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Exhaustion of Administrative Remedies in Selective Service Cases, United States v. Holby, 477 F.2d 649 (2d Cir. 1973)

EXHAUSTION OF ADMINISTRATIVE REMEDIES IN SELECTIVE SERVICE CASES

United States v. Holby, 477 F.2d 649 (2d Cir. 1973)

After appellant was denied classification[1] as a conscientious objector,[2] he unsuccessfully pursued his administrative appeals.[3] Although

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1. A Selective Service registrant is classified at a formal meeting of the local board at which a majority of the members are present. 32 C.F.R. § 1604.56 (1973). Classification is based on written information in the registrant's file and oral statements of the registrant or his witnesses made at any personal appearance. *Id.* § 1623.1(b). Each registrant is presumed to be I-A, *i.e.* available for military service, unless eligibility for a deferment or exemption is clearly established. *Id.* § 1622.1(a). *See also* SEL. SERV. L. REP. PRACTICE MANUAL ¶¶ 1072-78 (1968). Definitions of the various Selective Service classifications are found at 32 C.F.R. §§ 1622.10-.46 (1973).

2. 50 U.S.C. App. § 456(j) (1970) exempts conscientious objectors from military service. This statute has been implemented by 32 C.F.R. § 1622.14(a) (1973), which provides:

> In class I-O shall be placed every registrant who would have been classified I-A but for the fact that he has been found, by reason of religious, ethical, or moral belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in combatant or noncombatant training and service in the Armed Forces.

See Gillette v. United States, 401 U.S. 437 (1971); Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965); Sicurella v. United States, 348 U.S. 385 (1955). *See generally* Comment, *Selective Service Law: The Selective Conscientious Objector*, 55 IOWA L. REV. 288 (1969); Comment, *The Conscientious Objector and the First Amendment: There but for the Grace of God . . . .*, 34 U. CHI. L. REV. 79, 95-105 (1966).

Defendant submitted a fully completed Selective Service Form 150, Special Form for Conscientious Objector, to his local board outlining his religious beliefs and objections to war, which developed as a result of his membership in the Episcopal Church and which were embodied in the *Nicene Creed*. He included letters from seven persons—friends, minister, and family—attesting to his beliefs and sincerity, as well as two pamphlets dealing with religion, war, and conscience. Appellant admitted participation in R.O.T.C. for two years while in college, but pointed out that such participation was mandatory for graduation, and that he had led a successful campaign to make the program voluntary. Finally, he pointed to his active participation in various peace movements and pacifist groups. *See* Brief for Appellant, App. at 10-25, United States v. Holby, 477 F.2d 649 (2d Cir. 1973).

3. Pursuant to 32 C.F.R. §§ 1624.1-.3 (1973), appellant, accompanied by his clergyman, appeared before the local board following his initial classification, but the board voted to retain appellant in the I-A classification. Appellant appealed pursuant to *id.* § 1626.3, and the State Appeal Board undertook a de novo consideration of appellant's file. By a vote of 2 to 1 he was retained in class I-A. The one dissenting vote allowed appellant to appeal to the Presidential Appeal Board, as provided by *id.* § 1627.1, but this appeal was also unsuccessful.

appellant refused to submit to induction, the United States Attorney refused to prosecute.[4] Subsequently, on orders of the state director, the local board reopened[5] appellant's file and requested that he appear for a "discretionary" interview.[6] Appellant refused to appear,[7] did not appeal the resulting I-A classification,[8] and again refused to submit to induction. In a criminal prosecution for refusal to submit to induction,[9] the district court held that appellant's failure to exhaust ad-

4. After reviewing appellant's file, the United States Attorney refused to prosecute for two reasons: (1) he found no basis in fact for denying the requested I-O classification; and (2) the local and appellate boards had failed to state their reasons for denying appellant's request. *See* Brief for Appellant, App. at 50-51, United States v. Holby, 477 F.2d 649 (2d Cir. 1973).

5. *See* 32 C.F.R. § 1625.2(a)(1) (1973).

The effect of a reopening is to start the administrative classification process over from the beginning, as if the registrant had never been classified. The registrant has the same rights to an appearance and appeal as before, and the failure to exercise these rights again operates as a waiver. *See id.* §§ 1625.13, 1641.3.

The thrust of most registrants' attacks on the Selective Service System has been to persuade the courts to force the local boards to reopen, thereby giving the registrants another chance to present their cases. *See, e.g.*, Mulloy v. United States, 398 U.S. 410 (1970); Miller v. United States, 388 F.2d 973 (9th Cir. 1967). *See generally* Sedler, *The Procedural Defense in Selective Service Prosecutions: The View From Without and Within*, 56 IOWA L. REV. 1121, 1142-71 (1971). In *Holby* appellant attacked the reopening policy from the opposite direction by challenging the authority of the System to force him to present his case again when no change had occurred either in the facts material to his request or the applicable law. *See* Brief for Appellant at 15, United States v. Holby, 477 F.2d 649 (2d Cir. 1973).

6. Such a discretionary interview is not provided for by statute and is not meant to replace the right of personal appearance guaranteed by 32 C.F.R. § 1624.2 (1973). Local Board Memorandum No. 41 (subsequently rescinded August 27, 1970) instituted discretionary interviews, the sole purpose of which was to provide the local board and the registrant another chance to discuss the registrant's file. 4 SEL. SERV. L. REP. 2174 (1968).

Appellant was called to appear for such an interview on two occasions—once immediately following the United States Attorney's refusal to prosecute and again after the state director ordered that his file be reopened. In both instances he requested that his counsel and a stenographer be allowed to accompany him to the interview since he was under threat of prosecution, but the local board refused, relying on 32 C.F.R. § 1624.1(b) (1972), which prohibited the presence of a registrant's counsel at a personal appearance. Appellant then refused to appear, stating that there was nothing more he could add to the record. *See* Brief for Appellant, App. at 58, United States v. Holby, 477 F.2d 649 (2d Cir. 1973).

7. *See* note 6 *supra.*

8. The effect of a I-A classification is discussed at note 1 *supra.*

9. 50 U.S.C. App. § 462(a) (1970). *See, e.g.*, McGee v. United States, 402 U.S. 479 (1971); United States v. Bush, 476 F.2d 1094 (7th Cir. 1973); United States v. McBride, 468 F.2d 567 (8th Cir. 1972); United States v. Kekich, 463 F.2d 1203 (6th Cir. 1972); United States v. Pringle, 438 F.2d 1216 (1st Cir. 1971); United States v.

ministrative remedies barred the defense that his classification was invalid.[10] The Second Circuit Court of Appeals reversed and *held*: A Selective Service registrant, having once exhausted his administrative remedies, is not required to re-exhaust those remedies if there has been no change in his circumstances or the applicable law, and the record before the local board is complete.[11]

Houston, 433 F.2d 939 (2d Cir. 1970); United States v. Zmuda, 423 F.2d 757 (3d Cir. 1970).

10. United States v. Holby, 345 F. Supp. 639 (S.D.N.Y. 1972). A Selective Service registrant who is unsatisfied with his classification and seeks judicial review has three alternatives. First, he may refuse to submit to induction and challenge the validity of the classification in a criminal prosecution. *See, e.g.*, McGee v. United States, 402 U.S. 479 (1971); McKart v. United States, 395 U.S. 185 (1969); United States v. Bender, 469 F.2d 235 (8th Cir. 1972); United States v. Williams, 420 F.2d 288 (10th Cir. 1970); Wills v. United States, 384 F.2d 943 (9th Cir. 1967); Glover v. United States, 286 F.2d 84 (8th Cir. 1961). *See generally* Note, *Judicial Review of the Selective Service Classifications*, 56 VA. L. REV. 1288 (1970) [hereinafter cited as *Judicial Review*]; 40 FORDHAM L. REV. 617 (1972); 1971 WIS. L. REV. 318. Secondly, he may submit to induction and challenge the validity of the induction order by an application for discharge. Conscientious objector discharges are the subject of DOD Directive No. 1300.6 (Aug. 20, 1971), implemented by Army Reg. 635-20, Air Force Reg. No. 35-24, and *Bupersnote* 1900. If the discharge is denied, the applicant may petition for a writ of habeas corpus. *See, e.g.*, United States *ex rel.* Checkman v. Laird, 469 F.2d 773 (2d Cir. 1972); Scott v. Commanding Officer, 431 F.2d 1132 (3d Cir. 1970); Paszel v. Laird, 426 F.2d 1169 (2d Cir. 1970). This procedure is not advisable for applicants whose conscientious objector views "crystallized" prior to induction. *See* DOD Directive No. 1300.6, at pt. III, ¶ c; Brown v. McNamara, 387 F.2d 150 (3d Cir. 1967). *But cf.* Ehlert v. United States, 402 U.S. 99 (1971). Courts have regarded such submission to induction as a waiver of the applicant's rights to the requested classification. *See* Shaw, *Selective Service Litigation and the 1967 Statute*, 48 MIL. L. REV. 33, 78-87 (1970) (cases collected). *See generally* Brahms, *They Step to a Different Drummer: A Critical Analysis of the Current Department of Defense Position Vis-A-Vis In-Service Conscientious Objectors*, 47 MIL. L. REV. 1 (1970); Comment, *God, the Army, and Judicial Review: The In-Service Conscientious Objector*, 56 CALIF. L. REV. 379 (1968). Thirdly, the registrant may petition for an injunction barring his induction. *See, e.g.*, Clark v. Gabriel, 393 U.S. 256 (1968); Oestereich v. Selective Serv. Local Bd. No. 11, 393 U.S. 233 (1968); Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967). This alternative has shortcomings, however, because 50 U.S.C. App. § 460(b)(3) (1970), passed in response to *Wolff*, allows pre-induction judicial review only in criminal prosecutions. *See generally* Donahue, *The Supreme Court vs. Section 10(b)(3) of the Selective Service Act: A Study in Ducking Consitutional Issues*, 17 U.C.L.A.L. REV. 908 (1970); O'Neil, *Review of Selective Service Reclassifications*, 37 GEO. WASH. L. REV. 536 (1969); Tigar & Zweben, *Selective Service: Some Certain Problems and Some Tentative Answers*, 37 GEO. WASH. L. REV. 510 (1969); Winick, *Direct Judicial Review of the Actions of the Selective Service System*, 69 MICH. L. REV. 55 (1970).

11. United States v. Holby, 477 F.2d 649 (2d Cir. 1973). Appellant also attacked the validity of his induction order on two grounds: (1) there was no basis in fact for denial of his I-O request; and (2) the local and appellate boards had failed to

The doctrine of exhaustion of administrative remedies is a well-established, if inconsistently applied,[12] rule of administrative law. Generally, the doctrine is invoked, with limited exceptions, to preclude judicial review of an administrative ruling unless the petitioner has availed himself of all the opportunities for review prescribed by the statutes governing the particular agency.[13] Several reasons for the doctrine have been

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give reasons for rejecting his request, thus denying him due process of law. The court of appeals found for appellant on both of these allegations and dismissed the indictment.

Holby is a prosecution for refusal to submit to induction. Although registrants no longer are being drafted, the decision of the court of appeals nevertheless is significant. First, several thousand young men are awaiting trial for refusal to submit to induction. Secondly, the reactivation of the military draft is a substantial possibility considering the limited success of the "all-volunteer" Army to date. *See generally The Armed Forces Without Drafting—Results So Far*, U.S. NEWS & WORLD REP., Aug. 6, 1973, at 41; *Doubts About an All-Volunteer Army*, THE NEW REPUBLIC, Mar. 3, 1973, at 9-11; *Volunteer Army—Is It Working?*, U.S. NEWS & WORLD REP., Aug. 6, 1973, at 38-40. Thirdly, the decision could have an effect on the application of the exhaustion of remedies doctrine in proceedings before other administrative agencies. *See* notes 21 & 36 *infra*.

12. Judicial application of the doctrine of exhaustion of administrative remedies is dependent to a great extent on the statutes which control the different administrative agencies. The Supreme Court has applied the exhaustion doctrine strictly if the statute prescribes the required administrative procedures and limits appeal from the administrative decision. *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). *But see* McKart v. United States, 395 U.S. 185 (1969); Greene v. United States, 376 U.S. 149 (1964); Allen v. Grand Cent. Aircraft Co., 347 U.S. 535 (1954); Public Utilities Comm'n v. United Fuel Gas Co., 317 U.S. 456 (1943).

13. *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.01 *et seq.* (Supp. 1965) [hereinafter cited as DAVIS]; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424-58 (1965) [hereinafter cited as JAFFE]; L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 328-61 (1968); Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFFALO L. REV. 327 (1963) [hereinafter cited as *Exhaustion of Remedies*]; *Federal Administrative Law Developments—1970*, 1971 DUKE L.J. 149, 305-11; Note, *The Doctrine of Exhaustion of Administrative Remedies*, 18 WAYNE L. REV. 1403 (1972).

Courts recognize limited exceptions to the application of the exhaustion doctrine. First, courts have not applied the doctrine if the petitioner can show that the agency committed a clear mistake of law. Mistakes of law take the form of mistaken interpretation of the applicable rules and regulations, mistaken construction of jurisdictional statutes, or mistakes of constitutional law. *See, e.g.*, McKart v. United States, 395 U.S. 185 (1969) (local board erred by interpreting "sole surviving son" classification as requiring existence of family unit); Leedom v. Kyne, 358 U.S. 184 (1958) (NLRB exceeded its jurisdiction in ordering inclusion of professional and non-professional employees in same bargaining unit); NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944) (NLRB did not misinterpret law by classifying newsboys as "employees"); United States v. Williams, 420 F.2d 288 (10th Cir. 1970) (registrant not afforded pro-

advanced. First, there is a need for a complete factual record upon which the agency may exercise its expertise and discretion.[14] Secondly, the agency should be given every opportunity to correct its own mis-

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cedural due process); Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967) (abridgement of registrant's rights to due process); Pan Am. World Airways, Inc. v. Boyd, 207 F. Supp. 152 (D.D.C. 1962) (CAB acted beyond its jurisdiction in suspending operating permit pending fact-finding investigation).

Secondly, courts will allow an exception to application of the doctrine when the petitioner shows that appeal within the administrative agency would be futile. Futility of appeal must be shown by a system regulation, a consistent course of decision by the agency, or an inability of the agency to grant the necessary relief. *See, e.g.*, American Fed'n of Gov't Employees v. Acree, 475 F.2d 1289 (D.C. Cir. 1973) (inability of agency to grant relief needed to correct wrong); Martinez v. Richardson, 472 F.2d 1121 (10th Cir. 1973) (inability of agency to grant necessary relief); United States v. Hayden, 445 F.2d 1365 (9th Cir. 1971) (consistent course of decision against granting registrant desired classification); Koepke v. Fontecchio, 177 F.2d 125 (9th Cir. 1949) (challenge of agency regulation within agency would be futile). Informal policies and oral directives of the agency are not a sufficient showing to excuse a failure to exhaust for futility. *See* Sedler, *supra* note 5, at 1183-85.

Thirdly, courts will permit an exception to application of the doctrine if the petitioner will suffer irreparable injury while waiting for the administrative processes to be completed. *See, e.g.*, Eccles v. Peoples Bank, 333 U.S. 426, 434 (1948); Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290 (1923); Bannercraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345, 355 (D.C. Cir. 1972).

Finally, if the petitioner demonstrates an extreme ignorance of the procedures of the administrative agency, thus negating any intelligent waiver of appeal rights, the courts will make an exception to the application of the exhaustion doctrine. Little or no formal education is the basis for such a showing, and the exception is usually applicable only to Selective Service cases. *See, e.g.*, United States v. Rabe, 466 F.2d 783 (7th Cir. 1972); United States v. Batson, 334 F. Supp. 971 (W.D. Mo. 1971); United States v. Harris, 302 F. Supp. 1194 (D. Ore. 1968).

14. McKart v. United States, 395 U.S. 185, 194 (1969); *see* Parisi v. Davidson, 405 U.S. 34, 38 (1972); McGee v. United States, 402 U.S. 479, 485 (1971); *cf.* Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971); Jewel Cos. v. FTC, 432 F.2d 1155 (7th Cir. 1970); United States v. Great N. Ry., 337 F.2d 243, 246 (8th Cir. 1964); Meekins, Inc. v. Boire, 320 F.2d 445, 450 (5th Cir. 1963); United States v. Fritz Properties, Inc., 89 F. Supp. 772, 777 (N.D. Cal. 1950). *See generally* DAVIS § 20.01; JAFFE 424-25; *Exhaustion of Remedies* 327. In *McKart* the Court drew the distinction between classifications which were simply a matter of statutory interpretation and those which required the exercise of expertise and discretion by the agency. 395 U.S. at 198 n.16. Whether the Court intended this distinction to be conclusive has been questioned in a line of cases in the Fourth Circuit. In United States v. Davis, 413 F.2d 148, 151 (4th Cir. 1969), the court indicated that the Supreme Court, by remanding the appellate court's decision in United States v. McNeil, 401 F.2d 527 (4th Cir. 1968), *vacated*, 395 U.S. 463 (1969), had "undermined" the *McKart* distinction. In *McNeil* the Fourth Circuit had refused to review a registrant's claim as a conscientious objector because he had failed to exhaust his administrative remedies. *McNeil* was precisely the type of case that the Supreme Court had distinguished in *McKart*. *See generally Judicial Review* 1296-302.

takes, a policy that advances the related goal of judicial economy by eliminating unnecessary judicial review.[15] Finally, the administrative process will be impaired if petitioners are encouraged to bypass agency channels.[16]

The exhaustion doctrine most often is applied when a party prematurely seeks judicial intervention in an administrative proceeding.[17] When review is denied, the applicant simply returns to pursue the administrative processes.[18] A more perplexing situation arises when, as in the case of many Selective Service registrants, the party seeking judicial review is under criminal prosecution for failure to comply with an agency order.[19] In such a case administrative remedies are no

15. *See, e.g.*, Parisi v. Davidson, 405 U.S. 34, 38 (1972); McGee v. United States, 402 U.S. 479, 484 (1971); McKart v. United States, 395 U.S. 185, 195 (1969); Sterling Drug, Inc. v. FTC, 450 F.2d 698, 710 (D.C. Cir. 1971); Hayes v. Cape Henlopen School Dist., 341 F. Supp. 823, 832 (D. Del. 1972). *See generally* DAVIS § 20.01; JAFFE 424-25; *Exhaustion of Remedies* 327.

16. McGee v. United States, 402 U.S. 479, 485 (1971); *see, e.g.*, McKart v. United States, 395 U.S. 185, 194-95 (1969); United States v. Houston, 433 F.2d 939 (2d Cir. 1970); United States v. Zmuda, 423 F.2d 757 (3d Cir. 1970).

17. *See, e.g.*, FCC v. Schreiber, 381 U.S. 279 (1964); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Meekins, Inc. v. Boire, 320 F.2d 445 (5th Cir. 1963); Neisloss v. Bush, 293 F.2d 873 (D.C. Cir. 1961); Union Oil Co. v. FPC, 236 F.2d 816 (5th Cir. 1956); Shank v. FPC, 236 F.2d 830 (5th Cir. 1956).

18. *See, e.g.*, Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 299 (1973) (complaint of antitrust conspiracy stayed to give administrative officials time to act); Bristol-Myers Co. v. FTC, 469 F.2d 1116, 1118 (2d Cir. 1972) (petition to force FTC to issue subpoenas dismissed with directions to reopen informal negotiations); Meekins, Inc. v. Boire, 320 F.2d 445 (5th Cir. 1963) (petition dismissed with directions to ICC to hold hearings).

19. While a limited number of prosecutions arise from other administrative proceedings when the Government attempts to enforce statutory penalties against persons who fail to adhere to administrative rulings, the majority of criminal prosecutions occur in the Selective Service System. Other administrative agencies usually deal with groups or businesses that retain legal counsel to advise them of the proper procedures and how to avoid criminal prosecutions, whereas the registrants of the Selective Service System usually are unfamiliar with and unable to learn about the intricacies of the System. One example of a quasi-criminal action outside the Selective Service System is the enforcement of penalties for ignoring crop quotas under the Agricultural Adjustment Act of 1938, 7 U.S.C. §§ 1281-393 (1970). *See, e.g.*, United States v. Sykes, 310 F.2d 417 (5th Cir. 1962); United States v. Jeffcoat, 272 F.2d 266 (4th Cir. 1959); United States v. Donaldson, 264 F.2d 804 (6th Cir. 1959); Corpstein v. United States, 262 F.2d 200 (10th Cir. 1958); United States v. Bonderer, 139 F. Supp. 391 (W.D. Mo. 1956). A few similar cases have arisen under ICC regulations. *See, e.g.*, United States v. Apicella, 148 F. Supp. 457 (D.N.J. 1957).

For Selective Service cases, see McGee v. United States, 402 U.S. 479 (1971); Estep v. United States, 327 U.S. 114 (1946); Falbo v. United States, 320 U.S. 549 (1944); United States v. Nelson, 476 F.2d 254 (9th Cir. 1973); United States v. Bush,

longer available to the defendant and the application of the exhaustion doctrine may deprive him of a hearing on one or more substantive defenses.[20]

The Supreme Court has stated that the exhaustion doctrine "is not to be inflexibly applied,"[21] and that its application in criminal prosecutions is justified only when "the interests underlying the exhaustion rule clearly outweigh the severe burden [of possible imprisonment] imposed upon the [defendant] if he is denied judicial review."[22] Thus, when the burden on the defendant predominates, the failure to exhaust will

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476 F.2d 1094 (7th Cir. 1973); United States v. McBride, 468 F.2d 567 (8th Cir. 1972); United States v. Kekich, 463 F.2d 1203 (6th Cir. 1972); United States v. Hernandez, 453 F.2d 297 (5th Cir. 1971); United States v. Dombrouski, 445 F.2d 1289 (8th Cir. 1971); United States v. Pringle, 438 F.2d 1216 (1st Cir. 1971); United States v. Houston, 433 F.2d 939 (2d Cir. 1970); United States v. Zmuda, 423 F.2d 757 (3d Cir. 1970); United States v. Lockhart, 420 F.2d 1143 (9th Cir. 1969); United States v. Smogor, 411 F.2d 501 (7th Cir. 1969); DuVernay v. United States, 394 F.2d 979 (5th Cir. 1968), *aff'd*, 394 U.S. 309 (1969); Thompson v. United States, 380 F.2d 86 (10th Cir. 1967). *See generally Judicial Review*; 40 FORDHAM L. REV. 617 (1972); 1971 WIS. L. REV. 318.

20. At the time an applicant is charged as a defendant in a criminal prosecuton for failure to obey an agency order, the administrative processes are closed. If the applicant/defendant is convicted, he is imprisoned or fined. When the exhaustion of administrative remedies doctrine is applied at the trial, the defendant may not be able to raise one or more of his defenses to the charges against him. *See, e.g.*, Ehlert v. United States, 402 U.S. 99 (1971); United States v. Bush, 476 F.2d 1094 (7th Cir. 1973); United States v. McBride, 468 F.2d 567 (8th Cir. 1972); United States v. Kekich, 463 F.2d 1203 (6th Cir. 1972).

21. McKart v. United States, 395 U.S. 185, 194 (1969). *See also* McGee v. United States, 402 U.S. 479, 483 (1971). *McKart* has been relied on extensively for this proposition in cases involving agencies other than the Selective Service. *See, e.g.*, American Fed'n of Gov't Employees v. Acree, 475 F.2d 1289, 1292 (D.C. Cir. 1973) (Civil Service Commission); Pepsico, Inc. v. FTC, 472 F.2d 179, 192 (2d Cir. 1972) (dissenting opinion); Bristol-Myers Co. v. FTC, 469 F.2d 1116, 1118 (2d Cir. 1972); Bannercroft Clothing Co. v. Renegotiation Bd., 466 F.2d 345, 355 (D.C. Cir. 1972); City of New York v. New York Tel. Co., 468 F.2d 1401, 1402 (Tem. Emer. Ct. App. 1972); United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 452 (9th Cir. 1971); Great Falls Community TV Cable Co. v. FCC, 416 F.2d 238, 243 (9th Cir. 1969).

22. McKart v. United States, 395 U.S. 185, 197 (1969). McKart had been reclassified from IV-A (sole surviving son) to I-A following the death of his mother, because the local board found that the family unit had ceased to exist. *Id.* at 189. He did not appeal the reclassification and failed to appear for either the physical or the induction. The court of appeals ruled that he was precluded from challenging the validity of his classification because he had failed to exhaust his administrative remedies. United States v. McKart, 395 F.2d 906 (6th Cir. 1968). The Supreme Court applied the weighing test and reversed, excusing McKart's failure to exhaust his administrative remedies. *See generally Judicial Review* 1296-302.

be excused and the Court will examine the validity of his defense.[23]

In *United States v. Holby* the Second Circuit applied the weighing of interests test[24] and noted that the burden of possible imprisonment on the defendant was "exceedingly harsh."[25] Balanced against this burden, the court found no compelling governmental interests: (1) appellant had presented as complete a factual record as possible and the Selective Service System had had five opportunities to exercise its expertise and correct its mistakes;[26] (2) appellant had not attempted to evade the System's procedures;[27] and (3) exempting the small number of similarly situated registrants from re-exhausting their remedies would not impair the operation of the System.[28] The court, therefore, found no justification for requiring the appellant to re-exhaust his remedies, notwithstanding the apparent requirements of the Selective Service regulations.[29]

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23. In Selective Service prosecutions, the validity of the defendant's classification is judged by a "basis in fact" test that was first enunciated in Estep v. United States, 327 U.S. 114 (1946). The scope of judicial review under the test has been described as the "narrowest known to the law." Blalock v. United States, 247 F.2d 615, 619 (4th Cir. 1957). Judicial review is limited to a determination, based on the Selective Service file, whether there is any conceivable "basis in fact" for the classification given by the local board. If the court can find no such basis for the classification, then the induction order is invalid and no prosecution can stand. The local board will then reclassify the registrant, usually consistent with the findings of the court. *But see* United States v. Hayden, 445 F.2d 1365 (9th Cir. 1971) (after court found no basis in fact for defendant's I-A classification and dismissed indictment, local board again classified defendant I-A). *See generally* Note, *Due Process in Selective Service Appeals*, 39 U. CHI. L. REV. 331, 331-34 (1972).

24. *See* McKart v. United States, 395 U.S. 185 (1969); notes 22 & 23 *supra* and accompanying text.

25. 477 F.2d at 653. Throughout its discussion of the issue of appellant's failure to exhaust, the court reiterated its belief that appellant was fully entitled to the conscientious objector classification denied him by the System. *Id.* at 653-54. Under traditional analysis, such statements would be premature since any decision on the merits of appellant's classification should come only after the threshold question of exhaustion of remedies has been answered. Since the function of the exhaustion doctrine is to bar judicial consideration of the merits of an allegation when the party seeking review has not resorted to the available administrative remedies, to use a decision on the merits as a basis for excusing the failure to exhaust completely negates the intended effect of the doctrine. The same type of analysis appears in the cases to which the court analogizes *Holby*. *See* United States v. Rabe, 466 F.2d 783 (7th Cir. 1972); United States v. Hayden, 445 F.2d 1365 (9th Cir. 1971); Glover v. United States, 286 F.2d 84 (8th Cir. 1961); note 33 *infra*.

26. 477 F.2d at 654.

27. *Id.* at 655.

28. *Id.* at 654.

29. The local board had reopened appellant's file, *see* note 5 *supra*, but the court

Additionally, the court identified *Holby* with a line of cases characterized by *United States v. Rabe*,[30] *United States v. Hayden*,[31] and *Glover v. United States*.[32] An analysis of these cases in conjunction with *Holby* reveals a less stringent application of the exhaustion doctrine in criminal prosecutions for refusal to submit to induction into the Armed Forces. This relaxed application emphasizes the following considerations: (1) whether the registrant presented a prima facie case for the classification requested;[33] (2) whether callousness was evident in the System's consideration of the request;[34] and (3) whether the registrant reasonably complied with the administrative requirements of the System.[35] Just how far the courts will go in applying the *Holby*

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neglected to deal specifically with 32 C.F.R. § 1625.13 (1973), which states that reopening of the file starts the classification process anew. The court implicitly acknowledged that a reopening starts the process again, but nevertheless rejected the Government's argument that the regulation bars a court from considering what has transpired previously within the administrative process. Had the court accepted the Government's position, any registrant given a deferment or exemption could be forced continually to relitigate his status whenever the state director ordered that his file be reopened. Thus, it appears that a local board, upon reopening, must reconsider the registrant's claim without reference to prior decisions, while the registrant is entitled to any favorable effects from prior proceedings and appeals. *Cf.* United States v. Goss, Crim. No. 71-1473 (N.D. Cal., Mar. 2, 1973), *reprinted in* 6 SEL. SERV. L. REP. 3152 (1973), in which the district court, in dealing with a factual pattern similar to *Holby*, appeared to deny effect to the requirement of 32 C.F.R. § 1625.13. On motion to dismiss the indictment, the court stated: "[T]here appears to be no authority which requires a registrant to conduct a full appeal on an identical claim each time he is reclassified." United States v. Goss, Crim. No. 71-1473-OJC (N.D. Cal., Nov. 27, 1972), *reprinted in* 6 SEL. SERV. L. REP. 3044 (1973).

30. 466 F.2d 783 (7th Cir. 1972).

31. 445 F.2d 1365 (9th Cir. 1971).

32. 286 F.2d 84 (8th Cir. 1961).

33. In each case, the courts made an initial decision that the registrant had presented a prima facie case for conscientious objector status. *See* note 25 *supra*. The courts then proceeded to find a means for excusing the registrant's failure to exhaust. Such an approach is consonant with Judge Magruder's belief that the exhaustion doctrine is purely discretionary, emanating from the equity courts. *See* Smith v. United States, 199 F.2d 377, 381 (1st Cir. 1952). *See also* JAFFE 425-26. It should be noted that under the provisions of 32 C.F.R. § 1661.8 (1973), it is quite simple for a registrant to present a prima facie conscientious objector claim. A short statement of opposition to all wars, combined with an explanation of the religious, ethical, or moral beliefs on which the opposition is based, usually is sufficient.

34. *See* United States v. Rabe, 466 F.2d 783, 786 (7th Cir. 1971), *citing* Glover v. United States, 286 F.2d 84 (8th Cir. 1961), United States v. Williams, 420 F.2d 288 (10th Cir. 1970), *and* United States v. Davis, 413 F.2d 148 (4th Cir. 1969).

35. The extent to which a registrant must pursue his remedies does not appear definitively from the cases. The most that can be said at present is that the more a registrant demonstrates a willingness to cooperate with the System, the more likely

interpretation of the exhaustion of remedies doctrine in other types of criminal prosecutions remains to be seen.[36] At the very least, however, it appears that in Selective Service cases the burden has shifted to the Government to justify the application of the exhaustion doctrine on the facts of each case.[37]

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the courts are to excuse a later failure to exhaust administrative remedies. *See* United States v. Holby, 477 F.2d 649 (2d Cir. 1973); United States v. Weaver, 474 F.2d 936 (7th Cir. 1973); Glover v. United States, 286 F.2d 84 (8th Cir. 1961); *cf.* United States v. Shriver, 473 F.2d 436 (3d Cir. 1973) (court in dictum suggested a belief that the registrant was entitled to conscientious objector classification, although the Third Circuit refused to determine the question, since the registrant had failed to make any personal appearance or appeal the I-A classification).

36. In cases involving other administrative agencies, the courts have relied extensively upon *McKart* for the proposition that the doctrine of exhaustion of administrative remedies is not to be inflexibly applied. *See* note 21 *supra.* Since *McKart* provided the basis for the approach used by the court in *Holby*, application of a *Holby*-type analysis arguably should govern exhaustion of administrative remedies cases outside the Selective Service System. The argument would seem to have special significance in cases in which imprisonment and/or fines can result from a prosecution for failure to comply with administrative rulings.

37. In past cases the Government has been able, with a few exceptions, to preclude judicial review of the merits of a registrant's claim by showing that he had failed to exhaust his administrative remedies. If the trend exemplified by *Holby* continues, however, courts will decide the merits of the registrant's claim, and then require the Government to show that the effects on the System of allowing the registrant and others like him to be excused from exhausting will outweigh the injury to the registrant if he is convicted.