The Burger Court Opinion Writing Database

Ehlert v. United States

402 U.S. 99 (1971)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 26, 1971

Re: No. 120 - Ehlert v. United States

Dear Potter:

Please join me.

Regards,

WEB

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

March 24, 1971

Dear Potter,

Re: No. 120 - Ehlert v. U. S.

I voted to reverse but stated that the differences between reversal and affirmance seemed to me so small that I should not write a dissent should the majority vote to affirm. It seems to me you have worked out your affirmance so that the differences are even less than I expected. Therefore, I agree.

Sincerely,

H. L. B.

Mr. Justice Stewart

cc: Members of the Conference

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March 18, 1971

Dear Potter:

I will prepare a dissent in No. 120 - Ehlert v. U. S., and will have it around early next week.

W. O. D.

Mr. Justice Stewart

WDdm

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: Douglas, J.

Circulated: 3-23

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 120.—October Term, 1970

William Ward Ehlert, Petitioner, v. United States. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March —, 1971]

Mr. Justice Douglas, dissenting.

The rather stuffy judicial notion that an inductee's realization that he has a "conscientious" objection to war is not a circumstance over which he has "no control" within the meaning of the Regulation [1] is belied by experience. Saul of Tarsus would be a good witness: [2]

> "Now as he journeyed he approached Damascus, and suddenly a light from heaven flashed about him, and he fell to the ground and heard a voice saying to him, 'Saul, Saul, why do you persecute me?' And he said, 'Who are you, Lord?' and he said, 'I am Jesus, whom you are persecuting; but rise and enter the city, and you will be told what to do.'"

The stories of sudden conversion are legion in religious history; and there is no reason why the Selective Service boards should not recognize them, deal with them, and, if sincere, act on them even though they come after notice of induction has been received.

The Court holds that the proper remedy is in-service processing of these claims. That is to say, the claims that come so late, even though they come prior to induction, are to be processed by military rather than by civilian personnel.

[1] 32 CFR § 1625.2 (1970).

[2] 9 Acts 3–6.

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4, 5, 6

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 120.—October Term, 1970

Circulated:

Recirculated: 4/13/71

William Ward Ehlert, Petitioner, *v.* United States. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1971]

Mr. Justice Douglas, dissenting.

The rather stuffy judicial notion that an inductee's realization that he has a "conscientious" objection to war is not a circumstance over which he has "no control" within the meaning of the Regulation [1] is belied by experience. Saul of Tarsus would be a good witness: [2]

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[1] 32 CFR § 1625.2 (1970).

[2] 9 Acts 3–6.

March 19, 1971

Re: No. 120 - Ehlert v. United States

Dear Potter:

I am glad to join your excellent opinion in this case.

Sincerely,

J.M.H.

Mr. Justice Stewart

CC: The Conference

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 120.—October Term, 1970

William Ward Ehlert, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March —, 1971]

Mr. Justice Brennan, dissenting.

Selective Service Regulation 1626.2, 32 CFR § 1626.2 (1970), relieves a local board of its general obligation to consider a registrant's claim for deferment whenever the claim is received after the notice to report for induction has been mailed "unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." The Court of Appeals held that this regulation relieved the local board of the necessity of considering any claim that a registrant's conscientious objection to war had crystallized after receipt of an induction notice because, in the court's view, a registrant had control over such a change. 422 F. 2d 332 (CA9 1970). The Court here finds it unnecessary to come to grips with this holding and consider whether a conscientious objection claim could come within the terms of a regulation, since it finds the interpretation of the regulation controlled by "a reasonable, consistently applied administrative interpretation." *Ante,* at 6.

I cannot defer to an interpretation I cannot discover. All of the cases cited by the Court make clear that judicial interpretation of an ambiguous regulation is to be informed by reference to *administrative practice* in interpreting and applying a regulation, not by reference

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 120.—October Term, 1970

William Ward Ehlert, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March —, 1971]

Mr. Justice Brennan, dissenting.

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3-30-71

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 120.—October Term, 1970

William Ward Ehlert, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1971]

Mr. Justice Brennan, with whom Mr. Justice Marshall joins, dissenting.

Selective Service Regulation 1626.2, 32 CFR § 1626.2 (1970), relieves a local board of its general obligation to consider a registrant's claim for deferment whenever the claim is received after the notice to report for induction has been mailed "unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." The Court of Appeals held that this regulation relieved the local board of the necessity of considering any claim that a registrant's conscientious objection to war had crystallized after receipt of an induction notice because, in the court's view, registrants have control over such changes in their beliefs. 422 F. 2d 332 (CA9 1970). The Court here finds it unnecessary to come to grips with this holding and consider whether a conscientious objection claim comes within the terms of this regulation, since it finds the interpretation of the regulation controlled by "a reasonable, consistently applied administrative interpretation." *Ante,* at 6.

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Not Circulated

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 120.—October Term, 1970

William Ward Ehlert, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1971]

Mr. Justice Brennan, with whom Mr. Justice Marshall joins, dissenting.

Selective Service Regulation 1625.2, 32 CFR § 1625.2 (1970), relieves a local board of its general obligation to consider a registrant's claim for deferment whenever the claim is received after the notice to report for induction has been mailed "unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." The Court of Appeals held that this regulation relieved the local board of the necessity of considering any claim that a registrant's conscientious objection to war had crystallized after receipt of an induction notice because, in the court's view, registrants have control over such changes in their beliefs. 422 F. 2d 332 (CA9 1970). The Court here finds it unnecessary to come to grips with this holding and consider whether a conscientious objection claim comes within the terms of this regulation, since it finds the interpretation of the regulation controlled by "a reasonable, consistently applied administrative interpretation." *Ante,* at 6.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

No. 120.—October Term, 1970

Circulated: MAR 16 1971

Recirculated: _____

William Ward Ehlert, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March —, 1971]

Mr. Justice Stewart delivered the opinion of the Court.

The question in this case is whether a Selective Service local board must reopen the classification of a registrant who claims that his conscientious objection to war in any form crystallized between the mailing of his notice to report for induction and his scheduled induction date. The petitioner before us made no claim to conscientious objector status until after he received his induction notice. Before the induction date, he then wrote to his local board and asked to be allowed to present his claim. He represented that his views had matured only after the induction notice had made immediate the prospect of military service. After Selective Service proceedings not material here, the petitioner's local board notified him that it had declined to reopen his classification because the crystallization of his conscientious objection did not constitute the "change in the registrant's status resulting from circumstances over which the registrant had no control" required for post-induction notice reopening under a Selective Service regulation.[1] The petitioner

[1] 32 CFR § 1625.2 (1970) provides, in pertinent part:

"[T]he classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report

5/8

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: Stewart, J.

Circulated:

Recirculated: MAR 30 1971

SUPREME COURT OF THE UNITED STATES

No. 120.—OCTOBER TERM, 1970

William Ward Ehlert, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1971]

MR. JUSTICE STEWART delivered the opinion of the Court.

The question in this case is whether a Selective Service local board must reopen the classification of a registrant who claims that his conscientious objection to war in any form crystallized between the mailing of his notice to report for induction and his scheduled induction date. The petitioner before us made no claim to conscientious objector status until after he received his induction notice. Before the induction date, he then wrote to his local board and asked to be allowed to present his claim. He represented that his views had matured only after the induction notice had made immediate the prospect of military service. After Selective Service proceedings not material here, the petitioner's local board notified him that it had declined to reopen his classification because the crystallization of his conscientious objection did not constitute the "change in the registrant's status resulting from circumstances over which the registrant had no control" required for post-induction notice reopening under a Selective Service regulation.[1] The petitioner

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"[T]he classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 3, 1971

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 120, Ehlert v. United States

Twenty cases, held for No. 120, Ehlert v. United States, appear on pages 9 and 10 of the Conference List for Friday, May 14. Attached hereto is a memorandum containing a very brief summary of these cases and an indication of how I would dispose of them.

P.S.

No. 111, United States v. Holmes--Oral claim of conscientious objection presented for first time at induction center. Not clear whether respondent represented that his objection crystallized before or after his induction notice was mailed. CA 2 held that the draft board had to hear respondent's claim. Grant, vacate, and remand for reconsideration in light of Ehlert.

No. 130, Wenzel v. United States--Petitioner's local board, acting as if governed by the Gearey rule though located in the Ninth Circuit, found the facts presented did not warrant reopening. The SG supports this finding because petitioner did not indicate on his CO form when his beliefs had crystallized, though he later contended they did not take shape until after the induction notice. CA 9 affirmed petitioner's conviction on Ehlert. Deny.

No. 132, Millang v. United States--Substantially identical to No. 130, Wenzel, supra. Deny.

No. 141, Brossard v. United States--Substantially identical to Ehlert. CA 9 affirmed petitioner's conviction. Deny.

No. 142, Harris v. United States--Petitioner's conviction summarily affirmed on Ehlert by CA 9. Deny.

No. 145, Flesch v. United States--Petitioner's conviction summarily affirmed on Ehlert by CA 9. Deny.

No. 149, Dillon v. United States--Petitioner filed a timely application for I-A-O status, mistakenly not applying for I-O. He

received the I-A-O and was ordered to report for induction. He then requested a I-O and on its denial refused induction. CA 9 affirmed his conviction on alternative early crystallization and Ehlert grounds. Deny.

No. 151, Posner v. United States--Petitioner requested a CO form the day after he received his induction notice. The local board declined to reopen, saying his beliefs were "no different than before" and that he was not "a genuine Conscientious Objector," but granted a courtesy interview which lasted over two hours. CA 9 affirmed petitioner's conviction without relying on Ehlert, finding support for the local board's determination of pre-notice crystallization and rejecting petitioner's argument that the long courtesy interview constituted a de facto reopening from which he had a right to administrative appeal. I would deny.

No. 179, Pieters v. United States--Facts identical to those in No. 111, Holmes, supra. CA 9 affirmed petitioner's conviction. Deny.

No. 261, Robley v. United States--Petitioner did not present his CO claim until some time after he had refused induction. He also challenges his local board's failure to reopen the revocation of his III-A (dependency) classification, but all he did was mail his board a letter claiming to be the sole support of his widowed mother and a younger brother and that he was contributing to the support of his daughter. The letter was sent after an initial failure to report for induction, did not request III-A status,

and was not accompanied by substantiating documents. Petitioner also seeks to raise, for the first time, a Gutknecht delinquency issue. Deny.

No. 275, Swierenga v. United States--The earliest point at which petitioner has any argument he presented his CO claim is still after the mailing of his induction notice. CA 6 affirmed his conviction. Deny.

No. 284, Bender v. United States--The trial court found that petitioner's claim, presented after induction notice, had matured beforehand. CA 9 affirmed his conviction. Deny.

No. 356, Evans v. United States--Petitioner presented his CO claim after mailing of his induction notice. It appears never to have been determined whether he was a late crystallizer or not. The local board seems to have reopened petitioner's classification and denied his claim. Petitioner unsuccessfully exhausted his administrative appeals and then refused induction. CA 9 affirmed his conviction without relying on Ehlert. Petitioner challenges the power of the Selective Service System to have time cutoffs for presentation of CO claims and argues that he should have been allowed to have counsel and witnesses at his local board hearing. I would deny.

No. 542, McKinney v. United States--Petitioner presented a hazy, verbal CO claim when he first reported for induction. He says that his objection crystallized during the time he spent at the

induction center between his pre-induction physical and his being interviewed for security clearance. He was not then asked to accept induction. There followed several months of no word from the Army, then an order for induction which petitioner refused. Deny.

No. 611, Laird v. Capobianco--Respondent sought habeas after accepting induction following his draft board's refusal to reopen his classification and consider his claim of late-crystallizing conscientious objection. CA 2 reversed a district court's denial of the writ. Respondent's proper avenue is in-service channels. Grant, vacate, and remand for reconsideration in light of Ehlert.

No. 5082, Banks v. United States--Petitioner did not present his long-matured CO claim until after his induction notice was mailed. CA 5 affirmed his conviction on that ground. Deny.

No. 5145, Eason v. United States--Petitioner's local board refused to reopen on Ehlert grounds, though it is quite possible his objection had crystallized even before his induction notice. CA 4 affirmed his conviction. Deny.

No. 5159, Jones v. United States--Written claim of conscientious objection presented for first time at induction center. Not clear whether objection crystallized before or after induction notice. CA 4 affirmed petitioner's conviction. Deny.

No. 5269, Smith v. United States--Petitioner seems to concede

pre-notice crystallization and attacks the validity of any time-cutoff regulation. There is also a claim of technical invalidity of the induction order. CA 9 affirmed petitioner's conviction. Deny.

No. 5358, Walker v. United States--After several failures to report for induction, petitioner claimed conscientious objector status, explaining his failure to do so earlier by saying he had mistakenly thought he would have to go to jail in any event. His objection appears to have crystallized before the first induction notice, though there is no clear finding on the question. CA 1 affirmed his conviction. Deny.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 6, 1971

Re: No. 120 - Ehlert v. U.S.

Dear Potter:

Please join me.

Sincerely,

Byron

Mr. Justice Stewart

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 29, 1971

Re: No. 120 - Ehlert v. United States

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

March 22, 1971

Re: No. 128 - Eisler v. United States

Dear Potter:

Please join me.

Sincerely,

H.A.B.

Mr. Justice Stewart

cc: The Conference

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