

Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

----- X
 JOSEPH THOMAS MULLOY
 Petitioner;
 vs.
 THE UNITED STATES,
 Respondent.
 ----- X

Docket No. 655

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ORAL ARGUMENT OF:

P A G E

Robert Allen Sedler, on behalf
of Petitioner 2

Joseph J. Connolly, on behalf
of Respondent 17

REBUTTAL ARGUMENT OF:

Robert Allen Sedler, on behalf
of Petitioner 37

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 JOSEPH THOMAS MULLOY, :
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 Petitioner; :
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 vs. : No. 655
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 THE UNITED STATES, :
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 Respondent. :
 :
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Washington, D. C.
April 20, 1970

The above-entitled matter came on for argument at
1:45 p.m.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

- Robert Allen Sedler, Esq.
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Lexington, Kentucky
Attorney for Petitioner

- Joseph J. Connolly, Esq.
Office of the Solicitor General
Department of Justice
Washington, D. C.
Attorney for Respondent

1 including the right of appeal. The board summarily dismissed.
2 The first issue then evolves around the summary dismissal.

3 The petitioner has contended throughout these
4 proceedings that the board either was required to reopen,
5 because, based on his SSS Form 150 and the letters and other
6 information submitted in support of the claim, he made out a
7 prima facie case of entitlement, or that what really happened
8 was that the board in fact reopened, deciding the claim against
9 him on the merits, but denying him the appeal to which he
10 was entitled by the regulations.

11 In this Court the government now concedes -- which
12 is a clear departure from its position heretofore -- that
13 based on the SSS Form 150 and the supporting letters, the peti-
14 tioner made out a prima facie case for entitlement. But, says
15 the government, even so, the board does not have to reopen.
16 I think issue was drawn on that first point.

17 The second issue ---

18 Q Do you think it can be told from this record
19 what the reason for the board's action was?

20 A No, Your Honor, this is a point that we have
21 made, in that the board did not say why it found that he wasn't
22 a conscientious objector. But the record does clearly say
23 what the board did. The Form 100, the face form, following
24 the November 9th meeting says, "Classification not reopened."
25 Following the meeting on January 11th, the SSS 100 Form reads,

1 "All information in the file considered, including claim
2 of conscientious objector." The board felt that information
3 did not warrant reopening of 1A classification, a vote 4 to 0.

4 This was also brought out in the testimony both
5 in the civil trial and the criminal trial, where Chairman Sherman
6 stated that taking everything in the file, assuming what he
7 said to be true, he did not make out a case and he saw no reason
8 to reopen, because it wasn't there.

9 I think it is very clear that the board's reason for
10 its action was that the petitioner did not make out a prima
11 facie case for entitlement. This was the government's argument
12 both in the district court and before the Court of Appeals.

13 The Court of Appeals explicitly stated that petitioner
14 did not make out a prima facie case, and, therefore, the board
15 was not required to reopen.

16 Now we have contended all along that the only way
17 you can say that he didn't make out a prima facie case is to
18 totally distort the meaning of prima facie case and say that
19 prima facie case means the same thing as a merits determination.
20 I think that is the point that stands out most clearly in this
21 case, that there was nothing more that the board could have done
22 no further information that it could have considered, if it had,
23 in fact, reopened the classification.

24 But what it did was to say, "We don't think he is
25 a conscientious objector." Now the board can say that. But

1 under the regulations this constitutes a reopening in fact,
2 entitling the registrant to an administrative appeal under
3 Section 162513.

4 The second issue -- and this is, in a way, related
5 to the first -- is simply that he was denied due process,
6 because the board did not give him a full, fair hearing. They
7 didn't read the file. They, at best, looked through it,
8 scanning it, before making a determination that he didn't state
9 a prima facie case. There simply wouldn't have been time at
10 a so-called "courtesy" hearing for the three members who were
11 present to even scan, let alone read, the detailed answers to
12 SSS Form 150, let alone all the other information in the file.

13 Q Does that necessarily, or possibly, rest on an
14 assumption that they hadn't read it a little bit sooner?

15 A They so stated. There were three members pre-
16 sent, Your Honor, at the November 9th hearing. Mr. Sherman,
17 the chairman, testified, "Well, we looked over his file before
18 he came in as we would anyone else." Now at that time -- and
19 the record in the civil trial will bear this out -- there were
20 other registrants ahead of Mulloy; then Mulloy came into the
21 interview. Mr. Downs said that the file was there, and any
22 member who wanted to could look at it. I asked Mr. Downs,
23 "Did you read it?" And he said, "No, I just scanned it, because
24 I was the newest member of the board and I wasn't familiar with
25 what was in the file at all." Mr. Wolking said that he read it,

1 but he couldn't recall how much time he spent on it. I think
2 it is very clear from the evidence that these members didn't
3 read the file.

4 We have also contended, as part of the same denial
5 of the full, fair hearing, that the demonstrable incompetence
6 of the draft board members was a denial of due process. They
7 simply did not understand what a conscientious objector was.

8 The clerk testified that in her 17 years with the
9 board, no one had ever been assigned to civilian work as a
10 conscientious objector.

11 Mr. Sherman, the chairman of the board, thought that
12 a conscientious objector was one who was opposed to the use of
13 violence, which, of course, is not the statutory definition.

14 Mr. Downes didn't seem to realize that the board
15 had the power to determine whether a man was a conscientious
16 objector.

17 Mr. Wolking seemed to think that by applying for
18 conscientious objector status the registrant stated that he
19 would not do alternative civilian service.

20 Now I think this is the factual situation that we
21 are dealing with. The government says that the board must have
22 assumed that the petitioner was not sincere, otherwise, it
23 would have been inexplicable that they didn't reopen.

24 I would suggest that there may be another reason, that
25 they never read the file, and that if they had read the file,

1 it wouldn't have made any difference, because they had no under-
2 standing of what a conscientious objector was.

3 The relevant time period is a fairly brief one. All
4 the relevant events, relating to conscientious objector status,
5 occurred between May 1967 and January 1968. The petitioner,
6 after leaving school in 1966, went to work for the Appalachian
7 Volunteers, an anti-poverty group working in Eastern Kentucky.
8 He was given an occupational deferment, 2A, from March 1966 to
9 May 1967.

10 In May 1967 he was classified as 1A. This was
11 affirmed by the appeals board in August of 1967; I believe the
12 date was August 16. On August 11, 1967 petitioner and two
13 other people were arrested in Eastern Kentucky on a charge of
14 teaching sedition.

15 All this is brought out in *McSurely vs. Ratliff*
16 cited in the brief, where a three-judge federal court found
17 that the prosecution was undertaken to inhibit organizing
18 activities in Eastern Kentucky and enjoined the prosecution,
19 because the statute was patently unconstitutional.

20 The petitioner spent some time in jail before he
21 was released on bond. There was a midnight raiding party;
22 15 armed men led by the prosecuting attorney came to the
23 petitioner's house, ransacked it, took all the books and records.
24 This was the sedition prosecution to which the petitioner was
25 subject.

1 The three-judge federal court enjoined the prosecution
2 on September 14, 1967. It then directed the petitioner and the
3 other plaintiffs to execute a \$500 recognizance bond to the
4 federal court, pending the right of appeal.

5 The state's right of appeal expired 60 days later, and
6 no appeal was taken.

7 The petitioner stated in his letter to the board of
8 October 17th that his experiences in Eastern Kentucky,
9 including the sedition prosecution, were the precipitating
10 catalysts. This caused generalized belief in pacifism and
11 non-violence. And he demonstrated his belief in non-violence
12 by supporting letters.

13 It crystallized, in his view, into objection to
14 participation law. He wrestled with his conscience and came
15 to the conclusion saying, "I can now say I am a conscientious
16 objector."

17 He wrote this to the board. He filled out the SSS
18 Form 150 in great detail. Included in the supporting inform-
19 ation were letters from a Catholic priest testifying his
20 sincerity, testifying that why opposition to war was consistent
21 with Catholic teaching. There were further letters testifying
22 as to his activities in Eastern Kentucky.

23 The board members granted this "courtesy" hearing, as
24 they called it, on November 9th right after the interview which
25 lasted about 10 or 15 minutes. Here I would really like to

1 quote from the government's brief: "They (meaning the board
2 members) discussed the case briefly and came to the unanimous
3 conclusion that there was no basis or justification for
4 reopening classification."

5 The effective decision was made on November 9th, and
6 an entry to this effect was made on Form 100, "Classification
7 not reopened." The reason the board didn't take a vote that
8 evening was that petitioner was still under bond to the federal
9 court and was believed under indictment in Kentucky on a charge
10 of flourishing a deadly weapon, which was later dropped.

11 They took the formal vote at a meeting of January 11.
12 And according to Chairman Sherman, at that time, it readopted
13 or reaffirmed its action of November 9th. It is at that time
14 that we have the entry in the face Form 100, "All information
15 in the file was considered, including claim of conscientious
16 objection. All members present felt this information did not
17 warrant a reopening of 1A classification."

18 Q He had based his claim for non-draft status for
19 a considerable period on an occupational deferment, hadn't he?

20 A He had an occupational deferment until May 1967.
21 This then was not renewed, and this was denied in August 1967.
22 He didn't file for conscientious objector until October 1967
23 following the sedition prosecution. But he had made it very clear
24 that he considered his work in Appalachia to be the clearest
25 demonstration of his religious beliefs, his sincerity and his

1 opposition to war.

2 I think it is also fair to say that he believed that
3 if he were granted conscientious objector status, he might be
4 permitted to continue to do anti-poverty work, which would
5 presumably qualify as alternative service in the national
6 interest under Section 1660.1 of the regulations.

7 If the members of the board had read his SSS Form 150,
8 they would have understood the correlation between his work
9 in Appalachia and his claim of conscientious objector status.
10 I think it is the height of sophistry to say that a young man,
11 not learned in the law, who by law can't be represented by counsel
12 before these draft boards, can suddenly have his claim for
13 conscientious objector status converted into a claim for
14 occupational deferment, which had previously been denied.

15 Q You have been rather severe on the draft board
16 people in their lack of grasp of what they were supposed to be
17 doing. Wasn't it rather late for this man to discover himself
18 what a conscientious objector was in the circumstances?

19 A I want to make clear, Your Honor, that this is
20 a pre-induction case, that there was no outstanding order for
21 induction.

22 Q It is a classification though.

23 A Pardon.

24 Q It was a classification.

25 A Yes, Your Honor.

1 Q So he knew that he was subject to call.

2 A Well this, I think, is true of any registrant
3 in class 1A. I think if you say that this is late, then it
4 becomes, then what you are saying is that if a registrant doesn't
5 claim conscientious objector status at age 18, when he registers
6 for the draft, it can always be found that he is late.

7 Q I was relating this to the argument that you
8 offered -- it hadn't occurred to me until you offered it -- that
9 he thought that his activity in the anti-poverty movement was
10 a sufficient demonstration of his conscientious objector state
11 of mind and attitude. Now, I say to you, if that is what he
12 thought it was, wouldn't it have been reasonable for him to
13 communicate that at an earlier stage than he did?

14 A I think there are two answers to that, Your
15 Honor. In the first place, as long as he had another defer-
16 ment, the board could not consider his claim for conscientious
17 objector status under the regulations. But, I think that all
18 of these things led up; I focus on this particular event, namely
19 the sedition prosecution. It is when does a man really have to
20 face up to the question, "Am I a conscientious objector?"

21 There is a recent decision that came down from the
22 Fourth Circuit involving an in-service conscientious objector
23 that said that being called to Vietnam may be the catalytic
24 factor.

25 Moreover, there is another point that I would like to

1 make, that the board never considered this. Mr. Sherman, the
2 chairman of the board, was specifically asked, "Did you ask him
3 any questions as to why he did not file for the claim of
4 conscientious objector earlier?" Mr. Sherman's answer was,
5 "No, none that I recall."

6 In other words, presumably a board could find that the
7 man's objection to war matured at an earlier time and conceiv-
8 ably -- though McKart might suggest to the contrary -- but
9 conceivably under 1625 1d, it could find that the claim was not
10 timely asserted. That is not the case here. The board members
11 assumed that the claim was timely asserted. They stated that
12 they assumed he was sincere in everything that he said.

13 Now the government is trying to say, "No, they really
14 didn't mean that." But it can't point to one place in the
15 record where any board member affirmatively stated, "No, we
16 didn't believe him."

17 Q Isn't the issue of law in this case a very
18 narrow one? Namely, what does it take to trigger a consideration
19 of a reopening of a classification?

20 A Exactly, Your Honor.

21 Q Isn't that all there is to this case?

22 A That is what I call the first issue.

23 Q And you've got the Second Circuit and some
24 other Circuits, principally the Second, saying, "All you've
25 got to do is show a prima facie case on paper." And you've

1 got other Circuits, including this one, saying, "No, there is
2 more discretion in the board than that. Even though it is
3 prima facie, showing on paper, they have a right to make some
4 kind of evaluation of it."

5 A I would submit, Your Honor, that with regard to
6 pre-induction --

7 Q Have I stated the issue incorrectly?

8 A I think that is a perfectly correct statement
9 of the first issue. I would say that with regard to pre-
10 induction requests for reopening, every Circuit but the Sixth
11 has held that the board is required to reopen when the
12 registrant presents a prima facie case. That is when the new
13 facts, if true, would entitle the registrant to the claimed
14 classification, the board must reopen. The Sixth Circuit held
15 this too, in Townsend vs. Zimmerman.

16 But in Mulloy they departed from Townsend vs. Zimmer-
17 man. The Sixth Circuit is the only Circuit that holds that the
18 board is not required to reopen whenever a prima facie case for
19 classification has been presented. They have held this in the
20 case of the most difficult claim, one of conscientious objector.
21 What they have done is to completely obliterate the line between
22 a refusal to reopen and a denial of the claim on the merits
23 following a reopening. What they are saying is that the board
24 can decide if it wants to reopen or if it doesn't want to
25 reopen.

1 Now this is totally contrary to the clear import of
2 the regulation. There are two reasons, I think, why a board
3 has to reopen upon the presentment of a prima facie case. The
4 first goes to procedural due process.

5 Upon a reopening a registrant gets a personal appear-
6 ance. That is mandatory under Section 1625.11 and 1625.13.
7 It is only by a personal appearance that he will get a chance
8 to tell his side of the story. Otherwise, the board can simply
9 decide without having heard him present his story.

10 The second reason relates to an appeal. Under the
11 regulations, whenever the draft board decides the merits, that
12 determination is to be reviewed by an appeals board. If the
13 draft board can decide the merits unilaterally, then you com-
14 pletely negate the provisions of 1625.13, providing for an
15 appeal after reopening.

16 Where the board is not supposed to reopen, under
17 1625.4, is where the new fact, even if true, would not entitle
18 the registrant to the claimed classification.

19 Q As I understand it then, you would say that the
20 board is without discretion if presented to it allegations
21 that if true would entitle the registrant to a new or different
22 classification? So in other words the time process involved in a
23 reopening, a personal appearance, is a matter of months, I
24 suppose?

25 A Exactly.

1 Q So I suppose a registrant could say, "I am now
2 a member of the United States Senate," -- even though that were
3 demonstrably false -- "and, therefore, I ask for a reclassifi-
4 cation as a member of the United States Senate." And according
5 to your submission, as I understand it, it would be incumbent
6 upon the board to grant him a personal appearance and reopen
7 his classification and find that no, he wasn't a member of the
8 United States Senate at all. But then there would be an appeal.
9 Then he could say next time, "Now I am a member of the FBI," or
10 "I am a divinity student," and just go through the various
11 exemptions and deferments until everybody ran out of time and
12 he was over 26 years old. Could he do that under your sub-
13 mission?

14 A Two answers: It won't do him any good to reach
15 26, because under 1631.7a if his number comes up, he is liable
16 and he is called, notwithstanding, that he reaches 26. So that
17 won't do him any good.

18 Q I suppose if he went long enough, he could reach
19 46.

20 A There are only a limited number of classifications.
21 But, if I may suggest, I was going to answer Your Honor's
22 question, no. Because I don't want to get into a box of
23 advocating something ridiculous. Let me draw an analogy to a
24 motion for summary judgment.

25 I read Sections 1625.1, 1625.2, and 1625.4 as, in

1 effect, embodying dismissal of a complaint on the ground that
2 it fails to state a claim on which relief can be granted. There
3 we do not look beyond the facts of the claim. Assuming that the
4 facts, if true, would not entitle the registrant to the
5 claimed classification, the board is justified in dismissing.
6 But if the facts, if true, would entitle him to the claimed
7 classification, the board must reopen, unless there is no
8 genuine issue of material fact.

9 In other words, I would use the same thing as in the
10 summary judgment case. Suppose a registrant asks for a
11 reopening on the ground that he is a regularly enrolled student
12 in Podunk College as of January 1. On January 2 there is
13 received in his file a letter from the registrar of Podunk
14 College saying that as of January 2 he was dismissed. Assuming
15 the board verifies this, calls the registrant in, lets him
16 verify this, I would say no; they are not required to reopen,
17 and there is no reopening in fact.

18 What I am saying is that where the new facts, if
19 true, would entitle the registrant to the claimed classification
20 and it cannot be said that there is any genuine issue as to
21 any material fact, this would require reopening. I think, Your
22 Honor, that would answer your question as to the member of the
23 Senate.

24 Q I suppose so long as there is an allegation --
25 Does this have to be made under oath?

1 A I believe there are severe penalties for making
2 false statements to the board. That should serve as a
3 sufficient deterrent. I really don't think that this is a prac-
4 tical problem. There is nothing to be gained anymore by a
5 registrant delaying this. It won't prevent his induction.
6 Moreover the board --

7 Q Does it have to be made under oath? Do you have
8 to swear to this? You don't, do you? You just write them a
9 letter, don't you?

10 A True.

11 Q Or maybe on the form provided by the board?

12 A Yes, the board could provide it. It is
13 provided in the statute that any false statements to the board
14 subjects a person to 5 years imprisonment and a fine of
15 \$10,000. So that should be sufficient deterrent against
16 making false statements.

17 I believe I will reserve time for rebuttal.

18 MR. CHIEF JUSTICE BURGER: Thank you, Counsel.

19 Mr. Connolly.

20 ARGUMENT OF JOSEPH J. CONNOLLY

21 ON BEHALF OF RESPONDENT

22 MR. CONNOLLY: Mr. Chief Justice and may it please
23 the Court:

24 Since Mr. Sedler has taxed the government for chang-
25 ing its position during this litigation, it seems appropriate

1 for me to restate the government's position at the outset of
2 my argument. I think I can do so in two propositions, which
3 I will briefly describe and then return to each in more
4 detail.

5 The first proposition relates to what we believe
6 to be the basic issue of law in this case. That is: what
7 inquiries can a local board make and what issues can it resolve
8 concerning a request for reclassification, without the board
9 being deemed to have, in fact, reopened the classification.

10 Section 1625.4 of the regulations clearly specifies
11 two issues which are for the primary determination by the
12 board in deciding whether to reopen. The first is: whether
13 the facts alleged by the registrant, if true, would justify a
14 change in the registrant's classification. The second issue
15 is whether the facts presented are new facts, which were not
16 considered by the board at the time the registrant was
17 classified.

18 The discretionary language of 1625.2 also demonstrates
19 that there are other issues which may be resolved by the board
20 without a reopening. Thus, we believe that the board may, in
21 certain circumstances, decide that critical facts are not true
22 and, therefore, that reclassification would not be justified.

23 The board also may reach certain conclusions about
24 the facts alleged and deny reopening on that basis. Thus, in
25 certain narrowly defined cases-- which I will illustrate

1 presently -- the board may conclude that the registrant's
2 civilian work is not in the national interest or that his claim
3 of conscientious objection is not a sincerely held belief.

4 Interpreted in this manner, we believe that the
5 regulation affords a necessary flexibility to the Selective
6 Service System to dispose of meritless applications without
7 full administrative procedures. This is necessary -- as we
8 show in our brief -- in order to prevent the administrative
9 system from becoming bogged down with such applications and to
10 prevent disingenuous registrants from postponing and perhaps
11 avoiding military service.

12 Our second proposition relates to the facts of this
13 case. We submit that what the local board did in this case was
14 to conclude that the petitioner had not set forth facts which
15 would classify a conscientious objector classification, because
16 the true premise for his claim was his belief in the impor-
17 tance of his work in Appalachia.

18 This is a determination which the board is clearly
19 authorized to make. And, as I hope to demonstrate later in
20 this argument, the board had a rational basis on the facts of
21 this case for making that determination.

22 Mr. Sedler has stated that the government has
23 conceded that there was a prima facie basis, a prima facie case,
24 for reclassification. The government has made this concession,
25 and I should clarify our position.

1 We believe that certain of the facts set forth in
2 petitioner's Form 150 and in the accompanying letters, taken
3 together with all doubts resolved in favor of the petitioner
4 and with all inconsistent information disregarded, would have
5 constituted a prima facie case.

6 But the question for the local board was whether it
7 should try to piece together the favorable information, resolve
8 doubts in favor of the petitioner, and disregard his own
9 statements that seemed inconsistent with his claim.

10 That was the question which the board resolved after
11 its courtesy interview with the petitioner. It decided that
12 there was no reason to reopen, because the facts, as explained
13 by the petitioner, did not justify reclassification.

14 Now as to the point of law involved in this case. I
15 would like to give three illustrations of what I think would be
16 the government's position as to what inquiries the board can
17 make without reopening and what issues it can resolve without
18 reopening.

19 I think the first illustration was illicit in Mr.
20 Sedler's colloquy with Mr. Justice Stewart, concerning the
21 question whether the registrant is a student at X College,
22 whether he is a United States Senator, or perhaps, whether his
23 wife is pregnant as he alleges.

24 We believe that the discretion granted to the board
25 in Section 1625.2 allows the board to inquire into that critical

1 fact, if true, and if the fact is not true then to deny
2 reopening on that basis.

3 The second illustration that I would give is a
4 situation where a registrant claims that he is employed in the
5 national interest. Let's suppose that he says that he is
6 employed in an electronics factory making radar scopes for
7 jet fighter planes.

8 Now in that case we would believe that the board --
9 if there is no reason to doubt the truth of the fact -- would
10 be required to reopen and consider that claim on the merits.

11 The situation might be different if it were another
12 case in which the registrant alleged that he was employed in
13 such and such a factory, and the board had very recently
14 decided in a case on the merits that someone doing exactly what
15 this registrant was doing was not in the national interest,
16 perhaps, in that case, the board would be justified in declining
17 to reopen without full consideration.

18 The third example in this area would almost be
19 humorous when in a situation which is very clear that the
20 occupation is not defensible, such as a Good Humour salesman or
21 something like that. We think that the board could deny a
22 reopening.

23 Now the third example is the situation of the
24 conscientious objector. As the cases illustrate there are two
25 issues for the board to resolve on the merits in that case.

1 First is: what is the character of the registrant's belief,
2 that is, what does he say that he believes concerning his
3 moral objection to participation in war; what is the nature of
4 that belief.

5 The second issue is the sincerity of his belief. That
6 is: does he really, genuinely believe what he says he believes
7 about participation in war, or is this a claim of convenience.

8 Q Would you agree, Mr. Connolly, with your
9 adversary that the Circuits are at odds on what the standard
10 for reopening is?

11 A There is some disagreement among the Circuits,
12 Mr. Justice. I think the Sixth ---

13 Q The Second is flatly against this decision,
14 isn't it?

15 A Yes, it is. It has illustrated its position,
16 in somewhat of a different context in the Gearey cases. But,
17 of course, those cases did involve a claim of conscientious
18 objection made after an induction notice has been sent. But
19 very similar issues are presented by this case.

20 We would submit that in most instances that
21 second issue for the board to resolve, that I said, whether
22 this man really believes what he says he believes, what is in
23 his mind, is a question that could not be resolved by the
24 board without a reopening to give the registrant a formal
25 opportunity for appearance before the board and an appeal

1 to the state appeals board.

2 We would say, however, that there might be certain
3 cases in which even that claim, that issue could be resolved
4 by the board without a reopening. If the registrant claims that
5 his conscientious objection to military service is based, for
6 example, upon study in a monastery, in a divinity school or
7 a strong association with a peace church or a peace group, and
8 the board finds by reliable means that those allegations are
9 untrue, it might make the decision, without reopening, that
10 this registrant is insincere in his claim.

11 I think that is a justifiable decision in this case,
12 and in all these other lines of cases, if there is any
13 prejudice that would result to the registrant in that case,
14 in any of those cases, from the board's erroneous view, the
15 registrant could learn what the reason for the local board's
16 decision was, and if it secured erroneous information, he could
17 correct the record, and the case would proceed from that point.

18 Q You say if the board finds by reliable means
19 that what he says is not true or where they find that they
20 think it is not true, what sort of reliable means are they
21 going to find out about this? All they have is his statement,
22 his allegation. There is no response as I understand it.

23 A That is right.

24 Q It is not an adversary proposition.

25 A They could write a letter, depending upon what

1 the claim was, write a letter to the source from which that
2 claim originates, the referent in a statement of fact. And
3 if the referent writes back in a letter that looks like it comes
4 from the referent that says, "I have never heard of the
5 registrant; he has never been engaged in any peace work with
6 our organizaiton, never been employed in our plant, never
7 attended our school," I would submit that that would be a basis
8 for the board saying, "No, you haven't made out a case; you
9 haven't alleged facts which, if true, would justify your
10 reclassification."

11 Q Do selective service boards actually write
12 letters to these referents?

13 A I don't know. I do know that they verify
14 academic deferments in some way through correspondence with
15 the universities and colleges.

16 Q The usual practice I suppose is to have the
17 registrant, himself, when he applies for reclassification to
18 supply the documentary support for it. Isn't that the basis?

19 A That is usually done, but I believe there is
20 some practice of verifying with the board. There is certainly
21 nothing in the regulations which would preclude the board from
22 doing that. Indeed 1625.1c appears to contemplate that the
23 board will do that.

24 Q How long would it take for you or I to find out
25 whether a man is a conscientious objector?

1 A It depends on the type of claims that he makes
2 to support his claim for being a conscientious objector, Mr.
3 Justice. If I were faced with a full-ripened claim for
4 conscientious objection, which appeared to be based upon some
5 longstanding belief, some basis in the registrant's religious
6 doctrines, if the claim was evidenced by prior statements of
7 objection to participation in war and activities in objection
8 to participation in war---

9 Q In ten minutes?

10 A No, I don't think I could do that in 10 minutes.
11 But that is not the case here.

12 Q Would it take you as long as it did the Second
13 Circuit to decide Seeger?

14 A I don't know the fact to which you refer.

15 Q The Seeger Case.

16 A I don't know how long it took them to resolve
17 Seeger.

18 Q It could take as long -- I find little merit in
19 this ten minutes here.

20 A Mr. Justice, what I intend to get to in a few
21 minutes is the phrasing of what issue was before the local
22 selective service board in this case and what inquiry it was
23 making. The inquiry that it was making was not the inquiry
24 that I suggested earlier: do you really believe what you said
25 you believe? The inquiry before the local board -- and this is

1 evidenced, in answer to an earlier question by Mr. Justice
2 Harlan, by what the board said it did after the interview --
3 the inquiry before the board was: is this man really claiming
4 conscientious objection to war in any form, or is he rehearsing
5 the positions that he has taken with respect to the importance
6 of his civilian employment?

7 Q Well, a couple of these gentleman -- this is
8 kind of peripheral -- but as I read the record it seemed to
9 be that two of the board, or one of them said, that they really
10 didn't question this man's sincerity.

11 A That is correct, Mr. Justice.

12 Q It is very muddy as to what in the world they
13 did do.

14 A It is not a very good record to reach in and
15 decide exactly what the local board did in this case. If my
16 recollection of the record is correct, only two of the board
17 members testified as to the basis for their conclusion in
18 this case, that the classification should not be reopened. And
19 both of those testified, in effect, that what this man was
20 really saying to us is what he had said before, that he believes
21 that his participation in the Appalachian Volunteers is a
22 critical and vital matter, both to him and to the community,
23 and that it would be immoral, if you will, to take him away to
24 fight in Vietnam at this time.

25 I approach my discussion of what the record shows in

1 this case with a bit of hesitancy, because the board members
2 hardly were articulate in their views. It is not a very good
3 case to decide. That is why I tried to concentrate mostly
4 upon the legal standards.

5 Q That is all bound up in it; because the
6 consequence, understanding your position here, is that nobody
7 has reviewed the underlying merits of this claim, because it
8 has never been reopened. He doesn't get his administrative
9 appeal, and he gets no judicial review.

10 A Well, Mr. Justice, we believe that the
11 regulations and fundamental fairness contemplate that result.
12 The regulations do contemplate that an individual who doesn't
13 allege facts which, if true, would justify reclassification
14 does not get a reopening, and he does not get an appearance
15 before the board and an appeal. We believe that that is an
16 appropriate regulation and a fair regulation. Because what
17 it does is to prevent, really, the kind of situation that Mr.
18 Justice Stewart was suggesting in his colloquy with Mr. Sedler.
19 That is, you first start with United States Senator then go to
20 Congressman and go on and on down the line. You do run out
21 of time.

22 I tried to state the fundamental premise of our
23 legal position which is that the board -- it is very necessary
24 for the board to have some means of disposing of meritless
25 cases, some way to decide, as a preliminary matter, whether

1 a case has merit or doesn't have merit, principally on whether
2 it alleges the necessary facts suggested by a reclassification,
3 but also to suggest some of the issues which the board can
4 reach in making that decision consistent with the regulation,
5 consistent with fundamental fairness.

6 Now the remaining time I would like to go through
7 and just illustrate to the Court the kind of facts and allega-
8 tions that the local board was confronted with in this case,
9 which would suggest the reason for inquiry and justify our
10 argument, I believe, that what the board decided was based upon
11 facts that it clearly had before it.

12 Q Mr. Connolly, do you assume as has been charged
13 that the board didn't know what it was doing?

14 A I would like to speak to that. At this time,
15 perhaps, dispose of it. We discussed it at some length in our
16 brief, and I don't intend to go into it very deeply. I
17 disagree with Mr. Sedler's statement that the decision was
18 made to deny reopening on the afternoon of November the 9th,
19 although there is some support in the record for Mr. Sedler's
20 statement.

21 I believe that the record taken as a whole, including
22 the further testimony, including the testimony of a board
23 member who wasn't even there at that interview, but who read
24 the file, read the summary of his interview and then decided on
25 January 11 to vote against reopening. I think that the record

1 as a whole shows that, even though there might have been a
2 predisposition against reopening by those members who were
3 present at the November the 9th meeting, that that disposition
4 did not ripen into a decision until January 11, until they had
5 all read the file and until they had given it mature considera-
6 tion.

7 The question as to whether they knew what they were
8 doing. I don't believe that that is really supported by the
9 record at all. There is some very cursory, very short exam-
10 ination of what I would concede to be inarticulate board
11 members which related very, very specifically to the labels
12 of classification to be given. And I don't think that it
13 can be concluded on that basis that these board members were,
14 I believe Mr. Sedler has used the word, incompetent to decide
15 this claim.

16 Q Suppose somebody had accepted a job deferment
17 doing some kind of work like this man was doing, but he was
18 a conscientious objector; he believed in all of the things that
19 he said he believed in. But he thought that this was the type
20 of work that was in exchange for being not drafted. And then
21 somebody tells him, "Look, if you are a conscientious objector,
22 you have to state fully that you want this because you are a
23 conscientious objector." And then he says it. He could be
24 reclassified as a conscientious objector, could he not?

25 A I believe so, but we had ---

1 Q But in this case you have the two of them
2 combined together without any means of your separating them.

3 A That is right, but I think that what we have
4 to look to in this case is that there was a proceeding; there
5 was a personal interview with the registrant before the local
6 board in which he did have that chance to separate out the
7 considerations, to tell the local board exactly what his
8 religious beliefs were and what his conscientious beliefs
9 were, to focus on them and to alleviate any possible confusion
10 which the board had.

11 We have two board members, after that interview -- in
12 which we must presume that they gave him fair consideration
13 at that time, fairly tried to resolve any doubts -- they said
14 that what this man essentially wants, what he considers
15 important is his work with the Appalachian Volunteers.

16 To illustrate that, Mr. Justice, I would like to jump
17 ahead of myself and go to the letter which petitioner wrote
18 to his local board after that interview. I think it is a very
19 revealing letter.

20 He starts out by saying, "I have been thinking about
21 the short interview I had with you all last week. It doesn't
22 seem to me that all the points were covered as they should have
23 been and that I was not able to fully express my position of
24 conscience." That is the way he starts out. He had some
25 reservations that he didn't get across to the board what he

1 really wanted to get across to them.

2 But what does he go on to say? He starts out by
3 saying, "These are certainly troubled times in this country."
4 Then he talks about discrimination and poverty, the coming
5 revolution, "Another revolution is beginning to take place in
6 this country. I, of course, hope that this revolution takes
7 a non-violent form, but I remind you that I am an organizer,
8 that I have dedicated my live to change and to the constant
9 struggle that is democracy. There is nothing that can stop me
10 from organizing against something that I don't believe."

11 And then, down a paragraph on page 59: "I told you
12 that I felt I was serving my country's needs here in Pike
13 County. That was no frivolous statement. The problems are too
14 great to be ignored any longer, and no one should be sent to
15 another country as long as we are in the mess we are in."

16 So that is what he really wanted to get across to
17 the board. This was a letter written some 3 days after his
18 interview. So I think, Mr. Justice, that even though we don't
19 know exactly what he said in that interview, we have the fact
20 of the interview; we have the ambiguities in the petitioner's
21 own form, which I am going to bring out in just a second. And
22 we have a local board, which we must presume gave fair
23 consideration, concluding that what the man really wanted was
24 what he had before, the opportunity to continue his organizing
25 work in Appalachia. I think that is clearly demonstrated by

1 his subsequent letter.

2 Q This type of communication from him probably
3 explains why the board felt he was a sincere even if, perhaps,
4 confused young man.

5 A I think that is right, Mr. Chief Justice. And
6 while you mention the point, I would like to go back and
7 clarify any ambiguity which might have arisen from the govern-
8 ment's brief on the question of sincerity.

9 We believe that the question before the board is --
10 the question that the board phrased for itself is: this is a
11 very sincere young man, but is he a very sincere what? And the
12 way that the board resolved that was that he was a very sincere
13 Appalachian Volunteer, who believed that it was essential for
14 him, as a matter of conscience for him, to remain in his present
15 work, organizing the poor in Appalachia.

16 The board did not in any way suggest that the
17 petitioner would be mendacious or less than candid with them.
18 I think that it decided that what the petitioner wanted was
19 continuation of his classification.

20 I am just going to take some highlights from the
21 petitioner's selective service conscientious objector form,
22 which is Form 150, and is printed at the beginning of page 15
23 of the appendix. To go over to page 16, there is a series of
24 questions which the petitioner answered at length in an
25 appendix; he didn't use the forms.

1 Question no. 3 was: Explain how, when and from
2 whom or from what source you received the training and acquired
3 the belief which is the basis of your claim made in series 1.
4 The claim made in series 1 was that he was conscientiously
5 opposed to military service in any form.

6 He began his long answer to that question on page
7 19 of the appendix. It starts by saying that he was born to
8 Catholic parents and inspired by missionary orders and had,
9 apparently, Catholic school training up through high school,
10 then became deeply troubled and faced a religious crisis and,
11 incidentally, attempted suicide.

12 Then after that, he says he began to get back on
13 the right track and came under the influence of Thomas Merton,
14 who was then residing in a monastery there in Eastern Kentucky.
15 He says that Merton was very influential in his formulating
16 his views.

17 Then he reaches in, on page 21, for the whole rest
18 of the answer to talk about the inspiration of his work as an
19 Appalachia Volunteer. His credo is set forth at the bottom
20 of page 21, I suppose: "As I grew and participated in the
21 world, I was able to determine a priority on the things I
22 learned as a child. Thus, I place love of my fellow man above
23 regular church attendance, and I place "Thou shalt not kill"
24 above "An eye for an eye". I learned rapidly in my work in the
25 southern highlands of the significance of love and understanding

1 and the futility of violence and force. Too many poor people
2 have been used and walked on by the power-hungry courthouse
3 gangs. There is an urgent need for the poor to become organ-
4 ized and the rich to be educated. This must be done in a non-
5 violent way. Violence only breeds violence."

6 This appears to be a culmination of what he should
7 have been alleging to be a religiously-founded opposition
8 to participation to war in any form.

9 Q Is it your position that that does not make out
10 what someone would call a prima facie case, that you are a
11 conscientious objector?

12 A It is our position that the ambiguities inherent
13 in that statement, and in other statements, which I, perhaps,
14 will get a chance to read, plus statements of the registrant
15 which so plainly indicated to him the primary importance of
16 his work, tended to justify the board's conclusion -- or did
17 justify the board's conclusion that it ought not to try to
18 piece together the various, individual statements which might
19 have justified a reclassification in order to decide whether to
20 reopen.

21 We don't doubt, Mr. Justice, that if you did do what
22 I suggested early in the argument, to piece all of these little
23 statements together, in what you might regard as a brief for
24 the conscientious objector, to resolve any ambiguities in his
25 favor, and to disregard the significant emphasis on his belief

1 in the importance of his job, that you could conclude ---

2 Q But what is the ambiguity? I thought, just
3 reading through all this record, he indicated that he had
4 been taught from a child not to kill people; he didn't believe
5 in it and he had conscientious objections to doing it and he
6 would consider it murder.

7 A Well, there are, I believe ---

8 Q I am not saying that should have been accepted,
9 but wasn't that enough to call for some kind of hearing?

10 A No, I don't believe so, Mr. Justice, in light
11 of the fact that the other statements which he made in his
12 form suggested that this wasn't the primary thrust of his
13 belief. It was a statement which stands out -- I mean it is
14 a sufficient allegation, perhaps, of conscientious objection,
15 just as signing the first line of that form is a sufficient
16 allegation of conscientious objection. But we don't believe
17 that the board is required to reopen and give full consideration
18 just merely because the individual signs that statement.

19 Q But the trouble is, as you said earlier, you can't
20 tell what basis the board went on.

21 A Well, we think that ---

22 Q I know that you are justifying it on a set of
23 assumptions which have to be premised on the fact that you
24 cannot tell with specificity or with any sense of assurance
25 what ground the board went on.

1 A All I have got is the statement of the board
2 members that their conclusion -- the basis of their consider-
3 ation and after the courtesy interview -- was that what this
4 man really wanted was that.

5 Then the question really becomes who bears the risk
6 of non-persuasion. If ---

7 Q Well, the record is very muddy, I suggest to
8 you, because the Court of Appeals seemed to indicate in one
9 point of its opinion that it did not think that what had been
10 alleged was sufficient to make out a prima facie case of
11 conscientious objection. And you gentlemen, the government
12 in its brief, now concede that the Court of Appeals is in error
13 in such a suggestion. In other words, you concede that the
14 papers -- as I read your brief -- that the papers did make
15 out a claim of conscientious objection. And you have to pin
16 your argument on a refusal to reopen on the grounds that the
17 board has more power than that. Then when it comes to what
18 that power is, you are dealing with a record which, on your
19 own statement, you say you can't tell what the board decided.

20 A It is not a strong record. If I have to reach
21 to that point, then I can't elaborate on the record; I can just
22 say what it says. But in answer to an ultimate statement, what
23 I tried to do early in the argument is to say that there may be
24 enough here if you piece it together the right way.

25 Thank you, Mr. Chief Justice.

1 MR. CHIEF JUSTICE BURGER: Mr. Connolly.

2 Mr. Sedler, you have five minutes left.

3 REBUTTAL ARGUMENT OF ROBERT ALLEN SEDLER

4 ON BEHALF OF PETITIONER

5 MR. SEDLER: Thank you, Your Honor.

6 To get back to the first point that I made. The issue
7 before this Court is not whether petitioner Mulloy is a
8 conscientious objector or whether there is a basis in fact for
9 a board's merit decision followed by an appeal that a man was
10 not a conscientious objector. The issue before the Court is:
11 was the board required to reopen and give the man an appeal?
12 That is all we were asking in this case, is to have an appeal.

13 The government has gone through the file pointing
14 out that the board could have found this and the board could
15 have found that. For purposes of argument let's assume that
16 the board could have done this. Under the regulations this
17 decision is also to be made by an appeals board.

18 In this case it is the petitioner who is arguing for
19 adherence to the regulations, and it is the government who is
20 arguing for a broad interpretation of the regulation for
21 which it can find no support.

22 The clear scheme of the regulations is that merits
23 determinations are to be reviewed. When a man makes out a
24 prima facie case or a new classification -- the CO claim had
25 never been made before -- assuming that there is an issue of

1 of material fact -- and certainly the government's argument
2 makes it clear that there was such an issue -- then the
3 procedure provided for in the regulations is for the board to
4 reopen, make a decision, then give the man a personal appear-
5 ance so that he can fully tell his side of the story, present
6 his version, try to correct the board. Then if the board still
7 keeps him in that classification, the case is reviewed by
8 the appeals board.

9 That is all we are talking about here, should there
10 have been an appeal. The consequences that the government
11 talks about are imaginary. In all of the other Circuits the
12 boards have been required to reopen whenever a prima facie case
13 has been presented. The draft hasn't stopped functioning. All
14 that it has meant is that people will get a fair chance.

15 The present petitioner is under a sentence of 5
16 years of imprisonment and a fine of \$10,000 following a
17 determination that is basically made for 10 minutes. And I
18 repeat, Your Honors, they never read the record.

19 It seems to me -- and maybe I have an advantage here
20 over the government's counsel, because I have tried the case
21 from the beginning -- that we are in Never, Never Land. The
22 government has attributed these highly sophisticated mental
23 processes to the board. But the board never read the file.
24 They never carefully went through the SSS Form 150.

25 It may well have been, on the basis of what they

1 heard at the interview, that they thought he was asking for
2 an occupational deferment. They couldn't have reached that
3 conclusion if they would have read his SSS Form 150. They
4 would have seen -- as Your Honors pointed out from the bench --
5 the correlation between his views.

6 Now we are talking about a young man, at this time
7 23 years old, who wasn't represented by counsel. Maybe if
8 lawyers were allowed to appear before draft boards, we could
9 clear some of these things up.

10 If the board members had these doubts, why didn't
11 a board member ask him, "Now, Mr. Mulloy, let's be clear.
12 What are you claiming? Classification as a conscientious
13 objector? Or do you want an occupational deferment?" Nobody
14 asked him that. Nobody asked him any questions at all.

15 He was entitled to assume that they read the record,
16 but they didn't. We are told that we are supposed to presume
17 that these proceedings are fair and regular. I would submit,
18 with all due deference, that you can't presume that on the
19 record that we have here, because the board members simply did
20 not read the file.

21 We are talking about the most difficult classification
22 here, that of conscientious objector. The board members
23 throughout assumed the sincerity of the petitioner; they assumed
24 that he was sincere in his beliefs.

25 Those beliefs are essentially religious beliefs

1 This is clear from the reading of the Form 150; it is clear
2 from the letter from the Catholic priest; it is clear from
3 the other evidence in the file.

4 I would submit that there is no evidence in the file
5 at all that is inconsistent with the claim of conscientious
6 objector status. So that what the issue comes down to, on
7 the procedural question, is when does a draft board have to
8 reopen.

9 We would submit that a board must reopen whenever
10 a pre-induction claim is made for a new classification. I
11 believe my time has subsided. Thank you.

12 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Sedler.
13 Thank you for your submission, and you, Mr. Connolly. The
14 case is submitted.

15 (Whereupon at 3:50 p.m. the argument in the above-
16 entitled matter was concluded.)

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