

## THE SELECTIVE SERVICE SYSTEM: AN ADMINISTRATIVE OBSTACLE COURSE†

Through his inevitable contacts with the Selective Service System a young man of draft age will learn whether he must spend a portion of his life in the armed forces. For the vast majority of those registered with the Selective Service System, their experiences with this unique administrative agency will be no more troublesome than any routine encounter with a large bureaucratic organization. This majority falls into two general classes. In one class are those who have no valid grounds for seeking a deferment or exemption from military service,<sup>1</sup> who meet the minimum

---

† This Comment is the product of both normal legal research and a limited field study of the operations of the Selective Service System. The field study was confined to interviews with registrants and various officials of the Selective Service System in California. The author's efforts to examine Selective Service records and files and to observe the various administrative proceedings discussed in the Comment were rebuffed by provision of the regulations and the reluctance of draft officials to open their files and proceedings to outsiders. Among those interviewed were fifteen registrants, four local draft board chairmen, two appeal board chairmen, three local board clerks, one state administrator and one regional administrator. Summaries of these interviews are on file in the offices of the *California Law Review*. Because many of those interviewed requested that they not be identified, each interview summary has been given a code number and will be cited by code number in various footnotes. In the code numbers, AB means appeal board chairman, BC means local board chairman and R means registrant.

The field study was not designed to draw a representative sample for statistical analysis; there may be greater variation in Selective Service policies and practices than the interviews revealed. However, the field study provided a context for comparing the legislative and judicial assumptions about the Selective Service System with the actual policies and practices of that agency. Because considerable discretion is vested in local draft boards, policies and procedures vary from board to board, and generalizations about board operations are difficult to draw. The results of the field study simply illustrate that the current draft law has produced questionable policies which result in unfair and inequitable treatment of registrants.

The author is grateful to Sheldon L. Messinger and other staff members of the Center for the Study of Law and Society, University of California, Berkeley, for their valuable cooperation and assistance in the preparation of this Comment. The author is also grateful for the financial assistance provided by a grant from the Law Research Scholarship Fund of the School of Law (Boalt Hall), University of California, Berkeley.

<sup>1</sup> The existing classification system starts with the assumption that "each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established." 32 C.F.R. § 1622.1(c) (1962). As each registrant's availability for military service or eligibility for exemption or deferment is determined, he is assigned to a classification which defines his status within the Selective Service System. Broad classification rules and principles are contained in 32 C.F.R. pt. 1622 (1962, Supp. 1965). There are four general classes of deferments and exemptions. Those registrants whose civilian activities contribute to the national health, safety, or interest and who are deferred so they can continue them, are placed in Class II. 32 C.F.R. § 1622.20 (1962). Deferments in this class include those for persons engaged in necessary employment (II-A), agricultural work (H-C) and studies leading to college degrees (II-S). Registrants who have a wife and children dependent upon them for support, or whose induction would result in extreme hardship to those dependent upon them for support are placed in Class III. 32 C.F.R. § 1622.30

mental and physical standards established by the armed forces, and who are inducted<sup>2</sup> with reasonable efficiency and dispatch when their time comes. In the other class are registrants who assert one of several grounds for deferment or exemption,<sup>3</sup> who have their claims processed as a matter of routine under established procedures, and who find their deferments or exemptions granted without question or dispute by their local boards. This Comment is concerned with a third class of registrants—those who believe they have valid grounds for deferment or exemption from military service, who find their claims disputed and denied by their local boards, and who must then use the various appellate procedures within the Selective Service System, and occasionally in the courts, to clarify their rights. For these registrants the Selective Service System will often appear to be an administrative obstacle course, covered with more legal pitfalls and frustrations than anything they have ever encountered in the vastness of American bureaucracy.

The basic administrative structure of the Selective Service System was built hastily in an atmosphere of world crisis in 1940.<sup>4</sup> That same structure, with some modifications, is preserved in the Selective Service System of 1966.<sup>5</sup> It is not surprising that an administrative system which was essentially a creature of necessity, which has existed without basic change for twenty-six years, and which so intimately affects the lives of

---

(1962). Class IV contains various classes of exemptions. Persons eligible for such deferments include registrants who have completed military service (IV-A), certain government officials (IV-B), aliens (IV-C), ministers (IV-D), and registrants found to be physically, mentally or morally unfit for military service (IV-F). 32 C.F.R. § 1622.40 (1962). Class V is reserved for those registrants who are beyond the age of liability for military service. A registrant is eligible for a V-A classification when he reaches the age of twenty-six unless he has received a deferment from military service at any time. If so, he will not be eligible for a V-A classification until the age of thirty-five. See 32 C.F.R. § 1622.50 (1962).

<sup>2</sup> Registrants in this general class will frequently enlist in the armed forces rather than wait for induction by the Selective Service System. A major purpose of the peacetime draft is to maintain this stimulus to enlistments for those who will eventually be snared by the conscription net.

<sup>3</sup> This Comment includes in the categories of deferment and exemption the two classifications reserved for conscientious objectors. A different kind of involuntary service is required of these registrants. Conscientious objectors who are classified I-A-O are subject to non-combatant military service. 32 C.F.R. § 1622.11 (1962). Conscientious objectors who oppose both combatant and noncombatant military service are classified I-O. 32 C.F.R. § 1622.14 (1962). Those in the latter category retain their civilian status but must spend two years performing civilian work which contributes to the maintenance of "the national health, safety, or interest." 32 C.F.R. § 1622.16(a) (1962).

<sup>4</sup> See *Falbo v. United States*, 320 U.S. 549, 551-52 (1944).

<sup>5</sup> The 1940 draft law was permitted to expire in 1947. Within a year, however, the armed forces found that enlistments were not adequate to maintain military strength. Congress enacted the current draft law in 1948. 62 Stat. 604 (1948), as amended, 50 U.S.C. App. §§ 451-73 (1964). The 1948 act preserved the basic administrative structure created in 1940. Compare § 10 of the 1940 act (54 Stat. 893) with § 10 of the 1948 act (62 Stat. 618).

so many Americans should come under the spotlight of criticism. But it has taken the rapid manpower buildup for the Vietnam war to stimulate a serious and intensive public debate over the draft system.<sup>6</sup>

The Selective Service System has been given a large share of the responsibility for putting the men needed for the Vietnam war into uniform.<sup>7</sup> This responsibility has greatly increased the work of local boards in reclassifying registrants and processing them for induction.<sup>8</sup> Adding to the work load is the fact that, for the first time in more than a decade, the consequences of being drafted mean more than simply wasting two years of one's life on a dreary army post. It means the possibility of becoming part of a shooting war and the growing casualty lists from that war. As a result, a growing number of registrants have been resorting to the administrative processes within the Selective Service System to seek deferment or exemption from military service.<sup>9</sup> As the work load has increased, many structural weaknesses of the Selective Service System have been accentuated and exposed to public scrutiny.

It would be a mistake, however, to view the current debate over the inequities of the Selective Service System as simply a product of the Vietnam war. Many of the faults of the draft which are being discussed in that debate are inherent in the Selective Service System as it is now structured, and those faults will remain after the Vietnam war is history unless the system is restructured. One of the basic faults of the system—and the one with which this Comment is primarily concerned—is the lack of adequate procedural safeguards for registrants who seek recourse to the administrative procedures within the system to clarify their rights and obligations under the draft law. Two separate incidents illustrate the scope of this problem.

On October 15, 1965, some forty University of Michigan students

---

<sup>6</sup> That debate has led to a congressional investigation of the conscription system, N.Y. Times, June 23, 1966, p. 1, col. 7, and the appointment by the President of a 20-member advisory commission on the draft law, N.Y. Times, July 3, 1966, p. 1, col. 8. "The burning of draft cards, the organized campaigns to encourage draft dodging and other recent demonstrations against military conscription have been directed primarily against the Government's policies in Vietnam rather than the draft itself. To recognize that, however, is not to ignore the almost universal dissatisfaction with the Universal Military Training and Service Act." Raymond, *The Draft Is Unfair*, N.Y. Times, Jan. 2, 1966, § 6 (Magazine), p. 5.

<sup>7</sup> The size of this responsibility is illustrated by the dramatic increase in the number of men drafted as a result of the rapid military mobilization for Vietnam. The manpower buildup began in earnest in September 1965. From July 1964 to June 1965, the Selective Service System called 101,300 registrants to military service. From July 1965 to June 1966, the number of registrants inducted more than tripled to 336,554. These figures were supplied by Colonel Walter H. Henderson, Deputy Director of the Selective Service System in California, during an interview on July 14, 1966 [hereinafter cited as Henderson Interview].

<sup>8</sup> See Hershey, *Concepts of Responsibility*, Selective Service, March, 1966, p. 1.

<sup>9</sup> *Ibid.*

conducted a sit-in at a local draft board in Ann Arbor, Michigan, to protest the war in Vietnam.<sup>10</sup> The demonstrators were arrested and charged with violating a local trespass ordinance. Most were convicted and either fined or sentenced to jail.<sup>11</sup> Eleven demonstrators subsequently found themselves stripped of their student deferments and reclassified I-A by their local draft boards.<sup>12</sup> Although this action by the local boards received the emphatic endorsement of Lieutenant General Lewis B. Hershey, National Director of the Selective Service System,<sup>13</sup> it raised serious questions of constitutional law.<sup>14</sup> The reclassifications appeared to be a blatant attempt to use the conscription system to punish and stifle dissent.

A month later a registrant who had been classified I-A made a personal appearance before his local board to request classification as a conscientious objector.<sup>15</sup> The registrant, and his parents who accompanied him, were shocked and bewildered to find themselves the targets of verbal abuse from the board members. The registrant found his patriotism challenged because of his pacifist views and because, consistent with those views, he had participated in anti-war demonstrations. The board members also suggested that the registrant's father had evaded military service and had become a war profiteer because he had been classified IV-F during World War II. The chaotic hearing ended with a denial of the registrant's claim for conscientious objector status.<sup>16</sup>

It is distressing to learn that the draft law is perhaps being used to

---

<sup>10</sup> Comment, 114 U. PA. L. REV. 1014, 1043 (1966).

<sup>11</sup> *Ibid.*

<sup>12</sup> Letter from Ernest Mazey, Executive Director of the American Civil Liberties Union of Michigan, to Charles H. Wilson, Jr., June 10, 1966; on file, *California Law Review*. Eight of those registrants have unsuccessfully challenged their reclassification within the Selective Service System and face induction into the armed forces. The New Republic, Oct. 8, 1966, p. 8.

<sup>13</sup> N.Y. Times, Dec. 22, 1965, p. 3, col. 6.

<sup>14</sup> The constitutional issues are explored in Comment, 114 U. PA. L. REV. 1014, 1047-48 (1966). Any effort to use the draft law to stifle dissent would seem to be a clear infringement of first amendment guarantees of free speech and expression. See letter from Fred M. Vinson, Jr., Assistant United States Attorney General, to Charles H. Wilson, Jr., May 24, 1966; on file, *California Law Review*.

<sup>15</sup> Interview No. R-1.

<sup>16</sup> As this Comment was being written, the registrant's appeal within the Selective Service System of his local board's decision was still pending. An examination of his background reveals that his claim for conscientious objector status was not clear-cut under the established criteria for such classifications. See *United States v. Seeger*, 380 U.S. 163 (1965); *Witmer v. United States*, 348 U.S. 375 (1955); *Fleming v. United States*, 344 F.2d 912 (10th Cir. 1965); *United States v. Corliss*, 280 F.2d 808 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960). His local board seemed less interested in exploring his eligibility for conscientious objector status, however, than in vilifying the registrant and his parents for their pacifist views.

stifle dissent and that classifications are the product of the prejudices of local board members. But it is even more distressing to conclude after a thorough study of the Selective Service System that there are no adequate safeguards within that system to ensure that classifications based on such questionable grounds will not be allowed to stand. This Comment will examine the reasons why the administrative structure of the Selective Service System deprives registrants of basic procedural fairness, and will suggest methods of adding adequate procedural safeguards to the system.

## I

### STATUTORY AND JUDICIAL ASSUMPTIONS ABOUT THE SELECTIVE SERVICE SYSTEM

#### *A. The Administrative Structure*<sup>17</sup>

It will be helpful to begin by tracing the administrative steps taken by a registrant within the system. When a youth reaches the age of eighteen, he is required by statute to register<sup>18</sup> with a local draft board.<sup>19</sup> He is given a Selective Service number<sup>20</sup> and a registration certificate,<sup>21</sup> and his name is entered in the board's Classification Record.<sup>22</sup> This is a roster of registrants maintained in chronological order.<sup>23</sup> As a general rule, a registrant will be ordered to report for induction according to the order in which his name appears in the Classification Record of his local draft board.<sup>24</sup>

---

<sup>17</sup> The present Selective Service System was created by the Selective Service Act of 1948. 62 Stat. 604, as amended, 50 U.S.C. APP. §§ 451-73 (1964). The administrative structure of that agency, however, is practically identical with that created by the Act of Sept. 16, 1940, 54 Stat. 885, for World War II. Some of the court decisions cited in this Comment interpret provisions of the 1940 act. Because the statutory provisions interpreted by the early cases discussed in this Comment were re-enacted in the 1948 law, those decisions remain valid authority.

<sup>18</sup> 62 Stat. 605 (1948), as amended, 50 U.S.C. APP. § 453 (1964). The duty is imposed on "every male citizen of the United States, and every other male person now or hereafter in the United States." *Ibid.* For a list of persons excused from the registration requirement, see 32 C.F.R. § 1611.1 (1962).

<sup>19</sup> Registration can be at any local board and need not be at the local board which has jurisdiction over the registrant's legal residence. 32 C.F.R. § 1613.1 (1962).

<sup>20</sup> The registration number has four elements, designating the registrant's state, his local board, his year of birth and his position on the local board's classification record. 32 C.F.R. § 1621.2(a) (1962).

<sup>21</sup> The registrant is required to have the registration certificate in his possession at all times. 32 C.F.R. § 1617.1 (1962).

<sup>22</sup> 32 C.F.R. § 1621.6 (1962).

<sup>23</sup> *Ibid.*

<sup>24</sup> See 32 C.F.R. § 1631.7(a) (1962). This regulation also lists the exceptions to the "oldest first" order of induction. The most notable exception involves those registrants who are delinquent under the statute. Although a registrant must register at the age of eighteen, he is not liable for military service until six months later. 62 Stat. 605 (1948), as amended, 50 U.S.C. APP. § 454(a) (1964).

The local board initiates the classification procedure by sending the new registrant a questionnaire which, when completed, provides the board with the basic information necessary for an initial classification.<sup>25</sup> The board notifies the registrant of his classification<sup>26</sup> on a form which also informs him of the steps he can take if he feels he has been improperly classified.<sup>27</sup> These steps include requesting a personal appearance before his local board<sup>28</sup> or filing notice of appeal<sup>29</sup> within ten days.<sup>30</sup> Typically, the new registrant will be classified I-A and, because he will have no valid basis for claiming a deferment or exemption, he will not protest that classification.<sup>31</sup> But the initial I-A classification does not necessarily mean the registrant will ultimately be ordered to report for induction. There is normally a lapse of several years between the time of the initial classification and the time that a local board begins to draft registrants of his age group.<sup>32</sup> During this interval, the registrant's situation may change, giving him grounds for claiming a deferment or exemption. The Selective Service regulations recognize this possibility by providing that no classification is permanent<sup>33</sup> and by authorizing the reopening and reconsideration of a registrant's classification when his status changes.<sup>34</sup>

The regulations permit a reopening of a classification either at the registrant's request or on the initiative of the local board.<sup>35</sup> As a practical matter, the registrant who is classified I-A and who feels that changed conditions entitle him to a lower classification<sup>36</sup> must take the initiative

---

<sup>25</sup> 32 C.F.R. §§ 1621.9, 1623.1 (1962).

<sup>26</sup> 32 C.F.R. § 1623.4 (1962).

<sup>27</sup> SSS Form 110.

<sup>28</sup> 32 C.F.R. pt. 1624 (1962) outlines the personal appearance procedure.

<sup>29</sup> 32 C.F.R. pts. 1626-27 (1962) contain the appeal procedures.

<sup>30</sup> The ten-day period starts with the mailing of the classification notice by the local board. 32 C.F.R. §§ 1624.1(a), 1626.2(c)(1) (1962).

<sup>31</sup> An exception to this generalization is the registrant who can establish his conscientious objection to war to the satisfaction of his local board. Otherwise, the eighteen-year-old registrant does not have the necessary qualifications for the deferments and exemptions described in note 1 *supra*.

<sup>32</sup> The time between registration and induction is becoming increasingly shorter because of the manpower demands of the Vietnam war. Before the recent acceleration of draft calls, local boards met their draft quotas with registrants from the twenty-two- and twenty-three-year-old age groups. The rapid mobilization for Vietnam has forced some local boards to start calling nineteen-year-old registrants. See, e.g., Interview Nos. BC-2 and BC-4.

<sup>33</sup> 32 C.F.R. § 1625.1(a) (1962).

<sup>34</sup> 32 C.F.R. § 1625.2 (1962).

<sup>35</sup> *Ibid.*

<sup>36</sup> The various classifications are ranked according to priority in 32 C.F.R. § 1623.2 (1962). The lower a registrant's ranking on the priority list, the less susceptible he is to being drafted.

in seeking a reopening.<sup>37</sup> For example, the registrant may have entered college since his initial classification.<sup>38</sup> Or he may have married and had children.<sup>39</sup> Or he may have started working in a position which is considered "necessary to the maintenance of the national health, safety, or interest."<sup>40</sup> In each instance the registrant will have a valid basis for requesting a reopening of his classification. Whenever a classification is reopened, the local board is viewed as classifying the registrant anew, even if it denies the deferment request and retains the registrant's I-A classification.<sup>41</sup> Therefore, if the registrant's deferment request is denied, he has the same rights to a personal appearance and to appeal as he had when he was initially classified.<sup>42</sup> When the registrant has actively sought a deferment or exemption and his request has been denied, he is quite likely to use those procedures to protest the denial.

The registrant is entitled to both a personal appearance and an appeal, but the right of appeal is not preconditioned on the making of a personal appearance.<sup>43</sup> At the personal appearance, the registrant may present to local board members, either orally or in writing, the reasons he thinks he is entitled to a deferment or exemption.<sup>44</sup> The board can permit other persons to appear on behalf of a registrant, but under no conditions is the registrant entitled to be "represented" by an attorney before the local board.<sup>45</sup> If the local board persists in denying the deferment or exemption following the personal appearance, the registrant can then file notice of appeal with the local board.<sup>46</sup> An appeal is a matter of right; the local board has no power to deny it.<sup>47</sup> When notice of appeal is filed, the local board assembles the registrant's file and forwards it to the proper appeal board.<sup>48</sup> The appeal board considers only the information in the

---

<sup>37</sup> The practical reason is that a local board has thousands of registrants in its files and the board members are unable to keep abreast of the activities of all registrants.

<sup>38</sup> He could then seek a student deferment under § 1622.25.1 of the regulations. 31 Fed. Reg. 4893 (1966).

<sup>39</sup> He could then seek a dependency deferment under 32 C.F.R. § 1622.30 (1962).

<sup>40</sup> He could then seek a necessary employment deferment under 32 C.F.R. § 1622.22 (1962).

<sup>41</sup> 32 C.F.R. § 1625.11 (1962).

<sup>42</sup> 32 C.F.R. § 1625.13 (1962).

<sup>43</sup> SSS Form 110. If a local board deprives a registrant of a personal appearance after classifying him, however, the board's action will be grounds for invalidating the classification. *Davis v. United States*, 199 F.2d 689 (6th Cir. 1952).

<sup>44</sup> 32 C.F.R. § 1624.2(b) (1962).

<sup>45</sup> 32 C.F.R. § 1624.1(b) (1962).

<sup>46</sup> 32 C.F.R. § 1626.2 (1962). Section 1626.1 lists other persons who are entitled to appeal on behalf of a registrant.

<sup>47</sup> See 32 C.F.R. § 1626.13 (1962); 1 *SELECTIVE SERVICE SYSTEM, THE CLASSIFICATION PROCESS* 157-58 (Special Monograph No. 5, 1950).

<sup>48</sup> 32 C.F.R. § 1626.13 (1962). The regulations require that there be one appeal board

registrant's file. The registrant has no right to appear before the appeal board.<sup>49</sup> The results of the appeal are forwarded to the registrant by his local board.<sup>50</sup> If the appeal board unanimously rejects a registrant's deferment or exemption request, the registrant can obtain no further relief within the Selective Service System<sup>51</sup> unless the state director believes that a further appeal to the President "is in the national interest or necessary to avoid an injustice."<sup>52</sup> However, if one or more members of the appeal board dissent from the denial of the deferment or exemption, the registrant is entitled to appeal to the President.<sup>53</sup> If that further appeal fails, the registrant will then be subject to induction unless he fails to meet established physical and mental standards,<sup>54</sup> or unless new conditions arise before he receives his order to report for induction which would entitle him to a reopening of his classification.<sup>55</sup>

These are the administrative procedures available to all registrants within the Selective Service System. This Comment will examine these procedures for fairness.

## *B. Statutory Assumptions*

### *1. A System of Selection*

Any critical analysis of the Selective Service System must be accompanied by a full awareness of the assumptions which underlie the current draft law. Perhaps the most basic of these assumptions is that, while many are potentially eligible to serve, few will be called to actual military service. In establishing the existing system of conscription in 1948, Congress made the deliberate policy choice of creating a system of

---

for each federal judicial district in a state. 32 C.F.R. § 1604.21 (1962). Normally, the registrant's appeal will be submitted to the appeal board having jurisdiction over his local board. If the registrant seeks an occupational deferment, however, and he is employed outside the jurisdiction of that appeal board, he may request that the appeal be submitted to the appeal board with jurisdiction over his area of employment. 32 C.F.R. § 1626.11(b) (1962).

<sup>49</sup> 1 SELECTIVE SERVICE SYSTEM, THE CLASSIFICATION PROCESS 160-61 (Special Monograph No. 5, 1950). The regulations, however, establish a special review procedure for conscientious objector claims. A registrant seeking conscientious objector status is given a hearing before a Department of Justice hearing officer after the Federal Bureau of Investigation has checked his background. 32 C.F.R. § 1626.25 (1962).

<sup>50</sup> 32 C.F.R. § 1626.31 (1962).

<sup>51</sup> See 32 C.F.R. § 1627.3 (1962).

<sup>52</sup> 32 C.F.R. § 1627.1(a) (1962).

<sup>53</sup> 32 C.F.R. § 1627.3 (1962). The President, however, never sees such appeals. This function has been delegated to the National Selective Service Appeal Board which consists of three members appointed by the President. 32 C.F.R. § 1604.6 (1962).

<sup>54</sup> The registrant would then be classified IV-F and would be exempt from military service.

<sup>55</sup> The regulations prohibit the reopening of a classification after the registrant has received his order to report for induction unless there has been a change in his status from circumstances over which he had no control. 32 C.F.R. § 1625.2 (1962).



*selection.* The congressional statement of policy in the Selective Service Act of 1948 declares that "in a free society the obligations and privileges of serving in the armed forces and reserve components thereof should be shared generally, in accordance with a system of selection . . . ."<sup>56</sup> This basic policy still underlies the draft law, despite a 1951 amendment<sup>57</sup> changing the title of the act to the "Universal Military Training and Service Act." The existing conscription system is universal only in the sense that every American male is potentially subject to the draft.<sup>58</sup>

Any system of conscription based on principles of selectivity rather than universality will inevitably produce inequities.<sup>59</sup> The Selective Service System, however, cannot properly be criticized because it drafts some and not others.<sup>60</sup> It exists to implement that policy. Until the congressional policy of selectivity changes,<sup>61</sup> criticism of the Selective Service System should be directed at the methods by which selections are made. It is here that reform is most needed.

Congress has established the criteria by which the existing methods of selection should be judged. The draft law declares that the system of selection should be one "which is fair and just, and which is consistent with the maintenance of an effective national economy."<sup>62</sup> The act further provides that "the selection of persons for training and service . . . shall be made in an impartial manner . . . ."<sup>63</sup> Discrimination based on race or color is specifically barred by the statute.<sup>64</sup> Within these broad limits, the President is given discretion to implement these criteria through rules and regulations prescribing the specific methods of selection.<sup>65</sup> Thus,

---

<sup>56</sup> 62 Stat. 604 (1948), as amended, 50 U.S.C. APP. § 451(c) (1964).

<sup>57</sup> 65 Stat. 75 (1951).

<sup>58</sup> Of 30,700,000 men who have registered with the Selective Service System since 1948, only 3,625,000 have been drafted. *SELECTIVE SERVICE SYSTEM, SELECTIVE SERVICE CHRONOLOGY* 40 (rev. ed. 1965).

<sup>59</sup> A favorite game among draft critics is to find two registrants with similar backgrounds who receive different treatment from their draft boards. See, e.g., Johnson, *Who Should Serve?*, *The Atlantic*, Feb. 1966, p. 63. But such differences in treatment prove nothing without an examination of the factors which cause the inequities.

<sup>60</sup> When President Lyndon B. Johnson referred to the "crazy quilt" results produced by the existing conscription system, he was careful to direct his criticism at the draft law itself and not the administration of that law. *Wall Street Journal*, Aug. 19, 1966, p. 1, col. 3.

<sup>61</sup> The current draft law is scheduled to expire in 1967, and Congress will then have the opportunity to take a fresh look at the conscription system. The fact that both Congress and the Executive Branch have already begun inquiries into the present system suggests that some changes will be made in the draft law. See note 6 *supra*. However, it seems highly unlikely that Congress will completely abandon the concept of selectivity which has been a key feature of the draft law for 26 years.

<sup>62</sup> 62 Stat. 605 (1948), as amended, 50 U.S.C. APP. § 451(c) (1964).

<sup>63</sup> 62 Stat. 608 (1948), as amended, 50 U.S.C. APP. § 455(a) (1964).

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*; 62 Stat. 618 (1948), as amended, 50 U.S.C. APP. § 460(b)(1) (1964).

the general statutory conscription scheme established by Congress and the rules and regulations adopted by the Selective Service System to implement that scheme should be evaluated on the basis of the statutory criteria of fairness, justice and impartiality. Only if these standards are ignored can the system be faulted for selecting one registrant for military service while leaving another's civilian status undisturbed.

## 2. Importance of the Local Board

In an age in which the most common complaint made against the federal bureaucracy is its centralization of authority and responsibility, the Selective Service System stands as something of an anomaly. Authority within the Selective Service System is almost totally decentralized.<sup>66</sup> Each local draft board<sup>67</sup> is viewed as possessing complete autonomy, particularly in processing claims for deferment and exemption.<sup>68</sup> The precise degree of local board autonomy is debatable,<sup>69</sup> but it is clear that local boards have considerable discretion in classification matters. Such discretion is consistent with the importance ascribed by Congress to the local boards in the total conscription scheme. Repeated reference to the key role to be played by local boards can be found in the debates that preceded the enactment of the 1940 statute.<sup>70</sup> The local board retained its central position in the 1948 act.<sup>71</sup> Even today, the local board is something of a sacred cow among congressmen. One Republican critic of the draft paused in the midst of an attack on the inequities of the selection system to note that "no thoughtful person would wish to replace local draft boards with a single office in Washington."<sup>72</sup>

The major virtue attributed to the local boards is that they permit representatives of a particular community to decide which members of that community will be required to submit to military service.<sup>73</sup> General Hershey once explained this principle in quaint language. "[T]he choice [of who is to serve] is being made by the neighbors of the man," Hershey told a Senate committee in 1940, "and we think that the thing

---

<sup>66</sup> See, e.g., 86 CONG. REC. 11650-51 (1940) (remarks of Rep. Celler).

<sup>67</sup> At the last official count, there were 4,061 local draft boards. 1965 SELECTIVE SERV. ANN. REP. app. 4.

<sup>68</sup> Henderson Interview; 1 SELECTIVE SERVICE SYSTEM, ORGANIZATION AND ADMINISTRATION OF THE SYSTEM 188 (Special Monograph No. 3, 1951).

<sup>69</sup> The nature of local board autonomy and its consequences for registrants is discussed at length in the text accompanying notes 249-84 *infra*.

<sup>70</sup> See, e.g., 86 CONG. REC. 11673 (1940) (remarks of Rep. Mott); *id.* at 11465 (remarks of Rep. Austin).

<sup>71</sup> See note 5 *supra*.

<sup>72</sup> The remark was made by Rep. William T. Cahill of New Jersey. 24 CONGRESSIONAL QUARTERLY WEEKLY REPORT 1344 (1966).

<sup>73</sup> See, e.g., 86 CONG. REC. 11465 (1940) (remarks of Rep. Austin).

must be kept simple enough so that the average citizen can see how it works . . . .<sup>74</sup> In addition to assuring a registrant that he will be selected by his neighbors, the system of local boards was viewed as the best method of keeping the conscription system responsive and accountable to the people of a community.

The members of the boards thus assume a great and important responsibility which they carry out under the continuous observation of all other members of the local community. This in itself is the best assurance both of efficiency and impartiality and justice. It is about as far removed from bureaucracy and dictatorship as anything that can be imagined.<sup>75</sup>

Consistent with these goals, the statute and the regulations require that local board members be residents of the county in which the board is located,<sup>76</sup> and the emphasis in board proceedings is on informality.<sup>77</sup> The typical local board is composed of from three to five members<sup>78</sup> who are uncompensated.<sup>79</sup> A key restriction on board members is that they may not be members of the armed services or any reserve component,<sup>80</sup> thus emphasizing civilian control of the selection process.<sup>81</sup> The day-to-day matters of administration are left to the board's paid civilian employees. The board meets an average of once a month<sup>82</sup> to deal with classifications and personal appearances requested by registrants. Procedural formal-

---

<sup>74</sup> *Hearings Before the Senate Military Affairs Committee on S. 4164*, 76th Cong., 3d Sess. 384 (1940).

<sup>75</sup> 86 CONG. REC. 11678 (1940) (remarks of Rep. Mott).

<sup>76</sup> 62 Stat. 619 (1948), as amended, 50 U.S.C. APP. § 460(b)(3) (1964).

<sup>77</sup> See, e.g., *United States v. Pitt*, 144 F.2d 169, 172 (3d Cir. 1944).

<sup>78</sup> The statute requires each board to have a minimum of three members. 62 Stat. 619 (1948), as amended, 50 U.S.C. APP. § 460(b)(3) (1964). The precise number of board members is at the option of the board chairman. For example, there are three local boards in Berkeley, California. Two have five members and the other has three members. The chairman of the three-member board feels he can operate more efficiently with the smaller number of men. Selective Service officials will not interfere with a chairman's decision to hold board membership to the statutory minimum of three men unless the board falls behind in its work. Then Selective Service officials will put pressure on the chairman to increase board membership to five or more men. Telephone interview with Mrs. Nell Head, Coordinator, Berkeley Local Board Group A, 2199 Bancroft Street, Berkeley, California, September 7, 1966.

<sup>79</sup> 32 C.F.R. § 1603.3 (1962).

<sup>80</sup> 62 Stat. 619 (1948), as amended, 50 U.S.C. APP. § 460(b)(3) (1964); 32 C.F.R. § 1604.52(c) (1962).

<sup>81</sup> Civilian control has been a key feature of the Selective Service System since its origin. See *Hearings Before the Senate Military Affairs Committee on S. 4164*, 76th Cong., 3d Sess. 380 (1940).

<sup>82</sup> The regulations impose no requirement on the frequency of local board meetings, but interviews revealed that monthly meetings are typical. The increased amount of work generated by the Vietnam mobilization, however, has forced some local boards to meet more frequently. See, e.g., Interview No. BC-1.

ties are held to a minimum at the personal appearance. The courts recognize that this proceeding is "stripped of the panoply of formal judicial tribunals,"<sup>83</sup> and Selective Service literature on the subject depicts the personal appearance as a group of neighbors sitting down with the registrant to discuss his problems with him.<sup>84</sup>

### C. Judicial Assumptions

#### 1. The Right of Judicial Review

The draft law makes the decisions of local boards "final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe."<sup>85</sup> The actions of appellate agencies within the Selective Service System are likewise declared "final" by the statute.<sup>86</sup> A similar finality was ascribed to administrative decisions under the draft laws of 1917<sup>87</sup> and 1940,<sup>88</sup> and these provisions caused the courts some difficulty in deciding the extent to which judicial review of draft classifications was available.

Judicial review under the 1917 act was sought only through habeas corpus proceedings by those who felt they had been improperly inducted.<sup>89</sup> This procedure was used because of a provision in that act which made a registrant subject to military jurisdiction from the date that his induction notice was mailed.<sup>90</sup> The courts would generally grant a writ of habeas corpus based on a challenged classification only if they found that the classification was arbitrary or was not based on substantial evidence.<sup>91</sup> The 1940 act<sup>92</sup> and the present law<sup>93</sup> departed from the 1917 statute by providing that a registrant would not be subject to military jurisdiction until he was actually inducted. Thus, when courts faced challenges to the 1940 act, they had to decide not only whether judicial

<sup>83</sup> *United States v. Pitt*, 144 F.2d 169, 172 (3d Cir. 1944).

<sup>84</sup> 1 SELECTIVE SERVICE SYSTEM, THE CLASSIFICATION PROCESS 158 (Special Monograph No. 5, 1950).

<sup>85</sup> 62 Stat. 620 (1948), as amended, 50 U.S.C. APP. § 460(b)(3) (1964). The "appeal" mentioned in the extract means an appeal within the administrative structure of the Selective Service System.

<sup>86</sup> *Ibid.*

<sup>87</sup> Act of May 18, 1917, ch. 15, § 4, 40 Stat. 80.

<sup>88</sup> Act of Sept. 16, 1940, ch. 720, § 10(a)(2), 54 Stat. 893.

<sup>89</sup> Those prosecuted for draft evasion apparently did not raise the defense of an improper classification at their criminal trials. See Bell, *Selective Service and the Courts*, 28 A.B.A.J. 164, 167 (1942).

<sup>90</sup> Act of May 18, 1917, ch. 15, § 2, 40 Stat. 78. See also *Billings v. Truesdell*, 321 U.S. 542, 546 (1944).

<sup>91</sup> The cases which arose through habeas corpus proceedings under the 1917 act are collected in Note, 10 GEO. WASH. L. REV. 827, 829 n.7 (1942).

<sup>92</sup> Act of Sept. 16, 1940, ch. 720, § 11, 54 Stat. 894.

<sup>93</sup> 62 Stat. 622 (1948), as amended, 50 U.S.C. APP. § 462(a) (1964).

review of classifications was permissible despite the finality imparted to Selective Service proceedings, but also the point in time at which such classifications could be challenged.

In *Falbo v. United States*,<sup>94</sup> a Jehovah's Witness who had been classified as a conscientious objector was convicted of willfully failing to obey an order of his local board to report for civilian work of national importance. He argued that his local board had wrongfully denied him an exemption from military service as a minister and that he was therefore under no obligation to obey an order based on an erroneous classification. The majority opinion sidestepped the issue of judicial review<sup>95</sup> by ruling that the registrant's challenge of his classification in the courts was premature because he had failed to exhaust his administrative remedies. The Court noted that the 1940 draft law was enacted under emergency conditions which required rapid mobilization of the nation's manpower. Nothing in the act's legislative history suggested that Congress would countenance "litigious interruption" of the selection process.<sup>96</sup> A registrant was, therefore, required to complete all the steps in the administrative process before seeking judicial review of his classification. The registrant in *Falbo* failed to meet this requirement by refusing to report to the induction center for assignment to civilian work of national importance. The Court noted that if he had reported to the induction center as ordered he might have been rejected for failing to meet the physical or mental requirements.<sup>97</sup> Therefore, judicial review of his classification was foreclosed to him. Despite this holding, the Court clearly suggested that judicial review of classifications was possible under the 1940 act after the registrant had exhausted his administrative remedies.

The Court finally faced squarely the issue of the availability of judicial review under the 1940 act in *Estep v. United States*.<sup>98</sup> That case also involved a Jehovah's Witness who had been denied a ministerial exemption by his local board. The registrant in *Estep*, however, had reported to the induction station as ordered and had been accepted for service in the Navy before refusing to submit to induction. Thus, the Court held under *Falbo* that the registrant had exhausted his remedies within the

---

<sup>94</sup> 320 U.S. 549 (1944).

<sup>95</sup> Justice Rutledge wrote a concurring opinion in which he argued that the word "final" in the 1940 act precluded all judicial review. 320 U.S. at 555. In dissent, Justice Murphy argued that a registrant is entitled to seek judicial relief from any illegal or arbitrary administrative order. *Id.* at 555-61.

<sup>96</sup> 320 U.S. at 554.

<sup>97</sup> *Id.* at 553. Under World War II procedures, registrants were given a physical examination at the induction station and were inducted immediately if they met minimum physical standards. Present procedures require local draft boards to send registrants for physical examinations before issuing induction orders. See 32 C.F.R. pt. 1628 (1962).

<sup>98</sup> 327 U.S. 114 (1946).

Selective Service System.<sup>99</sup> The Court then examined the statutory context of the finality given draft board proceedings to determine whether courts could properly review challenged classifications. Congressional silence on the question, the Court said, would not necessarily preclude judicial review. After listing a series of possible board actions which it termed "lawless and beyond its jurisdiction,"<sup>100</sup> the Court concluded:

We cannot read [the act] as requiring the courts to inflict punishment on registrants for violating whatever orders the local boards might issue. We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction. . . . We are loath to believe that Congress reduced criminal trials under the Act to proceedings so barren of the customary safeguards which the law has designed for the protection of the accused.<sup>101</sup>

Thus, as a matter of statutory construction, the Court held that judicial review was available.<sup>102</sup> But the opinion suggests that such review might be a constitutional requirement if Congress attempted to foreclose it in the statute.<sup>103</sup>

The *Falbo* and *Estep* decisions give the registrant the opportunity to vindicate his deferment or exemption claim in the courts, but they make that opportunity a calculated risk. To reach the stage at which judicial review finally becomes available, the registrant must go to the brink of induction and then refuse to be inducted. But, by such a refusal, the registrant becomes subject to the criminal sanctions of the draft law.<sup>104</sup> As a practical matter, therefore, review of his classification will come when he raises the issue of an allegedly erroneous classification as a defense in his criminal trial. If the trial court or appellate court holds that the registrant was not wrongfully denied the deferment or exemption, he may serve a prison term because he felt he had not been treated fairly within the Selective Service System.<sup>105</sup>

---

<sup>99</sup> *Id.* at 123.

<sup>100</sup> *Id.* at 121.

<sup>101</sup> *Id.* at 121-22.

<sup>102</sup> See *id.* at 119-22; 4 DAVIS, ADMINISTRATIVE LAW § 28.12, at 63 (1958).

<sup>103</sup> See 327 U.S. at 120. Congress apparently approved the Court's interpretation of the word "final" in the 1940 act when it enacted the current draft law. See S. REP. NO. 1268, 80th Cong., 2d Sess. 18 (1948).

<sup>104</sup> "[A]ny person . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under [this act] . . . shall, upon conviction . . . be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment . . ." 62 Stat. 622 (1948), as amended, 50 U.S.C. APP. § 462(a) (1964).

<sup>105</sup> The convicted registrant might be offered the option of being inducted into the armed forces rather than going to jail. See Comment, 114 U. PA. L. REV. 1014, 1018 (1966).

The registrant, of course, still has the option of submitting to induction and then challenging his classification by petitioning for a writ of habeas corpus.<sup>106</sup> If his court challenge fails, he will simply have to complete his active duty obligation of two years of military service. But, for the sincere conscientious objector who feels he has been wrongfully denied conscientious objector status by his local board, this is no choice at all. To such an individual, submitting to military service under any conditions is as repugnant as a prison sentence.<sup>107</sup> Even for the registrant who does not claim conscientious objection to military service, a petition for a writ of habeas corpus after induction can have unpleasant consequences if it is unsuccessful. Platoon sergeants and company commanders can make Army life quite uncomfortable for new recruits who fall into the catch-all category of "troublemakers," and a draftee who rushes to the courts for a writ of habeas corpus would probably be considered a troublemaker by the typical sergeant or company commander.

## 2. Scope of Judicial Review

*Estep v. United States* not only recognized the availability of judicial review of Selective Service proceedings; it also defined the scope of such judicial review.

The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is *no basis in fact* for the classification which it gave the registrant.<sup>108</sup>

This standard of review has been consistently articulated<sup>109</sup> and further refined by the courts. The Fourth Circuit, for example, has said:

---

<sup>106</sup> See *Estep v. United States*, 327 U.S. 114, 123-25 (1946). But, following the *Estep* decision, this remedy fell into general disuse. See Tietz, *Jehovah's Witnesses: Conscientious Objectors*, 28 So. CAL. L. REV. 123, 134 (1955).

<sup>107</sup> The sincerity of a registrant's beliefs is a crucial factor in a conscientious objector case. *Witmer v. United States*, 348 U.S. 375 (1955); *United States v. Corliss*, 280 F.2d 808 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960). Therefore, it is conceivable that a conscientious objector who chooses the course of submitting to induction and seeking a writ of habeas corpus might find a court questioning his sincerity in opposing all war because he willingly entered military service.

<sup>108</sup> *Estep v. United States*, 327 U.S. 114, 122-23 (1946) (emphasis added). In a footnote, the Court said that the same scope of review applies to deportation cases, where Congress has declared the deportation order to be final, and to cases in which a registrant seeks release from military service through habeas corpus proceedings. *Id.* at 123 n.14.

<sup>109</sup> See, e.g., *United States v. Seeger*, 380 U.S. 163, 185 (1965); *Dickinson v. United*

In a prosecution for refusing to submit to induction, the scope of judicial inquiry into the administrative proceedings leading to the defendant's classification is very limited. The range of review is the narrowest known to the law. . . . The "clearly erroneous" rule applied in equity appeals has no place here, nor even the "substantial evidence" rule of the Administrative Procedure Act . . . . Congress gave the courts no general authority of revision over draft board proceedings, and we have authority to reverse only if there is a denial of basic procedural fairness or if the conclusion of the board is without any basis in fact.<sup>110</sup>

Whether the courts have been as successful in applying this narrow scope of review as they have been in articulating it has been questioned by several commentators.<sup>111</sup> The Supreme Court itself has contributed to the confusion in at least two cases.

*Dickinson v. United States*<sup>112</sup> involved a Jehovah's Witness who had been denied an exemption as a minister by his local board and who was prosecuted for refusing to submit to induction. The Court recited the basis in fact standard of review<sup>113</sup> and disclaimed any application of the substantial evidence test.<sup>114</sup> But after reviewing the factual record of the case and the basis for the petitioner's request, the Court concluded that he had clearly brought himself within the statutory criteria for exemption.

Dickinson's claims were not disputed by any evidence presented to the selective service authorities, nor was any cited by the Court of Appeals. The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. We have found none here. . . . [W]hen the uncontroverted evidence supporting a registrant's claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.<sup>115</sup>

---

States, 346 U.S. 389, 394 (1953); *United States v. Beatty*, 350 F.2d 287, 289 (6th Cir. 1965), *cert. denied*, 382 U.S. 1028 (1966); *Fleming v. United States*, 344 F.2d 912, 915 (10th Cir. 1965); *Boyd v. United States*, 269 F.2d 607, 610 (9th Cir. 1959).

<sup>110</sup> *Blalock v. United States*, 247 F.2d 615, 619 (4th Cir. 1957). This statement of the law has been cited with approval in *DeReimer v. United States*, 340 F.2d 712, 715 (8th Cir. 1965), and *United States v. Corliss*, 280 F.2d 808, 810 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960).

<sup>111</sup> See, e.g., 4 DAVIS, *ADMINISTRATIVE LAW* §§ 28.12, 29.07 (1958); Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020, 1047-49 (1956); Comment, 114 U. PA. L. REV. 1014, 1020-23 (1966).

<sup>112</sup> 346 U.S. 389 (1953).

<sup>113</sup> *Id.* at 394.

<sup>114</sup> *Id.* at 396.

<sup>115</sup> *Id.* at 396-97.



The dissenters complained that the majority opinion required that a "board must find and record affirmative evidence that . . . [the registrant] has misrepresented his case—evidence which is then put to the test of substantiality by the courts. In short, the board must build a record."<sup>116</sup> Professor Davis has argued that the majority in *Dickinson* departed from the basis in fact standard of review by depriving local draft boards of the power to disbelieve a registrant's factual evidence without producing factual evidence of its own.<sup>117</sup>

In *Witmer v. United States*,<sup>118</sup> a Jehovah's Witness claimed his local board had wrongfully denied him classification as a conscientious objector. The Court declared that "it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies."<sup>119</sup> In an apparent effort to retreat from the broad implications of *Dickinson*, the Court noted that the problem of proof facing a conscientious objector was different in kind from that facing the registrant in *Dickinson*. A registrant requesting exemption as a minister can support his claim by producing objective evidence which tends to show that he is in fact a minister. The crucial issue in a conscientious objector case, however, is the sincerity of the registrant's objection to war on religious grounds. Sincerity is a subjective matter, and objective facts are of value only to the extent that they reflect on a registrant's sincerity. Therefore, a registrant cannot claim conscientious objector status as a matter of right simply because he produces certain objective data—such as membership in a religious sect which advocates pacifism—which tends to support his claim.<sup>120</sup>

From its examination of the record the Court concluded that there was no valid basis for disbelieving the registrant's sincerity in seeking classification as a conscientious objector. It was therefore forced to rely on the objective facts in the record to rule on the local board's action. After reviewing the registrant's background, the Court said:

With due regard for the policy of Congress, which was to make review within the Selective Service System final in all cases where there was conflicting evidence or where two inferences could be drawn from the same testimony, we cannot hold that petitioner was wrongfully denied the conscientious objector classification. In short, there was basis in fact for the Board's decision.<sup>121</sup>

---

<sup>116</sup> *Id.* at 399.

<sup>117</sup> See 4 DAVIS, ADMINISTRATIVE LAW § 29.06, at 148-49 (1958).

<sup>118</sup> 348 U.S. 375 (1955).

<sup>119</sup> *Id.* at 380-81.

<sup>120</sup> See *id.* at 381-82.

<sup>121</sup> *Id.* at 383.

Although this appears to be an application of the "basis in fact" standard of review, the language used by the Court resembles that used in applying the substantial evidence test under the Administrative Procedure Act,<sup>122</sup> a test the *Witmer* Court specifically claimed it was not applying.<sup>123</sup> The lower courts during the same period added to the confusion with language which seemed to embrace the substantial evidence test.<sup>124</sup> And cases can be found where the courts clearly applied the substantial evidence test to draft board proceedings.<sup>125</sup>

Professors Davis and Jaffe suggest that courts frequently deviate from the "basis in fact" scope of review they articulate because it runs against the judicial grain to support an administrative decision which the judges think has no substantial basis.<sup>126</sup> A reading of the cases,<sup>127</sup> however, leaves the distinct impression that the debate over the "basis in fact" standard of judicial review is largely a problem of semantics. Neither the substantial evidence test nor the basis in fact test purport to define the scope of judicial review with any degree of mathematical precision. Essentially, the basis in fact test warns the courts they are to give decisions made in Selective Service proceedings more credence than they give to other administrative determinations. Because the articulated test lacks precision, inconsistent applications are to be expected. For every decision which apparently applies a substantial evidence test to the Selective

---

<sup>122</sup> 4 DAVIS, ADMINISTRATIVE LAW § 29.07, at 151 (1958). See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

<sup>123</sup> 348 U.S. at 381.

<sup>124</sup> See, e.g., *Capehart v. United States*, 237 F.2d 388 (4th Cir. 1956), *cert. denied*, 352 U.S. 971 (1957); *Jewell v. United States*, 208 F.2d 770 (6th Cir. 1953); *United States v. Pekarski*, 207 F.2d 930 (2d Cir. 1953).

<sup>125</sup> See, e.g., *Batterton v. United States*, 260 F.2d 233 (8th Cir. 1958). The court faithfully stated the basis in fact test, but then conducted an extensive review of the factual record in the case to find there was no basis in fact for the registrant's classification. The court ignored what appeared to be a clear basis in fact for the denial of conscientious objector status to the registrant—he admitted that he had not completed his study of the Bible and that such a complete study might change his opposition to war in any form.

<sup>126</sup> See 4 DAVIS, ADMINISTRATIVE LAW § 29.07, at 151-52 (1958); Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020, 1050 (1956).

<sup>127</sup> The cases which articulate the basis in fact scope of judicial review and then purport to apply it are numerous. A random reading of the cases reveals only that the courts have been unable to develop any clear notion of the precise limits of the basis in fact standard. See, e.g., the following cases in which the courts found a basis in fact for the registrant's classification: *United States v. Sturgis*, 342 F.2d 328 (3d Cir.), *cert. denied*, 382 U.S. 879 (1965); *United States v. Norris*, 341 F.2d 527 (7th Cir.), *cert. denied*, 382 U.S. 850 (1965); *Fitts v. United States*, 334 F.2d 416 (5th Cir. 1964); *United States v. Mohammed*, 288 F.2d 236 (7th Cir.), *cert. denied*, 368 U.S. 820 (1961); *Shaw v. United States*, 264 F.2d 118 (9th Cir. 1959). But see the following cases in which the courts found no basis in fact for the registrant's classification: *United States v. Cole*, 315 F.2d 466 (4th Cir. 1963); *Parr v. United States*, 272 F.2d 416 (9th Cir. 1959); *Batterton v. United States*, 260 F.2d 233 (8th Cir. 1958); *United States v. Hurt*, 244 F.2d 46 (3d Cir. 1957).

Service proceedings,<sup>128</sup> a decision can be found which faithfully adheres to the narrower scope of review implicit in the basis in fact test.<sup>129</sup> And, occasionally, a court's detailed review of the factual record of the case can be mistaken for a weighing of the evidence.<sup>130</sup>

The significance of the basis in fact standard of review is not that courts confuse it with the substantial evidence test nor that courts apply it with apparent inconsistency. These problems stem largely from the imprecision of the test itself,<sup>131</sup> or from the careless use of language by courts in explaining the grounds for their decisions.<sup>132</sup> The significance of the basis in fact test is that it provides a convenient rationalization for a court to pay less attention than it otherwise might to possible procedural unfairness in draft board proceedings. As a result, a registrant who takes the calculated risk of refusing to be inducted so that he can get judicial review of his classification has no assurance that his allegations of procedural unfairness will be fully examined by the courts.<sup>133</sup>

<sup>128</sup> See cases cited in note 124 *supra*.

<sup>129</sup> See, e.g., *Keefer v. United States*, 313 F.2d 773 (9th Cir. 1963); *United States v. Mohammed*, 288 F.2d 236 (7th Cir.), *cert. denied*, 368 U.S. 820 (1961); *United States v. Corliss*, 280 F.2d 808 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960).

<sup>130</sup> See, e.g., *Parr v. United States*, 272 F.2d 416 (9th Cir. 1959).

<sup>131</sup> Professors Davis and Jaffe have suggested that the basis in fact scope of review means that the courts are not required to look to the "whole record" in Selective Service cases; rather, they can scan the record for isolated facts which will support a draft board's decision. See 4 DAVIS, *ADMINISTRATIVE LAW* § 29.07, at 152 n.17 (1958); Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020, 1049 (1956). Some courts apparently accept this view as the meaning of the basis in fact standard. See, e.g., *United States v. Cole*, 315 F.2d 466 (4th Cir. 1963); *Shaw v. United States*, 264 F.2d 118, 120 (9th Cir. 1959).

This interpretation of the basis in fact scope of review is of questionable value, however, in attempting to delineate that standard for judicial inquiry into the validity of draft classifications. The "whole record" concept is derived from § 10(e) of the Administrative Procedure Act, 60 Stat. 244 (1946), 5 U.S.C. § 1009(e) (1964), and the interpretation given that provision by the Supreme Court in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). Yet, Congress has specifically excluded Selective Service proceedings from the provisions of the Administrative Procedure Act. 62 Stat. 623 (1948), 50 U.S.C. App. § 463(b) (1964). This exclusion suggests that there is no requirement that courts examine the whole record in reviewing draft classifications. The Davis and Jaffe interpretations of the basis in fact test are a product of the so-called generalist approach to administrative law problems—an approach which has been criticized because it fails to take into account the special problems faced by particular administrative agencies. See, e.g., Hesse, Book Review, 54 CALIF. L. REV. 1392, 1403-06 (1966). This criticism seems particularly appropriate when a generalist approach is taken to Selective Service cases. For example, the "whole record" concept is difficult to apply to local board proceedings because local boards are not required to make any record of what is said at the personal appearance. See text accompanying notes 201-19 *infra*.

<sup>132</sup> *Witmer v. United States*, 348 U.S. 375 (1955) illustrates this problem. The Court stated explicitly that it found a basis in fact for the registrant's classification. *Id.* at 383. But, in reaching that conclusion, the Court used language which reminded the commentators of the definition of the substantial evidence test in *Universal Camera Corp. v. NLRB*, *supra* note 131, at 488. See text accompanying notes 121-23 *supra*.

<sup>133</sup> Because of the narrower scope of review implicit in the basis in fact standard, the

### 3. *Exemptions and Deferments as Matters of Legislative Grace*

The constitutionality of Congress' power to raise an army in time of war or peace through conscription is beyond dispute. Although occasional constitutional challenges to the draft law can still be found in the cases,<sup>134</sup> this issue was largely laid to rest in the *Selective Draft Law Cases* of 1918.<sup>135</sup> The Supreme Court ruled that the Constitution conferred on Congress the specific powers to raise and support armies and to declare war; conscription was simply a necessary and proper means of implementing those delegated powers.<sup>136</sup> The Court placed no limits on that power and clearly suggested it was plenary.

The broad sweep of the conscription power was clarified several years later in *United States v. Macintosh*.<sup>137</sup> An alien's application for citizenship had been denied because his conscientious objection to war made him unwilling to subscribe to the statutory oath of allegiance without qualification. He wanted to stipulate that he did not feel obligated to bear arms for the United States in an unjust war. He argued that the Constitution relieved the conscientious objector from the obligation of military service if such service was contrary to his religious beliefs. The

---

University of Michigan students who were stripped of their student deferments and reclassified I-A following their sit-in at the Ann Arbor draft board probably cannot rely on judicial relief from the actions of their draft boards. See text accompanying notes 10-14 *supra*. If those students meet the established physical and mental standards for military service and their local boards are drafting registrants in their age group, a court could find a basis in fact for the reclassifications even though the classifications infringed on constitutionally protected freedoms.

This possible consequence of the narrow scope of judicial review given Selective Service decisions is consistent with the fear expressed by the Supreme Court that the process of selection under the draft law might be subject to litigious interruption. See *Falbo v. United States*, 320 U.S. 549, 554 (1944). If the chances of a successful judicial challenge of a classification are increased, the number of challenges will probably increase. This result could be harmful to national security in time of emergency. It has been suggested, however, that this problem could be solved by a provision in the draft law authorizing two standards of judicial review—a broad standard to be applied during peacetime when the consequences of litigious interruption would not be so serious, and a narrower standard for times of emergency. See Comment, 114 U. PA. L. REV. 1014, 1023 (1966).

<sup>134</sup> The latest constitutional challenge appears to have been in *United States v. Mitchell*, 246 F. Supp. 874 (D. Conn. 1965), *rev'd on other grounds*, 354 F.2d 767 (2d Cir. 1966). The defendant was prosecuted for ignoring a notice to report for induction. He argued that the draft law was being unconstitutionally applied to mobilize manpower for Vietnam because Congress had not declared war. The court flatly rejected this argument which it said would "render Congress helpless to prepare in advance against the dangers of war." 246 F. Supp. at 898. *Accord*, *Warren v. United States*, 177 F.2d 596 (10th Cir. 1949).

<sup>135</sup> 245 U.S. 366 (1918).

<sup>136</sup> See *id.* at 377.

<sup>137</sup> 283 U.S. 605 (1931), *overruled by* *Girouard v. United States*, 328 U.S. 61 (1946), on its main holding. However, the *Macintosh* dictum relating to native-born conscientious objectors has survived the overruling. See authorities cited in note 139 *infra*.

Court termed this argument "astonishing" and said, "The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit . . . ."<sup>138</sup> Consistent with that dictum, the courts have repeatedly held that deferments and exemptions are matters of legislative grace and that a registrant bears the burden of clearly establishing his right to an exemption or deferment.<sup>139</sup>

## II

### THE REGISTRANT AND THE SYSTEM

Because of the judicial assumptions concerning the narrow scope of review and the point in time at which judicial review is available, one would expect that the internal procedures of the Selective Service System meticulously safeguard the rights of registrants. The great paradox of the judicial attitude toward the Selective Service System, however, is that the registrant who seeks to assert his claim for deferment or exemption within that agency often finds the administrative process a legal obstacle course. He learns quickly that basic procedural fairness is more the result of the benevolent good will of his local board members than any rights he might try to assert. This part of the Comment will examine aspects of the regulatory scheme which make it difficult for a registrant to obtain a full and effective hearing on his claim for exemption or deferment within the Selective Service System or in the courts if he seeks judicial review. It will then describe how local board autonomy weakens effective control of draft board decisions and leads to uneven treatment of deferment and exemption requests. Finally, it will demonstrate that the present system of meeting monthly draft quotas from the small local board manpower pools generates its own inequitable treatment of registrants.

#### *A. The Regulatory Scheme*

The Supreme Court has characterized the draft law as "a comprehensive statute designed to provide an orderly, efficient and fair procedure to marshal the available manpower of the country."<sup>140</sup> Too often, however, the regulations which implement the statute seem to elevate efficiency of mobilization over fairness to the registrant. This is not to say that

---

<sup>138</sup> *Id.* at 623-24.

<sup>139</sup> See, e.g., *Dickinson v. United States*, 346 U.S. 389, 395 (1953); *United States v. Beatty*, 350 F.2d 287, 289 (6th Cir. 1965), *cert. denied*, 382 U.S. 1028 (1966); *Fleming v. United States*, 344 F.2d 912, 915 (10th Cir. 1965); *United States v. Nichols*, 241 F.2d 1 (7th Cir. 1957).

<sup>140</sup> *United States v. Nugent*, 346 U.S. 1, 9 (1953).

those who have written the regulations have consciously sacrificed fairness to expediency.

Viewed as a whole, the regulatory scheme seems quite solicitous of the rights of a registrant who feels he has been unjustly classified. The registrant can insist on a personal appearance before his local board; he can carry his case to the appeal board as a matter of right; and, under certain conditions, he can have his claim for deferment or exemption reviewed by the President.<sup>141</sup> But fairness often gives way to expediency in the specific procedures devised for implementing that regulatory scheme. For the most part, this is a result of the emphasis on informality in local board proceedings.<sup>142</sup> The regulations reflect this informality by denying many formal procedural protections normally associated with other administrative tribunals.<sup>143</sup> For example, registrants cannot be represented by attorneys before local boards;<sup>144</sup> the board need not make a record of what is said at a personal appearance;<sup>145</sup> and the board is not required to give any explanation for the actions it takes.<sup>146</sup> This informal procedure has been approved by the courts,<sup>147</sup> a judicial attitude which seems to stem from the doctrine that a registrant has no right to a deferment or exemption.<sup>148</sup>

---

<sup>141</sup> These administrative proceedings are discussed in detail in the text accompanying notes 35-55 *supra*.

<sup>142</sup> See text accompanying notes 76-84 *supra*.

<sup>143</sup> The draft law specifically makes the Administrative Procedure Act inapplicable to the administrative proceedings of the Selective Service System. 62 Stat. 623 (1948), 50 U.S.C. APP. § 463(b) (1964).

<sup>144</sup> 32 C.F.R. § 1624.1(b) (1962).

<sup>145</sup> The regulations require only that the board maintain minutes of its meetings, 32 C.F.R. § 1604.58 (1962), and that the fact of the registrant's appearance before the board be noted in the registrant's file, 32 C.F.R. § 1624.2(a) (1962). The "minutes" of board meetings need not include a summary of what is said at the personal appearance. See *Ayers v. United States*, 240 F.2d 802, 809 (9th Cir. 1956), *cert. denied*, 352 U.S. 1016 (1957).

<sup>146</sup> See 32 C.F.R. § 1623.4(d) (1962); *United States v. Greene*, 220 F.2d 792, 794 (7th Cir. 1955).

<sup>147</sup> See, e.g., *United States v. Sturgis*, 342 F.2d 328, 332 (3d Cir.), *cert. denied*, 382 U.S. 879 (1965) (registrant is not entitled to counsel at his personal appearance); *Reap v. Shamibora*, 241 F.2d 803, 808 (5th Cir. 1957) (local board need not give the reasons for its actions); *Ayers v. United States*, 240 F.2d 802, 809 (9th Cir. 1956), *cert. denied*, 352 U.S. 1016 (1957) (local board need not make a detailed record of its proceedings).

<sup>148</sup> See text accompanying notes 134-39 *supra*. That a registrant cannot claim a deferment or exemption as a matter of right implies that he cannot insist on more formal procedures as a matter of right. Such a line of reasoning seems to suggest an unconstitutional conditions analysis. However, an essential element of such an analysis seems to be missing in the Selective Service context. A successful unconstitutional conditions argument requires a showing that the person claiming a right or privilege has been forced to surrender a constitutional protection. Because the Constitution probably does not require more formal draft board proceedings, it cannot be said that a registrant is surrendering formality as a condition for receiving the benefit of a deferment or exemption. For a fuller discussion of the unconstitutional conditions doctrine, see Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

The search for standards by which established Selective Service System proceedings can be measured for fairness is an elusive one. Professor Davis encountered a similar problem in examining the conditions under which a trial-type hearing should be required in the administrative process.

Judicial opinions have not crystallized any basic principle to guide the determination of when the method of trial should be required, either by interpretations of "due process" or of a statutory requirement of "hearing," or by a kind of common law that often seems to operate in this area, unanchored to any constitutional or statutory provision.<sup>149</sup>

Courts in Selective Service cases often state that a denial of "basic procedural fairness" by local boards is a ground for upsetting a draft classification,<sup>150</sup> but it is difficult to distill any precise meaning for that concept from the cases. It is equally difficult to determine whether the concept of "basic procedural fairness" comes from the Constitution, statutory construction, or "a kind of common law . . . unanchored to any constitutional or statutory provision."<sup>151</sup> The test of basic procedural fairness appears to be more pragmatic than conceptual. The courts appear to be adopting unconsciously a test suggested by Professor Davis in another context—"what method [or procedure] will in the circumstances best achieve the objective of assuring enlightened action which will afford proper safeguards to affected interests?"<sup>152</sup> This test is wholly practical and adaptable to the peculiar problems of the Selective Service System.<sup>153</sup> It is perhaps what one court had in mind when it declared that considerations of "practical due process" would be ignored if it sustained the classification it was reviewing.<sup>154</sup>

This practical test of basic procedural fairness is applied in this Comment in assessing the procedural safeguards afforded registrants within the Selective Service System. While the test lacks precision of definition, it takes full account of the narrow scope of judicial review applied to draft board decisions and of the consequences of an unsuccessful court

---

<sup>149</sup> Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 198 (1956). Cf. *Simmons v. United States*, 348 U.S. 397, 405 (1955), a Selective Service case in which the Court spoke of "concepts of basic fairness which underlie all our legislation."

<sup>150</sup> See, e.g., *DeRemer v. United States*, 340 F.2d 712, 715 (8th Cir. 1965); *Blalock v. United States*, 247 F.2d 615, 619 (4th Cir. 1957).

<sup>151</sup> See, e.g., *Sterrett v. United States*, 216 F.2d 659, 665 (9th Cir. 1954). The court lists two grounds for invalidating a classification but gives no doctrinal basis for such judicial actions.

<sup>152</sup> Davis, *The Requirement of Opportunity To Be Heard in the Administrative Process*, 51 YALE L.J. 1093, 1096-97 (1942).

<sup>153</sup> A flexible test of basic procedural fairness should lessen the fears of some courts that requiring draft boards to follow the more rigid and formal procedures of judicial tribunals would breed litigious interruption of the selection process. See, e.g., *United States v. Nugent*, 346 U.S. 1, 10 (1953).

<sup>154</sup> *United States v. Greene*, 220 F.2d 792, 794 (7th Cir. 1955).

challenge of a classification.<sup>155</sup> The basic premise underlying the test of basic procedural fairness is that the difficulty of obtaining judicial relief from draft board decisions makes it imperative that the administrative procedures of the Selective Service System be scrupulously fair to registrants.

### 1. *The Right to Counsel*

Selective Service regulations provide that "no registrant may be represented before the local board by anyone acting as attorney or legal counsel."<sup>156</sup> The courts have uniformly sustained this restriction on the assistance of counsel at the personal appearance by ruling that it provides no ground for invalidating a draft classification.<sup>157</sup> Underlying those rulings is the premise that draft board proceedings are non-judicial and non-criminal in nature and that an invalidation of the restriction would be an unwarranted extension of the right to counsel. This premise is unassailable on constitutional grounds,<sup>158</sup> but it is not so clear that such a restriction is consistent with notions of basic procedural fairness. This question must be examined in the broader context of the machinery provided by the regulations for advising a registrant of his rights and obligations under the draft law.

---

<sup>155</sup> The consequences of an unsuccessful court challenge can be a prison term. See text accompanying notes 104-05 *supra*.

<sup>156</sup> 32 C.F.R. § 1624.1(b) (1962). While this provision prohibits only *representation* by counsel at the personal appearance, a non-lawyer board member could not be faulted for interpreting it to mean that a registrant's attorney may not be present at the personal appearance.

<sup>157</sup> *E.g.*, *United States v. Capson*, 347 F.2d 959, 962-63 (10th Cir. 1965); *United States v. Sturgis*, 342 F.2d 328, 332 (3d Cir.), *cert. denied*, 382 U.S. 879 (1965); *Steele v. United States*, 240 F.2d 142, 145 (1st Cir. 1956); *Niznik v. United States*, 173 F.2d 328, 336 (6th Cir. 1949).

<sup>158</sup> In the typical Selective Service proceedings, the sixth amendment right to counsel "in all criminal prosecutions" is clearly inapplicable. However, if local draft boards adopt the view of General Hershey that registrants who interfere with the administration of the draft law should be inducted into military service rather than punished in courts of law, the guarantees of the sixth amendment relating to counsel might be applicable to local board proceedings. General Hershey feels that "whenever possible, a young man who violates the Selective Service law should be given an opportunity to enter the armed forces rather than to be prosecuted." *U.S. News & World Report*, Jan. 10, 1966, p. 39. However, he includes in the category of violations of the Selective Service law any action by a registrant which interferes with the orderly administration of that law. In his view, this category includes sit-ins conducted at local board offices. See Comment, 114 U. PA. L. REV. 1014, 1043-45 (1966). Therefore, if local boards feel that reclassification of a student demonstrator to I-A is a substitute for criminal prosecution for trespass, the registrant should have the assistance of counsel and other procedural safeguards which accompany a criminal trial when he makes his personal appearance. One local board chairman interviewed said he felt that local boards should have the power to induct registrants who engage in such violations of the law as burning draft cards and trespassing on local board property. He thought this solution was better than prosecuting such violations in a court of law. Interview No. BC-4.



The non-lawyer who tries to learn of his rights and obligations by reading the statute and regulations will probably become only more bewildered for his efforts.<sup>159</sup> The statute and regulations are written in typically technical language, and the legal effect of a particular provision can often hinge on the meaning given to a particular word or phrase.<sup>160</sup> In theory, the registrant is not left wholly to his own resources in trying to understand the draft law. The regulations authorize local boards to appoint "advisors to registrants"<sup>161</sup> and require each board to have a government appeal agent<sup>162</sup> assigned to it. The advisor has the duty of assisting registrants in completing the various forms they must submit and of advising them "on other matters relating to their liabilities under the selective service law."<sup>163</sup> The only qualification stipulated for an advisor is that he be at least thirty years of age. The government appeal agent's duties include attending local board meetings if requested to do so, appealing those local board classifications he feels should be reviewed by the appeal board, and being "equally diligent in protecting the interests of the government and the rights of the registrant in all matters."<sup>164</sup> The government appeal agent "shall, whenever possible, be a person with legal training and experience."<sup>165</sup>

These regulations seem to suggest that a registrant has adequate assistance available to him in seeking to understand his rights and obligations under the draft law. This, in turn, would seem to mitigate the disadvantage to a registrant of denying him representation by counsel at a

---

<sup>159</sup> This can also be true of registrants with some legal training. One law student misread his classification notice (SSS Form 110) and thought he could either request a personal appearance or appeal his classification. Interview No. R-7. In fact, he had both rights.

<sup>160</sup> Prior to 1955, 32 C.F.R. § 1604.41 read that "advisors to registrants *shall* be appointed." (Emphasis added.) This was amended in 1955 to read "advisors to registrants *may* be appointed." (Emphasis added.) In *Uffelman v. United States*, 230 F.2d 297, 301-02 (9th Cir. 1956), the court ruled that the pre-1955 language made the appointment of advisors by local boards mandatory and that failure of a board to appoint advisors would be a basis for invalidating a classification if the registrant could show he was prejudiced by the board's deficiency. The implication is that the failure to appoint advisors under the present permissive language of that regulation would provide no basis for invalidating a classification. There is still room for confusion, however, because § 1604.41 also provides that if advisors are appointed their names "*shall* be conspicuously posted in the local board office." (Emphasis added.) This case suggests that a board which appoints advisors to registrants but neglects to post their names conspicuously will risk having a classification invalidated while a board which fails to appoint advisors runs no such risk. A registrant could not be faulted for being unaware of the different legal effect of two sentences in a single section of the regulations simply because "may" is used in one sentence and "shall" in the other.

<sup>161</sup> 32 C.F.R. § 1604.41 (1962).

<sup>162</sup> 32 C.F.R. § 1604.71 (1962).

<sup>163</sup> 32 C.F.R. § 1604.41 (1962).

<sup>164</sup> 32 C.F.R. § 1604.71(d)(5) (1962).

<sup>165</sup> 32 C.F.R. § 1604.71(c) (1962).

personal appearance. Such is not the case. Very few draft boards bother to appoint advisors to registrants.<sup>166</sup> In fact, some local board chairmen are unaware of the provision in the regulations authorizing them to appoint advisors.<sup>167</sup> Since the regulations require that government appeal agents be appointed, each local board has one of these uncompensated officials assigned to it. As a general rule, the appeal agents are lawyers who could assist both the local board members and registrants during the personal appearance.<sup>168</sup> However, local boards do not seem to call on their appeal agents for this purpose,<sup>169</sup> and most registrants are generally not aware that they can make use of the services of the appeal agent.<sup>170</sup> Local board chairmen seem to think that any formal machinery for advising a registrant of his rights and obligations is unnecessary. They point out that any registrant who needs information can visit the local board offices and talk to the employees there. They feel that the employees of their boards know the regulations and the draft law as thoroughly as anyone. If a registrant is not satisfied with the answers he receives at the local board's offices, the board chairmen say they stand ready to give a registrant any assistance he needs.<sup>171</sup>

This attitude of the board chairmen ignores the realities of the conscription process. The average registrant does not view his local draft board as a friendly advisor prepared at all times to give him information and advice which will be in his best interests. The goal of most registrants is to avoid military service as long as possible; they view the local board as an adversary which is trying to frustrate that goal. A person will turn

---

<sup>166</sup> Henderson Interview. In a number of cases registrants have sought to have their classifications invalidated because their local boards failed to appoint advisors. *E.g.*, *United States v. Sturgis*, 342 F.2d 328 (3d Cir.), *cert. denied*, 382 U.S. 879 (1965); *Steele v. United States*, 240 F.2d 142 (1st Cir. 1956); *Frank v. United States*, 236 F.2d 39 (9th Cir. 1956).

<sup>167</sup> See, *e.g.*, Interview Nos. BC-1 and BC-4.

<sup>168</sup> The regulations impose divided loyalties on the appeal agent by requiring that he protect the interests of both the government and the registrant. However, because the appeal agent has a continuing relationship with the local board and only a brief encounter with any single registrant, it has been suggested that an appeal agent will tend to be biased in favor of the board. See Comment, 114 U. PA. L. REV. 1014, 1031 (1966).

<sup>169</sup> One local board chairman did not know that an appeal agent had been assigned to his board, even though the agent's name was posted on a bulletin board at the local board's offices. Interview No. BC-4. The other board chairmen interviewed said they called on the appeal agent for assistance only infrequently.

<sup>170</sup> None of the registrants interviewed had heard of the government appeal agent nor had they been told of the availability of his services.

<sup>171</sup> This attitude was expressed in varying forms by the board chairmen interviewed. Some courts have approved of that attitude by ruling that a registrant is not prejudiced by a board's failure to appoint advisors if local board members displayed a willingness to assist a registrant in understanding his rights and obligations under the draft law. See, *e.g.*, *United States v. Sturgis*, 342 F.2d 328, 331-32 (3d Cir.), *cert. denied*, 382 U.S. 879 (1965); *Uffelman v. United States*, 230 F.2d 297, 301-02 (9th Cir. 1956).

to an adversary for information and advice only as a last resort and without any confidence that the advice tendered will be in his best interests. The benign and paternalistic attitude of board chairmen that they or their delegates can best advise a registrant is perhaps a natural outgrowth of the informality which surrounds local board procedures. But this attitude argues against any provision in the regulations which discourages a registrant from seeking independent legal advice.

Such advice can be of crucial importance if a registrant is to take full advantage of the administrative process within the Selective Service System to assert his claim to a deferment or exemption. Despite the generally informal nature of draft board proceedings, some courts hold registrants to strict compliance with the specific provisions of the statute or regulations.<sup>172</sup> If the registrant does not follow prescribed procedures exactly, he may waive a valuable right. For example, he may lose any claim to a reopening of his classification if he does not make his request in writing and if the request does not specifically state that he is seeking a reopening.<sup>173</sup> Similarly, a registrant must request a personal appearance before his local board within a ten-day period or lose that right.<sup>174</sup> The ten-day period starts with the mailing of the classification notice, unless the notice is improperly addressed through a board error. In the latter case, the ten-day period starts upon the receipt of the notice by the registrant.<sup>175</sup> If, however, the classification notice fails to reach a registrant within ten days because he has failed to notify his local board of an address change,<sup>176</sup> the registrant may find he has automatically lost his right to a personal appearance.<sup>177</sup> Because the procedures by which a registrant can assert his rights are generally couched in technical legal language<sup>178</sup>

---

<sup>172</sup> "The decisions are legionary that each and every requirement in the Selective Service Act must be strictly complied with." *United States v. Schwartz*, 143 F. Supp. 639, 640 (E.D.N.Y. 1956). *But cf.* this language in *United States v. Greene*, 220 F.2d 792, 794 (7th Cir. 1955): "While classification is the democratic method for obtaining military manpower, it is not an adversary proceeding . . . in which the slightest mis-step mechanically penalizes registrants."

<sup>173</sup> See *Frank v. United States*, 236 F.2d 39 (9th Cir. 1956) in which the court ruled the registrant had not been denied due process by his local board's refusal to reopen his classification because his written communications with the board requested a "personal hearing" and not a reopening as such. *Accord*, *Shaw v. United States*, 264 F.2d 118 (9th Cir. 1959). *Contra*, *Townsend v. Zimmerman*, 237 F.2d 376 (6th Cir. 1956).

<sup>174</sup> 32 C.F.R. § 1624.1(a) (1962).

<sup>175</sup> *Frank v. United States*, 236 F.2d 39 (9th Cir. 1956).

<sup>176</sup> The regulations require registrants to keep their local boards informed of all address changes. 32 C.F.R. § 1613.12(b) (1962).

<sup>177</sup> See *Kaline v. United States*, 235 F.2d 54, 60-61 (9th Cir. 1956).

<sup>178</sup> For example, the classification notice (SSS Form 110) informs a registrant of his rights to a personal appearance and to appeal his classification. One district court judge said of that notice: "[T]his [form] is a complicated thing. It takes a Philadelphia lawyer to read that." *United States v. Capson*, 347 F.2d 959, 963 (10th Cir. 1965). One law student,

and because courts tend to hold the registrant to strict compliance with prescribed procedures,<sup>179</sup> basic procedural fairness requires the Selective Service regulations and officials to refrain from discouraging a registrant from seeking independent legal advice and assistance.

It is true that the regulations only prohibit a registrant from being "represented" by counsel at the personal appearance; they do not prevent him from seeking legal advice outside of these administrative proceedings.<sup>180</sup> Further, some legitimate objections can be raised to "representation"<sup>181</sup> by counsel at local board proceedings. There is the fear, for example, that if such proceedings take on the character of formal adversary proceedings, delay and litigious interruption of the selection process will be encouraged.<sup>182</sup> One local chairman said he feared that permitting representation by counsel would give wealthier registrants an unfair advantage.<sup>183</sup> These objections can be met by allowing registrants at the personal appearance independent legal assistance which falls short of actual representation. The personal appearance is a crucial phase of a registrant's bid for deferment and exemption, and it is then that an attorney can be of the greatest assistance to a registrant. If an attorney were permitted to attend the personal appearance, he could be expected to familiarize himself with the statute and regulations in advance and then observe whether the board's actions conformed with legal requirements. It is no solution to say that the registrant can report his experiences to his attorney. The registrant may not appreciate the legal significance of certain board actions, and his account of the personal appearance may omit crucial details. The registrant's account of these proceedings, therefore, is no substitute for the attorney's personal observations. Further,

---

after reading the classification notice, thought that it put him to the choice of either appealing or making a personal appearance. Interview No. R-7.

<sup>179</sup> Not all courts impose on the registrant the requirement of strict compliance with the letter of the regulations. See, e.g., *Manke v. United States*, 259 F.2d 518 (4th Cir. 1958); *United States v. Greene*, 220 F.2d 792 (7th Cir. 1955). But a registrant who defies the draft law to seek judicial review of his classification can never be certain which precedent a judge will follow in his case.

<sup>180</sup> This distinction, however, may not be clear to the average registrant. An attorney's assistance can be most valuable at the personal appearance, and denying a registrant legal assistance at that proceeding could discourage him from seeking independent legal advice.

<sup>181</sup> This term is used in the legal sense in this Comment. See BLACK, LAW DICTIONARY 1465 (4th ed. 1951).

<sup>182</sup> See *United States v. Nugent*, 346 U.S. 1, 10 (1953). Cf. 1 SELECTIVE SERVICE SYSTEM, THE CLASSIFICATION PROCESS 159-60 (Special Monograph No. 5, 1950), where even the personal appearance and appeal procedures are criticized for breeding delay in the selection process.

<sup>183</sup> Interview No. BC-1. Another board chairman gave a more practical reason for opposing the presence of a registrant's counsel at the personal appearance. He said the attorney would subject the board members to harassment and might talk them into changing their minds. Interview No. BC-3.

the presence of someone other than the registrant and board members at the personal appearance could serve as a check on abusive behavior by board members.<sup>184</sup>

The interest of the Selective Service System in discouraging litigious interruption and the interest of the registrant in having effective legal assistance can be accommodated within the framework of existing regulations. The regulations permit local boards to allow persons other than the registrant to be present at the personal appearance.<sup>185</sup> A registrant's attorney may, therefore, attend the personal appearance to observe and possibly to counsel his client, but not to represent him. Some revision of the regulations would be necessary, however, to make this limited right to counsel effective. As the regulations now read, only the registrant has a "right" to appear before the local board; the board has complete discretion to deny the right to be present to anyone else.<sup>186</sup> To prevent local boards from using this discretion to exclude a registrant's attorney, the regulation should be amended to give the registrant the right to be accompanied by at least one other person at his personal appearance. It should be clearly stated that this person can be an attorney.<sup>187</sup> The board can be given discretion to decide whether more than one person may accompany the registrant and whether anyone but the registrant should be allowed to speak at such proceedings.<sup>188</sup>

## 2. Local Board Accountability for Its Actions

When a local board classifies a registrant, the regulations require only that the classification be entered on designated Selective Service forms.<sup>189</sup> One court has interpreted this requirement to mean that the classification symbol is the sole articulation a local board need give to its decision.<sup>190</sup>

---

<sup>184</sup> This would not guarantee that board members would not engage in abusive behavior. One registrant was vilified by board members in the presence of his parents, his wife and a family friend who had been allowed to attend the personal appearance. Interview No. R-1.

<sup>185</sup> 32 C.F.R. § 1624.1(b) (1962).

<sup>186</sup> *Ibid.* There are no limits on the exercise of this discretion. See *Uffelman v. United States*, 230 F.2d 297, 303-04 (9th Cir. 1956).

<sup>187</sup> This clarification is necessary if the regulations continue to prohibit representation by counsel at the personal appearance. Board members can be expected to read the prohibition on representation by counsel to mean that an attorney cannot accompany a registrant to the personal appearance under any circumstances.

<sup>188</sup> These limitations seem desirable. Permitting the board to limit the number of persons who can accompany a registrant will prevent the board's meeting room from becoming so crowded that reasoned inquiry and deliberation will be impossible. The limitation on the right to speak will give the board some control over the amount of time to be allotted to each personal appearance. If local boards take the proper view of the personal appearance, which is to develop information to permit board members to make an intelligent classification, they can be expected to make wise use of these limitations.

<sup>189</sup> 32 C.F.R. § 1623.4(d) (1962).

<sup>190</sup> *United States v. Greene*, 220 F.2d 792 (7th Cir. 1955). *Accord*, *Reap v. Shambora*, 241 F.2d 803 (5th Cir. 1957).

In other words, the local board is not required to explain its actions. This interpretation is consistent with a literal reading of the regulations and can put the registrant who wants to challenge his classification at a distinct disadvantage. To illustrate: Local boards had broad discretion in ruling on requests for student deferments in the fall of 1965 and were generally able to devise their own deferment standards.<sup>101</sup> Most local boards were primarily interested in determining whether a particular registrant was in school to obtain an education or was simply trying to evade the draft.<sup>102</sup> These boards would generally look to see whether the registrant was making "normal progress toward a degree"<sup>103</sup>—that is, whether the registrant had been in continuous attendance at a college or university. Any voluntary interruption in a registrant's education would be viewed as evidence that he was not making normal progress toward a degree.<sup>104</sup> A registrant, however, may have had a legitimate reason unrelated to draft evasion for leaving school for a year or more.<sup>105</sup> Financial problems may have forced him to leave school to earn the money necessary to complete his education.<sup>106</sup> But if he is not aware that his local board has denied him a student deferment because his education was interrupted, it will probably not occur to him to try to justify the time he spent away from school.

Considerations of basic procedural fairness, therefore, would seem to require that a local board explain in writing<sup>107</sup> why it gave a particular

---

<sup>101</sup> Interview with Lieutenant Colonel Frank C. Lyman, Coordinator, Coast District Headquarters of the California Selective Service System, 450 Golden Gate Avenue, San Francisco, California, August 23, 1966.

<sup>102</sup> Henderson Interview. At least one local board in California was completely hostile to requests for student deferments. Interview No. AB-1.

<sup>103</sup> Henderson Interview.

<sup>104</sup> One board chairman said he would not feel badly about interrupting a student's education by drafting him if he found that the student had previously voluntarily interrupted his own education. Interview No. BC-4.

<sup>105</sup> Most draft boards appear to fear that a student may deliberately prolong his education until he reaches the age of twenty-six so that he will continue to receive student deferments until that age. Although a registrant who receives any deferment remains eligible for the draft until the age of thirty-five, local draft boards have been instructed not to induct registrants who are twenty-six years of age or older. Telephone interview with Mrs. Nell Hcad, Coordinator, Berkeley Local Board Group A, 2199 Bancroft Street, Berkeley, California, September 7, 1966. Therefore, the registrant who can maintain his student deferment past the age of twenty-six might effectively evade military service. However, this privileged sanctuary may be disappearing because of Vietnam. See San Francisco Chronicle, Oct. 4, 1966, p. 1, col. 7 (final home edition).

<sup>106</sup> Interview Nos. R-7 and R-8.

<sup>107</sup> Most local boards will give a registrant an oral explanation of his classification at the personal appearance, but this explanation need not be reduced to writing. This makes it difficult for the appeal board and a reviewing court to assess the validity of the challenged classification. Courts occasionally display dissatisfaction with a local board's failure to explain its classification in writing. See, e.g., *United States v. Hagaman*, 213 F.2d 86, 89 (3d Cir. 1954).

classification whenever that classification is challenged.<sup>198</sup> Such a requirement would make a registrant's recourse to the personal appearance and appeal procedures of the Selective Service System more meaningful by assisting him in preparing his argument for the deferment or exemption he is seeking. It would also serve as a check on possible arbitrary action by a local board. To the extent that a local board need not explain its actions it is not accountable for those actions. A classification based on prejudice or a clear violation of the regulations can pass unnoticed. Requiring local boards to explain their actions in writing will not eliminate this danger completely, but it should act as a deterrent. A board might want to deny a registrant a student deferment because he had participated in an anti-war demonstration,<sup>199</sup> but it may be unable to devise a credible independent justification which it can put into writing. If a board motivated by prejudice does find an independent justification which it can give as a written explanation for its action, that explanation will be subject to the scrutiny of the appeal board and possibly a reviewing court for its validity.<sup>200</sup> Requiring local boards to justify a challenged classification in writing could have the further advantage of encouraging even treatment of registrants with similar backgrounds. The written justification for a disputed classification will be a point of reference for board members in ruling on similar challenges in the future. In addition, the appeal board will have a basis for deciding whether local boards are consistently applying the criteria they devise for the various classifications.

### 3. *The Burden of Making the Record*

The fact that the local board need not explain its actions in writing is part of a broader problem faced by registrants in Selective Service proceedings—the burden is on the registrant to reduce to writing all relevant information bearing on his claim for a deferment or exemption. For the most part, the registrant will satisfy this burden by completing the various forms supplied him by his local board<sup>201</sup> and by complying with the requirement that he keep the board informed in writing of all changed

---

<sup>198</sup> The reasons for most classifications are apparent from the information a registrant is required to supply on the various forms he must fill out. To require a written explanation of every classification, including those which are obvious from the content of a registrant's file, would be an undue burden on local boards. Therefore, it is reasonable to limit the written explanation requirement to those classifications which are challenged by registrants.

<sup>199</sup> See text accompanying notes 10-14 *supra*.

<sup>200</sup> The written explanation also may reveal that the board has misconstrued the applicable legal standards. This can be a basis for invalidating the board's classification. See *Sicurella v. United States*, 348 U.S. 385 (1955).

<sup>201</sup> The basic form completed by all registrants is the Classification Questionnaire (SSS Form 100). 32 C.F.R. § 1623.1(a) (1962). Conscientious objectors must complete a special form (SSS Form 150) on which they elaborate the nature and basis of their opposition to war. 32 C.F.R. § 1621.11 (1962).

circumstances which bear upon his classification.<sup>202</sup> The possibility for confusion and noncompliance by the registrant comes at the personal appearance.

The regulations require the local board to maintain "minutes" of all its meetings.<sup>203</sup> Local boards normally have their clerks present at all meetings to take notes for the minutes.<sup>204</sup> The courts, however, have not interpreted the requirement that minutes be kept to mean that the board must reduce to writing all that is said at a personal appearance. "The requirement that the Local Board keep 'minutes' is satisfied by a formal record of action taken and cannot be construed to demand detailed discussions."<sup>205</sup> In addition, the regulations permit a registrant to present new information at his personal appearance but require that "such information shall be in writing, or, if oral, shall be summarized in writing by the registrant."<sup>206</sup> This seems to define the registrant's duty with sufficient clarity. Even if a registrant is aware of this requirement, however, he may be misled by the board clerk and her stenographic pad<sup>207</sup> into believing that the board is making a summary of all that is said at the meeting. But the burden is clearly on the registrant to reduce to writing any new information he presents at the personal appearance. And, as the law now stands, he is probably best advised to summarize anything said by board members which seems to reflect on the credibility of their classification decision.<sup>208</sup> Otherwise, such information may never get into the record.

Local boards have occasionally regretted their failure to reduce to

---

<sup>202</sup> 32 C.F.R. § 1625.1(b) (1962). One registrant gave the clerk of his local board an oral explanation of why his college education had apparently been interrupted for one year. The board clerk said she was satisfied with the explanation and assured the registrant his student deferment would be maintained. Several months later, however, he received a notice to report for a physical examination. When he called the local board, he learned that the clerk he had talked to earlier had been transferred to another draft board. The new clerk checked the registrant's file and told him she could find no written explanation for the interruption in his education. Fortunately for the registrant, he was able to locate the former clerk at another draft board and she explained the situation to her replacement. His deferment was granted. Interview No. R-10.

<sup>203</sup> 32 C.F.R. § 1604.58 (1962).

<sup>204</sup> This is not required by the regulations, but the board members who were interviewed said their boards followed this practice.

<sup>205</sup> *Ayers v. United States*, 240 F.2d 802, 809 (9th Cir. 1956), *cert. denied*, 352 U.S. 1016 (1957).

<sup>206</sup> 32 C.F.R. § 1624.2(b) (1962).

<sup>207</sup> Several registrants interviewed said they had noticed the board clerk taking notes during their personal appearances.

<sup>208</sup> Registrants seeking classification as conscientious objectors frequently seek advice from such organizations as the Central Committee for Conscientious Objectors, the American Friends Service Committee and Turn Toward Peace. These organizations generally advise the registrant to reduce to writing immediately following the personal appearance a full summary of all that was said. Examples of such summaries are attached to Interview Nos. R-1 and R-2.



writing statements made during the personal appearance,<sup>209</sup> and courts occasionally complain of the inadequacy of the record they have to review.<sup>210</sup> An inadequate record can be particularly detrimental to a registrant who is seeking conscientious objector status and who is not fully aware of the law governing such claims. Under the statute, the objection to war must be based on "religious training and belief."<sup>211</sup> But mere membership in or affiliation with a religious sect that is traditionally pacifistic will not qualify a registrant for conscientious objector status. It is the quality of the individual registrant's beliefs which is crucial. "[T]he ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form."<sup>212</sup> Thus, "the registrant . . . [must] demonstrate two elements—personal conscientious opposition to participation in war in any form, and the source of opposition in 'religious training and belief' . . . . Neither suffices without the other."<sup>213</sup> The registrant, however, may not be aware of this dual requirement. He may be a lifelong Quaker, for example, and feel that his religious affiliation is sufficient to entitle him to classification as a conscientious objector.<sup>214</sup> As a result, he could fail to put sufficient written information into his file to convince an appeal board of his sincerity if the local board denies him conscientious objector status.

Basic procedural fairness would seem to require that the burden of making a record of a personal appearance should be on the local board. Minimally, the local board and not the registrant should be prejudiced by an inadequate record.<sup>215</sup> Some courts have interpreted *Dickinson v.*

---

<sup>209</sup> A Selective Service monograph which outlines experiences under the 1940 draft law notes that local boards were often unhappy when appeal boards changed a registrant's classification. "Too often one or more members of a local board were possessed of personal knowledge of importance which, when considered by the board, resulted in a classification perhaps unwarranted by the statements of the written record . . . . Frequently their decisions were influenced by oral statements of the registrant or other witnesses but which were never made part of the record." 1 SELECTIVE SERVICE SYSTEM, THE CLASSIFICATION PROCESS 161 (Special Monograph No. 5, 1950).

<sup>210</sup> See, e.g., *United States v. Corliss*, 280 F.2d 808, 815 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960), where the court complained that such records are "always cold and often thin." Cf. *United States v. Hagaman*, 213 F.2d 86, 89 (3d Cir. 1954).

<sup>211</sup> 62 Stat. 609 (1948), as amended, 50 U.S.C. APP. § 456(j) (1964). The Supreme Court's latest interpretation of that provision—*United States v. Seeger*, 380 U.S. 163 (1965)—made conscientious objector status available to a broader class of registrants, but it retained the necessity for a religious basis for the objection to war.

<sup>212</sup> *Witmer v. United States*, 348 U.S. 375, 381 (1955).

<sup>213</sup> *United States v. Corliss*, 280 F.2d 808, 815 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960).

<sup>214</sup> Interview No. R-2.

<sup>215</sup> See *Ayers v. United States*, 240 F.2d 802, 808-09 (9th Cir. 1956), *cert. denied*, 352 U.S. 1016 (1957), where the court assumed the registrant was treated fairly even though the

*United States*<sup>216</sup> as requiring local boards to build a record to justify their classifications.<sup>217</sup> It would be a short step from these holdings to require local boards to include in their "minutes" a summary of what is said by the registrant and board members at a personal appearance. Some boards follow this practice now and have not found it unduly burdensome.<sup>218</sup> Such a procedure would provide appeal boards and reviewing courts with a more complete record when they rule on challenged classifications.<sup>219</sup> It would also conform more closely with the reasonable expectations of a registrant who sees a board clerk taking notes during his personal appearance.

#### 4. *Effect of Local Board Error*

The registrant who overcomes the obstacles of the lack of independent legal assistance and a possibly inadequate record to demonstrate local board error in classifying him may still not be successful in challenging his classification in court.<sup>220</sup> The alleged board error must have prejudiced

---

record was silent with respect to the registrant's allegations that the board followed improper procedures in classifying him.

<sup>216</sup> 346 U.S. 389 (1953).

<sup>217</sup> See, e.g., *Wiggins v. United States*, 261 F.2d 113, 114-15 (5th Cir. 1958), *cert. denied*, 359 U.S. 942 (1959); *Batterton v. United States*, 260 F.2d 233, 236 (8th Cir. 1958). This view of *Dickinson* is based on the dissent's interpretation of the majority opinion: "Under today's decision, it is not sufficient that the board disbelieve the registrant. The board must find and record affirmative evidence that he has misrepresented his case . . . . In short, the board must build a record." 346 U.S. at 399. This interpretation of the *Dickinson* opinion is debatable. It is true that the majority said that "Dickinson's claims [relating to his request for a ministerial exemption] were not disputed by any evidence presented to the selective service authorities," and that "the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption." *Id.* at 396. However, the Court was less concerned with the procedures by which local boards should meet this requirement than with assuring that classifications given "solely on the basis of suspicion and speculation" would not be allowed to stand. *Id.* at 397. Because the record before the Court revealed no basis in fact for the denial of the ministerial exemption, the Court could conclude only that speculation and suspicion were the basis for the local board's action. The record before a court must reveal a factual basis for the challenged classification, but *Dickinson* in no sense places on a local board the burden of making such a record. That case simply warns local boards that suspicions will be insufficient to support a classification.

Although *Dickinson* does not necessarily require a local board to compile a record to justify a disputed classification, concepts of basic procedural fairness should. The local board has more adequate resources than the typical registrant to meet such a requirement. The registrant can adequately contest what he feels is an unjustified classification only if he knows why the board acted as it did.

<sup>218</sup> Interview Nos. BC-1 and BC-4. One board chairman said, however, that his board might have to eliminate this procedure if his board's work continues to increase because of the pressures of the manpower mobilization for the Vietnam war. Interview No. BC-2.

<sup>219</sup> One appeal board chairman said he found such written summaries of what is said at the personal appearance quite helpful in judging the validity of challenged classifications. Interview No. AB-2.

<sup>220</sup> The "error" referred to is more than simply an erroneous classification in light of

the registrant for the classification to be invalidated,<sup>221</sup> and the prevailing view appears to be that the registrant has the burden of proving that the board error was prejudicial.<sup>222</sup> Frequently this burden of proof will be an impossible one to carry, and the decision as to who should have the burden of proof can determine the outcome.<sup>223</sup> The requirement that the registrant prove he was prejudiced by local board error contrasts with the position adopted by the courts when the registrant fails to follow procedures prescribed by the statute or regulations. Such a failure by the registrant generally constitutes a waiver of valuable rights;<sup>224</sup> but the government need not prove that its mobilization of manpower was harmed or prejudiced by the registrant's error.<sup>225</sup>

A better approach to local board error appears to be that adopted in *Steele v. United States*.<sup>226</sup>

While it does not appear unjust . . . to place upon the defendant the burden of showing that a procedural safeguard has been denied him, once this fact has been established, it would seem only a natural

---

the factual record. *Estep* requires courts to sustain classifications which might appear erroneous to a judge if the classifications have a basis in fact. *Estep v. United States*, 327 U.S. 114, 122-23 (1946). Rather, the errors discussed here are departures from procedures prescribed by the regulations which deprive a registrant of a full and fair hearing of his claim for deferment or exemption.

<sup>221</sup> See, e.g., *United States v. Lawson*, 337 F.2d 800, 813 (3d Cir. 1964), *cert. denied*, 380 U.S. 919 (1965); *Frank v. United States*, 236 F.2d 39, 43 (9th Cir. 1956); *United States v. Phillips*, 143 F. Supp. 496, 502-03 (N.D. W. Va.), *aff'd*, 239 F.2d 148 (4th Cir. 1956).

<sup>222</sup> The split in the federal courts of appeals on the burden of proof issue is discussed in *United States v. Sturgis*, 342 F.2d 328, 331-32 (3d Cir.), *cert. denied*, 382 U.S. 879 (1965). The court thought the better view was that the burden of proof of prejudice should be on the registrant.

<sup>223</sup> The prejudice doctrine has been most fully developed in cases in which the registrant has alleged unfair treatment because his local board failed to post the names of advisors to registrants. See, e.g., *United States v. Sturgis*, *supra* note 222; *Bradshaw v. United States*, 242 F.2d 180 (10th Cir. 1957); *Rowton v. United States*, 229 F.2d 421 (6th Cir. 1956). Typically, the registrant is arguing that he would have presented a more effective case for the deferment or exemption he sought if he had had the assistance of an advisor. This, however, is merely speculative and is not sufficient to meet the burden of showing prejudice. For example, the court in *Sturgis* said the registrant was not prejudiced because the local board was prepared to give him any advice he sought. Because the registrant can never *prove* he would have followed a different course with the advice of an advisor, he will never be able to carry his burden of proof in such cases. Similarly, the government, if it were given the burden of proof, could not prove the registrant would not have followed a different course. It is for this reason that the placing of the burden of proof will often determine the outcome in cases involving procedural error by local boards.

<sup>224</sup> See text accompanying notes 172-79 *supra*.

<sup>225</sup> For example, the registrant's failure to request a personal appearance within ten days cuts off his right to a personal appearance. See, e.g., *Frank v. United States*, 236 F.2d 39, 42 (9th Cir. 1956). The government need not justify depriving a registrant of this valuable right by showing that the selection process will be prejudiced by any extension of the ten-day period.

<sup>226</sup> 240 F.2d 142, 146 (1st Cir. 1956).

application of the traditional burden of proof [in criminal cases] to require that the prosecution prove "beyond a reasonable doubt" that the denial of the procedural safeguard has not prejudiced the defendant.

Some courts seem properly concerned that a registrant who deliberately ignores his obligations under the draft law will seize upon "mere procedural irregularities which expose him to no prejudice"<sup>227</sup> to upset an otherwise valid classification.<sup>228</sup> On the other hand, whenever the courts find that the local board error was not merely a formal defect but one which deprived the registrant of "substantial rights," they will invalidate the classification without discussing the prejudice or burden of proof issues.<sup>229</sup> But the line between mere formal defects and those which deny a registrant substantial rights can be narrow. Where the defect is merely formal and technical, the government should have no problem carrying its burden of proof on the prejudice issue. Where the question is close and the placing of the burden of proof can determine the outcome, basic procedural fairness requires that the registrant be given the advantage. After all, the local board has erred, and the *Steele* doctrine requires that the registrant prove to the satisfaction of a court that there was an error.<sup>230</sup>

#### 5. *De Novo Review by the Appeal Board*

The easiest case for a registrant who challenges his classification in the courts would seem to be where he proves that the local board was prejudiced against him. Yet such a registrant, if he has taken the natural course of seeking review of his claim for deferment or exemption by the appeal board, will find his path to a successful court challenge obstructed by another legal doctrine:

It is universally held that the Appeal Board considers matters of classification *de novo* and its classification is one of first instance, not a mere affirmance or reversal of the Local Board, and that any . . . prejudice on the local level is cured by a fair consideration on the appeal.<sup>231</sup>

---

<sup>227</sup> *United States v. Lawson*, 337 F.2d 800, 813 (3d Cir. 1964), *cert. denied*, 380 U.S. 919 (1965).

<sup>228</sup> See, e.g., *Kaline v. United States*, 235 F.2d 54 (9th Cir. 1956) where the registrant repeatedly ignored his obligations under the draft law and then pointed to inconsequential defects in his local board's procedures in his efforts to invalidate a clearly justified classification.

<sup>229</sup> See, e.g., *United States v. Fry*, 203 F.2d 638 (2d Cir. 1953); *United States v. Stiles*, 169 F.2d 455 (3d Cir. 1948).

<sup>230</sup> Because the registrant may not have had independent legal assistance at the crucial stages of the administrative proceedings, and because the record of those proceedings may be inadequate, even this burden will not be easy for the registrant to carry.

<sup>231</sup> *DeRemer v. United States*, 340 F.2d 712, 719 (8th Cir. 1965). *Accord*, *United States v.*

The only possible exception to this doctrine is where local board prejudice has so infected the registrant's record that the appeal board is misled in its review of his classification.<sup>232</sup> This judicial doctrine is consistent with a fair reading of the regulations,<sup>233</sup> but it ignores the actual approach that appeal boards take to their reviewing function.<sup>234</sup>

Appeal board chairmen interviewed admitted their panels gave consideration and credence to classifications made by local boards,<sup>235</sup> particularly in close cases.<sup>236</sup> This attitude by appeal board members should not surprise the courts; it is wholly consistent with the assumptions which underlie the administrative structure of the Selective Service System. The local board is supposedly composed of neighbors of the registrant who know him and his community best. This is not true of appeal board members who may live hundreds of miles from the registrant.<sup>237</sup> In most cases in which a classification is appealed, the local board will have talked to the registrant at a personal appearance. The appeal board's review is limited to the information contained in the registrant's file;<sup>238</sup> the registrant does not appear in person before the appeal board.<sup>239</sup> And the registrant's record may be lacking the information necessary for the appeal board to make a meaningful independent decision.<sup>240</sup> These factors tend to make de novo review by the appeal board more a goal than a fact. The courts should recognize these realities. Considerations of basic procedural fairness require that the courts abandon their mechanical application of the de novo doctrine and make a practical assessment of

---

Van Hook, 284 F.2d 489, 491 (7th Cir. 1961); *Ayers v. United States*, 240 F.2d 802, 809 (9th Cir. 1956), *cert. denied*, 352 U.S. 1016 (1957).

<sup>232</sup> See, e.g., *United States v. Corliss*, 280 F.2d 808, 816-17 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960).

<sup>233</sup> See 32 C.F.R. § 1626.26 (1962).

<sup>234</sup> It is interesting to note the Selective Service System's own attitude on the de novo issue in 1 SELECTIVE SERVICE SYSTEM, THE CLASSIFICATION PROCESS 158-63 (Special Monograph No. 5, 1950). After noting that appeal boards neither confirmed nor reversed local board classifications (*id.* at 158), the author asserted that "these reviews . . . were for the most part routine and usually resulted in the *confirmation* of the local board's classification . . . ." *Id.* at 162 (emphasis added).

<sup>235</sup> Interview Nos. AB-1 and AB-2.

<sup>236</sup> Interview No. AB-1. But these are the very cases in which local board prejudice against the registrant could be the decisive factor in the classification.

<sup>237</sup> The regulations require that there be one appeal board for each federal judicial district in the state. 32 C.F.R. § 1604.21 (1962).

<sup>238</sup> There is an exception to this in cases in which a registrant appeals his local board's denial of a conscientious objector classification and the appeal board initially denies him a I-O classification. The registrant's file is then forwarded to the Justice Department for investigation and a recommendation. One part of the Justice Department's procedure is to give the registrant a hearing before a designated hearing officer. 32 C.F.R. § 1626.25 (1962).

<sup>239</sup> 1 SELECTIVE SERVICE SYSTEM, THE CLASSIFICATION PROCESS 160-61 (Special Monograph No. 5, 1950).

<sup>240</sup> See text accompanying notes 201-19 *supra*.

the effects of local board prejudice. If the registrant establishes the fact of local board prejudice, the courts should require the government to prove that the prejudice did not deprive him of fair consideration of his appeal by the appeal board.

Considered in isolation, none of these five elements of procedural unfairness would severely handicap a registrant seeking deferment or exemption from military service. But considered together, they indicate that the administrative proceedings of the Selective Service System, which are given such finality by the courts, fall short of assuring registrants that their claims will receive full and effective hearings. Constitutional requirements are probably met by simply giving the registrant the opportunity to be heard.<sup>241</sup> Practical considerations dictate that the opportunity provided be fair and effective from the registrant's point of view. The registrant who feels he has been treated fairly within the Selective Service System will be less likely to defy the draft law to obtain judicial review of his classification.<sup>242</sup>

Registrants will be accorded greater procedural fairness within the Selective Service System only if revision of the regulations is accompanied by a more realistic judicial appraisal of a registrant's relationship with his local board. Courts now seem too willing to make bland assumptions about the inherent fairness of Selective Service administrative proceedings<sup>243</sup> simply because a registrant can demand a personal appearance and

---

<sup>241</sup> See GELLHORN & BYSE, *ADMINISTRATIVE LAW CASES* 709-15 (4th ed. 1960); Davis, *The Requirement of Opportunity To Be Heard in the Administrative Process*, 51 *YALE L.J.* 1093 (1942).

<sup>242</sup> Invariably, the registrant who carries his challenge of a classification to court will allege one or more procedural irregularities in the handling of his classification. Because the registrant generally must prove he was prejudiced by such irregularities, he will not succeed by merely proving that the board followed improper procedures. But proceedings shorn of such irregularities would reduce considerably the incentive to seek judicial review of a classification.

<sup>243</sup> Judicial assumptions about the fairness of a local board's proceedings abound in *Ayers v. United States*, 240 F.2d 802 (9th Cir. 1956), *cert. denied*, 352 U.S. 1016 (1957). The registrant complained, *inter alia*, that he had been stripped of his conscientious objector classification largely on the basis of a letter to his local board from a district Selective Service administrator. The letter said the registrant was not entitled to a I-O classification because his religious sect was not on a list of approved pacifist churches. The registrant claimed he was not shown the letter and therefore had been unable to rebut its contents. The court replied: "Since the hearing was held soon afterwards [receipt of the letter], it is to be assumed that any new information which the Board had was acted upon and discussed at that time. . . . Since there was a hearing, we must assume that it was a regular one, and, since the files are public for the inspection of the registrant, it must be assumed that he exercised this privilege." *Id.* at 808-09 (emphasis added). The court was forced to resort to such assumptions because the record was inadequate to show that the local board did in fact follow proper procedures. Basic procedural fairness would require that such doubts about the fairness of local board proceedings be resolved in favor of the registrant.

appeal board review as a matter of right. The registrant, however, is in no position to insist that those proceedings be conducted in accordance with concepts of basic procedural fairness. He has been put on notice by the courts that deferments and exemptions exist only because of legislative grace and that he has no "right" to a deferment or exemption.<sup>244</sup> Further, he has been told that the obligation imposed on him by the draft law is a "supreme and noble duty" which contributes to "the defense of the rights and honor of the nation."<sup>245</sup> Consequently, the registrant is placed in the position of a person seeking a gratuity, and the gratuity he seeks is equated with shirking his duty and a lack of patriotism.<sup>246</sup> He is in a poor psychological position to demand additional procedural safeguards. In addition, whether the gratuity will be granted depends largely on the good will of members of the registrant's local board. The informality which surrounds local board proceedings gives them a very personal atmosphere, and the classification decisions made at those proceedings are subject to very limited external control.<sup>247</sup> The registrant, therefore, will ordinarily refrain from making demands that might anger board members and lead to a classification which is a product of that anger.<sup>248</sup> Because of these dynamic elements which underlie the registrant's confrontation of his local draft board, the courts should be extremely hesitant to endorse procedures which will give the registrant anything less than a full and effective hearing of his claim for exemption or deferment.

### *B. Local Board Autonomy*

The autonomy attributed to local draft boards within the Selective Service System can be a second major source of inequitable treatment of registrants. The extent of this autonomy is often exaggerated by Selective Service officials. For example, General Hershey has said, "I

---

<sup>244</sup> See notes 134-39 *supra* and accompanying text.

<sup>245</sup> Selective Draft Law Cases, 245 U.S. 366, 390 (1918).

<sup>246</sup> Some board members take this attitude toward registrants who request classification as conscientious objectors. See Stewart, Local Board: A Study of the Place of Volunteer Participation in a Bureaucratic Organization 135-38 (Unpublished dissertation, Columbia University, 1950); Interview No. R-1.

<sup>247</sup> This lack of control is due largely to the limited scope of judicial review of local board decisions, the autonomy enjoyed by local boards within the Selective Service System and the inadequate record available for appellate review.

<sup>248</sup> One board chairman told of a registrant's father who called him after the son had received an induction notice. The father was highly agitated and threatened vague reprisals against members of the board. The board chairman responded by moving the registrant's induction date ahead by one month without consulting other members of the board. Interview No. BC-4. Most registrants are reluctant to make any requests or demands of their local boards. This attitude is based on the theory that the less contact a registrant has with his local board the less the board will be aware of his existence and possible eligibility for military service.

can't order a local draft board to do anything."<sup>249</sup> This attitude is shared by state Selective Service officials<sup>250</sup> and by some local board chairmen.<sup>251</sup> But General Hershey has considerably more power over local boards than he will admit:<sup>252</sup> He issues Selective Service regulations as the President's delegate. Under the draft law, actions of local boards are subject to the "rules and regulations prescribed by the President."<sup>253</sup>

Autonomy more accurately refers to the broad discretion vested in local boards by the regulations. Many provisions of the regulations are written in general language and are permissive rather than mandatory. Local board discretion is greatest in determining deferment and exemption policies,<sup>254</sup> and it is this broad discretion which produces many inequitable applications of the draft law. With some 4,000 local boards deciding independently who should be deferred and why, it is not surprising that registrants with similar backgrounds receive inconsistent treatment within the Selective Service System. Local board autonomy in devising deferment and exemption standards can result in 4,000 different conscription policies.

This autonomy can be one of the most difficult obstacles faced by a registrant seeking to clarify his rights and obligations under the draft law. Autonomy tends to eliminate the element of predictability from the classification process. If a registrant is trying to make plans for his education or for employment, he cannot rely on his interpretation of the classification criteria published in the regulations. His local board's unpublished standards may be unrelated to his fair reading of the general classification principles contained in the regulations. And, because deferment and exemption policies can vary widely from board to board, he cannot rely on the experiences of friends who have similar backgrounds

---

<sup>249</sup> U.S. News & World Report, Jan. 10, 1966, p. 43.

<sup>250</sup> Henderson Interview.

<sup>251</sup> "We run the board pretty much like we want to," one Midwestern local board chairman told a newspaper reporter. Wall Street Journal, Nov. 23, 1965, p. 1, col. 8.

<sup>252</sup> The courts recognize that local boards enjoy considerable independence of action within the Selective Service System. See *United States v. Lawson*, 337 F.2d 800, 816 (3d Cir. 1964), *cert. denied*, 380 U.S. 919 (1965). But there are some procedural protections accorded registrants in the regulations which local boards can ignore only at the risk of having their classifications invalidated by the courts. See, e.g., *Sterrett v. United States*, 216 F.2d 659, 665 (9th Cir. 1954) (a local board's denial of a personal appearance is grounds for upsetting a local board's classification).

<sup>253</sup> 62 Stat. 619 (1948), as amended, 50 U.S.C. App. § 460(b)(3) (1964).

<sup>254</sup> Colonel Henderson, for example, said that local boards can ignore directives from national headquarters relating to deferment criteria. Henderson Interview. The regulations set down general guidelines for the various classifications. See 32 C.F.R. pt. 1622 (1962). But local boards are also told that eligibility for deferment ultimately depends on the status of the individual registrant. 32 C.F.R. § 1622.20(b) (1962). This inevitably means that the general guidelines must be adapted to individual circumstances.



but who are registered with different local boards. Ultimately, a registrant's eligibility for deferment or exemption can depend solely on the whims of the three to five men who constitute his local board.<sup>255</sup>

The local autonomy which produces these inequities and uncertainties is an essential concomitant of the policy decision made by Congress to establish a conscription system in which local draft boards should play a central role. A local board could not be responsive to the needs of its community<sup>256</sup> and the problems of individual registrants if it lacked authority to adopt and apply flexible deferment and exemption standards. The supporters of the local board system would argue, therefore, that the uncertainties and inequities produced by local autonomy are simply the price that must be paid for the advantages of local boards.<sup>257</sup> An examination of the supposed advantages of local boards, however, suggests that those advantages are more a goal than a reality.

First, local board members are supposed to be representative of their communities and thus best able to represent community interests within the Selective Service System. The composition of local boards, however, frequently fails to reflect the social and economic structure of the areas over which the board has jurisdiction. A study of World War II local boards found that board chairmen and members were drawn primarily from the middle class and higher paid professions and occupations.<sup>258</sup> Interviews suggested the same pattern of board composition persists today,<sup>259</sup> even on boards which have jurisdiction over lower class and slum neighborhoods.<sup>260</sup> The method used to select local board members is probably responsible for the unrepresentative character of those boards. In California,<sup>261</sup> for example, the presiding judge of the superior court

---

<sup>255</sup> That this is true in practice was borne out by interviews with local board chairmen. One chairman said his board paid little attention to a registrant's course of study in college and was primarily concerned with whether a registrant was a full-time student and was doing satisfactory work. Interview No. BC-1. But another chairman said he did not feel that a registrant with a major such as Greek philosophy should be deferred from military service. Interview No. BC-4. Thus, whether a registrant studying Greek philosophy or some similar college major will receive a student deferment can depend on his local board's view of the utility of such a course of study.

<sup>256</sup> See text accompanying notes 73-75 *supra*.

<sup>257</sup> General Hershey sees this advantage to the local board system: "We've got 4000 local boards and if half of them are wrong, that's a damn sight better than if I were making the decisions. I could be wrong all the time. One of the strengths of a democracy is that the people can make their own mistakes." Johnson, *Who Should Serve?*, *The Atlantic*, Feb. 1966, p. 64.

<sup>258</sup> Stewart, *supra* note 246, at 63-67.

<sup>259</sup> See Interview Nos. BC-1, BC-2 and BC-4.

<sup>260</sup> One board chairman interviewed owned an insurance agency. His board's territory encompassed a sprawling Negro ghetto. Interview No. BC-3.

<sup>261</sup> The regulations provide only that local board members shall be appointed by the President upon the recommendation of the governors of the various states. 32 C.F.R.

of the county in which a board is located nominates men to fill vacancies on the board.<sup>262</sup> The judge must normally rely on his own circle of acquaintances for nominations or suggestions for nominations.<sup>263</sup> A judge's acquaintances will normally be drawn from the middle class and from the professions.

Second, local board members are supposed to have the advantage of knowing a registrant as a neighbor and, therefore, of being able to make a classification most consistent with the interests of the registrant, the community and the nation.<sup>264</sup> This assumption bears little resemblance to reality. One board chairman said he had no interest at all in a registrant as a human being. He said he took a totally impersonal approach to classifications and considered registrants as little more than names in a file.<sup>265</sup> This attitude is probably extreme, but it illustrates the absurdity of viewing local board proceedings as a group of neighbors sitting down for a friendly chat with a registrant. Local board members only infrequently had personal knowledge of the registrants they dealt with during World War II,<sup>266</sup> and the impersonal approach is probably the rule rather than the exception in local board proceedings today, particularly in urban areas.<sup>267</sup>

Third, because local board members were to be known in the community, it was assumed that they would operate under "the continuous observation of all other members of the local community."<sup>268</sup> This was to be "the best assurance both of efficiency and impartiality and justice."<sup>269</sup> Actually many local board members seek deliberately to isolate themselves from the community because they fear possible harassment from disgruntled registrants.<sup>270</sup> Board clerks are instructed not to reveal

---

§ 1604.52(b). Each governor is free to devise his own method of securing nominations to fill vacancies on local boards.

<sup>262</sup> The nominations are forwarded to the governor who routinely passes them on to the President for formal appointment. Henderson Interview.

<sup>263</sup> See, e.g., Interview Nos. BC-1 and BC-3.

<sup>264</sup> See, e.g., *United States v. Pitt*, 144 F.2d 169, 172 (3d Cir. 1944). Cf. 1 SELECTIVE SERVICE SYSTEM, ORGANIZATION AND ADMINISTRATION OF THE SYSTEM 187 (Special Monograph No. 3, 1951).

<sup>265</sup> Interview No. BC-3.

<sup>266</sup> Stewart, *supra* 246, at 81-85.

<sup>267</sup> See Wall Street Journal, Nov. 23, 1965, p. 1, col. 8.

<sup>268</sup> 86 CONG. REC. 11673 (1940) (remarks of Rep. Mott).

<sup>269</sup> *Ibid.*

<sup>270</sup> See, e.g., Interview Nos. BC-1 and BC-3. One registrant who asked the clerk of his local board for the name of the board chairman was told such information could not be revealed. He was told that board members feared registrants might seek retaliation against them for classifications given. Interview No. R-5. This isolation of board members from registrants was carried to absurd lengths by one switchboard operator who told one registrant he was not allowed to speak to his local board at all. Interview No. R-11.

the names of board members unless the registrant is unusually persistent and the clerk finds it impossible to answer his questions.<sup>271</sup> Although one can sympathize with board members who fear harassment and possible retaliation<sup>272</sup> if their identities become known, the anonymity which they achieve makes effective community control a myth.<sup>273</sup>

Fourth, the informality which surrounds local board proceedings is supposed to give a registrant the opportunity for a full and frank discussion of his claim for deferment or exemption with board members. But some board members have a wholly different concept of the function of the personal appearance. They view it more as an opportunity for them to justify their denial of an exemption or deferment to a registrant than as an opportunity for the registrant to convince the board he deserves a deferment or exemption.<sup>274</sup> Because these board members do not attend the personal appearance for the purpose of listening to the registrant's story and perhaps being persuaded by it, they very seldom change a classification as a result of the registrant's appearance. The registrant who realizes that board members are not listening to his story and are more interested in justifying their own actions will leave the personal appearance dissatisfied and frustrated. He will have gained nothing from

---

<sup>271</sup> This policy reflects an attitude which exists at all levels of the Selective Service System and which repeatedly frustrated the efforts of the author to interview local board members. A letter to the California headquarters of the Selective Service System requesting the names of local board chairmen in the state was met with a flat rejection. It was only after the intervention of Rep. John E. Moss of California, chairman of the United States House of Representative's Subcommittee on Foreign Operations and Government Information, that a state official permitted the author to copy a list of local boards in California. See letter from Jack Matteson, Chief of Government Information for the Subcommittee on Foreign Operations and Government Information, to Professor Ira Michael Heyman, Professor of Law, University of California, Berkeley, May 18, 1966; on file, *California Law Review*. Colonel Henderson, however, refused to supply the names of the chairmen of the local boards, claiming that such men are not compensated for their services and do not want to be bothered by interviews. The author, therefore, was forced to visit local board offices and ask the board clerk for the names of the board chairmen. This was a frustrating process. It was necessary to go to extreme lengths to assure the board clerk that the purpose of the interviews was legitimate and that the various board chairmen would not be harassed. Still some clerks would not reveal the names of the board chairmen. Rather, they undertook the job of calling those men and asking them if they would consent to be interviewed. Less than half of the chairmen so contacted agreed to be interviewed.

<sup>272</sup> One board chairman told of an irate parent who threatened to boycott a retail store owned by a board member. Interview No. BC-4.

<sup>273</sup> Cf. Stewart, *supra* note 246, at 202-05. This author conducted a thorough study of local board performance during World War II under the 1940 act. Although local boards were supposed to represent their communities in the conscription system, the author concluded that boards became increasingly isolated from the community and were simply "agents of a central authority." In effect, local boards became representatives of the conscription system in the community.

<sup>274</sup> Interview Nos. BC-2 and BC-3.

the informality of local board proceedings. Rather, that informality may make it more difficult for the registrant to challenge his classification within the Selective Service System or in the courts.<sup>275</sup>

This analysis suggests that many of the supposed advantages of the local board system are nonexistent. And this, in turn, suggests that the local autonomy which is an integral part of that system is not worth preserving at the cost of the inequities and uncertainties which it produces. This conclusion is strengthened by evidence that local board autonomy can become a device by which local board members and Selective Service officials can evade effective control. One study of local board operations during World War II found that

the legally established autonomy of the Local Boards in classification . . . permitted the administrators [of the Selective Service System] to state truthfully that they did not have the authority to make arbitrary changes in individual classifications and to refer the appellant back to his Local Board or to an Appeal Board. . . . [This was] a convenient escape . . . of considerable utility to the administrators.<sup>276</sup>

One cannot help but feel that General Hershey's claim that he has no control over local board actions is simply his "convenient escape" from any responsibility for controversial classification decisions by local boards.<sup>277</sup> On the other hand, local board chairmen tend to disavow any autonomy or discretion when questioned about controversial classifications. For example, one board chairman said his board would have no flexibility in applying the new class-standing criteria for student deferments<sup>278</sup> because "it's the law."<sup>279</sup> The whole question of student deferments has stirred considerable controversy,<sup>280</sup> and this board chairman

---

<sup>275</sup> More formal proceedings—which would include the presence of a registrant's attorney and a written summary of what is said—would not guarantee that board members would listen to and be persuaded by what a registrant says at the personal appearance. But they would lay the foundation for a more effective appeal.

<sup>276</sup> Stewart, *supra* note 246, at 38.

<sup>277</sup> The statement by General Hershey quoted in the text accompanying note 249 *supra* was in response to a question concerning the reclassification of registrants who burn their draft cards.

<sup>278</sup> 31 Fed. Reg. 4893 (1966). In addition to a registrant's class standing, a local board can consider his score on a deferment test administered in the spring of 1966. The regulation specifies a minimum score of 70 on that test to qualify a registrant for a student deferment. Initial results from the test, however, showed that more than 90% of those who took the test received the minimum grade or higher. Henderson Interview. This suggests that the test results will be of little assistance to local boards in ruling on student deferments.

<sup>279</sup> Interview No. BC-4.

<sup>280</sup> See Memorandum on Academic Freedom Issues Arising Out of New Selective Service Criteria for Deferring Students, dated June 2, 1966, and issued by the American Civil Liberties Union office in New York City. The memorandum summarizes the issues involved in the controversy surrounding student deferments.

can conveniently evade responsibility for decisions in this area by blaming inflexible regulations imposed from above. But that same board chairman felt he had full discretion and authority to ignore completely the criteria in the regulations relating to "necessary employment" deferments.<sup>281</sup> As a result, a registrant will encounter a bewildering series of disclaimers when he seeks to fix responsibility within the Selective Service System for what he thinks is an unjustified classification. If he seeks out and confronts his local board members, they may simply shrug their shoulders and claim they had no choice under the regulations.<sup>282</sup> If he carries his protest to a regional or state headquarters, he may be met by another shoulder shrug. The local boards are autonomous, he will be told; even top Selective Service administrators cannot interfere with their decisions. These will simply be feeble protests by men not willing to accept responsibility for a challenged decision. The regulations relating to classification are written in broad and permissive language. They give local boards all the discretion and flexibility they need to adjust deferment and exemption standards to peculiar problems faced by individual registrants. This, essentially, is what is meant by local board autonomy. Selective Service administrators at the regional or state level, on the other hand, have no direct authority to change local board decisions. But these officials can use their positions and influence to persuade local boards to reconsider a classification, and they do occasionally intercede on behalf of registrants who seek their assistance.<sup>283</sup> These officials feel that such

---

<sup>281</sup> This board chairman is an industrial relations manager for a large corporation, and he feels he has intimate and specialized knowledge of the manpower needs of industry. The regulations suggest clearly that occupational deferments should be given only to those men engaged in occupations essential to national defense needs. See 32 C.F.R. § 1622.20(a) (1962). The board chairman said, however, that he knew there was an acute shortage of tool and die makers in industry and that he would grant a II-A deferment to any man in that occupation or who planned to become a tool and die maker even if he was not working in an industry contributing to the national defense effort. Interview No. BC-4.

<sup>282</sup> For example, one registrant was denied a student deferment because he had left college for a year in undergraduate school. He went to his personal appearance equipped with letters from college officials explaining that serious financial problems had forced him to leave school and that he was serious about obtaining an education. The board members told him, however, that they had no authority to consider such factors and that they were forced to deny him a student deferment. They said such information was only within the jurisdiction of the appeal board. Interview No. R-8.

<sup>283</sup> One registrant was denied a student deferment by his local board because he had spent a year away from college as an undergraduate. He appealed and in March 1966 received word that the appeal board had voted unanimously to give him a student deferment. Three months later he was notified by his local board he had been reclassified I-A. When he called the local board for an explanation, he was told the board had decided to reclassify all its student-registrants I-A and send them for physical examinations to determine how many of them met minimum physical standards for induction. The board clerk told him that protesting the reclassification at a personal appearance would be a futile gesture since the

actions inject added fairness into Selective Service procedures. But because such actions are wholly unofficial, the registrant must depend on the good will of the administrators for their assistance. And this, in turn, tends to breed paternalism within the administrative structure of the Selective Service System.<sup>284</sup>

Local autonomy, therefore, emerges as just one more administrative obstacle a registrant must face in seeking a draft deferment or exemption. To the extent that local boards think they can completely ignore classification criteria in the regulations, the registrant faces a rule of men rather than a rule of law. His eligibility for deferment or exemption will depend not on established standards applied uniformly to all registrants in like circumstances, but on the attitudes and whims of the three or five men on his local draft board. And, whenever a local board disavows its autonomy and blames a controversial classification on criteria issued by national headquarters, local autonomy becomes a convenient escape from responsibility for those administrators who drew up the criteria.

---

board would not change its mind. The registrant's father was puzzled by this action of the local board and called state headquarters to inquire about the propriety of the local board's action. He was told by an official at state headquarters not to worry. Even if his son passed his physical and was ordered to report for induction, he was told, the son could still appeal to state headquarters and probably have the induction order canceled. Interview No. R-12. In fact, there is no right of appeal to a state headquarters and any intervention by officials at state headquarters depends solely on the judgment of such officials that a registrant is deserving of such action. However, such intervention can be quite effective. Colonel Henderson told of a registrant who had been accepted for the Peace Corps only a few days after receiving his notice to report for induction. His local board told him it was powerless to cancel the notice for induction and he called state headquarters for assistance. The local board offices were in the same building as the state headquarters. A state official simply walked into the local board offices and convinced the board clerk to cancel the induction order. And one registrant who sought assistance from state headquarters after his local board repeatedly ignored his pleas for a cancellation of his induction orders was notified by the state director the day before he was to report for induction that his orders would be canceled. Interview No. R-7.

<sup>284</sup>Paternalism develops because the registrant has no right at all to insist on intervention by administrators at state headquarters. Those officials are fully aware of the absence of this right. Intervention is reserved for those registrants who are deserving of it, but the administrators are the sole judges of which registrants will be the beneficiaries of the considerable pressure the administrator can put on the local boards. The state director has specific authority in the regulations to intervene on behalf of the registrant at the appeal board level of the administrative proceedings. See 32 C.F.R. § 1626.61(a). Under that section, the state director can require the appeal board to reconsider a registrant's case whenever he "deems it to be in the national interest or necessary to avoid an injustice." This, however, does not lessen the paternalistic atmosphere of state headquarters because the section makes the state director the sole judge of when reconsideration by the appeal board will be in the national interest or will avoid an injustice. Similarly, 32 C.F.R. § 1625.3(a) (1962) provides that the state director can, by written request, require a local board to cancel a registrant's induction order and reopen his classification. But this regulation contains no criteria for determining when the state director is required to take such action.

*C. Manpower Pools and Monthly Quotas*

The Selective Service System divides the nation into more than 4,000 local board areas, each constituting a separate and self-contained manpower pool. Because of this division of the nation's manpower resources, it is possible for one registrant to be drafted and another deferred simply because they are under the jurisdiction of different draft boards and not because one deserved a deferment and the other did not.

The territorial boundaries of local boards are drawn by the various state directors. The regulations contain only general guidelines to assist the state directors in dividing their states into local board areas. No local board area should have a population exceeding 100,000, the regulations state, and each county should have at least one local board area.<sup>285</sup> Large cities and populous counties will be divided into several board areas under these guidelines.<sup>286</sup> The state director has total discretion in making those divisions.

The state director is also responsible for dividing his state's monthly draft quotas among the various local boards under his jurisdiction.<sup>287</sup> A local board's quota will be based on the number of registrants it has "available for service in the armed forces."<sup>288</sup> This means that a local board's quota will be based on the number of registrants it has classified I-A. As the number of these registrants is reduced by deferments and exemptions, the board's quota will normally be reduced. During periods of rapid mobilization, however, quotas for all local boards increase and some deferments become expendable commodities. As its pool of I-A registrants is depleted at an accelerated pace, a local board will find it necessary to cut back on the number of deferments it grants so it can continue to meet its quotas.<sup>289</sup> This has been one of the principal impacts<sup>290</sup> of the Vietnam war on the Selective Service System,<sup>291</sup> and the

---

<sup>285</sup> 32 C.F.R. § 1604.51 (1962).

<sup>286</sup> The City of San Francisco, for example, is divided into ten local board areas. Los Angeles County has forty-seven local board areas.

<sup>287</sup> The precise procedure for determining monthly calls and quotas within the Selective Service System is outlined in 32 C.F.R. pt. 1631 (1962).

<sup>288</sup> 32 C.F.R. § 1631.1 (1962).

<sup>289</sup> To some extent, local boards tend to over-react when draft quotas increase and to reclassify registrants out of proportion to actual manpower demands. See Chapman, *Selective Service and National Needs*, The Reporter, June 16, 1966, pp. 15, 16.

<sup>290</sup> Another impact of the Vietnam conflict has been the drafting of registrants as young as nineteen years old. Prior to the Vietnam military buildup, registrants generally were not drafted until they reached the age of twenty-two or twenty-three. See Interview Nos. BC-2 and BC-4.

<sup>291</sup> This is reflected partly in the new class-standing criteria for student deferments issued in March 1966. See 31 Fed. Reg. 4893 (1966). Before the mobilization for Vietnam, students generally were deferred for as many years as they remained full-time students. If draft calls

student deferment has been a major victim.<sup>292</sup> This accounts for the unusually large number of students who found themselves reclassified in the fall of 1965.

Not all local boards, however, have been forced to cut back on student deferments to meet the increased manpower demands of the Vietnam conflict. Boards which have a small number of students among their registrants and, therefore, a larger number of potential I-A registrants can afford to continue granting student deferments. These boards are generally located in lower economic areas where most registrants cannot afford higher education.<sup>293</sup> Boards located in wealthier neighborhoods, however, generally have a high proportion of students among their registrants and face the greatest pressure to limit the number of student deferments they grant.

The inequities which can result are illustrated most dramatically when a registrant is reclassified I-A but sees or hears of a fellow student who is from his hometown, who has a comparable level of academic achievement, and who has retained his student deferment. The deferred student just happened to be registered with a local board which had fewer students among its registrants. Such inequities are a by-product of the local board structure and the attempt to meet draft quotas from more than 4,000 small and separate manpower pools. But this explanation is unrelated to the policies underlying the various draft deferments and exemptions. And it is hardly an adequate explanation for those registrants who are drafted because of geography.<sup>294</sup>

### III

#### ACHIEVING THE GOAL OF FAIRNESS WITHIN THE SELECTIVE SERVICE SYSTEM

The inequities which result from inadequate procedural safeguards within the Selective Service System and from the operations of local

---

remain high because of Vietnam, the new criteria could result in a sizeable number of students having their schooling interrupted by military service.

<sup>292</sup> Telephone interview with Mrs. Nell Head, Coordinator, Berkeley Local Board Group A, 2199 Bancroft Street, Berkeley, California, September 7, 1966.

<sup>293</sup> It should be noted that while these boards do not have a large number of student deferment requests to contend with, they generally receive a larger number of dependency deferment requests and exempt a larger number of registrants for health and mental deficiencies. See Chapman, *supra* note 289, at 16; Interview No. BC-3. However, one board chairman whose board area encompasses lower class and slum neighborhoods said he was still drafting only twenty-three-year-olds despite the pressures of the Vietnam war. Interview No. BC-3.

<sup>294</sup> The uneven treatment of registrants in like circumstances simply because they are under the jurisdiction of different draft boards is not merely a phenomenon of the Vietnam conflict. Similar problems existed during World War II. See Stewart, Local Board: A Study of the Place of Volunteer Participation in a Bureaucratic Organization 33-34 (Unpublished dissertation, Columbia University, 1950).



draft boards suggest clearly that the draft law is falling short of its stated goal of fair, just and impartial selections.<sup>295</sup> Achieving that goal has two distinct aspects. First, selections must be made under conditions and criteria which will ensure that registrants in like circumstances and with similar backgrounds will receive substantially equal treatment.<sup>296</sup> Second, those registrants who resort to the administrative processes of personal appearance and appeal to assert claims for deferment or exemption should be accorded adequate procedural safeguards to assure them of a full and effective hearing of their claims. Both of these objectives can be achieved through modifications in the administrative structure of the Selective Service System and through a more realistic judicial assessment of the position of a registrant within that system. Because the judicial attitude has been molded by statutory and regulatory provisions, however, the initiative in making those changes must come from Congress and the officials responsible for administering the draft law.

*A. Regional Classification Boards and Objective  
Classification Criteria*

Two basic modifications in the present administrative structure are essential to effective reform of the Selective Service System. First, local draft boards should be abolished as jurisdictional and decision-making units<sup>297</sup> and should be replaced by regional classification boards. Second, classification criteria should be made as objective as possible<sup>298</sup> and should be prescribed by national Selective Service headquarters to ensure more uniform treatment of registrants. Because local boards have become sacred cows, their abolition would be a difficult political decision for Congress to make. But it is the essential starting point for meaningful reform of the Selective Service System.

---

<sup>295</sup> See text accompanying notes 62-65 *supra*.

<sup>296</sup> No system of selection can guarantee all registrants absolute equality of treatment, but substantial equality should at least be the goal of the system.

<sup>297</sup> Eliminating local boards as *jurisdictional* units means that a registrant will no longer be part of a local board manpower pool. Eliminating local boards as *decision-making* units means that local boards will no longer have the power of classification. The present local board offices can be maintained as administrative units to handle such routine tasks as registering men for the draft, preparing their records for the induction center and the many other routine problems they now handle.

It should be noted at this point that the elimination of local boards would involve many details of implementation which are beyond the scope of this Comment. It is not the purpose of this Comment to prescribe a table of organization for a reconstituted Selective Service System. Rather, this Comment will attempt to sketch in broad outline several proposals which should contribute to fairer and more equitable treatment of registrants.

<sup>298</sup> This proposal is inapplicable to conscientious objector classifications since the subjective factor of the sincerity of a registrant's beliefs is a crucial element in those classifications. Objective criteria would also be difficult to develop for hardship deferments. Most other classifications lend themselves to objective criteria.

Regional classification boards would be patterned after the existing appeal boards, but with one important difference: A registrant would have the right to appear in person before a regional board to argue his claim for deferment or exemption. This would be the equivalent of a personal appearance before local draft boards. But, unlike local boards, the regional classification boards would be required to extend a registrant certain procedural safeguards, including the assistance of counsel and a record of the proceedings.<sup>299</sup> These safeguards would give the registrant greater assurance of a full and effective hearing.

Some of the advantages of substituting regional classification boards for local draft boards are obvious. A regional board with jurisdictional lines corresponding to those of appeal boards<sup>300</sup> would have a much broader-based manpower pool from which to select its inductees. The possibility that a registrant will be denied a deferment because of the character of his neighborhood will thus be reduced. Further, the fact that fewer boards will be making classification decisions will tend to reduce the possibility of unequal treatment of registrants. Even if a regional classification board were vested with unchecked discretion, the deferment and exemption standards it developed would apply over a considerably broader geographical area than any single local draft board now covers.<sup>301</sup>

Regional classification boards applying more objective deferment and exemption criteria have several less obvious advantages. While local board members are generally not representative of the social structure of

---

<sup>299</sup> This is not intended to be an exhaustive list of the procedural safeguards a registrant should be accorded when he appears before a regional classification board. The precise procedures to be adopted by such boards should probably retain some degree of informality to give the boards a degree of flexibility in handling the increased number of classification challenges which can be expected during a period of rapid manpower mobilization. The two procedural safeguards mentioned in the text are those which a registrant is denied by the existing local draft boards and which put registrants at a distinct disadvantage when denied.

<sup>300</sup> The regulations now require one appeal board for each federal judicial district in a state, 32 C.F.R. § 1604.21 (1962), and the regional classification boards should have similar areas of jurisdiction. To preserve the registrant's right of appeal from the decisions of the regional boards, new appeal boards with even wider areas of jurisdiction should be created. The new appeal boards could have jurisdictional lines corresponding to those of the federal courts of appeals.

<sup>301</sup> The existing appeal boards tend to impart this type of uniformity to the present classification system. Each appeal board develops its own deferment and exemption criteria and applies those criteria to a broad geographical area. That appeal board criteria differ significantly from those developed by individual local boards is reflected in the number of times appeal boards change local board classifications. Appeal board chairmen interviewed estimated they reversed local board classifications in at least 30% of the cases reviewed. Interview Nos. AB-1 and AB-2. This figure corresponds with the experience of appeal boards during World War II. See Stewart, *supra* note 294, at 57. Registrants, however, pay a high price in anxiety, uncertainty and frustration to benefit from this uniformity. See Interview No. R-8.

the areas which they supervise,<sup>302</sup> the regulations require that the composition of the appeal boards be representative of general economic patterns. "The appeal board should be a composite board, representative of the activities of its area, and as such should include one member from labor, one member from industry, one physician, one lawyer, and, where applicable, one member from agriculture."<sup>303</sup> Since the regional classification boards would be patterned after existing appeal boards, the regional boards would assume this representative character.

A classification board of such composition would be more conducive to the establishment of formal procedures which will more adequately assure a registrant of a full and effective hearing. The typical local board member has had no legal training and is generally not aware of the nature and significance of adequate procedural safeguards. In fact, some local board members display a suspicion and hostility toward such safeguards.<sup>304</sup> A regional classification board which is required to have a lawyer among its members should be more receptive to the introduction of more formal procedures. The board members, for example, need not fear that a registrant accompanied by an attorney will put them at a disadvantage.<sup>305</sup> The lawyer-member could act as the board's attorney in confrontations with registrants and their attorneys. And, because the lawyer-member could be expected to have a working knowledge of the statute, regulations and relevant court decisions,<sup>306</sup> the registrant could more confidently expect an application of substantive and procedural rules which conform with established legal requirements.<sup>307</sup>

It might be argued that the establishment of regional classification boards with formal procedures and safeguards will tend to encourage

---

<sup>302</sup> See text accompanying notes 258-63 *supra*.

<sup>303</sup> 32 C.F.R. § 1604.22 (1962).

<sup>304</sup> One board chairman interviewed expressed the fear that a registrant's attorney would subject his board to harassment and abuse. Interview No. BC-3. Local boards during World War II resented the protection afforded registrants by appeals within the Selective Service System. See Stewart, *supra* note 294, at 57-58.

<sup>305</sup> This attitude was implicit in the statement of the board chairman who feared harassment by a registrant's attorney. Interview No. BC-3.

<sup>306</sup> Board members interviewed generally claimed to have full knowledge of the contents of the Selective Service regulations. But the interviews revealed significant gaps in that knowledge. For example, one board chairman was not aware that local boards were required to have government appeal agents assigned to them. Interview No. BC-4. Another did not know that local boards had the discretion to allow persons other than the registrant to attend a personal appearance. Interview No. BC-2. These men were not lawyers. The two appeal board chairmen interviewed had had legal training and experience and were much more aware of the contents of the regulations.

<sup>307</sup> The regional classification boards could bring more regularity to their proceedings by appointing a hearing officer who would be responsible for conducting board proceedings in accordance with prescribed procedures.

registrants to seek administrative review of their classifications and thus disrupt the selection and mobilization process.<sup>308</sup> Such an argument would be the product of misplaced emphasis. Any conscription system which drafts some and defers others and which provides administrative procedures by which classifications can be challenged will, of its own force, breed administrative delays in the selection process. More formal proceedings will be a neutral factor at best. The lack of formal procedures and safeguards at local board proceedings has not discouraged administrative delays by registrants. In fact, the informality of local board proceedings may prolong that delay. Registrants who feel that the informal procedures of the personal appearance have deprived them of full and effective hearings will tend to challenge local board decisions before the appeal board and possibly in the courts. More formal procedures before the regional classification boards should reduce this stimulant to administrative delay.

The development of more objective classification criteria should also tend to reduce the incidence of administrative delay. Subjective criteria which vests considerable discretion in any single man or group of men will produce disparate results depending on the particular interpretation given. A registrant who is unhappy with the interpretation given by his local board will appeal on the hope that a different group of men—the appeal board—will come up with an interpretation more favorable to him. As classification criteria become less subjective, the chances that different men will reach different results in applying the criteria will be reduced. This will decrease the possibility of a successful appeal from the initial classification decision and should tend to discourage such appeals.<sup>309</sup> The experience with student deferment criteria illustrates this point. The criteria applied to such deferments in the fall of 1965 were highly subjective and gave local boards considerable discretion in ruling on such deferment requests.<sup>310</sup> During that period appeal boards received an unusually large number of appeals from students who had been denied deferments.<sup>311</sup> In March 1966, new regulations were issued which based

---

<sup>308</sup> This would be analogous to the rationale of discouraging litigious interruption of the selection process by requiring a registrant to exhaust his administrative remedies and by limiting the scope of judicial review. See *Falbo v. United States*, 320 U.S. 549 (1944); *Estep v. United States*, 327 U.S. 114 (1946).

<sup>309</sup> As long as appeal within the Selective Service System remains a matter of right, nothing will prevent a registrant from pressing a non-meritorious appeal for the sole purpose of delaying his induction. But interviews with board chairmen suggest that the incidence of non-meritorious appeals is small. Local board chairmen feel most registrants are sincere in seeking administrative review of their classifications.

<sup>310</sup> See text accompanying notes 191-96 *supra*.

<sup>311</sup> No precise figures are available on the number of appeals in the various categories of deferments and exemptions. But appeal board chairmen interviewed said student appeals outnumbered all others in late 1965 and early 1966. See, e.g., Interview No. AB-1.

student deferment criteria on a registrant's class standing.<sup>312</sup> Appeal boards anticipate a significant reduction in student appeals if the class-standing criteria are applied uniformly by local boards.<sup>313</sup> This is only logical. If registrants understand that their eligibility for student deferments depends on their own academic performance and not on the subjective judgments of classifying officials, the incentive to appeal adverse rulings will be reduced.

Perhaps the most serious objection that can be made to replacing local draft boards with regional classification boards is that the work load on the regional boards will be unmanageable. It is estimated that local boards now make up to eight million classification decisions each year.<sup>314</sup> It will be argued that this work load cannot be effectively absorbed by fewer than 200 regional classification boards. This argument is valid only if it is assumed that regional board operations will be patterned after local board operations.

Under the existing draft law, only the local draft board can classify a registrant.<sup>315</sup> This means that even the new registrant whose classification questionnaire shows no conceivable ground for deferment or exemption will not be classified until the local board can meet, review his file and reach the inevitable decision to classify him I-A.<sup>316</sup> This is a result of the broad discretion vested in local draft boards. Since these boards have virtually unbridled authority to place a registrant in any classification they choose, board members must accept the responsibility for making every classification. Because the discretion of regional classification boards would be curtailed by uniform and objective classification criteria, present classification procedures could be drastically revised to reduce the pressure on regional board members. For example,<sup>317</sup> every new registrant could be classified I-A automatically<sup>318</sup> unless his classification brought him clearly within the objective criteria established for deferment or exemption. This process could be handled as a matter of routine by the

---

<sup>312</sup> 31 Fed. Reg. 4893 (1966). However, because of the concept of local board autonomy, the new criteria are only guidelines and local boards are not required to apply them uniformly in student deferment cases.

<sup>313</sup> Interview Nos. AB-1 and AB-2.

<sup>314</sup> SELECTIVE SERVICE SYSTEM, SELECTIVE SERVICE CHRONOLOGY 40 (rev. ed. 1965).

<sup>315</sup> 62 Stat. 618 (1948), as amended, 50 U.S.C. App. § 460(b)(3) (1964); 32 C.F.R. § 1622.1(c) (1962).

<sup>316</sup> This explains why there are as many as eight million classification decisions each year.

<sup>317</sup> Because this Comment does not purport to establish a table of organization for a reconstituted Selective Service System, the procedures outlined in the text are merely illustrative of a possible new approach to classification.

<sup>318</sup> This would be consistent with existing regulations which provide: "Each registrant shall be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established . . ." 32 C.F.R. § 1622.1(c) (1962).

paid personnel of the regional board. Notice of the initial classification would be accompanied by an explanation, in nonlegal language, of the registrant's right to request a reopening of his classification whenever changed circumstances qualify him for deferment or exemption.<sup>319</sup> Accompanying this explanation would be a list of the various deferments and exemptions available and a general statement of the applicable criteria. Each regional board could create a position of classification officer, to be filled by a paid employee who has a competent working knowledge of the statute, regulations and established classification criteria. The classification officer would be responsible for reviewing all requests for reopenings of classifications and for making the initial decision on such requests consistent with the objective classification criteria.<sup>320</sup> The registrant would have the right to appeal that ruling to the regional classification board,<sup>321</sup> which would consider the challenge *de novo*. Such review by the regional board would not have the same weaknesses as *de novo* review by the current appeal boards.<sup>322</sup> Because the registrant would appear before the regional board, the board would not be forced to rely solely on a possibly inadequate record to evaluate the challenged classification. It could also require the classification officer to explain in writing why the classification sought by the registrant was denied.

Such a screening process, if it made proper use of the objective classification criteria, should leave the regional board with no more cases to handle than the existing appeal boards process.<sup>323</sup> The board should be left primarily with those deferment and exemption requests for which objective criteria will be difficult to develop. These will include hardship deferments and conscientious objector claims. Because registrants will have the right to appear before the regional classification boards and because such boards will be required to formalize their proceedings with

---

<sup>319</sup> The registrant would also have the right to protest the initial classification decision before the regional board. But most new registrants have no valid basis for seeking deferment or exemption. See text accompanying notes 31-34 *supra*.

<sup>320</sup> The classification officer should have the authority to call the registrant in for an interview before reaching a decision on the request for a reopening. The registrant should have the right to appear in person before this official if he wishes.

<sup>321</sup> The regional classification board should make periodic reviews of the decisions of the classification officer that are not challenged to assure proper application of deferment and exemption criteria.

<sup>322</sup> See text accompanying notes 231-40 *supra*.

<sup>323</sup> These cases totaled 9,741 from July 1964 to June 1965. 1965 SELECTIVE SERV. ANN. REP. app. 13. The regulations provide the machinery to permit appeal boards to adjust to any substantial increase in work load. Additional panels of five men can be appointed "if the number of appeals sent to the [appeal] board becomes too great for the board to handle without undue delay." 32 C.F.R. § 1604.22 (1962). The regional classification boards can be given the same adaptability if the number of appeals exceed expectations.

more procedural safeguards, the regional boards will probably spend more time on each case than the existing appeal boards do. But this additional demand on board members' time would be a small price to pay for the increased uniformity and fairness which should result from regional board operations.<sup>324</sup>

Because it will be virtually impossible to develop objective classification criteria to apply to hardship deferments and conscientious objector claims, the problem of individual board discretion will remain in those cases. But because that discretion will be exercised within the context of proceedings which offer increased procedural safeguards to registrants, the possibility of arbitrary and unchecked decisions will be decreased. And, because fewer boards will be exercising such discretion, the possibility of widely disparate decisions will be reduced.

### *B. Living With the Local Board System*

If Congress finds it politically impractical to abolish the local board system, the chances for meaningful reform of the Selective Service System will be reduced but not eliminated. The starting point for reform within the context of the local board system is the development of objective classification criteria to limit local board discretion.<sup>325</sup> Accompanying this action should be new regulations giving registrants various procedural safeguards at local board proceedings as a matter of right. These should include the right to be accompanied by an attorney and a requirement that the board make a written summary of its reasons for making a challenged classification and of all that is said at a personal appearance. For those unable to afford independent legal assistance, the regulations should require local boards to appoint lawyers from the community as advisors who will have the sole function of advising registrants of their rights and obligations under the draft law. Finally, local boards should be required to make more effective use of the government appeal agent. Because he

---

<sup>324</sup> The increased time required of regional board members may cause one problem. Local and appeal board members are presently uncompensated. It may be difficult to obtain competent men to spend additional time on Selective Service matters without pay. If this is true, the solution is simple. Regional board members should be compensated on a per diem basis. The cost would be small compared to the advantages of the regional board system.

<sup>325</sup> The new student deferment criteria, based on class standing and test score results, are an example of the type of objective standards that can be developed. See 31 Fed. Reg. 4893 (1966). Objective criteria could also be devised by national Selective Service headquarters for necessary employment deferments. Based on a continuing review of critical industries and their manpower needs, national headquarters could issue criteria defining the industries and occupations within the scope of necessary employment deferments, and the qualifications a registrant must establish to satisfy the criteria. The crucial element in devising such criteria is the requirement that, in all cases, local boards must give a registrant a particular deferment or exemption when he brings himself within the objective standards.

is an attorney, his most effective role at local board proceedings would be that of a presiding officer who would direct the questioning of the registrant, ensure that the statute and regulations are properly applied and generally give the personal appearance a semblance of procedural regularity.<sup>326</sup>

### C. *The Judicial Attitude*

Unless Congress deprives Selective Service proceedings of the finality they are now accorded by the draft law, there is little possibility that courts will broaden the scope of judicial review of those proceedings or permit review any earlier in the administrative process.<sup>327</sup> The courts, however, can contribute to increasing a registrant's procedural protections within the Selective Service System by making a more realistic assessment of a registrant's disadvantageous position when he challenges a classification. Under existing procedures, the registrant's confrontation of local board members is hardly a confrontation of equals. The registrant is in no position to demand procedural fairness; he must depend on the good will of board members for fair treatment. The courts could help to restore the balance in the confrontation by resolving doubts about fairness of procedure in favor of the registrant. Whenever the registrant proves that his local board followed improper procedure in classifying him, the registrant should prevail unless the government can prove he was not prejudiced by the improper procedure. If the registrant alleges improper procedure and the record is silent on the question, the courts should not assume that proper procedure was followed.<sup>328</sup> The courts should require the government to produce affirmative evidence to refute the registrant's allegations. If the government cannot produce this evidence, the registrant should prevail. Rulings of this nature would stimulate local boards to adopt procedural safeguards and maintain adequate

---

<sup>326</sup> The problem that cannot be solved under the local board system is the inequitable treatment of registrants because they are part of a very small manpower pool.

<sup>327</sup> New challenges to the exhaustion of remedies requirement seem inevitable. The American Civil Liberties Union has announced it will seek restraining orders to prevent the induction of six of the Ann Arbor, Michigan, sit-in demonstrators whose efforts to restore their student deferments within the Selective Service System have failed. *The New Republic*, Oct. 8, 1966, p. 8. Although such equitable relief will be sought on the basis of an alleged unconstitutional application of the draft law, it is subject to the same arguments of litigious interruption of the selection process that have defeated other premature court challenges of classification decisions. There is at least one case in which a court enjoined a registrant's induction because of local board error. *Townsend v. Zimmerman*, 237 F.2d 376 (6th Cir. 1956). The court, however, did not attempt to reconcile the many cases requiring exhaustion of Selective Service remedies before judicial relief can be granted, but simply ignored the exhaustion issue.

<sup>328</sup> See *Ayers v. United States*, 240 F.2d 802, 808-09 (9th Cir. 1957), *cert. denied*, 352 U.S. 1016 (1957), where the court did make such an assumption.



records even if specific provisions of the regulations remain unchanged. While such a judicial approach to Selective Service cases would be a significant departure from existing doctrines, it is the minimum required of the courts under any concept of basic fairness to the registrant.

#### CONCLUSION

The controversy which currently surrounds the Selective Service System<sup>320</sup> is dramatic evidence that the draft law is falling short of its stated goals of fairness, justice and impartiality in the selection process. Many of the proposals for reforming the conscription system would drastically alter the present law<sup>330</sup> and the existing methods of selection.<sup>331</sup> Unless Congress abandons the policy of selectivity and enacts a truly universal service system, however, the problems of devising meaningful procedural safeguards for registrants who seek deferments and exemptions cannot be ignored. The courts can inject greater procedural fairness into the administrative process by taking a more realistic view of the status of a registrant in any selective conscription system. But the existing administrative procedures and structure were created by statute and regulation—the initiative for administrative reform must come from Congress and those officials responsible for issuing the regulations. Twenty-six years of experience under the present system suggest that Selective Service officials will not seize the initiative in protecting registrants' rights. Ultimately, the responsibility for making fairness to the registrant a fact rather than a stated goal of the draft law rests with Congress.

*Charles H. Wilson, Jr.*

---

<sup>320</sup> Most of the issues in the controversy are discussed in Chapman, *Selective Service and National Needs*, The Reporter, June 16, 1966, p. 15; Johnson, *Who Should Serve?*, The Atlantic, Feb. 1966, p. 63; Langer, *Vietnam: The Growing War and Campus Protests Threaten Student Deferments*, 150 Science 1567 (1965); Raymond, *The Draft Is Unfair*, N.Y. Times, Jan. 2, 1966, § 6 (Magazine), p. 5; Star, *How Fair Is the Draft?*, Look, April 19, 1966, p. 25.

<sup>330</sup> A Defense Department study has proposed that a registrant be eligible for the draft only at the age of nineteen. If a young man passed that age without being called to service, he would not have to worry about the draft except in times of national emergency when a large manpower pool would be necessary. See N.Y. Times, July 1, 1966, p. 1, col. 5. Such a system would make it easier for a young man to plan his education and his career.

<sup>331</sup> Sen. Edward M. Kennedy of Massachusetts has proposed that selection be by lottery rather than by local draft boards. N.Y. Times, June 30, 1966, p. 13, col. 3.