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Judicial Review--Selective Service Classifications

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In the *Falco* case the court relied heavily upon a Virginia statute to justify its position.[16] The Virginia Legislature has empowered the court to go beyond the "domicile" or "residence" requirements to include any custody case where the child is physically within the state and whose welfare demands adjudication.[17] The welfare of the child "is the primary, paramount, and controlling consideration of the court in all controversies between parents over the custody of their minor children."[18] In *Falco,* the mere presence of the child within the territorial jurisdiction of Virginia was held to be the contact with the state which was necessary to allow the court to act. This is in line with the modern trend of American decisions, although the "domicile theory" is still prevalent.

John Watson Cooper

Judicial Review—Selective Service Classifications

Thomas H. Warner failed to respond to the classification questionnaire sent to him by his local draft board. He was unanimously classified I-A, *i.e.,* available for military service, and declared delinquent. The registrant then appeared at the board to request Form No. 150 (Special Form for Conscientious Objectors) which was completed and returned to the board. The registrant's entire file was reviewed by the board members who determined that defendant was not entitled to reclassification. At various times in the proceeding, the registrant's stepfather supplied the draft board with information unfavorable to his stepson. The defendant was ordered to report for induction and, after reporting, refused to submit to induction. Warner was prosecuted for willful failure to submit to induc-

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[16] "[E]ach juvenile and domestic relations court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction . . . over all cases, matters and proceedings involving:
(1) The custody, support, control or disposition of a child:
(a) Whose parent or other person legally responsible for the care and support of such child is unable . . . so to do, to provide proper or necessary support, education as required by law, or medical, surgical or other care necessary for his well being;
(b) Who is without proper parental care, custody, or other guardianship; . . . .
(j) Whose condition or situation is alleged to be such that his welfare demands adjudication as to his disposition, control and custody . . . ." VA. CODE § 16.1-158 (1960 Repl. Vol.).

[17] *Id.*

[18] Muller v. Muller, 188 Va. 259, 269, 49 S.E.2d 349, 354 (1948).

tion into the armed forces of the United States.[1] The registrant contended that he was a conscientious objector and thereby entitled to a I-0 classification.[2] *Held,* convicted. The draft board had a basis in fact for denying the conscientious objector classification for reasons that the registrant was irresponsible in replying to communications and the stepfather of the registrant had supplied statements casting Warner in an unfavorable light to the board. *United States v. Warner,* 284 F. Supp. 366 (D. Ariz. 1968).

The court in the *Warner* case observed that the registrant involved was probably a person of such religious convictions that he could possibly be classified as a conscientious objector.[3] However, the court was precluded from making this its holding because of certain rules applicable to a federal court's judicial review of a selective service board's determination. The question involved was the standard of review of a particular case to be exercised by a federal court when considering a determination by a selective service board.[4]

The scope of judicial review to be exercised by a federal court when examining the decision of a selective service board is detailed in Section 460(b)(3) of the United States Code. In effect, this section provides that such review is limited to the issue of determining whether the selective service board has exceeded its jurisdiction, and the jurisdiction of the selective service board is subject to attack only "when there is no basis in fact for the classification assigned to such registrant."[5]

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[1] 50 App. U.S.C. § 462 (1964).

[2] For those who qualify as conscientious objectors there are two classifications: "I-O," under which the registrant, because of his opposition to participation on both combatant and noncombatant training and service, must make himself available for civilian work contributing to the maintenance of the national health, safety, or interest and "I-A-O," under which the registrant, because of his opposition to participation in combatant training and service, must make himself available for noncombatant military service only. 32 C.F.R. § 1622.14 (1968); 32 C.F.R. § 1622.11 (1968).

[3] United States v. Warner, 284 F. Supp. 366, 370 (D. Ariz. 1968) (dictum).

[4] Implicit in a discussion of the scope of review by a federal court of an administrative body is the assumption that the individual involved has first exhausted his administrative remedies. *See* Estep v. United States, 327 U.S. 114 (1946); Falbo v. United States, 320 U.S. 549 (1944); Magee v. United States, 392 F.2d 187 (1st Cir. 1968); Dugdale v. United States, 389 F.2d 482 (9th Cir. 1968); United States v. McKart, 395 F.2d 906 (6th Cir. 1968); Woo v. United States, 350 F.2d 992 (9th Cir. 1965); Kaline v. United States, 235 F.2d 54 (9th Cir. 1956); Doty v. United States, 218 F.2d 93 (8th Cir. 1955).

[5] No judicial review shall be made of the classification or processing of any registrant by the local boards, appeal boards, or the President, except as a defense to a criminal prosecution . . . after the registrant has respond-

Illustrative of cases applying section 460(b)(3) of the Selective Service and Training Act of 1967 is *Witmer v. United States.*[6] The registrant requested an exemption from military service for agricultural purposes. The record disclosed that the farm land he was intending to cultivate had not been worked for twenty-three years. In his request, Witmer expressly disclaimed any ministerial exemption; however, he did claim to be a conscientious objector based on his religious training and belief in a Supreme Being superior to those arising from human relations. Nevertheless, Witmer was classified I-A and shortly thereafter he notified the board that he was going to appeal the classification by virtue of his ministerial endeavors. The court stated that a selective service classification could be overturned only if there was no basis in fact for the determination. In conscientious objector cases, any fact which casts doubt on the veracity of the registrant is relevant, and that fact is affirmative evidence that the registrant's report is not accurate. With due regard for the policy which makes judicial review of the Selective Service System final where the evidence is in conflict or where two inferences could be drawn from the testimony, the court held that the registrant was not wrongfully denied the conscientious objector classification as there was a basis in fact for the board's decision.

In *Hunter v. United States,*[7] the registrant indicated in his Special Form for Conscientious Objectors (SS Form 150) that he was a Jehovah's Witness and opposed to participation in war in any form. Evidence was introduced to prove that Hunter was not familiar with the teachings of Jehovah's Witnesses, that he had not been seen at a church meeting for nine months, and that although he was a sincere person, he did not apply his sincerity to his religious work. A representative of the registrant's employer expressed the belief that Hunter was afraid to enter the service because of insecurity brought on by the type of family life to which he had been exposed. The registrant was classifid I-A, was accepted for induction, but refused to submit to induction and was convicted for willful failure to submit to induction into the armed forces of the United States. On appeal,

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ed either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *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. 50 App. U.S.C. § 460(b)(3) (1964), *as ammended,* (Supp. III, 1968).

[6] 348 U.S. 375 (1955).

[7] 393 F.2d 548 (9th Cir. 1968).

Hunter's only contention was that the board had no rational basis in fact for the classification. The court, in affirming the I-A classification, stated that the facts in the record supported the conclusion that Hunter was not a sincere conscientious objector and this was a basis in fact for sustaining the I-A classification.

In addition to factual situations regarding the sincerity of the selectee's convictions, the federal courts have also predicated their decisions upon circumstances relating to the selectee's activities.

The registrant in *Muhammad Ali v. Connally*[8] was an accomplished boxer, being national amateur champion of the United States, representative to the Olympic games in 1960, and professional heavyweight champion of the world in 1964. In the first instance, the registrant obtained an exemption on the basis of a mental deficiency. On reclassification, he sought exemption as a conscientious objector and, that failing, he claimed a ministerial exemption. The court exercised great care in examining the selectee's claim for a ministerial exemption and observed that review is limited to determining whether there is a basis in fact for the present classification. There must be proof incompatible with the proof of exemption to deny reclassification. The court held that the registrant's inconsistency in his claims for exemption provided a finding of fact that registrant should be denied the ministerial classification.

In *United States v. Davis,*[9] the defendant informed the board that he was a conscientious objector in his Classification Questionnaire (SS Form 100) and requested the board to furnish him the Special Form for Conscientious Objectors (SS Form 150). The board classified registrant I-A without having sent him the special form, and ordered him to report for a preinduction physical examination, which he failed to do. Registrant then visited the board and obtained the special form, but did not complete it nor return it. Another order to report for a preinduction physical was mailed to registrant, and he afterwards replied that he was a Black Muslim and refused to submit to a physical examination claiming exemption upon religious grounds. After referring the matter to the State Director for an opinion, it was ordered that another special form be sent to Davis and his classification be reopened and considered. Davis completed the form, and after a review by the board of his files, he was reclassified I-A.

[8] 266 F. Supp. 345 (S.D. Texas 1967). This particular case was a civil action for injunctive relief.

[9] 279 F. Supp. 920 (D. Conn. 1967).

Registrant claimed that he never received the Classification Card, and thereafter he failed to respond to other notices sent to him by the board. The defendant was indicted for willful failure to comply with an order from his local board to submit to a physical and mental examination. Registrant claimed his classification was arbitrary and capricious. The court, in finding the registrant guilty, stated that "[t]he defendant's history of inordinate indifference to many of the board's orders and communications, alone, is adequate justification for this finding."[10]

Judicial review in the federal courts has been primarily concerned with examining objective facts employed by the local boards to substantiate the board's determinations. However, of particular importance is a growing tendency in the federal judiciary to utilize another approach to the review of selective service classifications. More particularly, federal courts in three recent decisions have scrutinized constitutional deprivations incident to the Selective Service System.

In *Wolff v. Selective Service Local Board No. 16*,[11] the registrant participated in a demonstration at the selective service local board in protest to the United States' involvement in Viet Nam. Wolff, a student, was reclassified I-A. The registrant brought suit before his actual induction, notice of induction, receipt of notice to report for induction, or his completion of appeals within the Selective Service System. Wolff obtained judicial review as a result of the immediate deprivation of first amendment rights. The court stated that they were reluctant to bring any phase of the Selective Service System under judicial scrutiny, but as the rights of free speech and assembly were the most vital to the preservation of democracy, judicial review must take precedent over non-intervention.[12] The court, in reversing the denial of reclassification to II-S,[13] held that the mere threat of imposition of constitutional sanctions was an immediate and irreparable injury to the exercise of constitutional rights such as freedom of speech and assembly.[14]

Another example is *Gabriel v. Clark*[15] where registrant, by virtue

[10] U.S. v. Davis, 279 F. Supp. 920, 922 (D. Conn. 1967).
[11] 372 F.2d 817 (2d Cir. 1967).
[12] Wolff v. Selective Service Local Board No. 16, 372 F.2d 817, 822 (2d Cir. 1967).
[13] Registrant deferred because of activity in graduate study. 32 C.F.R. § 1622.26 (1968).
[14] Wolff v. Selective Service Local Board No. 16, 372 F.2d 817, 824 (2d Cir. 1967).
[15] 1 Sel. Serv. L. Rep. 3140 (N.D. Calif. 1968).

of his religious training and belief,[16] was conscientiously opposed to participation in war in any form. The local board refused to classify him as a conscientious objector and issued an order to report for induction. The court issued an injunction restraining the board from issuing further orders requiring the registrant to report for induction. The court stated that section 460(b)(3) of the Selective Service and Training Act of 1967, which purports to limit judicial review, if so construed and applied to this case, would deny due process "since judicial review cannot be conditional upon the risk of incurring a substantial criminal penalty or complying with an invalid order."[17]

The most recent constitutional deprivation decision, however, was reached in *Petersen v. Clark*[18] where it was decided that section 460(b)(3) of the Selective Service and Training Act of 1967 is unconstitutional. The registrant filed for an action to enjoin his scheduled induction into the armed services alleging the classification and order to report for induction, to be illegal. Petersen contended that it was a violation of the fifth amendment's due process clause to deny him the right to judicial review under the circumstances in his case. The court stated that if Congress may substitute an administrative agency for a constitutional court and that agency could determine the facts upon which the enforcement of constitutional rights depend, it would sap the judicial power as it exists under the constitution, and establish a government alien to our system.[19]

By analogy, the court in *Petersen* reasoned that since administrative agencies other than the Selective Service were subjected to judicial review, the Selective Service should also be subjected to judicial review even before administrative remedies are exhausted.[20] In concluding, the court held that due process demanded it unconstitutional to restrict a registrant to a criminal trial to raise the

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[16] Nothing contained in this title shall be construed to require any person to be subject to combatant training in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. [T]he term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. 50 App. U.S.C. § 456(j) (1964), *as ammended*, (Supp. III, 1968).

[17] Gabriel v. Clark, 1 Sel. Serv. L. Rep. 3140 (N.D. Calif. 1968).

[18] 285 F. Supp. 700 (N.D. Calif. 1968).

[19] Cromwell v. Berson, 285 U.S. 22, 56-57 (1932).

[20] *See* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936) (concurring opinion); Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920); Missouri Pacific Ry. v. Tucker, 230 U.S. 340 (1913); *Ex parte* Young, 209 U.S. 123 (1908); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).

defense that his order to report for induction was invalid because of a procedural error committed by the administrative agency in the classification process.[21]

The *Warner* case illustrates that it is most difficult indeed to establish that a selective service board exceeded its jurisdiction in deciding a particular case. This is because the local board can guard its province by showing that certain facts existed to substantiate its conclusion. As a result, the efficacy of contesting the board's decision on the grounds that it exceeded its jurisdiction may be seriously questioned. Rather, constitutional arguments, such as those set forth in *Wolff, Gabriel,* and *Petersen* could in the future be a more successful way to assure judicial review of one's selective service classification.

Gary Gordon Markham

Master-Servant—Right of Action by Employer Against Tort-feaser of Employee

West, allegedly negligent in driving his car, was involved in a collision. The driver of the other vehicle, an employee of Snow, was killed and six passengers, also employed by Snow, were injured. Snow brought an action against West to recover the profits lost from his business due to the loss of services of these employees. The trial court entered judgment for West, and Snow appealed. *Held,* judgment affirmed. This is a problem of interference with a contractual relation, that of employer-employee. To be actionable, the interference must be intentional and not an inadvertent or incidental invasion of the employer's contractual interest. An employer will not be permitted to recover for the loss of services of an employee negligently injured. *Snow v. West,* 440 P.2d 864 (Ore. 1968).

The action permitting the master to recover for the loss of services of an employee who has been injured by a third party is an ancient one. It can be traced to early Roman law where the head of the household could bring an action for violence committed upon his wife, his children, his slaves, or other members of his establishment, on the premise that they were identifiable with him, so that

[21] Petersen v. Clark, 285 F. Supp. 700, 712 (N.D. Calif. 1968).