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Armed Services - The Right to Pre-Induction Judicial Review. Breen v. Selective Service Local Board No. 16, 90 S. Ct. (1970)

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decision has resolved all doubts concerning section 14(a) violations in favor of the shareholders that the statute was designed to protect. The Congressional policy of insuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions is thereby reinforced.

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Armed Services—THE RIGHT TO PRE-INDUCTION JUDICIAL REVIEW. *Breen v. Selective Service Local Board No. 16*, 90 S. Ct. 661 (1970).

Petitioner Breen was given a II-S, student deferment, pursuant to the provisions of the MILITARY SELECTIVE SERVICE ACT OF 1967.[1] Subsequently, Breen's local board declared him a delinquent and reclassified him I-A.[2] Breen appealed the reclassification and sought an injunction in the district court to prevent possible induction. The court of appeals affirmed[3] the district court's dismissal of the suit for lack of jurisdiction.[4]

On certiorari,[5] the Supreme Court held that a student deferment is guaranteed by statute and cannot be revoked as a punitive measure.[6] Therefore, when the local board violated its statutory authority, pre-induction judicial review should have been available to test the legality

courts and the absence of express statutory authorization for reimbursement was not a bar to recovery of costs.

1. Pub. L. No. 90-40, § 6, 81 Stat. 102 *amending* 50 APP. U.S.C. § 456(h) (1964) (codified at 50 APP. U.S.C. § 456(h)(1) (Supp. IV, 1969)).

2. Petitioner Breen surrendered his registration certificate to protest the United States' involvement in Viet Nam. Every registrant must carry his draft card at all times. 32 C.F.R. § 1617.1 (1969). Breen's local board declared him delinquent and reclassified him for failure to perform his duty.

3. 406 F.2d 636 (2d Cir. 1969).

4. 284 F. Supp. 749 (D. Conn. 1968). The district court relied on 50 APP. U.S.C. § 460(b)(3) (Supp. IV, 1969), *amending* 50 APP. U.S.C. § 460(b)(3) (1964), which states that:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title [section 462 of this Appendix], after the registrant has responded either affirmatively or negatively to an order to report for induction . . . . *Provided,* that such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

5. Breen v. Selective Service Local Bd. No. 16, 394 U.S. 997 (1969) (order granting certiorari). While the case was pending in the court of appeals, a petition to the appropriate selective service appeal board for review of the local board's action was denied, and Breen was ordered to report for active duty.

6. Breen v. Selective Service Local Bd. No. 16, 90 S. Ct. 661 (1970).

of the board's action.[7] In reaching its decision, the Court relied on *Oestereich v. Selective Service Sys. Local Bd. No.* 11,[8] holding that a statutory exemption could not be revoked as a punitive measure, and *Gutknecht v. United States*,[9] which held that induction pursuant to delinquency regulations had not been authorized by Congress. The Court was unable to distinguish *Breen* from *Oestereich*, because there was no legal difference between a deferment and an exemption.[10]

As early as 1946 in *Estep v. United States*,[11] the Supreme Court refused to review local board decisions until the order to report for induction had been given.[12] This policy prevailed for over twenty years. In certain instances, however, a few courts took cognizance of manifest irregularities and unfairness,[13] while others dealt with the denial of due process in local board procedure.[14]

Initially the Supreme Court had upheld first and fourteenth amendment rights against excessively broad statutes regulating expression,[15]

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7. *Id.* at 666.

8. 393 U.S. 233 (1968); *noted in* 10 WM. & MARY L. REV. 992 (1969).

9. 90 S.Ct. 506 (1970).

10. 90 S.Ct. at 665:

> We fail to see any relevant practical or legal differences between exemptions and deferments. The effect of either type of classification is that the registrant cannot be inducted as long as he remains so classified.

11. 327 U.S. 114 (1946).

12. The ruling in *Estep* was consistent with the requirement that there be an exhaustion of administrative remedies as prescribed in Falbo v. United States, 320 U.S. 549 (1944), but the decision went further in that it delineated exhaustion of remedies. At induction the registrant could elect to: (1) submit to induction and petition for a writ of habeas corpus, or (2) report for but refuse to submit to induction thereby gaining access to judicial review in a criminal proceeding. 44 NOTRE DAME LAWYER 469, 470 (1969). The above election was qualified by the ruling in *Estep* which barred the courts from weighing evidence to determine if the classification by the local board was justified. In the words of the Court:

> 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 boards is reached only if there is no basis in fact for the classification which it gave the registrant.

Estep v. United States, 327 U.S. 114, 122-23 (1946), codified at 50 APP. U.S.C. § 460(b)(3) (Supp. IV, 1969) *amending* 50 APP. U.S.C. § 460(b)(3) (1964).

13. United States v. Bellmer, 404 F.2d 132 (3rd Cir. 1968) (denial of basic procedural fairness); Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956) (denial of the registrant's procedural rights). *See also* Sicurella v. United States, 348 U.S. 385 (1955); Batterson v. United States, 260 F.2d 233 (8th Cir. 1958).

14. United States v. Romano, 103 F. Supp. 597 (S.D.N.Y. 1952) (refusal of the right to post-classification hearing violates the defendant's right to due process).

15. Dombrowski v. Pfister, 380 U.S. 479, 485-89 (1965).

and then the right to judicial review became available when statutes granting power to federal agencies, acting within the scope of their authority, abridged the right of free speech.[16] In *Wolff v. Selective Service Local Board No. 16*,[17] the Court found a justiciable controversy prior to induction because the threat of criminal prosecution for refusing induction had such a "chilling effect" on freedom of speech that it caused impairment of the individual's rights in the first instance.[18] As a result pre-induction judicial review, without exhaustion of administrative remedies, became available when the constitutional rights of an individual were jeopardized by the action of the local board.

Reacting to the decision in *Wolff*, Congress attempted to clarify the ban on judicial review prior to exhaustion of administrative relief[19] by enacting § 10(b) (3) of the MILITARY SELECTIVE SERVICE ACT OF 1967.[20]

In *Oestereich v. Selective Service System* the Supreme Court refused to apply § 10(b)(3) to a situation involving a plaintiff who had been denied his statutory right to an exemption and had been reclassified as a punitive measure by his local board.[21] The Court ruled that Oestereich's exemption was a statutory right which was not subject to revocation as long as he continued to be a divinity student.[22] Therefore, the local board violated its statutory authority by revoking his exemption as a punitive measure. This decision removed punitive reclassification of exempt status from the purview of § 10(b)(3) thereby permitting pre-induction judicial review.[23]

16. *See* Estep v. United States, 327 U.S. 114, 126 (1946).

17. 372 F.2d 817 (2d Cir. 1967).

18. 372 F.2d at 824. *See generally* 81 HARV. L. REV. 685, 687-88 (1968).

19. H.R. REP. No. 267, 90th Cong., 1st Sess. 30-31 (1967):

> The Committee was disturbed by the apparent inclination of some courts to review the classification action of local boards or appeal boards before the registrant had exhausted his administrative remedies . . . . In view of this inclination of the courts to prematurely inquire into the classification action of local boards, the Committee has rewritten this provision of the law so as to more clearly enunciate this principle.

20. Pub. L. No. 90-40, § 8(c), 81 Stat. 104 (codified at 50 APP. U.S.C. § 460(b)(3) (Supp. IV, 1969)).

21. Oestereich v. Selective Service System Local Board No. 11, 393 U.S. 233 (1968). Oestereich held a IV-D divinity student exemption granted under 50 U.S.C. § 456(g) (1964). The local board declared him delinquent under 32 C.F.R. § 1642.4(a) (1969) and then reclassified him I-A pursuant to 32 C.F.R. § 1642.12 (1969) because he had returned his draft card in protest of the United States' involvement in Viet Nam.

22. 393 U.S. at 237.

23. The Oestereich Court said:

The Court in *Breen* extended the holding in *Oestereich* to permit pre-induction judicial review of the punitive reclassification of a deferred individual.[24] Further, the Court followed its earlier holding in *Gutknecht v. United States* prohibiting induction pursuant to delinquency regulations.[25] The result of *Breen* is a further limitation of the local board's freedom to interpret selective service legislation at the expense of statutory rights.

It is doubtful that the courts will allow further pre-induction judicial review of local board decisions unless there is a deprivation of individual rights as a result of arbitrary administrative action. This becomes apparent from the decision in *Clark v. Gabriel*, announced on the same day as *Oestereich*, which upheld the legislative ban on pre-induction judicial review in § 10(b)(3) where the issue to be decided involved the *merits* of a registrant's claim.[26] In short, the judiciary will, in all prob-

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> The case we decide today involves a clear departure by the Board from its statutory mandate. To hold that a person deprived of his statutory exemption in such a blantantly lawless manner must either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the Act with unnecessary harshness . . . . Since the exemption granted divinity students is plain and unequivocal . . . and since the scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed by legislative standards, we conclude that preinduction judicial review is not precluded in a case of this type.

Id. at 238-39. *See generally* 22 VAND. L. REV. 212 (1968).

24. 90 S. Ct. 661.

25. 90 S.Ct. 506, 511-12 (1970). The Court points out that the term "delinquents" is mentioned in only one portion of 50 APP. U.S.C. § 456(h)(1) (Supp. IV, 1969), 90 S.Ct. at 509

> This casual mention of the term "delinquents," moreover, must be measured against the explicit congressional provision for criminal punishment of those who violate the selective service laws, 50 U.S.C. App. § 462 . . . .

90 S.Ct. at 509.

> We search the Act in vain for any clues that Congress desired the Act to have punitive sanctions apart from the criminal prosecutions specifically authorized.

Id. at 511-12.

26. Clark v. Gabriel, 393 U.S. 256 (1968) (per curiam). Gabriel sought exemption from service as a conscientious objector and was denied that classification. The Court said:

> To allow pre-induction judicial review of such determination would be to permit precisely the kind of "litigous interruptions of procedures to provide necessary military manpower" (113 Cong. Rec. 15426 (Report by Senator

ability, continue to maintain its present role as guarantor of the individual's basic rights within a complex administrative system.

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Constitutional Law—CRIMINAL STATUTORY INFERENCES IN FEDERAL NARCOTICS LAWS. *Turner v. United States*, 90 S. Ct. 642 (1970).

The petitioner was convicted of the statutory offense of transportation and concealment of illegally imported heroin and cocaine.[1] The statute permitted the jury to infer from the fact of possession that the drugs were illegally imported and that the petitioner knew of the illegal importation.[2]

In affirming, the Court of Appeals for the Third Circuit held that the statutory inference was not violative of due process.[3] The Supreme Court, relying on *Leary v. United States*,[4] upheld the conviction of transportation and concealment of heroin, but reversed the conviction of transportation and concealment of cocaine.

To constitute a crime under the statute in question, one must knowingly receive, conceal, or transport a narcotic drug which was illegally

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Russell on Conference Committee action)) which Congress sought to prevent when it enacted § 10(b)(3).

Id. at 258-59.

See also Slone v. Local Board No. 1, 414 F.2d 125 (10th Cir. 1969); Petersen v. Clark, 411 F.2d 1217 (9th Cir. 1969); 20 SYRACUSE L. REV. 749, 751 (1969).

1. Turner v. United States, 90 S. Ct. 642 (1970). The petitioner was also convicted on two counts for failure to attach revenue stamps to the drug packets. *See infra* note 19.

2. 21 U.S.C. § 174 (1964). The relevant portion of this section provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned ....
>
> Whenever on trial for a violation of this section the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

See Sandler, *The Statutory Presumption in Federal Narcotics Prosecutions*, 57 J. CRIM. L.C. & P.S. 7 (1966).

3. 404 F.2d 782 (3rd Cir. 1968).

4. 395 U.S. 6 (1969).