In the

Supreme Court of the United States

JOSEPH PARISI,

Petitioner,

vs.

MAJOR GENERAL PHILLIP B. DVIDSON, et al,

Respondents.

No. 70-91

Washington, D. C.
October 19, 1971
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MAJOR GENERAL PHILLIP B. DAVIDSON, et al

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No. 70-91

Washington, D. C.

Tuesday, October 19, 1971

The above-entitled matter came on for argument at 2:47 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A BLACKMUN, Associate Justice

APPEARANCES:

RICHARD L. GOFF, ESQ., 44 Montgomery Street, San Francisco, California, for the Petitioner

WILLIAM T. BRAY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C., for the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 91, Joseph Parisi v. Philip Davidson.

(Discussion off the record.)

ORAL ARGUMENT OF RICHARD L. GOFF, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GOFF: Thank you, Mr. Chief Justice, and may it please the Court:

This case raises one issue and one issue only. That issue is whether the right of a serviceman to petition a Federal Court for habeas corpus, based on a wrongful -- and a claim of wrongful administrative denial -- of his application for discharge as a conscientious objector should be or may be suspended until he has exhausted certain kinds of military criminal proceedings which are pending against him at the time the habeas petition is filed.

The issue arises out of the District Court's order which was affirmed by the United States Court of Appeals for the 9th Circuit, in order that all proceedings under Petitioners Parisi's petition for habeas corpus, based on his claim that the Army had denied his conscientious objector discharge application without any basis in fact, should be stayed until exhaustion of military criminal proceedings which were pending based on the claim of refusal to obey an order to board a plane headed for Vietnam.

Q Well, would exhaustion have meant going all the way through the court of military appeals?

MR. GOFF: Under the District Court's order, Your Honor, the exhaustion remedy must be pursued until there has been a final judgment in the military criminal proceeding.

Q Does that include the court of military appeals?

MR. GOFF: I would assume that if the conviction were affirmed in the court of military review, that that would certainly necessitate continuing the appeal process through the court of military appeals.

Q Can you just briefly tell me what are the steps in military appellate process?

MR. GOFF: As I understand it, Your Honor, after the judgment of conviction and the sentence, there is a certain process of review by the convening authority which can take a certain period of time, several weeks, a few months --

Q Is there any time limit in the steps within which the convening authority has to complete that review?

MR. GOFF: I am not certain, Your Honor, of the exact time limit.

After the convening authority completes his review, then the case may be, and was in this case, appealed to the court of military review. The record is lodged in the court of military review, briefs are filed, the case is argued,

although in this case oral arguments were waived, there is a decision and if the decision is adverse to the defendant, then I would certainly read the District Court's order as requiring further exhaustion by an appeal to the court of military appeals.

Q Is that appeal of right?

MR. GOFF: As I understand it, that is an appeal of right, although I am not thoroughly familiar with that particular aspect of it.

Also, it seems that an additional exhaustion requirement is imposed by the decision of the 9th Circuit below, although perhaps not adhered to by the Solicitor General in his brief in the case at bar, namely a petition to the court of military appeals for extraordinary post conviction habeas corpus, supposedly discharging a man from the service.

Q You mean that too would have to be exhausted before he could proceed with --

MR. GOFF: Well, Your Honor, the 9th Circuit justified the entire exhaustion process.

Q Would that step also have to be exhausted before he could come into Civil court?

MR. GOFF: Your Honor, the District Court's order, I believe it could be argued that the step does not have to be exhausted. However, under the 9th Circuit's opinion

conferring that order, it appears that it might well have to be exhausted because really that's the only way, according to the 9th Circuit, that the man could ever obtain from the military process the right to discharge --

Q Is there any provision in the military process for stays of his being sent to Vietnam while these things are being done?

MR. GOFF: Well, Your Honor, the man was, and has been incarcerated until recently when --

Q Is there any provision for stays pending the completion of all this military appellate review?

MR. GOFF: I am not certain, Your Honor. I assume --

Q Well, no one has attempted to put him into combat duty?

MR. GOFF: That is correct, Your Honor.

Q They've just transferred the location of his noncombatant activity.

Q Well, they attempted to and he refused and that's the whole basis of the Court Martial, is that right?

MR. GOFF: Well, the attempt, Your Honor, was an order transferring him to Vietnam. He would have been engaged in psychological counseling in Vietnam, he refused the order and as his affidavit in District Court states for him that order raised incompatible conflict with his religious

beliefs because it would put him in a position where he was much more directly involved.

Q Is he in prison?

MR. GOFF: Petitioner, as we mentioned in our reply brief, we got the news just after we filed our original brief, has been -- the remainder of his confinement has been remitted. He still remains in the Army on an excess leave status.

Q What does that mean?

MR. GOFF: Well, as far as I can understand, Your Honor, it means that he is still subject to military jurisdiction.

Q Is he at home, or where is he?

MR. GOFF: I would think that he's at home in Connecticut, Your Honor.

Q Well, why would the military ever finish his -- reviewing his case then? Because he would be discharged unsatisfactory.

MR. GOFF: For one reason, the dishonorable discharge was part of the sentence and therefore I assume that the military appellate proceedings would go on in that connection.

Q How much of the sentence did he serve?

MR. GOFF: I think that he served about -- well, after the conviction, he served, I think, about 14 months of

his sentence. He was also incarcerated for four months after the charges were first lodged until the trial.

Q So that's 18 months all told. And what was the sentence?

MR. GOFF: The sentence, I think, was two years at hard labor and also dishonorable discharge.

Q And six months or more has been remitted?

MR. GOFF: Approximately six months has been remitted, that is correct.

We believe that the importance of the rights which petitioner sought and still seeks to vindicate in Federal Court, are undeniable. I think this Court has recognized on many occasions the importance of the writ of habeas corpus as a means of securing prompt and speedy and effective relief against unlawful restraints on personal freedom.

It has become also the accepted means of seeking judicial review of asserted wrongful denial of applications for discharge as conscientious objectors. I think it's important to keep in mind that when a serviceman seeks the writ on that basis, he is seeking relief from actions of the military which has violated his Constitutional right of due process. He is also seeking relief which will protect his religious beliefs, the liberty of his conscience' interests, which this Court also has recognized, are of very fundamental importance in a free society.

An essential element of the remedy of habeas corpus also has been its recognition that it is a prompt, swift means of obtaining judicial review.

And certainly in the case of military personnel whose duration of their military enlistment is necessarily limited, if a conscientious objector has had his application denied without basis in fact, only through prompt intervention, only through prompt access to the Federal Court to give him the review of the wrongfulness of the military denial of the claim. Only in that way can he secure the relief which will carry out the policy which is even recognized by the military's own regulations. It's more essential to respect a man's religious beliefs than to force him to continue serving in the military in violation of those beliefs.

Q I read the briefs some time ago, but if you are right, and if the District Court should have proceeded on the habeas corpus application and he had prevailed then he never could have been tried by Court Martial, could he? Because he would have been a civilian.

MR. GOFF: Your Honor, the basic question now before the Court goes to the right, the basic right to get Federal review of the claim in Federal Court, the merits of the claim.

Q In the Federal District Court.

MR. GOFF: Of the claim that the administrative

denial of his application was without basis in fact and denial of due process.

Q Right.

MR. GOFF: Now the issue of exactly what kind of relief the District Court might or might not grant, I don't think is presently before this Court. It has been recognized by many decisions, including the recent 9th Circuit decision in Bratcher v. McNamara that even if, for example, the Court did not feel that it could direct the immediate relief of the Petitioner, at the very least he has a right to a hearing and a determination of the merits of his claim, and under the habeas corpus statute the Court shall then dispose of the case as law and justice require.

Q Then if the merits of his claim were disposed of in his favor, then would that be res judicata in any subsequent Court Martial proceeding for disobedience of the order?

MR. GOFF: Well, Your Honor, I believe that that would be primarily a question of military law and for the military court to decide.

Q Why would it be? This would be a proceeding -- habeas corpus proceeding. This would be between him on the one hand and his custodian on the other, and his custodian would be a representative of the Army, I suppose. And the parties being the same, wouldn't that be res

judicata --

MR. GOFF: I certainly think that in a subsequent Court Martial proceeding a strong argument could be made that such a determination was res judicata.

Certainly, I think the effect of the District Court, the District Court were to give him the hearing on the merits and were to make a decision that his application had been denied without any basis in fact and is in violation of his rights of due process. That would be determination that he has a right to discharge as a conscientious objector, and I think that a strong argument could be made either for the proposition that he has a right to discharge which deprives the military of jurisdiction. Indeed, the Solicitor General's own brief seems to concede as much by the reference in the analogy to Army Regulation 635200, or at least for the more limited proposition which several of the District Courts have been adopting in their discharge orders that at least he ought to be put in the same position as he would have been in if the military had granted his application for discharge rather than deny it.

This again, I think, is something which is recognized by the Government's own brief, in their Footnote 34, where they point out the distinction between the type of order the military might give a man even while they are processing him out, such as an order to put on his uniform. And in those

circumstances, says the Government, the man wouldn't be excused from disobeying the order and presumably would have to go through the Court Martial process anyway.

On the other hand, the order which assigns him to some new duty station is an order which clearly the military would not have given him if they -- if the Secretary of the Army had granted his application for discharge as a conscientious objector, and if the military would not and could not have given him that order, then I think it would be quite proper for the District Court to say that the right of discharge shall be recognized now and shall supersede any Court Martial -- pending Court Martial proceedings.

Certainly, that's not so surprising in view of the fact that the military itself seems to recognize that such an order would be unlawful if it was an order which ordered the man to a new duty station and followed or was dependent upon a wrongful denial of the conscientious objector application.

I think that once the District Court has made the basic determination that the military denial of his claim was wrongful and without basis in fact, that he is entitled to discharge as conscientious objector. It then certainly has the power to inquire into the legality of the man's continued detention.

It is sort of like the basic purpose of the writ

requiring the jailer to justify the legality of the detention and in those circumstances if the Government wished to claim that the continued detention was justified by subsequent events, then I think the Court could certainly inquire into the validity of that particular claim.

(Whereupon, at 3:00 p.m. the argument was recessed, to reconvene at 10:00 a.m., the following day.)

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH PARISI, Petitioner,	:	
v.	:	No. 70-91
MAJOR GENERAL PHILLIP B. DAVIDSON, et al., Respondents.	:	

Washington, D. C.,

Wednesday, October 20, 1971.

The above-entitled matter was resumed for argument at 10:02 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will continue arguments in Parisi against Davidson.

You may proceed whenever you're ready, counsel.

ORAL ARGUMENT OF RICHARD L. GOFF, ESQ.,

ON BEHALF OF THE PETITIONER [Resumed]

MR. GOFF: Mr. Chief Justice, if it please the Court:

Trying to pick up where we left off yesterday, the government has pointed out in its brief that the various branches of the Armed Services have promulgated regulations which provide for an elaborate administrative review machinery of conscientious objector applications.

Now, in this case, the petitioner -- and in cases like it -- the petitioner has already completed and exhausted that elaborate administrative review machinery. I think it is important to focus on the fact that his habeas corpus petition challenges and seeks review of the validity of that administrative determination. It is not a situation like was present in the Gusik case or in the case of Noyd v. Bond, in which the petitioner in habeas corpus -- the petition was brought to challenge and seek review of alleged invalidity or asserted errors in the military criminal proceedings which were pending against the petitioner.

Here, on the other hand, the petitioner asserts in

court a right to discharge as a conscientious objector, which right is independent of those criminal proceedings; it's not dependent on any invalidity of those proceedings, but, rather, it arises from the wrongful administrative denial of his application for discharge as a conscientious objector without basis in fact.

So the government's reliance on the exhaustion of court martial remedies that was required in Noyd v. Bond and in Gusik v. Schilder, we believe is completely inapplicable. And I think the government itself recognized this only two years ago in a memorandum which the Solicitor General submitted to this Court in the case of Craycroft v. Ferrall; a memorandum which we were not able to discover until yesterday in the Clerk's office.

But in that particular case, the Department -- the Solicitor General stated very specificially the Department of Justice had determined to withdraw its support of the position previously urged in the brief in opposition in Noyd v. McNamara, that military judicial remedy must be exhausted before resort by servicemen with conscientious objector claims to civilian courts.

Q Is there a reference to that in the government's brief? Don't I remember that?

MR. GOFF: I think the government's brief, as I recall, refers to the Craycroft situation as one in which the

government at that time withdrew its insistence that -- or any reliance on the proposition that a conscientious objector applicant must resort to the military correction boards before seeking review in the federal courts.

I'd like to continue quoting, if I may, from the government --

Q Well, I want to be sure we have what you're quoting from, when we want to -- if, as, and when we want to look at it later.

MR. GOFF: Well, I don't think it is in the Appendix or in the Appendix to the government's brief, Your Honor. But what it is in is the memorandum of the Solicitor General in Craycroft v. Ferrall, No. 718 Miscellaneous, October Term 1969.

And in that memorandum the Solicitor General stated that nothing in this policy undermines the general rule urged by the government and adopted by this Court in Noyd v. Bond that military prisoners must ordinarily exhaust all available remedies within the particular service before seeking review on a habeas corpus petition in a federal civilian court.

Q Where is the -- at what state in the administrative procedures is this application?

MR. GOFF: The application in this particular case, Your Honor?

Q For exemption.

MR. GOFF: The Parisi case?

Q Yes.

MR. GOFF: Well, in the Parisi case --

Q Has that been exhausted?

MR. GOFF: The administrative process has been completely exhausted. Parisi had even exhausted the requirement that the Ninth Circuit was then imposing of also applying to the Army Board for Correction of Military Records.

Q Yes. But beyond that he can go where?

MR. GOFF: Beyond that he can go nowhere within the administrative process, and under an accepted doctrine in the federal courts he has the right to come in to the court on habeas corpus to review the validity of that administrative denial.

Q Well, on conviction he can go through the --

MR. GOFF: On conviction, the case is presently under submission to the Court of Military Review, and --

Q From there he can go to --

MR. GOFF: If conviction were affirmed, he would have an appeal; I understand it is not as a right, but at least a right to seek an appeal from the Court of Military Appeals.

Q And the Court of Military Appeals exercises a sort of certiorari jurisdiction?

MR. GOFF: That is my understanding, Your Honor, yes.

The Department of Justice did say, and I think this is the key point in this last memorandum: It is simply our view,

shared by the Department of Defense, that resort to courts martial should not be required before judicial review of a conscientious objector claim can be obtained.

Now, I recognize the right of the government to change its mind, but I really think they were right the first time. Because I would submit that the exhaustion requirement which they would now seek to impose, that is, that the man exhaust military criminal proceedings against him, in the first place, serves none of the purpose which underlie the exhaustion requirement as it has previously been developed by this Court.

The government has conceded that requiring resort to court martial remedies would not serve any purpose of allowing an administrative agency or the military tribunal to develop a fact record, to exercise administrative discretion, to apply any expertise to factual questions, or even to special questions of military law, such as was also emphasized by this Court in Noyd v. Bond.

Furthermore, the requiring resort to court martial remedies here is not necessary to avoid judicial intrusion into -- judicial intrusion upon or pre-emption of an agency to which either Congress or the military has confided the primary responsibility for deciding or reviewing the basic question which is now being presented to the federal court.

The agency with responsibility to decide that question, that is, the Secretary of the Army, has already decided it.

And we now seek in federal court the review of that particular determination.

So there is no effort here to disrupt the administrative decision-making scheme, which has been set up by the statute.

In fact, if the government were serious about the claim that exhaustion is necessary to avoid conflict with the military, or to allow the military to correct its own errors, then I would have thought that the government would have continued to insist that a serviceman appeal to the Army Board for Correction of Military Records after the Secretary of the Army has denied his claim for conscientious objection.

But as we know, in Craycroft, the government expressly conceded that such appeal was not necessary, and followed the Brooks v. Clifford decision, which held that to require the petitioner to undergo the delay of some four months of going to that kind of a board would work really an intolerable interference with his right to come into court and have access to the court on habeas corpus for swift review of the validity of the administrative denial of his conscientious objection claim.

Finally, I'd like to point out that the exhaustion requirement which the government would assert here would operate in a very random, hit-or-miss, and rather discriminatory manner.

For example, obviously, resort to court martial remedies would not be required in those cases, and we cited some in our brief as examples; where, after the administrative denial of the conscientious objector application has taken place, the military itself chooses not to insist on ordering a man to a new duty assignment, or revokes pending orders so that the man can come into court and present his habeas corpus petition.

Nor would it be applicable where, in cases -- and we've also cited examples -- where, although a military offense has been committed, the military in its discretion decides not to press the charges.

Furthermore, the government has conceded that it would be applicable under its standards only in those cases where the court martial court might be willing to entertain the defense, and this results in some rather perverse distinction, because it apparently means that the right of quick federal review on habeas corpus would be available to the man who jumps the gun and commits the military offense before his application for C.O. discharge has been finally processed and denied; but would not be available to the man who waits until after it's denied and then commits his offense.

Similarly, it apparently would be available to the man who obeys a simple order like refusal to -- disobeys a simple order, such as to "put on your uniform" or to "cut the

weeds behind the post building"; but apparently it would not be available, and the writ would be suspended, as to someone who disobeys a more serious order such as to go to Vietnam.

What it all boils down to, I think, is that the Army's denial of the application could be completely without basis in fact, totally wrongful, and the man would have a clear right to come into federal court on habeas corpus and get relief. And yet a military commander, by subsequently giving that man an order of a particular kind, apparently a rather major kind, and then going ahead and prosecuting a man for the disobedience of that order, could effectively bring about a suspension of the right to go to federal court.

Well, now, of course the man could obey the order, and then apparently his right wouldn't be suspended. But I think that only demonstrates another perverse aspect of the exhaustion requirement which the government seeks to require; namely, that it operates most harshly on those whose conscientious objector convictions are most sincere. Because in this case, for example, if Parisi had been willing to compromise what he felt were his conscientious objector beliefs and obey this particular order, then, under the government's position and under the Court of Appeals' position, he would have been able to come into court and, according to both the Court of Appeals and the government, it seems quite likely in this record that he would have received a relief on

the merits that he was seeking.

Q Well, on this order, it was totally consistent, as I understand it, with the tentative conclusion, at least, of the Ninth Circuit Justice, Justice Douglas, that such an order would not put him any closer to active military activities; am I correct? And he knew that.

MR. GOFF: That is correct. It is consistent with those tentative conclusions.

But I think that if we were to say, first of all, what we were trying to do at that particular time was to get either the district judge or the circuit justices or Justice Douglas to exercise discretionary power to grant temporary pendente lite relief, which obviously depends on several factors, such as the likelihood of success on the merits, a balancing of the conveniences, a determination of whether there is other adequate relief.

And to say that on failure to get that relief before there had been any kind of a determination on the merits of his conscientious objector claim, should later operate in effect to bar him from getting into court to review the merits of that claim, I think would be totally anomalous. I think Justice Douglas, in his own decision, said: if it were clear that applicant would win on the merits, a further protective order at this time would be appropriate.

Well, it wasn't clear at that time, but I submit that

the failure to get temporary relief should not operate, first, to bar the man from eventually coming into court and having his claim as conscientious objector determined on the merits.

Furthermore, I would --

Q Well, what is causing me a little difficulty is that the disobedience of an order was something separate and apart from his conscientious objector claim, at least in the tentative view of members of the judiciary, who said his moving into Vietnam to continue this wholly non-military activity in the Army was not inconsistent with his conscientious objector claim. And no different from his carrying on the same basic non-military activity with the Army here, Stateside.

MR. GOFF: Your Honor, I realize that those are the tentative conclusions of the justices who passed on that application.

I would submit that no one, other than Mr. Parisi himself, could finally make the determination as to whether that order did in fact violate his conscientious objector beliefs. He has stated in an affidavit --

Q Well, what if the order had been totally unrelated to any conceivable claim of conscientious objection, such as "pick up that toothbrush" or --

MR. GOFF: Well, apparently, in that case --

Q -- "pick up that cigarette butt"?

MR. GOFF: Apparently in that case the government

would concede that since the defense of conscientious objection or wrongful denial of conscientious objector application would not be entertained by the court martial, that the man would have a perfect right to come into federal court and have the administrative denial of his application reviewed.

Now, what we're saying is --

Q In the meantime, let's assume my kind of a case, where there was a prosecution for a willful failure, disobey a lawful order. Then if he won in the United States District Court on his habeas corpus, then he could never be prosecuted for that because he'd be a civilian; correct?

MR. GOFF: What I am suggesting, Your Honor, is that the basic thing that we --

Q I wondered -- I would appreciate an answer to my question.

MR. GOFF: Yes, I am going to give you one.

Q One way or the other.

MR. GOFF: Yes, I am going to give you an answer, exactly to that question.

The basic thing that we think that a man has a right to, under any circumstances, and regardless of the pending military criminal proceedings against him, is a right to immediate review in the federal court of the wrongfulness or the validity of the administrative denial of his conscientious objector application.

Now, if the court does make the determination that the application was denied without basis in fact, then we would say that it is a question of what kind of relief the district court is to grant after having made that determination; and if the Court, for example, were to find that it is quite clear that an order to a new duty assignment would not have been given to the man had the military originally granted his application, as it should have done, then I think it would be quite arguable to the district court that the right of discharge ought to be recognized and should cut across any military criminal prosecution.

On the other hand, if the district court found that the man disobeyed an order which the court -- or which the Army could have given to him even while they were processing him out -- this is the distinction suggested by the government itself, also, I might add -- then the court might well say that the right to discharge shall be recognized, but it shall be subject to the military prosecution against him.

Q The intermediate military prosecution?

MR. GOFF: Yes. And I think that's a perfectly sensible resolution of this particular problem. I think our brief discusses also the fact that in addition to the government's failure to show any compelling government interest supporting the suspension of the right to habeas corpus in this case, they have also completely failed to show

either an available or an adequate remedy to seek the kind of relief the petitioner does seek in the district court.

And for the reasons stated in the brief and today in oral argument, we would respectfully request that the decision of the Ninth Circuit be reversed and that the case be remanded so the petitioner finally can have his day in court on the merits of his claim.

Q Mr. Goff, would you make the same argument if the crime he was accused of, the military crime he committed was stealing a car or murder?

MR. GOFF: Yes, I would, Your Honor. I would make the same argument, that the right to come into court and have the court review the wrongfulness of the denial of the discharge application should be recognized right now, and that the question of what to do about that prosecution for stealing the car is a question which pertains to the relief which the district court is going to grant.

And I think that the Ninth Circuit has quite clearly recognized that in its recent Bratcher v. McNamara case, cited in our Reply Brief, which said that even if the right to discharge would not be immediate, that the court should immediately review the underlying claim of the wrongfulness of the denial of the conscientious objector application and then under the habeas corpus statute shall dispose of the case --

Q Well, presumably a conviction for the crime

would mean a discharge anyway; a dishonorable discharge.

MR. GOFF: Well, I think that the right that is sought in court, of course, is the right to -- an order directing the Army to discharge him as a conscientious objector.

Q Well, yes, but if he's committed a crime, which is unrelated to the conscientious objector --

MR. GOFF: Well, I think again that this is the kind of question that the court could get into in determining what relief to give the man. But I think that, as the Ninth Circuit has said, the court shall make the basic determination on the merits and shall then dispose of the case as law and justice require. And I think that we can allow our district judges to adopt appropriate remedies to take into account these varying circumstances which might come up.

The basic right of review is what we seek in this Court.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Goff.

Mr. Bray.

ORAL ARGUMENT OF WILLIAM T. BRAY, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

At the outset let me emphasize that the government's position does not attempt to support denial of petitioner's right for a review in the civilian courts at some point in time.

The question, rather, is: when should that review occur? Specifically the question is whether the district court erred in the exercise of its discretion by deferring action on petitioner's habeas corpus claim, pending the completion of military judicial proceedings where those proceeding had before them the very issue which had been presented in the habeas corpus proceeding, and where it was reasonably to be expected that the military not only would pass on that but that if it accepted the petitioner's position, the petition would receive all of the relief which he sought in the district court.

This we think brings into play the traditional doctrine of exhaustion of military remedies, which this Court explained both in Gusik and later in Noyd vs. Bond, and that the decision below is quite appropriate and should be affirmed.

Q Well, the administrative remedies have been exhausted?

MR. BRAY: That's correct.

However, at the time the administrative remedies were exhausted, and when the habeas corpus action came before the district court for its action on the merits, the petitioner had committed a court martial offense, and that offense was inextricably caught up with his claim to be a conscientious objector; and, indeed, the military has always taken the position, in this case, that that order would be an unlawful

order and thus he would not be subject to court martial if he were improperly denied his conscientious objector application --

Q Well, Mr. Bray, --

MR. BRAY: -- through the administrative process.

Q -- what if, instead of an order to go to -- a violation of an order to go to Vietnam, what if the military prosecution had been, as my brother White suggested, for stealing money from a fellow soldier. What would your position be? And if, otherwise, everything was as it is in this case?

MR. BRAY: There would be no need, then, to stay the habeas corpus action with respect to essentially collateral review of the administrative determination by the military. Because the military system itself would not be engaged in collateral review of that same decision.

That really is what we're saying is happening here. The military judiciary -- pardon me?

Q Well, what would be the result, in my hypothetical?

MR. BRAY: The result, if he were convicted of murder --

Q No, just if there had been a conviction and it was on appeal and, as I say, all the other facts as they are in this case, except that the offense with which he was charged was stealing -- was larceny, rather than violation of an order to go to Vietnam?

MR. BRAY: Right. The position of the military is

that if the civilian courts ordered his discharge from the Army, he would be discharged immediately. Even if he were under sentence for some confinement in the military.

Q No, not as to that; what would your position be in my hypothetical case? With respect to the timing of the habeas corpus hearing in the federal district court. You told us at the outset of your argument that the only issue here is one of timing, is one of when.

MR. BRAY: It could be heard immediately without any waiting at all for the proceedings in the military system.

Q Well, now, in this case, as I understand it, according, at least, to the tentative view of the Circuit Justice and others who passed on it, this order was not inconsistent with his claim of conscientious objector. And so, to that extent, it's equivalent in law to the offense of stealing, i.e., it's unrelated to his claim of conscientious objection.

That's what Mr. Justice Douglas, in effect, held, tantatively, as Circuit Justice.

MR. BRAY: As a tentative matter. However, our position is that the determination is not final at that point, and, further, that the lawfulness of the order is not premised strictly on whether or not the order conflicts with his conscientious objector status, but, rather, whether the order was given as a direct result of the denial of that conscientious

objector status.

Q Well, such violation in the service would be the direct or indirect result of his, of the Army's refusal to let him out. He wouldn't be in the Army to receive an order to pick up a cigarette, if he had been released as a conscientious objector, would he?

MR. BRAY: That's not quite right, because even if he were granted his application, as an administrative matter that would still be a period of time during which he would be processed for discharge. And during that period of time he is subject to the type of order which we say would not be the type that would delay civil proceedings. He would have to wear his uniform during that period of time; he would have to clean up his quarters during that period of time; he would have to cut the grass, if told to do so, during that period of time.

That's the distinction, we think, between the two.

The Court of Military Appeals, the highest military court, has held that the type of order which is subject to challenge on the ground that the administrative proceeding was without basis in fact is one that grows directly out of and is based on the administrative decision. No change in duty station.

So that the type of order that is involved here would ever be given --

Q Except I wonder if he should try to interpose the

defense of -- as he did in this court martial proceeding, and it was disallowed because the trial court held that there was a basis in fact for the administrative decision not allowing his conscientious objection claim; but I suppose on appeal it could very well be argued that this is not a relevent defense to this order, anyway, since it's already been held by at least one member of this Court, in a tentative way, that the order was quite consistent with his conscientious objector claim.

MR. BRAY: Whether or --

Q Therefore, disobedience of the order, he can't justify disobedience of the order on the basis of his conscientious objection.

MR. BRAY: Whether or not the order was within the confines of his conscientious scruples is not the test. The test, rather, is whether the order grew out of the denial of the application.

And even though it may be completely consistent, as the judiciary, the civilian judiciary has tentatively decided, with his claim to be a conscientious objector, nevertheless it is subject to being defended on the basis that it would not have been given but for this administrative decision, and that administrative decision is without basis in fact.

Q Well, suppose in this case he put in no defense in the court martial?

MR. BRAY: If he put in no defense in this case, our position generally, I think, would be that he should be -- there should be an opportunity for him to do so once it is beyond the point where it could be brought into the military proceedings, then there would be no exhaustion required beyond that point.

That would mean, at the very least, that a decision would have to be rendered by the court martial, given an order that could be challenged on this ground, such as the order here.

Q If he does not put in any defense, would he still be barred from bringing his case to court?

MR. BRAY: Until the point in time when he had -- when he was unable to put in that defense, yes.

Q Well, this is not unable; he just said, "I'll not put in any defense."

MR. BRAY: I would suggest --

Q How can you say that it grows out of the order, it grows out of the C.O. business?

MR. BRAY: What grows out of the C.O. business is --

Q How can you say it, then, if he puts in no defense?

MR. BRAY: What grows out of it is his refusal t- obey the order. Now, if he chooses not to defend his disobeyance of the order on that ground, then, after the court martial has handed down its judgment against him, then the

civilian courts could go forward with it.

Indeed, I might point out that that is --

Q Could they satisfy that military conviction?

MR. BRAY: That convication, yes, they could if they found that the order there was one that grew out of --

Q Well, you're merely saying the defendant then has a choice of forum, for a --

MR. BRAY: No, I'm not saying that.

Q He can either put in his defense in a military court, in which it then must be exhausted there, or he can forego the defense and take the risk in the -- and go to the federal court.

MR. BRAY: Yes.

Q Which could then set aside his court martial conviction.

MR. BRAY: It could. Now, that would bring up, I think, a different question: whether, because he had wilfully failed to raise a possible remedy within the military system, he should be barred from bringing it into the civilian courts.

Q But that isn't your position --

MR. BRAY: That's not our case, and it's not our position at this point in time. Frankly, I don't know what the position would be, of the government, if that situation should be presented. But our position is --

Q I wondered if --

MR. BRAY: -- that he has defended in this case, and indeed the issue not only was argued to his court martial but was -- is before the Court of Military Review, and he is defending the lawfulness of his order on the ground that it was directly a result of the administrative denial and the collateral attack on that administrative denial, on the basis-in-fact test, is before the military tribunals.

That, we think, is the traditional circumstance in which this Court has approved the lower courts in their awaiting the outcome of the military decision before going forward on the precise issue that is involved before the military.

This of course essentially is ground on considerations of comity. The Court has frequently stated that the civilian court should not intervene if there is an available remedy within the military court system, and if that remedy might provide the relief which the petitioner is seeking in the civilian courts. The reason, of course, is that the petitioner may well be successful in the military courts; and, in that event, there would be absolutely no need for the civilian courts to get involved at all; thus avoiding any needless friction between the two separate judicial systems.

Further, this is not, at this point in time, a situation where the civilian courts have said they will not -- cannot act on this matter. It, rather, truly is one only of

timing.

In this case the issue is involved in the military proceedings, the court martial proceedings, which are in the military judicial courts; and decision there, on precisely the same standard as is applied in the civilian courts, can be expected. And the decision below only is to await that decision before it goes forward.

Q Would you have the same position if the -- there had been no military offense until he had exhausted his administrative remedies in the military, and he had filed his habeas corpus petition, and the petition had gone to hearing; then he commits an offense and a court martial proceeding begins?

MR. BRAY: Our position there, I believe, Mr. Justice White, would be that he can go ahead and get it heard and decided, so this --

Q So that this is the typical traditional argument about comity between two courts --

MR. BRAY: That's right.

Q -- having the same issue before them?

MR. BRAY: That's all it is, at this point in time; that's all it's ever been.

Q However, it's just sort of a -- it's whoever gets there first, or a conservation of judicial resources, things like that?

MR. BRAY: Principally that's what's involved.

We believe there are some additional factors involved, but that's the basic one which was before this Court in Gusik and in Noyd vs. Bond.

Q How about res adjudicata?

MR. BRAY: That --

Q Generally speaking, that is a doctrine that's inapplicable to habeas corpus, as we both know. But the defense to the court martial is not habeas corpus. And let's assume that it was determined by the Court of Military Appeals that this defense is invalid because there was a basis in fact for the administrative denial of his conscientious objector claim.

Now, that would be in a case between the United States and -- between the United States Army and this man, Parisi. Now, would that have any res adjudicata effect in his subsequent habeas corpus hearing in a federal district court?

MR. BRAY: The policy of the military is stated, and we think properly stated, in the regulation in our Appendix. When a civilian court determines that a serviceman was improperly denied discharge without a basis in fact, the military court, the military system will discharge him on that ground.

Q Well, this --

MR. BRAY: Regardless of the outcome of the military litigation.

Q But this is the opposite --

MR. BRAY: No, I'm saying that even if there were --

Q A prior determination.

MR. BRAY: -- a final determination from the Court of Military Appeals, and then the civilian courts held that he was entitled to discharge, the military would discharge him. Indeed, the Goguen decision, that also is reproduced in our Appendix, involved a very similar circumstance. There the claim had been denied through the Court of Military Review, and was pending in the Court of Military Appeals when the civilian court acted; and the Court of Military Appeals dismissed the suit on the ground that the issue had been decided by the civilian court and the fellow should therefore be discharged.

Q As in my case, I'm assuming a prior determination by the Court of Military Appeals, that --

MR. BRAY: Yes.

Q -- there is a basis of fact.

MR. BRAY: The same result would follow. The serviceman would be discharged on the basis of the civilian court's order.

Q And how about what the Army interposed as a defense to the habeas corpus action; any sort of a res adjudicata defense?

MR. BRAY: That has not been either their policy as stated by the regulation or their policy in practice; they have processed the discharge promptly --

Q Well, I'm talking about --

MR. BRAY: -- in those circumstances.

Q I'm talking about conviction in our case, the Parisi case.

MR. BRAY: Yes.

Q There's been a conviction. Let's assume now it's affirmed on appeal, all the way up, upon a finding that there was in fact a basis for denying his conscientious objector claim.

Now you say this case involves only a matter of when, a matter of timing. So now the federal habeas corpus proceeding goes forward in the federal district court. Would the Army come in and say, Mr. District Judge, we have a defense to this action, because it's been determined by the highest military authority that there was a basis in fact for denying this man discharge?

MR. BRAY: They have not done that. And, as a matter of --

Q But could they, could they even do that?

MR. BRAY: Could they do that?

Q I mean, what's the function of habeas if they can determine that precise thing?

MR. BRAY: I suppose there could be an argument made that the two systems are completely autonomous and once a decision has been made in the military system it can't be

reviewed in the civilian courts at all.

Q You'd have to --

MR. BRAY: We do not make that argument in this case.

Q You'd have to overrule a lot of cases around here, if that's --

MR. BRAY: That's correct.

Q We haven't reached that point yet, though.

Q Is the government suggesting that habeas wouldn't be available?

MR. BRAY: Absolutely not, Mr. Justice Brennan. That's --

Q I would think you would admit frankly you couldn't make that argument.

MR. BRAY: We not only -- well, we certainly have not, and we would not.

Q Well, why do you even suggest that you might?

Q Well, all right, now, it wasn't his idea, it was mine.

MR. BRAY: I don't mean to suggest that, if I'm implying it.

The position of the government is that even though a decision had been handed down by the Court of Military Appeals, the highest court, that would not be binding in the subsequent habeas corpus action in the district court, the civilian

district court. And that the Court then could order, could find that there was no basis in fact and order a discharge, and that the Army would promptly discharge the fellow on that basis.

Q Mr. Bray, if we adopt your theory, and tomorrow a man exhausts every military administrative procedure on his C.O. claim, and loses, and notifies that he's going to habeas, all you have to do is to transfer him to Vietnam.

MR. BRAY: I don't think that's right, for -- let me explain to you.

Q Why not?

MR. BRAY: This case, I think, indicates what the remedy should and would be in that circumstance. The military man is not going to be subjected to orders that -- or should not be subjected to orders which are inconsistent with his claimed status.

Here the district court tried to protect him on that basis and entered a protective order barring the Army from ordering him to do things of a greater degree than what he was doing, psychological counseling. He was going to Vietnam to be a psychological counselor, and the civilian judiciary, by the Ninth Circuit and by the Circuit Justice, determined that that was no greater burden on him than what he had been doing in California; and thus refused to stay the order.

If, on the other hand, he was given an order, to use an

example, to go take rifle training or something of that sort, he could have it stayed, I presume.

Q Well, as I understand, your only point of denying the federal court jurisdiction in habeas corpus is the fact that he has been court martialed. Right?

MR. BRAY: That's right.

Now, it's not a denial --

Q So that if, in the future, any time somebody wants to go into federal court, you court martial him. Is that right?

MR. BRAY: Mr. Justice Marshall, let me suggest --

Q I am sure you don't mean that.

MR. BRAY: That is not what I mean.

Q I'm sure you don't.

MR. BRAY: For two reasons: first of all, the Army is -- there are means of challenging the Army's order before he's subject to court martial, just as the petitioner here attempted to do.

Q Yes.

MR. BRAY: And then, unilaterally, on his own, he decided that the order couldn't be obeyed by him and didn't obey it, after the civilian courts had an opportunity to review it and refused to stay it.

Secondly, the order involved here is one that grew directly out of the Army's denial of his application. They

would not have transferred him to Vietnam, or anywhere else for that matter, if -- so long as that application was pending. Thus the order itself is inextricably caught up in the claim, and for that reason he can defend it, and for that reason the military courts have decided to accept a collateral challenge to an administrative determination within the military and consider whether or not that administrative action has any basis in fact.

That of course is precisely the issue which he's presenting to the civilian courts now by means of habeas corpus. And we think the military court should be able to go forward.

There are, I think, some other reasons involved here besides comity alone, which suggest letting the military system run its course before the court below acts, as it has done.

Q Before you get to that, Mr. Bray, --

MR. BRAY: Yes, sir.

Q -- could he lawfully be transferred once a habeas corpus procedure had commenced?

MR. BRAY: Subject to that court's control, yes, sir.

Q Well, --

MR. BRAY: Just as what happened here.

Q But without that court's control he could not be transferred to Vietnam after he started the habeas corpus proceeding, could he?

MR. BRAY: I believe he could. There's nothing that would prevent the military from transferring him wherever it saw fit, so long as it's -- either its regulations didn't prohibit and they would not in that circumstance, to my knowledge, --

Q Don't the rules have something to say about that, about transfers? They certainly apply to criminal cases generally.

MR. BRAY: Well, of course, here the petitioner sought to have his transfer stayed because he was concerned that the courts would lose jurisdiction, which would seem to me to imply that he didn't have anything other than a court order to keep him from being transferred. The court refused to stay it on the ground, one, that the Army agreed to bring him back into the judicial district if he won on appeal; and, further, under the protective order that the court had previously entered.

Q If he had been ordered to be transferred to Florida or some other place, without any increase in hazard or anything, and he had refused that order, and then the Army -- and he was court martialed, but in that proceeding it was found that his C.O. claim was good, would his conviction for refusing the transfer order be set aside?

MR. BRAY: The Army's position is that no duty station transfer will be ordered --

Q That's just a matter of --

MR. BRAY: -- to a C.O.

Q That's just a matter of military law?

MR. BRAY: That's right.

Q Is it a regulation or --

MR. BRAY: It's a regulation.

Q Well, may I ask, Mr. Bray, --

MR. BRAY: Yes, sir.

Q I guess for federal detention, the habeas remedy is available not alone for constitutional denials but also for violations of federal law -- I forget how the exact language goes. And you suggested that the habeas remedy would be avilable, after he had exhausted the administrative remedies and the court martial remedies, all the rest of it, would be available at that point in time to review this.

Now, what would be the claim in habeas, that the determination in the court martial had violated a constitutional right or a stature, a federal statute; what would it be?

MR. BRAY: The claim would be the same as has been made at this point in time. That is, that the administrative determination was without basis in fact and that the order which ensued and for which, the disobeyance of which he was convicted grew directly out of that.

Q Well, I know, but what does that stem from? There must be a basis in fact for denial of a conscientious objector. Is that constitutional or is that --

MR. BRAY: Yes. The claim is that without a basis in fact he's been denied due process of law, and that has been accepted in the courts to this point in time, and we're not disputing it here.

Q But what's the source of the -- setting aside the court martial conviction that the C.O. claim is sustained. Is that a statutory -- I guess that would just be the court martial enforcing a military regulation?

MR. BRAY: That's correct. The court martial's attitude is that if the order grew out of the administrative denial, and that is without basis in fact, then the order itself --

Q Does that regulation have force within the statute?

MR. BRAY: I would presume it would, yes, sir. The regulation as as binding on the military as any statute would be.

Q But what handle, under the federal habeas corpus act, do you bring this under?

MR. BRAY: I am speaking, of course, for petitioner here, but my understanding of his position is, and this has been accepted in the courts generally, that the denial of an administrative remedy available within the military that does not have basis in fact is a denial of due process; that's a constitutional claim that entitles him to have it set aside.

We have not, as I say, challenged that in this Court or elsewhere at this point in time.

The other aspects of this, which indicate to us that the district court below was quite proper in awaiting the outcome, of course, are tied up in the fact that this is a court martial proceeding, that the petitioner did, on his own, decide to disobey an order that had received prior approval, at least in the sense of refusing to stay it, by the civilian system; and that this goes to the very heart of what a military system is all about, and the obedience and duty that are necessary to that system.

The military should be able to go forward with its disciplinary actions, and try to decide the issue itself.

Further, the underlying issue, of course, is the administration of the Army's regulations, the military law that is involved in this case.

While the military courts do not have any peculiar expertise with respect to the basis in fact test, the test that would be applied in the collateral review of the administrative determination, they do, we would submit, have expertise with regard to the military generally, and the military's administration of its regulations. And thus might well be able to bring knowledge to bear on this question as well as give guidelines that might promote uniformity within the military itself for the administration of this regulation.

All of which suggests that the military be allowed to go forward.

Further, we are not persuaded by petitioner's arguments that there has been a wrongful denial here, and such that it should be set aside.

First, let me emphasize that this is not a question, this is not a case in which the court martial proceedings had not been brought when the habeas corpus action came before the court for its action. Here the petitioner had disobeyed the order, and the court martial was imminent at the time the district court considered the habeas corpus petition on its merits.

While the court had previously stayed its consideration of it, that had been in terms of letting the administrative proceedings run their course, and that was a matter separate and apart from the court martial itself.

Now, this, of course, distinguishes this case from the Second Circuit's case of Hammond vs. Lenfest, and our policy is in agreement with the Hammond position, that is, that where there are no court martial proceedings pending, there is no exhaustion required within the military tribunals. That is shown in our Appendix, I believe it's page 61, and that is our policy position on this, that we will not require that. But we consider the two cases significantly different.

Secondly, the delay involved in this case, of course, is inherent in the exhaustion doctrine itself. The whole purpose

of it as applied to this case is merely to postpone the action by the civilian courts until such time as the military has a chance to clean its own house, if that's required, if a mistake has been made, and to pass on the same issue that is before the civilian court.

The underlying issue of the validity of the administrative determination, whether or not petitioner is a conscientious objector, of course, is very much alive. It is not conceded by us at this point in time, and is not conceded on this record that he's entitled to his conscientious objector claim. That is still a matter before competent tribunals, albeit military ones at this point in time in our judgment, just as it was at the time the stay was denied by Mr. Justice Douglas in December of 1969.

Finally, the delay which petitioner has gone through here is something which we don't find particularly burdensome on him because the order of the district court of course has been enforced throughout this period. He could not have been subjected to government -- beg your pardon, military duties, any greater than his psychological counseling duties at the time this all started.

Further, where he -- now he's at home now, to our knowledge, at least he's not on any military reservation pursuant to orders. He has finished serving his confinement, which was remitted partially, and is on excess leave status,

which means that he is outside of the military at the present time, although subject to its jurisdiction, until such time as the decision from the military tribunal is final.

Q Is he getting paid?

MR. BRAY: Is he getting paid? I don't believe he's getting paid. This excess leave status does not count, is not charged against him as leave time, it's not credited against his service in the military; and I would -- I understand from that that he's not paid during the time, either.

There would have been means whereby he could have gotten out of confinement during this time, had he sought to do so. The records we've been able to check indicate that he did not seek to do so, although the standard on which he would have done so is essentially a discretionary one, up to his commanding officer, both wherever he is held in confinement as well as the convening authority, so long as it has jurisdiction over it; yet he could have applied for that, and did not.

In any event, as I say, the confinement is not what he was complaining of, it was rather activities inconsistent with his C.O. claim.

Lastly, if I can mention briefly, we do think, of course, that there are remedies within the military system for petitioner, both with respect to the consideration of the issue which he has brought before the court. We think it's beyond doubt that that issue will be considered in the military

tribunals as it has so far been considered. It was considered on the merits by the court martial itself, while that authority found that it was -- that the administrative denial was not an abuse of discretion, we think that test, for all practical purposes, was essentially the same as the basis in fact, and it's very clear that the court before which the appeal is now pending, the Court of Military Review, will consider it on that test.

Q What test?

MR. BRAY: On the basis in fact test.

The Goguen decision, which is in our Appendix, very clearly states that that --

Q I'm not clear at all about that. You don't seem to have covered it in your brief. Have I missed something? I've been looking for --

MR. BRAY: The Goguen --

Q -- a military standard of conscientious objector and our decision in Falbo and Estep and --

MR. BRAY: It is covered in our brief, and also covered in the Goguen decision, which is reproduced as Appendix D to our brief.

And the test which the military will apply, this has been a developing area, the regulations themselves are of very recent origin, having come into being in 1962. But the test has developed, and it's very clear now that the test that will

be applied is a basis in fact test, exactly the same as that applied in the civilian courts. That is, the holding of Goguen that it will --

Q Well, the only thing in the record that I see is on page 40 of the Appendix, and that is the letter from the Adjutant General. That has the flavor of a different kind of a test.

MR. BRAY: Let me refer you to page 39 as well, Mr. Justice Douglas, and particularly that footnote. While the court martial itself --

Q Are you speaking of 39 of the brief or of the Appendix?

MR. BRAY: Yes, sir. I'm sorry, of the -- well, you're referring to the Appendix, I'm referring to our brief, pages 39 and 40.

While the court martial itself stated that it would consider this as not being an arbitrary, unreasonable, abuse of discretion, as we say there we don't think that really is any different from a basis in fact test; and, in any event, that is a matter which undoubtedly will be corrected if any error were committed there by the Court of Military Review, which is fully competent to correct this, since it really is a legal decision.

Q Well, that's really a certiorari jurisdiction, isn't it?

MR. BRAY: No, no. The Court of Military Review is a mandatory review, and that is where the --

Q On conscientious objection?

MR. BRAY: Yes. Well, it has chosen -- it has stated that it will review conscientious objector claims also as a mandatory matter, and that's where the case is now. The certiorari type jurisdiction is in the Court of Military Appeals, the third step in the proceedings.

Now, the Goguen decision in our Appendix is a Court of Military Review, the same court before which he now has his appeal pending, and it's clear from that decision that the test will be precisely the same as that applied by the civilian courts.

Lastly, we think that he will, as a practical matter, receive the relief he's requested in the district court. If he wins in the military courts, he'll be discharged. We think that, not only as a matter of our regulations but also as a matter of the court's supervisory powers, in any event the district court here has retained jurisdiction only until the court martial is final. That would occur when the decision, when a final decision is reached in the military tribunals, and at that point in time if he has not gotten the relief he wishes, surely the district court would grant it to him.

Q Mr. Bray, may I ask one question?

MR. BRAY: Yes, sir.

Q I'm just a little puzzled about what kind of habeas this is. This is certainly not 2255, is it?

MR. BRAY: As I say, I'm not sure what kind of habeas it is by virtue of the fact that the petitioner -- that's the petitioner's case. My understanding of the basis on which this was brought into court is that he has been denied due process of law because the administrative determination is without basis in fact.

Q Well, the reason I ask is that 2255 requires resort to the procedure under that section --

MR. BRAY: It is not a 2255 --

Q -- to obtain conviction in any court -- in any court with the power by Congress.

MR. BRAY: Counsel advises that the action was brought under Section 2241.

Q That's the original habeas statute?

MR. BRAY: Yes, Your Honor.

Q Was the military court established by statute?

MR. BRAY: Yes, sir, they certainly are.

Q On the basis of --

MR. BRAY: The articles are reproduced in our Appendix that establish these courts, Article 66 and 67 set them up as military courts. And indeed there are holdings to that effect.

Q Well, why is habeas corpus -- I'm not suggesting

that it -- I just haven't really focused on it. But 2255 says that application for habeas corpus will not be entertained unless 2255, the 2255 remedy has been sought in the courts which sentanced the prisoner.

MR. BRAY: Well, this is not an attack on the court martial. This is an attack on the administrative determination. And our position is that the collateral attack on the administrative determination is pending in the military courts, in connection with a court martial proceeding. And that comity, as well as other considerations, suggest that the civilian courts not act until that is completed.

Q This is -- this habeas corpus -- I appreciate your being asked, in a way, to speak for your brother on the other side; but I assume this is brought under --

MR. BRAY: 2241.

Q -- Title 28 of the United States Code, 2241.

MR. BRAY: That's correct, as I'm advised by counsel.

Q Thank you very much.

MR. BRAY: Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Bray.

Mr. Goff, you have one minute, we'll enlarge that a little bit and give you three if you need it.

MR. GOFF: Thank you, Your Honor.

REBUTTAL ARGUMENT OF RICHARD L. GOFF, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GOFF: Counsel has said that the only question here is when can petitioner get access to the federal court on habeas corpus to review his claim. Petitioner on May 22, 1969, first submitted to the Army his application for discharge as a conscientious objector.

The processing of that application continued until November 1969, when it was denied.

It was after that that petitioner tried to come into federal court and secure the swift, prompt adjudication of the legality of his detention, which is contemplated by the habeas corpus statute. The delays incident to requiring resort to the court martial process would be several months before trial or, in this case, several months until such time as the Court of Military Review can review the case. And I realize that that time is perhaps more in this case than it would usually be, but in many cases cited by the government the delay has been at least a year from court martial until review by the Court of Military Review, and in our view, and then of course beyond that to the Court of Military Appeals, and only at the Court of Military Appeals point, if at all, could the petitioner ever get the discharge which he seeks in the federal court promptly.

And it's very doubtful in our view that he could ever get a discharge, an administrative discharge, as a result of

the court martial process.

Q What did you say those times -- the administrative procedure through the Office of the Secretary have been completed by what date?

MR. GOFF: In this case, those --

Q November something.

MR. GOFF: -- procedures were completed by November 1969.

Q And on what date was the habeas filed?

MR. GOFF: The habeas was filed almost immediately, but that was suspended because, under the --

Q Yes, but I just wanted to get the dates.

MR. GOFF: The habeas was filed late in November 1969.

Q Now, when was the order, the disobedience of which he was court martialed for?

MR. GOFF: That was in December of 1969.

Q After the filing of the habeas petition?

MR. GOFF: After the filing of the habeas corpus petition. That is correct.

Q So that the habeas petition, then, was pending when the order issued; he disobeyed the order, and then the court martial --

MR. GOFF: That is correct. And it was not until the denial by the Army Board for Correction of Military Records, under the Ninth Circuit's view at that time, that he was able to

come back into federal court to seek review on the merits, and it was at that time that he was met by the government's stay motion.

Q All right. The suspension was because he had not gone to the Board for Correction of Military Records?

MR. GOFF: At that time and until very recently, in their Bratcher vs. McNamara opinion, the Ninth Circuit required the serviceman, even after denial by the Secretary of the Army, to go on and appeal up to the Army Board for the Correction of Military Records.

Q Now, before the proceedings before that Board had been completed, had the order issued and he disobeyed it?

MR. GOFF: That is correct, Your Honor.

Q So it was while that was pending before the Board for Correction of Military Records?

MR. GOFF: That is correct. Because, ironically, the military regulation which says that --

Q Had the court martial begun before that Board had completed its proceedings?

MR. GOFF: I think the charges had been lodged and petitioner was incarcerated in the stockade, the trial did not occur -- incidentally, the trial did not occur until after the district court's order in this case; so, certainly at the time of the district court's order the petitioner was not, at that time, advancing this defense in the court martial proceeding.

I think it would have been extremely imprudent for him to fail to do so, under the terms of the district court's order, but again the whole possibility --

Q The military proceeding had begun? The court martial.

MR. GOFF: The charges had been preferred. The trial took place shortly after the district court's order staying these proceedings.

Q And when was the court martial conviction? About?

MR. GOFF: The court martial conviction, as I recall, was in April of 1970.

Q 1970?

MR. GOFF: That is correct.

Q And it's still pending in --

MR. GOFF: It's pending in the Court of Military Review.

Q -- the Court of Military Review. There's been a great deal of delay there. Why?

MR. GOFF: There has been delay. Some of the delay, Your Honor, is the result of extension of time sought by petitioner's counsel -- we don't represent him, but he does have other counsel who have sought extensions. But even absent those extensions, it seems to us, just from looking at the many cases the government has cited, that an 11 or 12

months' delay is not unusual at all.

And we think that that kind of delay is simply inconsistent with the purpose of the writ of habeas corpus.

Q And these extensions sought by petitioner's counsel, who I understand is different counsel, were for what grounds, on what basis?

MR. GOFF: As I understand it, the extensions were sought on the ground that he simply had not had time yet to complete the brief and present it to the court.

Q That court is not being asked to stay its hands pending the determination of this case, is it or isn't it?

MR. GOFF: No, it's not. No. The case is under submission. Petitioner's counsel did waive oral argument, so the case has been under submission I think for two months, and the letter in the Appendix estimates that, as of September at least, the -- I'm sorry, as of an earlier time; two to four months' delay could be expected.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Goff.

MR. GOFF: Thank you very much, Your Honor.

MR. CHIEF JUSTICE BURGER: And thank you, Mr. Bray.

The case is submitted.

[Whereupon, at 10:58 a.m., the case was submitted.]