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HABEAS CORPUS-USE AS A REMEDY WHERE THE APPEAL PROCESS HAS BEEN EXHAUSTED

W. Stirling Maxwell
University of Michigan Law School

HABEAS CORPUS—USE AS A REMEDY WHERE THE APPEAL PROCESS HAS BEEN EXHAUSTED—Kulick, a Jehovah's Witness, registered under the Selective Service Act of 1940 and, though he claimed an exemption as a minister, his local draft board classified him 1-A. After he had exhausted his administrative remedies to have this classification changed, he reported for induction, as ordered, but refused to take the oath. For this refusal he was convicted under the provisions of the act and, on May 7, 1945, sentenced to imprisonment for a term of years. On the ground that under the Supreme Court's decision of *Falbo v. United States*[1] the local board's classification was not open to attack in such

[1] 320 U.S. 549, 64 S.Ct. 346 (1944).

a trial, the district court did not permit Kulick to develop as a defense his contention that the board's classification was invalid. Kulick did not appeal before the time allotted therefor expired on May 12, 1945. On February 4, 1946, the Supreme Court held, in *Estep v. United States*,[2] and the "rule" of the *Falbo* case did not apply where the defendant had exhausted his administrative remedies for a reclassification. Kulick thereafter sought *habeas corpus* in the federal district court, but the writ was denied.[3] On appeal to the circuit court, Kulick was ordered discharged.[4] On certiorari, *held*, reversed. Since Kulick did not appeal from the judgment of the trial court and "since we find no exceptional circumstances which excuse [his] failure, *habeas corpus* may not now be used as a substitute." [5] Three justices dissented.[6] *Sunal v. Large, Alexander v. United States ex rel. Kulick*, 332 U.S. 174, 67 S.Ct. 1588 (1947).

After stating that the trial court's erroneous exclusion of the evidence in support of defendant's only real defense "did not go to the jurisdiction of the trial court" [7] and "did not infect the trial with lack of procedural due process," [8] Justice Douglas concludes that the Court should decline the exercise of its discretion to grant the writ of *habeas corpus* to release one who has failed to take advantage of appeal as a remedy, in view of the public policy in favor of the conclusiveness of unappealed criminal judgments. He further states that "The case . . . is not one where the law was changed after the time for appeal had expired" but "is rather a situation where at the time of the [conviction] the definitive ruling on the question of law had not crystallized." [9] However, the overwhelming weight of opinion, during the time for appeal, was that the Court had decided, in the *Falbo* case, that the defense of erroneous classification was not available. Justice Black, speaking for the majority in that case, had stated: "The narrow question . . . presented by this case is whether Congress has authorized judicial review of the board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process. We think it is not." [10] Many of the lower federal courts took this statement upon its face and refused to allow the defense of erroneous classification in criminal proceedings under the act, regardless of defendant's exhaustion of, or failure to exhaust, his administrative remedies for a change of classification.[11] In the *Estep* case, the Court held that a person charged with violation of the act by failure to submit to induction might raise the defense that the board had no basis for its classification if he had first exhausted his administrative remedies for a change of classification; and the *Falbo*

[2] 327 U.S. 114, 66 S.Ct. 423 (1946). Justice Douglas emphasizes that the Estep case was argued by the same counsel as were employed by Kulick.

[3] United States ex rel. Kulick v. Kennedy, (D.C. Conn. 1946) 66 F. Supp. 183.

[4] United States ex rel. Kulick v. Kennedy, (C.C.A. 2d, 1946) 157 F. (2d) 811.

[5] Principal case at 184.

[6] Justices Frankfurter, Rutledge, and Murphy.

[7] Principal case at 181.

[8] Id. at 182.

[9] Id. at 181.

[10] 320 U.S. 549 at 554, 64 S.Ct. 346 (1944).

[11] Justice Frankfurter, in his concurring opinion in the Estep case, points out that forty circuit judges had construed the Selective Service Act to mean that "judicial review of a draft board classification is not available in a criminal prosecution." 327 U.S. 114 at 139, 66 S.Ct. 423 (1946).

case was distinguished on the ground that "the defendant challenged the order of his local board before he had exhausted his administrative remedies." [12] It is conceivable that many courts and lawyers, including Kulick's, were misled as to the scope of the decision of the *Falbo* case not only by Justice Black's language, which mentioned no exception to the "rule" of the case, but also by the failure expressly to mention the very fact on which the case was later distinguished. Judge Learned Hand concluded that, under such circumstances, "it would pass all fair demands upon Kulick's diligence to conclude him because of failure to appeal" [13] and that resort to *habeas corpus* was neccessary "to prevent a complete miscarriage of justice." [13] Implicit in Judge Hand's opinion seems to be the view that, if the Supreme Court had actually changed its construction of the act after the time for appeal had expired, Kulick could now succeed in his *habeas corpus* action. Justice Douglas, however, cites a decision of the Court of Appeals for the District of Columbia which supports the view that a change in statutory construction is not a valid ground for a collateral attack on a final judgment by use of *habeas corpus*. The policy argument in favor of the finality of unappealed judgments is a strong one, especially when, as in this case, petitioner's complaint is not that he has been altogether deprived of his only defense but rather that he has erroneously not been allowed to present it a second time, the matter having once been decided against him by the draft board. If, however, one accepts the view that a change in statutory construction after the time for appeal has expired is a ground for habeas corpus, then it is difficult, as a practical matter, to see why the present case should not be treated as if there had been such a change in construction. *W. Stirling Maxwell*

[12] 327 U.S. 114 at 123, 66 S.Ct. 423 (1946).

[13] (C.C.A. 2d, 1946) 157 F. (2d) 811 at 813 (1944).

[14] "Is one entitled to a discharge under a writ of habeas corpus where the court had power under the statutory construction to punish his acts in a criminal contempt proceeding at the time the acts were done and the sentence imposed, the court not having such power under a new statutory construction at the time the writ of habeas corpus was filed?" Vinson, C. J., answers the question in the negative and refuses to allow the collateral attack by habeas corpus upon the previous judgment which had been accepted as final. Warring v. Colpoys, (App. D.C. 1941) 122 F. (2d) 642 at 644.