Buffalo Law Review

Volume 3 | Number 1 Article 72

12-1-1953

Selective Service—Non-Disclosure of F.B.I. Report Did Not Invalidate Hearing Procedure

Edward Schmitt

SELECTIVE SERVICE—NON-DISCLOSURE OF F. B. I. REPORT DID NOT INVALIDATE HEARING PROCEDURE

Local draft board refused respondent's request for conscientious objector classification. Pursuant to § 6 (j) of the Selective Service Act of 1948 registrant's appeal was referred by his appeal board to the Department of Justice for an inquiry and hearing. This inquiry is conducted by the F. B. I. to determine the registrant's sincerity. A coded report then is sent to the hearing officer who notifies the registrant of his right to appear at the hearing and to request a résumé of the unfavorable evidence against him contained in the report. In the instant case, respondent claimed he was misled by the hearing officer's secretary who told him the report contained no unfavorable evidence. The appeal board accepted the Department of Justice's recommendation. Subsequently respondent was convicted for refusal to be inducted into the armed forces. *Held* (5-3): Nondisclosure of F. B. I. report did not invalidate procedure. *United States v. Nugent,* 346 U. S. 1 (1953).

The local draft board's determination of a registrant's classification is final. THE SELECTIVE SERVICE ACT OF 1948, 62 STAT. 620 (1948), 50 U. S. C. APP. § 460 (b) 3 (Supp. 1952). After exhausting his administrative remedies, however, a registrant has been allowed to invoke the defense of the invalidity of the procedure used in classifying him in a criminal evasion trial. *Estep v. United States,* 327 U. S. 549 (1943); see *Falbo v. United States,* 320 U. S. 549 (1943) (where the registrant had not exhausted his administrative remedies). A registrant may also raise the defense that his classification had no basis in fact. *Cox v. United States,* 332 U. S. 442 (1947). While the court will not weigh the evidence to decide whether it justifies the classification, it will examine the registrant's Selective Service file to determine whether the local board's classification had some basis in fact. *Imboden v. United States,* 194 F. 2d 508 (6th Cir. 1952).

Respondent in the instant case claimed he was denied the right to see the complete F. B. I. report. See 62 STAT. 609, 50 U. S. C. APP. § 456 (j) (Supp. 1947), as amended, 65 STAT. 83 (1951), 50 U. S. C. APP. § 456 (j) (Supp. 1952). The footnotes of the *Nugent* case conclude that no right was denied as no adverse matter was contained in the F. B. I. report.

Even at a trial the power of the Department of Justice to withhold documents has been upheld. *United States* ex. rel. *Touhy v. Ragen,* 340 U. S. 462 (1950). But when the government is involved in a suit the subject matter of which relates to secret

testimony, it cannot invoke this privilege. *United States v. Krulewitch,* 145 F. 2d 76 (2d Cir. 1944). While the government must supply evidentiary matter subpoenaed, it is not bound to disclose the identity of volunteered or solicited informants. *Bowman Dairy Co. v. United States,* 341 U. S. 214 (1951).

Secret government reports have been used where an employee was denied the privilege of continuing in government employment, *Bailey v. Richardson,* 341 U. S. 214 (1951); where an alien war bride was denied privilege of entering country, *United States* ex rel. *Knauff v. Shaughnessy,* 338 U. S. 537 (1949); where importer was not allowed to see his competitor's cost statistics, *Norwegian Nitrogen Products Co. v. United States,* 288 U. S. 294 (1933); where widows of civilian Air Force observers killed in crash sued under Tort Claims Act, *United States v. Reynolds,* 345 U. S. 1 (1953).

It has been held that the non-disclosure of an F. B. I. report containing names and addresses of informants is not a valid defense in a criminal evasion trial. *Imboden v. United States, supra.* Another court, however, has reasoned that such non-disclosure creates "a system in which selections might be made in uninformed reliance (by the appeal board) upon the recommendations of an executive officer, bottomed on secret police reports." *United States v. Geyer,* 108 F. Supp. 70, 71-72 (D. Conn. 1952): see *United States v. Boudizen,* 108 F. Supp. 395 (W. D. Okla. 1952) (held the hearing is not a judicial trial with the attendant right to cross-examine).

The majority in the instant case said, "The Department of Justice satisfies its duties under § 6 (j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair résumé of any adverse evidence in the investigator's report." (p. 6).

It seems clear that in the *Nugent* case the F. B. I. report contained no adverse matter affecting the registrant. What the Supreme Court will decide if such unfavorable evidence is in the secret report remains a problem. Indications are that the registrant is entitled to a fair résumé. But to determine the fairness of this résumé a disclosure of the F. B. I. report seems eventually necessary. *United States v. Evans,* U. S. District Ct. of Conn., August 3, 1953.

The use of secret government reports in the *Bailey* and *Norwegian Nitrogen* cases may be justified on the grounds that non-

disclosure was necessary to prevent the drying up of sources of information. No such limitation is applicable to individual conscientious objectors. In the last analysis secret government reports may not only deny them the privilege of staying out of the armed forces, but the right to stay out of jail.

Edward Schmitt

TORT—SUPREME COURT EXTENDS IMMUNITY FOR DISCRETIONARY FUNCTION TO GOVERNMENT MANUFACTURING

Plaintiffs instituted proceedings under the Federal Tort Claims Act to recover damages resulting from the alleged negligently caused explosion of fertilizer which was part of the Government's foreign aid program. *Held* (4-3): The acts of the government in formulating and carrying out the plan for the manufacture of such fertilizer were acts of discretion not resulting in liability. *Dalehite v. United States,* 346 U. S. 15 (1953).

The Federal Tort Claims Act, 28 U. S. C. §§ 1346, 2671-2678, 2680 (1946) authorizes tort suits against the Government under circumstances where a private person would be liable. It allows an exception in the case of discretionary functions whether or not the discretion be abused. 28 U. S. C. § 2680 (a).

From its legislative history the purpose of the exception appears to be twofold: (1.) to allow the government regulatory agencies to remain free from the claims of individuals effected by them, and (2.) to preclude the possibility of testing by tort action the validity of authorized government projects where no negligence is involved. *Hearings before Committee on Judiciary on H. R. 5373 and H. R. 6463,* 77th Cong., 2d Sess. 33 (1942).

In the absence of any concise definition of discretionary function in either the statute itself or the legislative history, resort must be made to the cases in which the defense was raised.

In cases involving government projects, the following acts have been held within the discretionary exception even when negligence was alleged: failure to mark a high tension wire, *Thompson v. U. S.,* 111 F. Supp. 719 (D. Md. 1953); spraying trees on government property, *Harris v. U. S.,* 106 F. Supp. 298 (E. D. Okla. 1952); planting a tree at experimental station, *Toledo v. U. S.,* 95 F. Supp. 838 (D. P. R. 1951); construction of dam, *North v. U. S.,* 94 F. Supp. 824 (D. Utah 1950); protection of migratory birds, *Sickman v. U. S.,* 184 F. 2d 616 (7th Cir. 1950);