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Still Further on Judicial Review of Classification by Selective Service System, or Judicial Review of Draft Board Classification Based on Ruling That Selectee is Not a Minister - Dickinson v. United States

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STILL FURTHER ON JUDICIAL REVIEW OF CLASSIFICATION BY SELECTIVE SERVICE SYSTEM, OR JUDICIAL REVIEW OF DRAFT BOARD CLASSIFICATION BASED ON RULING THAT SELECTEE IS NOT A MINISTER[1]

Dickinson v. United States[2]

By JAMES C. COX, JR.*

"Congress wanted men to get into the army, not to litigate about getting in." This remarkable statement was taken from Mr. Justice Frankfurter's separate opinion in the landmark case of *Estep v. United States.*[3] The case under comment, however, goes a long way on the road to saying that Mr. Justice Frankfurter's statement leaves much of the story untold.

In *Dickinson v. United States,*[4] the narrow question before the Supreme Court was whether there was a basis in fact for the denying of Dickinson's claim to a ministerial exemption under Section 6(g) of the Universal Military Training and Service Act.[5] After his claim was denied Dickinson refused to submit to induction in defiance of his local board's induction order and was consequently convicted of violating Section 12(a) of the Act.[6] The Court of Appeals for the Ninth Circuit affirmed the conviction,[7] and the Supreme Court granted certiorari.[8]

Section 6(g) provided, in part, that "regular or duly ordained ministers of religion" should be exempt from training and service (but not from registration) under that title, and Section 16(g) set out Congress' definition of a "regular or duly ordained minister of religion".[9] The term

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[1] This is the third in a series of casenote treatments of this topic. The earlier casenotes on the subject of judicial review of classification by the Selective Service system are found in 7 Md. L. Rev. 165 (1943), and in 8 Md. L. Rev. 154 (1944). This subject is also discussed in an excellent casenote entitled *Scope of Review of Selective Service Classification,* 16 G. W. L. Rev. 406 (1948).

[2] 346 U. S. 389 (1953). The same case below is found in 203 F. 2d 336 (1953).

[3] 327 U. S. 114 (1946).

[4] *Supra,* n. 2.

[5] 62 Stat. 609, 50 U. S. C. A. App. Sec. 456(g). The title of this legislation was changed from the "Selective Service Act of 1948" to the "Universal Military Training and Service Act" by 65 Stat. 75, 50 U. S. C. A., Sec. 451(a).

[6] In the United States District Court for the Northern District of California. Dickinson was sentenced to two years' imprisonment.

[7] 203 F. 2d 336 (1953).

[8] 345 U. S. 991 (1953).

[9] 62 Stat. 624, 50 U. S. C. A. App. 466(g).

"duly ordained minister of religion" was defined to mean a person who had been ordained, in accordance with the ritual or discipline of a church, religious sect, or organization to preach and teach its doctrines, and who, *as his regular and customary vocation,* preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in its creed. The term "regular minister of religion" was defined to mean one who, as his customary vocation, preaches and teaches the principles of religion of a church, religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect or organization as a regular minister. Registrants satisfying the statutory definition were entitled to be classified IV-D.

Dickinson, a Jehovah's Witness, originally claimed the IV-D classification shortly after he registered, at age 18, as required under the Act, at which time he stated, in his classification questionnaire, that he was a "regular", but not an ordained, minister, and was supporting himself by working 40 hours a week as a radio repairman. He devoted a number of hours each week to conducting two Bible study groups as well as "several hours each week" to preaching to the public. He was classified I-A, and the validity of this classification was not contested. However, after filing his classification questionnaire, Dickinson gave up his radio repair work, except for 5 hours per week which remained his chief source of income, was ordained by baptism, and was assigned missionary work as a full-time "pioneer" minister, devoting 150 hours each month to religious effort. Although informed of this marked change in Dickinson's activity, the local board continued him in I-A, which ruling was affirmed by the state and national appeal boards, and he was ordered to report for induction. Dickinson reported to the induction center but refused to submit to induction, whereupon his indictment and conviction followed.

Here once more the Court was faced with the question of the scope of judicial review of a classification made by a local draft board and confirmed by the administrative appeal provided for under the selective service system. The Universal Military Training and Service Act does not permit the direct judicial review of selective service classification orders, but, rather, provides, as did the 1917 and 1940 conscription acts[10] before it, that classification orders

[10] 40 Stat. 80 (1917) and 54 Stat. 885, *et. seq.*, 893 (1940), respectively.

by selective service authorities shall be "final". However, in *Estep v. United States,*[11] a case arising under the 1940 Act, the Court said:[12]

> "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification. . . ."

The Court in the instant case was careful to point out that the ministerial exemption was a narrow one, " 'intended for the leaders of the various religious faiths and not for the members generally'."[13] It was further stated:[14]

> "Certainly all members of a religious organization or sect are not entitled to the exemption by reason of their membership, even though in their belief each is a minister. *Cf. Cox v. United States,* 332 U. S. 442 (1947). On the other hand, a legitimate minister cannot be, for the purposes of the Act, unfrocked simply because all the members of his sect base an exemption claim on the dogma of its faith. That would leave a congregation without a cleric. Each registrant must satisfy the Act's rigid criteria for the exemption. Preaching and teaching the principles of one's sect, if performed part-time or half-time, occasionally or irregularly, are insufficient to bring a registrant under Section 6(g). These activities must be regularly performed. They must, as the statute reads, comprise the registrant's 'vocation'."

By a 6-3 decision, the Court reversed the conviction, holding (1) that, although determinations of fact by selective service authorities are not generally open to judicial

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[11] *Supra,* n. 3.

[12] 327 U. S. 114, 122 (1946).

[13] 346 U. S. 389, 394 (1953), quoting from Senate Report No. 1268, 80th Congress, 2d Session 13, which accompanied the 1948 Act.

[14] *Ibid.*

review, nonetheless such authorities may not deny a legitimately claimed exemption merely because of suspicion and speculation; (2) that the registrant in the instant case was squarely within the statutory exemption; and (3) that his right to exemption was unaffected by his incidental secular employment. In an opinion by Mr. Justice Clark, the Court found that Dickinson was ordained in accordance with the ritual of his sect and met the statutory test of regularity, teaching and preaching the principles of his sect and conducting public worship as a vocation, stating that "the ordination, doctrines, or manner of preaching that his sect employs diverge from the orthodox and traditional is no concern of ours; . . . the statute does not purport to impose a test of orthodoxy."[15]

Stating that the statutory definition of a "regular or duly ordained minister" does not preclude all secular employment, and that a statutory ban on all secular work would mete out draft exemptions with an uneven hand, to the detriment of those who minister to the poor and thus need some secular work in order to survive, the Court felt that to hold that one who supports himself by five hours of secular work each week may thereby lose an exemption to which he is otherwise entitled, would be to work a result that Congress had attempted to avoid, and held that Dickinson's five hours a week as a radio repairman did not supply a factual basis for the denial of the IV-D classification to him.

Dickinson's claims were not disputed by any evidence presented to the selective service authorities or to the appellate court. The Supreme Court made much of this point, stating:[16]

> "The task of the courts 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. . . . If the facts are disputed the board bears the ultimate responsibility for resolving the conflict — the courts will not interfere. Nor will the courts apply a test of 'substantial evidence'. However, the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption. The local board may question a registrant under oath, subpoena witnesses to testify, and require both registrant and

[15] *Ibid*, 395.
[16] *Ibid*, 396.

> witnesses to produce documents. . . . The board is authorized to obtain information from local, state, and national welfare and governmental agencies. . . . The registrant's admissions, testimony of other witnesses, . . . or information obtained from other agencies may produce dissidence which the boards are free to resolve. . . . But when the uncontroverted evidence supporting a registrant's claim places him prima facie within the 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."

Mr. Justice Jackson's dissenting opinion, concurred in by Mr. Justices Burton and Minton, reasoned that, although the *Estep* case[17] held that the registrant must be allowed the opportunity to show that his local draft board acted without jurisdiction in classifying him for service, the question of jurisdiction of the local board is reached *only if there is no basis in fact* for the classification. The import of all of this was that a local board lost jurisdiction if there were insufficient facts to support its jurisdiction. However, in the instant case, there was no allegation that the local board or the appellate board acted fraudulently or maliciously. The only logical assumption from the classification is that the boards disbelieved part of the petitioner's testimony or doubted his good faith in taking up religious work at the particular time he did.[18]

The problem inherent in the *Estep* case, and raised by the majority opinion in the instant case, is answered by the dissenting justices in the following clearly-worded passage from the instant case:[19]

> "It will not do for the Court . . . to say, on the one hand, that the board's action is not subject to 'the customary scope of judicial review' and that 'the courts are not to weigh the evidence', and then, on the other, to strike down a classification because no affirmative evidence supporting the board's conclusion appears in the record. Under today's decision, it is not sufficient that the board disbelieve the registrant. The board must find and record affirmative evidence that he has

[17] *Supra*, ns. 11, 12.

[18] Since induction was not an immediate threat when Dickinson changed his activities, the charge itself would hardly show bad faith, if that were an issue. However, bad faith is not at issue in cases such as this.

[19] *Supra*, n. 13, *dis. op.*, 397, 399.

misrepresented his case — evidence which is then put to the test of substantiality by the courts. In short, the board must build a record.

"There is nothing in the Act which requires this result. To the contrary, the whole tenor of the Act is that the factual question of whether the registrant is entitled to the claimed exemption shall be left entirely in the hands of the board."[20]

The usual rule is that one who claims the benefit of exceptions in a statute carries the burden of establishing that he is entitled to them. And the decisions of the board on such matters are made "final" by the Act, except where an appeal is authorized. The dissent complains that even when the word "final" is interpreted so as to allow judicial review of the board's jurisdiction, it does not follow that jurisdiction may be lost through a lack of evidence, and, furthermore, that, despite the comment in the *Estep* case that the board's action is not subject to ordinary review, the dissent continues to examine and weigh these purely factual determinations, and concludes with this pointed comment:[21]

"Perhaps what bothers the Court is that when no evidence is introduced against a registrant and the board fails to state its reasons for acting, there is no practical way for the trial court to determine whether the correct statutory standard has been applied. We freely admit the difficulty. . . . Since the record in this case would look the same whether the board acted fraudulently, with a misconception of the law, or in good faith, how is the trial court to proceed in determining the board's jurisdiction? The board, through silence, makes the registrant's task of proving lack of jurisdiction next to impossible.

"We think the Act nevertheless requires that in the absence of affirmative proof by the registrant that the board has misconstrued the law or acted arbitrarily, the board's decisions are final and not subject to judicial scrutiny. . . . The Court may not set aside the board's finding because the Court might have reached a different conclusion. If it is said that this puts an awesome power in the hands of the selective service

[20] 62 Stat. 620, 50 U. S. C. A. App., Sec. 460(b)(3).

[21] *Supra*, n. 13, *dis. op.*, 397, 400.

> authorities, we can only reply that conscription is an awesome business. Congress must have weighed this fact when it passed the Act. It must also have realized that to allow each registrant who is denied exemption a trial on the facts would be to place an impossible block in the way of conscription."

The decision in the *Dickinson* case carries forward another step the sequence of cases under the Selective Training and Service Act commencing with *Falbo v. United States*[22] in 1944, in which the Supreme Court required the petitioner to exhaust his administrative remedies before he was entitled to a judicial review of his classification on a criminal prosecution for violation of Section 11 of the Selective Training and Service Act of 1940.[23] In the next two years, eight out of eight Circuit Courts of Appeal refused review even in the absence of any question of exhaustion of administrative remedies.[24] But in the *Estep* case in 1946,[25] after the war had ended, the Supreme Court, sharply divided as to the reasons for its decision, denied the validity of the argument that judicial review was barred by Congressional silence as to such review together with the statute's specification of finality for the local board's determination, except for appeal within the selective service system under rules prescribed by the President. The opinion of the Court reasoned that the specification of finality meant that the evidence could not be weighed to determine whether the classification was justified, but did not prevent the Court from ascertaining whether, in fact, the local board had acted within its jurisdiction, saying in part:[26]

> "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be

[22] 320 U. S. 549 (1944).
[23] 54 Stat. 885, Acts 1940, c. 720, 57 Stat. 596, 597, Acts 1943, c. 342. 50 U. S. C. A. App., Secs. 301-318 (1946).
[24] The eight are listed in Mr. Justice Frankfurther's concurring opinion in the Estep case, 327 U. S. 114, 139 (1946).
[25] 327 U. S. 114 (1946).
[26] *Ibid*, 122.

> erroneous. The question of jurisdiction of the local boards is reached only if there is no basis in fact for the classification. . . ."

Later in 1946, in *Gibson v. United States*,[27] a unanimous Court held that a conscientious objector ordered to report to a civilian work camp, having exhausted his administrative remedies up to that point, and being indicted for violating Section 11 of the Selective Training and Service Act for failure to report to such camp, might raise as a defense in Court the fact that his classification was invalid. The Court felt that Congress intended some remedy to be available, should habeas corpus prove unavailable, to persons charged with such violation.

In 1947, in *Cox v. United States*,[28] in confirming the selective service classification as conscientious objectors of certain Jehovah's Witnesses who claimed to be ministers, Mr. Chief Justice Vinson, Mr. Justices Jackson and Burton concurring in an opinion by Mr. Justice Reed, felt that any judicial review, (a) should be strictly limited to the test of the *Estep* case, (b) was properly confined to the evidence as contained in the selective service files, and (c) that such determination — *i.e.*, whether there was, in fact, any basis in such evidence for the draft board's classification — must be made by the judge and not submitted to the jury, for the concept of a jury passing on the validity of administrative orders is neither consonant with administrative practice nor required by constitutional due process of law. Mr. Justice Frankfurter concurred in the result only.

Mr. Justice Douglas, in dissent, speaking for himself and for Mr. Justice Black, and repeating his position in the *Estep* case, agreed that the decision of the local draft board could be reversed only if there was no basis in fact for the classification, and that this determination was properly one of law for the courts.[29] He felt, however, that there was no adequate basis for the local boards to deny the classification of ministers to their petitioners, but that there was a clear statutory mandate to exempt all "regular or duly ordained ministers of religion", including Jehovah's Witnesses, whose door-to-door canvassing had been recognized as legitimate religious activity in *Murdock v. Pennsylvania*,[30] and that the mere fact that they failed to devote

[27] 329 U. S. 338 (1946).

[28] 332 U. S. 442 (1947).

[29] *Ibid, dis. op.*, 455.

[30] 319 U. S. 105 (1943).

full time to religious activities be deemed not controlling, as it was a not uncommon practice among rural ministers. Mr. Justice Murphy, joined by Mr. Justice Rutledge in dissent, objected to allowing the classification to have finality for purposes of criminal prosecution if the classification rested on anything less than "substantial evidence", stating that for such purpose the validity of the classification "should be established by something more forceful than a wisp of evidence or a speculative inference".[31] Mr. Justice Frankfurter's concurrence in result only reminds the thoughtful reader that in a concurring opinion in the *Estep* case he criticized the opinion of the Court, saying that the approach that erroneous classification goes to the jurisdiction of the board "revives, if indeed it does not multiply, all the causistic difficulties spawned by the doctrine of 'jurisdictional fact',"[32] which brought forth sharp criticism from the date of its sponsorship by Mr. Chief Justice Hughes in the famous case of *Crowell v. Benson*,[33] and which Mr. Justice Frankfurter felt "had earned a deserved repose".

On questions of personal liberty, the Court might have held that "administrative finality" is unconstitutional, but this view has been advanced only by Mr. Justice Murphy, who has earlier asserted that:[34]

> "To sustain the convictions . . . would require adherence to the proposition that a person may be criminally punished without ever being accorded the opportunity to prove that the prosecution is based upon an invalid administrative order. That is a proposition to which I cannot subscribe. It violates the most elementary and fundamental concepts of due process of law."

Mr. Justice Murphy went on to say that the word "final" in the statute "merely determines the point of administrative finality, leaving to the courts the ultimate and historical duty of judging the validity of the 'final' administrative orders. . . ."[35]

Thus, the scope of judicial review of draft board classification based on a ruling that the selectee is not a minister has proven difficult for the Court to determine. However,

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[31] *Supra*, n. 28, *dis. op.*, 457, 458.
[32] *Supra*, n. 25, *conc. op.*, 134, 142.
[33] 285 U. S. 22 (1932).
[34] *Supra*, n. 25, *conc. op.*, 125. *Cf.* concurring opinion of Mr. Justice Brandeis in St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 77 (1936).
[35] *Ibid*, 128.

the Court has come a long way from its original position that the selectee's only remedy available was by way of habeas corpus to its acknowledgment that a selectee may, under appropriate circumstances, assert as a positive defense in a criminal prosecution for violation of the provision of the Selective Training and Service Act the invalidity of an erroneous classification by the draft board.

This line of cases again demonstrates that whether a statute explicitly provides that administrative action shall be "final", or whether it is silent as to reviewability, the controlling factor seems to be the views held by the individual judges as to the desirability of review of the facts involved in the particular case under consideration.[36]

[36] See DAVIS, ADMINISTRATIVE LAW (1951), Ch. 19, pp. 832-839, 865-867.