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## JUDICIAL REVIEW OF DRAFT BOARD ORDERS

### HISTORICAL SKETCH

Early in the development of this country, conscription was recognized as essential to the protection and preservation of the national welfare in times of threat. Some of our early presidents—Washington, Madison, and Jefferson,—acknowledged the necessity of military service by compulsion; however, the advocates of federal conscription were met with overwhelming congressional opposition.<sup>1</sup> The authority of Congress to pass laws providing for the conscription of men has as its basis the clause empowering Congress to “. . . raise and support armies. . . .”<sup>2</sup> This power is amply supplemented by the necessary and proper clause.<sup>3</sup>

To cope with the exigencies of the then existing situation, Congress exercised this power by passing the first federal draft act on March 3, 1863,<sup>4</sup> entitled, “An Act for the enrolling and calling out the national forces, and for other purposes.” Subsequent to the passage of this Act, statutes of similar import were passed in 1917,<sup>5</sup> 1940,<sup>6</sup> and 1948.<sup>7</sup> The constitutionality of each of these Selective Service Acts has been challenged and the courts have repeatedly upheld their validity,<sup>8</sup> to such a vigorous extent that any prospective litigant may wisely assume that the contention of unconstitutionality has been conclusively withdrawn from the area of debate.

The perplexing question now before the courts in relation to the Selective Service Act of 1948,<sup>9</sup> (hereinafter called “the Act”) is under what circumstances and to what extent draft orders may be judicially reviewed. By an express provision of the Act, classification orders by selective service authorities “shall be final.”<sup>10</sup> To what degree the letter of the law as to the finality of the order is to be followed presented in the first instance, at best, a perplexing problem.<sup>11</sup> As we shall now see, current case law gives us some indication of the extent to which draft orders will be judicially reviewed.

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1. Encyclopedia Britannica, Vol. 6, p. 284.
  2. U.S. Const., Art. I, sec. 10, cl. 12.
  3. Ibid, Art. I, sec. 10, cl. 18.
  4. 12 Stat. 731 (1863).
  5. Selective Draft Act of 1917, ch. 15, 40 Stat. 76 (1917).
  6. Selective Service Act of 1940, 54 Stat. 894 (1940).
  7. Selective Service Act of 1948, 62 Stat. 604 (1948), as amended 50 U.S.C. Supp. sec. 450, 50 U.S.C.A. Supp., sec. 450.
  8. (a) The 1863 Draft Act was upheld in *Kneedler v. Lane*, 45 Pa.St. 238 (1863); *McCall's Case*, 15 Fed.Cas. 1225, No. 8, 669 (Ed.Pa. 1863). (b) The validity of the Selective Draft Act of 1917 was asserted in “*Selective Draft Law Cases*,” 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349 (1918). (c) The constitutionality of the Selective Service Act of 1948 was affirmed in *United States v. Bolton*, 192 F.2d 805 (2nd Cir. 1951).
  9. 62 Stat. 604 (1948), as amended 50 U.S.C. Supp. sec. 450, 50 U.S.C.A. Supp., sec. 450.
  10. Ibid.
  11. In *Frank v. Murray*, 248 Fed. 865 (8th Cir. 1918), it was indicated by way of obiter dicta that improper classification would only be available as a defense if the board lacked jurisdiction. Here the court failed to set out the jurisdictional facts necessary in order to make the board's action legal.

## FALBO V. UNITED STATES

In the leading case of *Falbo v. United States*,<sup>12</sup> Nick Falbo was convicted under the Selective Training and Service Act of 1940, for the crime of willfully failing to obey a local draft board order<sup>13</sup> to report for assignment to work of national importance. Falbo defended on the grounds that he was entitled to a statutory exemption from all forms of national service because he was an ordained minister.<sup>14</sup> He further asserted that it was the duty of the court to review the classification order to ascertain whether the local board had been prejudicial, unfair, and arbitrary. From these facts, the Court narrowed the issue to:

Whether congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process. . . .<sup>15</sup>

This query was answered in the negative. In affirming the conviction, the Court, through Mr. Justice Black, held that a registrant could not defend on the grounds that he was wrongfully classified and was entitled to a statutory exemption, where the offense was a failure to report for induction into the armed forces or for work of national importance. An application for judicial review is premature, said the Court, if made prior to the time when the registrant has taken all steps in the selective process, and has finally been accepted by the armed forces. The Court asserted that even if judicial review is a constitutional right, the registrant could not avail himself of it until final acceptance by the national service.

Because the Supreme Court refused to grant judicial review in the *Falbo* case, the lower federal courts interpreted the decision as meaning that no judicial review at all of a selective service order may be afforded a registrant.<sup>16</sup> Judicial review really was denied for failure of the registrant to exhaust his administrative remedies or to complete the administrative process. The *Falbo* decision not only failed to aid registrants desirous of securing judicial review of draft orders, but presented another problem which necessitated solution before the issue of judicial review itself could be raised, to wit: When is the administrative process complete?

## THE TREND AWAY FROM THE FALBO DOCTRINE

Through a series of decisions on points particularly related to the completion of the administrative process, such as, *Billings v. Truesdell*,<sup>17</sup>

12. *Falbo v. United States*, 320 U.S. 549, 64 S.Ct. 346, 88 L.Ed. 305 (1944).

13. 54 Stat. 885, 50 U.S.C. Supp. sec. 301-318, 50 U.S.C.A. Supp. sec. 301-318. Sec. 11 makes one criminally liable for wilful failure or neglect to perform any duty required by the Act.

14. Sec. 5 (d) of the Act exempts ordained ministers from training and service.

15. *Falbo v. United States*, supra at 349.

16. See *Cox v. United States*, 332 U.S. 442, 68 S.Ct. 115, 92 L.Ed. 59 (1947).

17. *Billings v. Truesdell*, 321 U.S. 542, 64 S.Ct. 737, 88 L.Ed. 917 (1944). This case held that a selectee becomes actually inducted and subject to military law only when he finally undergoes whatever ceremony or requirements of admission the Defense Department has prescribed. Military law was not applicable in the *Billings* case because the defendant had refused to take the oath; therefore the civil courts had jurisdiction over all violations.

*Estep v. United States*,<sup>18</sup> *Gibson v. United States*,<sup>19</sup> and certain regulation changes,<sup>20</sup> the Supreme Court finally came around to holding in the last mentioned case that: (1) conscientious objectors<sup>21</sup> are not required to report to camp in order to complete the administrative process; and, (2) they are not foreclosed by the *Falbo* decision<sup>22</sup> from making on criminal trial any defense open to them, once the registrants have finally been accepted for military service. The Court asserted that the latter rule applied if one had proceeded beyond the point of an exhaustion of administrative remedies. It is thus apparent from these decisions that the administrative process is complete when administrative appeals are exhausted<sup>23</sup> and a final order has been received from the draft board.

#### THE SCOPE OF REVIEW—THE ESTEP CASE

After this hurdle was crossed, the Supreme Court squarely faced the question of the scope of judicial review of draft orders in *Estep v. United States*.<sup>24</sup> *Estep* was convicted in a criminal case on a charge of refusing to submit to induction into the armed forces under section 11 of the Act. Lower federal courts relied on *Falbo v. United States*<sup>25</sup> and refused to allow the defense that the local board in issuing the draft order exceeded its jurisdiction, inasmuch as *Estep* was entitled to a IV-D classification. However, the Supreme Court rejected the argument of the prosecution that no litigious interruption in the selective process can be tolerated, and that a judicial inquiry into the validity of an induction order during the course of a criminal proceeding for refusing to submit to induction, is a prime example of litigious interruption. The Court held that the defendant was entitled to a judicial review of his contention that the local board had exceeded its jurisdiction, and that it was not necessary for the defendant to submit to induction and resort to habeas corpus before he could contest the draft board's order. The Court, through Mr. Justice Douglas, stated: "Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them." The *Falbo* case<sup>26</sup> was found inapplicable because here *Estep* had exhausted his administrative remedies.<sup>27</sup> In this decision, the majority was careful

18. *Estep v. United States*, 327 U.S. 114, 66 S.Ct. 423, 90 L.Ed. 567 (1946).

19. *Gibson v. United States*, 329 U.S. 338, 67 S.Ct. 301, 91 L.Ed. 331 (1946).

20. See sec. 653.11 et seq. of the Selective Service Regulations.

21. Under sec. 5(g) of the Act, persons having IV-E classifications are given conscientious objector status and are assigned to non-combatant service, or to work of national importance under civilian direction.

22. *Falbo v. United States*, supra note 12.

23. Method of appeal under present Act: After the appeal board decides against the selectee and his file is returned to the local board, selectee has the right under selective service regulations to examine all of his file, including the recommendations of the Department, 32 C.F.R. sec. 1606.32(a)(1); 32 C.F.R. sec. 1606.38(c). (Justice Department investigates, holds a hearing and makes a written report to the appeal board before said board reaches a decision). If reopening is denied, he may present his contentions to the Director of Selective Service, requesting a reopening of his classification or a reconsideration by the appeal board. 32 C.F.R. sec. 1625.3(a); 32 C.F.R. sec. 1626.61(a).

24. *Estep v. United States*, supra note 18.

25. *Falbo v. United States*, supra note 12.

26. *Ibid.*

27. For remedies provided within the selective service agency, supra note 23.

to point out: (a) that courts were not to weigh the evidence to determine whether the classification made by the local board was justified, (b) board decisions are final, even though erroneous, if made in conformity with the regulations and (c) the jurisdictional point is to be decided only if there is no "basis in fact" for the classification which the registrant received. The remedy of habeas corpus was considered, but excluded as not being expedient or favorable to cases of this character. A majority failed to perceive why "the court would send a man to jail today when it was apparent he would have to be released tomorrow."

In applying the "basis in fact" test developed in the *Estep* case,<sup>28</sup> one who examines the record on appeal to determine conformity is likely to be susceptible to the *weight* of the evidence and influenced thereby in his ultimate decision. This possibility has not seemed to worry the courts because the "basis in fact test," with its outgrowths, has been utilized wherever applicable. Examples of such utilization are *Sunal v. Large*,<sup>29</sup> *Smith v. United States*,<sup>30</sup> *United States ex rel. Trainin v. Cain*,<sup>31</sup> *Benzian v. Godwin*,<sup>32</sup> and *Cox v. United States*.<sup>33</sup> In affirming a conviction under the Act in the last mentioned case, the Court vigorously asserted that any charge to a jury without considering the action of the board would have been improper because whether there was no "basis in fact" for the board's classification is not a question to be determined by the jury on an independent determination of the evidence. Once the judge decides that the file supports the board, nothing in selective service file is pertinent to any issue proper for jury consideration. In other words, once the judge determines that the evidence in the selective service file supports the decision which the board has reached, such evidence is not to be reweighed on appeal.

#### THE NECESSITY OF SUBSTANTIAL EVIDENCE TO SUPPORT ORDERS

As we have seen from the *Estep*<sup>34</sup> and *Cox*<sup>35</sup> cases, judicial review of the jurisdiction of the local board is purportedly reached only if there is no "basis in fact" for the classification which it gave the registrant, and the courts may interfere only where the local board lacks jurisdiction to make the order. However, *Annett v. United States*<sup>36</sup> is an example of the influence of substantial evidence on the jurisdictional issue. Here Annett

28. *Estep v. United States*, supra note 18.

29. *Sunal v. Large*, 157 F.2d 165 (4th Cir. 1946). Held: draft orders are final as to judicial review unless there is no basis in statutes for the classification which the local board gave the registrant.

30. *Smith v. United States*, 157 F.2d 176 (4th Cir. 1946).

31. *United States ex rel. Trainin v. Cain*, 144 F.2d 944 (2nd Cir. 1944). Cert. denied, 323 U.S. 795, rehearing denied, 323 U.S. 819 (1945), cited with approval in the *Estep* case.

32. *Benzian v. Godwin*, 168 F.2d 952 (2nd Cir. 1948). This case held that where determination of registrant's status under the Act by the Director does not appear to be without a basis in fact, the Court of Appeals is not empowered to review the Director's determination.

33. *Cox v. United States*, 332 U.S. 442, 68 S.Ct. 423, 90 L.Ed. 567 (1946).

34. *Estep v. United States*, supra note 18.

35. *Cox v. United States*, supra note 16.

36. *Annett v. United States*, 205 F.2d 689 (10th Cir. 1953).

was convicted for failing to submit to induction under the Act. He defended on the grounds that the board's order classifying him as 1-A was erroneous and without factual basis. He presented voluminous evidence before the board tending to show that he was a bona fide member of Jehovah's Witnesses, but the board chose not to believe it and relied on the testimony of other witnesses, which lacked the support of any facts. The Court, on examining the record and finding *no substantial evidence* to support the board's order, concluded the board lacked jurisdiction and held the order void. A similar case is *Dickinson v. United States*.<sup>37</sup> In reversing a conviction under section 12 (a) of the Act, the Court, through Mr. Justice Clark, stated:

. . . The task of the court in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. We have found none here. . . . When the uncontroverted evidence supporting a registrant's claim places him prima facie within statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.

The effect upon local boards of decisions like *Annett*,<sup>38</sup> *Dickinson*<sup>39</sup> and the hint which was given in *Niznik v. United States*,<sup>40</sup> is a healthy one. Such decisions exert pressure upon local boards, not only to make decisions in conformity with the regulations of the Act, but also to weigh the evidence carefully in order to make certain that their orders are supported by substantial evidence. This position counteracts, to a certain degree, the effect of the holding in the *Estep* case<sup>41</sup> that erroneous decisions of the board are to be final if made in conformity with the Act. One gets the impression that the board's decision cannot conform with the Act if it is not supported by substantial evidence; however, the appropriate provisions of the Act itself,<sup>42</sup> indicate an opposite conclusion.

Cases like *United States v. Witner*<sup>43</sup> by contrast present quite a different situation. Here the court affirmed a conviction for refusing to submit to induction, stating that where the evidence supports two inferences, review within the selective service system is final. There is an echo of *Estep* in the court's assertion that, on judicial review, it will abstain from acting as a super draft board if the draft order has any "basis in fact."

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37. *Dickinson v. United States*, 346 U.S. 389, 74 S.Ct. 152, 98 L.Ed. 132 (1953).

38. *Annett v. United States*, supra note 36.

39. *Dickinson v. United States*, supra note 37.

40. *Niznik v. United States*, 184 F.2d 972 (6th Cir. 1950). The court reversed a conviction on the ground that the local board's order was not based on sufficient evidence, and thus was contrary to the regulation.

41. *Estep v. United States*, supra note 18.

42. *Selective Service and Training Act of 1946*, sec. 10(a)(2), 50 U.S.C.A. Supp. sec. 310(a)(2). Courts must not weigh evidence to determine whether classification made by the local boards are justified.

43. *United States v. Witner*, 348 U.S. 375, 75 S.Ct. 392, 99 L.Ed. 327 (1955).

## DENIAL OF PROCEDURAL RIGHTS IS SUBJECT TO REVIEW

Judicial review of draft orders has not been limited to questions of evidence. *Tung v. United States*<sup>44</sup> reversed a local board order which directed a registrant to report for induction without allowing him the appeal to which he was entitled under the Act. Denials of procedural rights have likewise brought reversals in the courts.

*United States v. Nugent*<sup>45</sup> was one of many such cases. The defense here was that the litigant was denied a fair resume of the evidence in the investigator's report.<sup>46</sup> The Supreme Court held that judicial review was proper, but that the defendant need not be permitted to see the investigator's report, or be given names of persons interviewed; that in a hearing the Justice Department sufficiently performs its duty if it accords fair opportunity to the registrant to speak freely before an impartial hearing officer, allows him to produce all relevant evidence in his behalf and supplies him in advance with a fair resume of any evidence in the investigator's report.

Two years later the Supreme Court distinguished the *Nugent* case<sup>47</sup> in *Simmons v. United States*<sup>48</sup> because the summary of the FBI reports was available to the registrant in the former case, whereas in *Simmons* not even a summary was supplied to the registrant. The majority opinion stated that failure of the registrant to request a resume of the Justice Department's report prior to the hearing does not constitute a waiver, and that a partial disclosure by the hearing officer is not a fair resume of the report. Fair resume was defined as:

. . . one which will permit the registrant to defend against the adverse evidence—to explain it, rebut it, or otherwise detract from its damaging force. . . .

Even though the statute<sup>49</sup> was silent on this procedural right, the Court considered the defendant's right to this report as a fundamental safeguard essential to basic fairness.

The same consequence occurs when the registrant has not been furnished with the Justice Department's recommendation or informed of its contents prior to an adverse decision by the board, even though such procedure is not expressly provided for in the regulations,<sup>50</sup> or the report is not requested by the registrant,<sup>51</sup> and he is entirely without knowledge of such right.<sup>52</sup>

44. *Tung v. United States*, 142 F.2d 919 (1st Cir. 1944).

45. *United States v. Nugent*, 346 U.S. 1, 73 S.Ct. 991, 97 L.Ed. 1417 (1953).

46. For the appropriate regulations, see C.F.R. 1626.25 (1949 ed.); 17 Fed. Reg. 5449, June 18, 1952. See also sec. 6 (j) of the Act, as amended 50 U.S.C.A. Supp., sec. 456 (j).

47. *United States v. Nugent*, supra note 45.

48. *Simmons v. United States*, 348 U.S. 397, 75 S.Ct. 397, 99 L.Ed. 339 (1955).

49. Universal Military Training and Service Act, sec. 6 (j) as amended, 50 U.S.C.A. Supp., sec. 456 (j).

50. *Gonzales v. United States*, 348 U.S. 407, 75 S.Ct. 409, 99 L.Ed. 345 (1955).

51. *United States v. Good*, 131 F.Supp. 923 (E.D. Pa. 1955).

52. *United States v. Bunder*, 131 F.Supp. 414 (M.D. Pa. 1955).

## CONCLUSION

The "quick freeze" of the pronouncement in *Falbo v. United States* that judicial review under the Act was altogether unavailable, because Congress had entrusted the administration of the selective service system to the civilian agency and not to the courts, has been melted by later decisions. It is now established that the silence of Congress as to judicial review<sup>53</sup> does not preclude federal courts from extending relief in the exercise of their general jurisdiction, which has been expressly granted by Congress. The registrant can now predict fairly accurately when he will or will not be afforded judicial review of draft orders.

It has been established through the cases herein discussed that a judicial review of draft orders will be afforded: (a) when a registrant is compelled to comply with an order before being given the right to exhaust his administrative remedies by appeal within the agency, (b) if there is no "basis in fact" for the order issued by the board, (c) or the order by the board is not supported by substantial evidence, (d) or if the registrant is denied a procedural right to which he is entitled, (e) or if the order is arbitrary and capricious.

The total effect of the judicial product to date is to curb the inclinations of some local boards to be careless or dogmatic in the issuance of draft orders, a consummation devoutly to be wished in an area which so profoundly affects the lives of many people.

THEODORE JEFFERSON

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 THE PROBLEM OF THE CHILD WITNESS

As nearly any mother will concede, one of the primary features of small children is the ambulatory characteristic; they get around. Thus, they often are in the right place at the right time to see people, things and events that are never witnessed by an adult. Because of this propensity their testimony may on occasion be of extreme importance in the litigation of a civil action or in a criminal prosecution. It should be pointed out that this same characteristic frequently places children in out-of-the-way places where atrocious crimes are committed against their persons. Since such acts are always committed in privacy the testimony of the child is frequently the most important evidence available in prosecuting the perpetrator of such a crime. These factors indicate that the probability is quite good that at some time during his professional career an attorney will want to call upon the testimony of a child. When he does he is confronted by two problems:

- (1) He must qualify the child as a competent witness.
- (2) He must elicit testimony from the child in an understandable and convincing manner.

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53. 62 Stat. 604 (1948), for amendments—supra note 8.