PETITIONER

(RESUMED)

MR. LEVINE: I will try to be as brief as possible., and save a minute or two for rebuttal if I may.

Mr. Justice White asked prior to the luncheon break what was the statutory requirement for the claim initially to be presented to the local board. I quote from Section 10 (b) (3) of the Act; which says that, "A local board shall hear and determine all questions or claims with respect to inclusion for or exemption of deferment from training and service under this Title."

I think pursuant to that requirement that the registrant has the burden of going forward with his claim to the local board.

The major deterrant to any other registrant---

Q Where is the statute that says that a court trying a criminal case is disentitled to consider whether a man is a conscientious objector or not?

A The statute only says, says that the Court shall obly review a basis in fact, and presumably that is the

limitation on this Courts review, or on any courts review, that they cannot consider the whole claim on its merits, but only on whether there is a basis in fact for denial.

Q You imply, that it can only review a board determination?

A That's right, Your Honor. The major deterrent, though, for another registrant to do what McGee did here, is the simple fact that if he wants his classification, the best place to do it is before the Selective Service System.

He only has to convince the Selective Servicy System on the merits that he's entitled to the classification, whereas a court, in review would only be determining whether ornot there is a basis in fact for denial of that claim.

We cite a long line of cases in this Court, Greene v. McElroy, Kent v. Dulles, which suggest that a substantial right, here the right to defend yourself in a criminal prosecution should not be abbrogated without explicit Congressional authorization.

Q Of course, the point you just made, that the Selective Service Systems administrative review should deny his conscientious objector status, then that denial would have to be accepted by this Court if there were a basis in fact for that denial, whereas, if somebody proceded along the lines that your cdient did, and somebody, well, Counsel, to use your phrase, then he would get a brand new, judicial de novo deter-

mination if you're right as to the validity of his conscientious objector claim, which might be more beneficial than the very very little review---

A I---

Q ---that the Court would be confined to if client has been deniedSelective Service administrative procedures.

A I did not mean to suggest that there would be a different standard of judicial review applicable to McGees claim, than there would be to a claim where in fact the classification was appealed.

I think the standard for McGees claim, the one used by the Second Circuit, was a basis in fact claim, as well as it would be if he had appealed.

Thank you, Your Honors.

Q That consumes all of your time, Mr. Levine.

Mr. Reynolds.

ARGUMENT OF WILLIAM BRADFORD REYNOLDS, ESQ.

ON BEHALF OF RESPONDENT.

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

I think that the cases Falbo and Estep read together, clearly establish that the principle of exhaustion of administrative remedies does have a place in criminal actions brought under the Selective Service laws.

And that general concept was not under attack in the recent McKart and (DeVernay) cases. They involved, instead, exceptional circumstances, said to warrant a relaxation of the doctrine, on the particular facts presented.

Here, however, Petitioner seeks to have this Court overrule Falbo, Estep, and their progeny, primarily because as I under stand the argument, he comes before the Courts, not as a Plaintiff seeking affirmative relief, but as a Defendant charged with a criminal offense.

At the outset, it seems that if an applicaiton of the exhaustion doctrine were to turn on such a distinction, the effect would be in essence to penalize the registrant who after failing to exercise his administrative remedies, decides to obey the law and submit to induction, seeking affirmative relief in the courts through a habeas corpus action.

He would, under Petitimners theory, be precluded by the exhaustion doctrine from challenging his classification. On the other hand, if this same registrant had decided to violate the law, and had then been criminally prosecuted, Petitioner maintains that he cannot similarly be barred from raising the same claim as a defense.

Q You mean, by violate the law, you mean refuse to submit to induction?

A Yes, Your HOnor.

Q Of course, his claim is that he's not vio-

lating the law, beacuse he's entitled to a conscientious objector---

A That's correct, Your Honor. If a criminal prosecution trial and he did fail to ---.

We do not think the exhaustion doctrine was ever intended to be applied in the manner which would encourage registrants to refuse induction and discourage them from complying with the law and testing their classification in habeas corpus procedings.

Moreover, to insist that the exhaustion doctrine cannot be inpoked under any circumstances in criminal prosecutions under the Selective Service laws, is to ignore the statutory scheme on which this Court has based its earlier decisions in this area.

Congress and the President carefully constructed a very comprehansive and fair administrative appeal process within the Selective Service System. At the time the local board classifies a registrant, it is required to notify him he has 30 days within which to request a personal appearance before his local board or to takt the appeal to the state Appeal Board.

And that there is a government appeal agent available to advise him fully of his appeal rights and assist him in any appeal process. At a personal appearahce, the registrant may discuss his classification, with the local board members and present both orally and in writing any new information

he believes may be relevant to his claim.

And a written record of the appearance is placed in his Selective Service file.

On appeal to the State Appeal Board, the registrant may specify in writing the matters in which he believes the local board erred or which he believes it failed to consider.

The State Appeal Boards consideration is de novo. The Based on its independent review of the registrants Selective Service files. Its classification is one of first instance. Not a mere affirmance or reversal of the local board.

Moreover, if the information in the registrants Selective Service file is not sufficient to enable the Appeal Board to determine the proper classification, the Appeal Board is required by the regulations to return the file to the local board for additional informationoor action.

From a final decision by the State Appeal Board, an appeal may be taken to the National Board if one, the State Appeal Board had been divided, or two, even had it not been divided, if the National or State Director is asked by the registrant to take the case to the National Board on his behalf and a question of some importance appears to be involved.

No registrant can be ordered to report for induction while his classification is being considered by thellocal and Appeal Beards.

Now while a registrant is nowhere required in the

statute or regulations to seek an administrative review of his local board classifiaction, the exhaustion of administrative remedies principle seems implicit in the entire statutory scheme.

When Congress, in 1967, added to Section 10 (b) (3) the provision generally prohibiting judicial review of classification and processing questions until after the registrant has responded either affirmatively or negatively, to an order to report for induction, the legislative history reflects clearly that the intent was to commit the resolution of such questions in the first instance to the discretion and expertise of anlocal and Appeal Boards.

And this intent, it seems to us, was underscored in this Courts recent decisions in Oestereich and Clark v. Gabriel, defining the narrow scope of pre-induction judicial review under Section 10 (b) (3) that is available to registrants who have exhausted their administrative appeal remedies.

And it seemed to be simple to the unanimous decision of theCourt only last term in Mulloy. Of course, as stated in the McKart case, the exhaustion doctrine must be tailored to fit the peculiarities of the administrative system which Congress and the President have created.

And thus, where, as In McKart, classification is not one requiring administrative discretion and expertise, but turns instead on the statutory interpretation. There is gener-

ally good reason to exhaust the exhaustion principle, to require further resort to local and Appeal Boards, which are concedly ill suited to the task of coping with such pure questions of law which serve no real purpose.

Similiarly, if the local boards action is challenged on strict Constitutional grounds as was the situation in the Wolff case in the Second Circuit, that exhaustion of administrative remedies might not be necessary.

In that case, the Second Circuit declined to invole the doctrine to preclude judicial review of delinquincy reclassifications, assigned to registrants for sitting in at their draft boards.

And ther reason given was that the action by the local board raised significant First Amentment questions under this Courts decision in Dumbrowski. Now would it seem is the doctrine so wooden as to require its application where a registrant can show he was physically unable to exhaust.

Or he could show some other special or unusual circumstances which justify his failure to exhaust. And I think in this connection its instructed to point out that the case, McNeil v. United States a conscientious objector case, which was remanded to the District Court after McKart for further consideration in light of this Courts decision in McKart.

In that case, Judge (Merrick) of the Eastern District of Virginia relaxed the exhaustion principle on the ground that

there were, in that case, special circumstances, in his words, that if, that the registrant apparently lacked any comprehension of his administrative rights, under the administrative appeal procedure.

However, we do not consider the instant case to be within any of these exceptions. At the outset, Petitionere efforts to bring the case within the McKart rationale on the ground that the local board failed to consider his conscientious objector claim is simplynnot supported by this record.

While there is some ambiguity in the board chairmans testimony as to whether the claim was, in March, 1966, at the time that Petitioner held a student deferment, whether it was considered at that time, ther record clearly established that Petitioners entire file was reviewed and considered by the full board prior to re-classification in September, 1967.

That is when he got his I-A classification from the II-S classificaiton.

And the District Court found as a fact that the claim had been fully considered as did the majority below. But I think that the essential point here is that even had the local board failed to consider the claim in the circumstances of this case, McKart wouldnnot be controlling.

It is undisputed that the local boarda action in September, 1967, was not in response to the letter Petitioner wrote to the President on April 15, 1967. That is, we do not have

here an instance of unlawful re-classification by the local board in the Oestereich and Greene sense.

At most, we have a situation where the board, in March 1966 did not actually consider the claim because Petitioner at that time held a lower II-S classification. And then in September, 1967, the board, mistakenly believing it had earlier considered a claim, and finding no new information in the file relating to the claim, based its denial on what it thought to be a prior determination on the merits.

It is our view that that is precisely the type of procedural error, had that in fact been the case, which Congress and the President anticipated at the time they constructed the elaborate appeal machinery within the system.

Plainly, a personal appearance would have corrected such a mistake. An appeal to the State Appeal Board, which was required to consider Petitioners file de novo, would certainly have cured the mistake.

Nothing here suggests that such a course would have been a futile exercise. Unlike McKart, the administrative determination of Petitioners conscientious objector claim was not a matter solely of statutory interpretation.

There was no statement here by the State Director as there was in McKart that hewas predisposed to deny Petitioners claim. Moreover, we are not here dealing with a classification question, where this Court can determine with any cer-

tainty that they could in McKart that Petitioner is entitled to an exemption as a matter of law.

Here the claim is to conscientious objector status. Such a claim by its very nature calls for the type of factual determinations which Congress has said should, in the first instance be left to the discretion and special expertise of local and appeal boards.

Moreover, it is one of the few claims that does not turn exclusively on the registrants written submissions. It is undisputed that Petitioner made out a primae faciae case for exemption in his special conscientious objector form.

But as this Court recognized in the Whitmer case, and again in (Seeger) there is also the substantial question of Petitioners sincerety.

Here the local board, which did consider the claim may have thought that the Petitioner was insincere, perhaps because he claimed to have always been a religious conscientious objector, and yet in August, 1964, at at time when he held a I-A classification, he expressed some willingness to submit to induction.

Or perhaps because his letter to the President was read by the local board as reflecting an objection to the governments policies in Viet Nam. And the board might have felt that this was the real basis for his claim. Whatever the basis for the local boards denial in this case, we think it is

clear that the administrative system never had an opportunity to examine the sincerity of Petitioners professed beliefs.

Perhaps, as Petitioner suggests, if the local board doubted his sincerety the better approach would have been to call him in for an interview prior to re-classification. But the law does not require local boards to do this.

Moreover, in view of Petitioners letter to the President and his subsequent statement to the local board that he would return all correspondence from the system unopened, both of which took place prior to the time that the local board considered his claim in September, 1967, it seems to us unlikely that the Petitioner would have appeared even if the local board had made such a request.

Q Did he sendtto the local board a copy of his letter to the President?

A He did not send himself a copy but it was touted to the local board.

Q The letter.

A Yes, the local board did recieve it, but it did not come directly---

Q Yes.

A ---from the Petitioner.

Q Was the notice to report for the physical examination a postcard or a sealed letter?

A I believe that that was a sealed letter.

I believe that the Selective Service System sends all their orders in sealed envelopes with their stamp on the corner and a window.

The essential point, Your Honor, is that the Selective Service laws place the burden on the registrant to proove his sincerety. Had Petitioner requested a personal interview perhaps he could have laid to rest any doubts that the local board might have had in this regard.

Had he taken an appeal to the State Appeal Board, perhaps it would have read Petitioners file differently than the local board and granted the exemption. Or it might have found the information in the file insufficient and sent it back to the local board with the instructions to call Petitioner for an interview.

What we are saying is if the local board did in fact commit error in the classification of Petitioner, it was precisely the type of error within the competence of the administrative agency to correct. But Petitioner has chosen deliberately to bypass the administrative appeal machinery. Whateverhis reasons he has willfully adopted a position of total non-cooperation with the system, a choice he made prior to the time that the board gave final consideration to his claim on the merits.

Thus there has been no opportunity for the local and appeal board to consider fully the sincerity of his profesed

beliefs.

If the exhaustion of administrative remedies is not required in this case, it seems to us that the operation of the Selective Service System could be seriously and effectively disrupted by others who might choose deliberately to bypass this elaborate administrative machinery that Congress and the President have established.

They would then be able to submit to their local boards well drafted conscientious objector claims, followed shortly by a letter advising the board that their opposition is so strong that they no longer can cooperate with the system.

Their cases then come to the Courts in the same posture as the instant case, without anyone having an opportunity to pass directly on the sincerety of their professed beliefs.

Since the Courts are not permitted under this Courts ruling in (Gibson) to recieve additonal evidence on this question, it seems to us that they would have no choice following the Estep standard which is now in statute but to dismiss a criminal prosecution for refusal to submit on the ground that the registrants Selective Service file, that is, the documents which were before the board, shows no basis in fact for denial of the primae facie written claim.

We are not suggesting that the sincere registrants who are genuinely opposed to participation in war in any form

are likely to run to this procedure.

As pointed out in McKart it seems unlikely that they will risk criminal conviction before taking all possible steps within the system to obtain an exemption of deferment. But in our view the exhaustion requirement is not needed for such registrants.

It is needed instead to cope with the recalcitrant registrant who refuses, for reasons best known to him, to cooperate with the system in any way. Who quite often is more intent on disrupting the operation of the system than obtaining an exemption.

It seems to us that he should not be allowed to sit back and ignore the administrative processes with impunity while others are being called up to serveiin his place.

Q What bearing do you think the Divinity claim has on this exhaustion problem, or its not a claim, because I guess he never file i one, did he?

A That's---

Q But its something on which the board was aware at the time.

A Well, Your Honor, in our view the board was not on constructive notice of the claim. I think our principle response is that with respect to the Divinity claim, Petitioner not only failed to exhaust his administrative remedies, he did not even invoke them in the first place. And

courts do not have under the statute plenary review of classification questions, but are explicitly limited to determining whether the action of the administrative agency is without any basis in fact.

But even if we assume that the board had constructive notice, and even if we assume that the facts that Petitioner relied on at trial, because the District Court did accept evidence on this point, even---

Q Judge Friendly dealt with it, in his footrote, but Judge Feinberg said nothing about it, as I recall.

A Except that Judge Feinberg did state, Your Honor, that his position would be entirely different even with respect to the conscientious objector claim if there had been no tendering of a claim in the first instance to the local board.

And I would also add that even on the facts presented, this Petitioner was not entitled to such an exemption. That's a factual question. The Courts looked at that and there was no showing that he met the statutory standard that his studies, that he himself as student studies were under the direction of a recognized church or theological institution.

He was attending Union Theological Seminary, but there is no evidence that he was there under the direction of a church or religious organization.

Q Does the record show whether or not he got a Divinity degree?

A I don't believe at the time of the case in the District Court that he had completed his studies. Whether he now has one or not, I don't know.

Q Oh. Your are going to deal with other issues if you lose this one, aren't you?

A If we lose this one, Your Honor, I do think that as to the other counts the Petitioner was properly convicted for the deliberate non-performance of duties inposed on him under the laws.

Q Now did the Court of Appeals pass on those issues?

A No, Your Honor, they did not.

Q None of them.

A Not on the other counts, No, Your Honor, they were discussed by the dissneting---

Q Well, if you lose this issue, do any of the other issues automatically wash out?

A No, they do not. In our view they don't.

Q The Court---

A As to---

Q The Court of Appeals thought they might, didn't they?

A I believe the---

Q That one or two of the other counts automatically hinged on this one?

A Well, one or two, the argument in one or two of the other counts hinged on the fact that he had been classified I-A---

Q Yes.

A But I don't believe that the Court of Appeals addressed itself to the other issues because it found that he was guilty on the first count and on the concurrent sentence doctrine its discretion is permitted.

Q But on the failure to furnish information count, that is unrelated wholly to---

A That's---

Q ---accurate or inaccurate classification.

A That's correct, on that count. But they did not reach that question.

Q So if you lose this issue we must remand to the Court of Appeals to pass on the remainder of the case?

A I believe if we lose on the first issue, you could properly remand to the Court of Appeals to pass on---

Q You don't urge that we make an independent examination of any of those other issues?

A I don't think that this Court needs to do that, I will address a comment or two to each of the other ones, I believe that---

Q I'm sorry, I don't mean---

A They were proper, but the Court of Appeals did not address itself to---

Q You would assume that the District Judge would give two years for failure to return a pieceof paper?

A No, Your Honor, I think that the two year sentence was based primarily on the first count and I think---

Q Well, if you lose on it, wouldn't the proper way be to go into the District court and ask for a reduction of sentence?

A That is our position in our brief, Your Honor, and Ibelieve that that is correct. But at the same time---

Q Because so far as I'm concerned I have great difficulty with a 2 year sentence on---

A We are not urging a 2 year sentence on the--

Q That's what I---

s A No, Your Honor, that's not what we are urging. But the other counts are briefed and before the Court.

I think that the conviction on those points was proper. The failure to report to his preinduction physical examination, Petitioner justified that on the fact that because he was classified I-A imporperly he was under no obligation to obey the intermediate directives of the local board.

Now I don't beleive that this argument can be sustained. The preinduction physical examination is for the purpose of assuring the local board that a registrant is physically qualified and available for induction, prior to the time that it issues its induction order in order to fill its call.

The induction which Petitioner underwent at the station is a much more, much shorter examination and it is merely to determine the changes in his physical status from the time of his earlier preinduction physical.

And therefore it's our view that that does not absolve his failure to report to the Selective Service preinduction physical.

He argues that his notice of classification was invalid because his assigned classification was invalid. In our view the qualifier "valid" in the regulation related, does not relate to anything other than the certificate itself. And that it be authentic and properly executed. Now Petitioner does not contest the fact that his notice of classification met these requirements.

And finally, on the information questionairre, the categorical language of the regulation violated provides that each registrant shall submit to his local board, in writing, all information which the local board may at any time request from him, Petitioner conceds that his failure to respond to the current information questionairre undoubtedly violated

this language.

We believe there is no good excuse, no good reason to excuse the violation. We are not dealing here with a minor lapse, but with a flat defiance of a reasonable request for information, not readily available to the local board otherwise, and which Petitioner never provided to them.

Q Thank you, Mr. Reynolds. Thank you, Mr. Levine, the case is submitted.

(Whereupon at 1:30 p.m. argument in the above entitled matter was concluded.)