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Andrew J. Kleczek

NOTES

PROCEDURE AND OBJECTIVES WITHIN THE SELECTIVE SERVICE SYSTEM

INTRODUCTION

Historically, the ultimate method of solving disputes between nations is war or the threat of war. The effectiveness with which a country wages or threatens war depends upon the size and strength of its armed forces. The influence that a nation exerts upon international affairs is more often dependent upon its military strength rather than the wisdom of its leadership.[1] Because military strength is at least partially dependent upon manpower,[2] some method of providing the armed forces with the needed manpower is essential. The method presently used in the United States is a form of conscription, more popularly known as the draft.

The process of conscription cannot be isolated from the general goals or values of the state. It is inextricably connected with, and affects, our fundamental concepts of fairness, equal rights before the law, and due process. As recently as 1960, the President's Commission on National Goals issued a statement which reiterated some of these basic goals and values:

> The status of the individual must remain our primary concern. . . .
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> Every man and woman must have equal rights before the law. . . .
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> . . . .
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> The degree of effective liberty available to its people should be the ultimate test of any nation. Democracy is the only means so far devised by which a nation can meet this test. To preserve and perfect the democratic process in the United States is therefore a primary goal in this as in every decade. . . .
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> . . . .
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> The development of the individual and the nation demand that education at every level and in every discipline be strengthened and its effectiveness enhanced. . . .
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> The basic foreign policy goal of the United States should be the preservation of its independence and free institutions. . . .[3]

The purpose of this comment is to describe and to evaluate the

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[1] However, the armed forces may be an internal threat to a government, which must be acceptable to the military in order to survive. W. MCNEILL, *The Draft in the Light of History*, in THE DRAFT: A HANDBOOK OF FACTS AND ALTERNATIVES, 117 (Sol Tax ed. 1967) [hereinafter cited as THE DRAFT].

[2] With the advancement of modern technology, the quality and educational level of the armed forces is also a primary factor.

[3] R. BOONE & N. KURLAND, *Freedom, National Security, and the Elimination of Poverty: Is Compulsory Service Necessary?*, in THE DRAFT 265, 266, *citing*, PRESIDENT'S COMMISSION ON NATIONAL GOALS (1960).

present system within the context of these values and the declared objectives of the Selective Service System.

THE POWER STRUCTURE

A. The Constitutional Basis of Conscription

The constitutional basis for the general power of Congress to conscript is found in article I, section 8 of the United States Constitution, which gives Congress the power to "raise and support armies," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." The manner in which Congress uses the power expressly granted to it is, of course, limited by other constitutional provisions, including the due process clause of the fifth amendment.

Only one United States Supreme Court decision deals squarely with the question of whether Congress has constitutional power to conscript. The Court, in *Arver* v. *United States*,[4] was reviewing the validity of the Selective Draft Law of 1917,[5] and held that Congress does have the power to conscript and that such power is not a violation of the involuntary servitude clause of the Constitution, concluding that:

> Thus sanctioned as is the act before us by the text of the Constitution, and by its significance as read in the light of the fundamental principles with which the subject is concerned, by the power recognized and carried into effect in many civilized countries, by the authority and practice of the colonies before the Revolution, of the States under the Confederation and of the Government since the formation of the Constitution, the want of merit in the contentions that the act in the particulars which we have been previously called upon to consider was beyond the constitutional power of Congress, is manifest.[6]

Although the draft law considered in *Arver* was passed at a time when war had been declared, the constitutionality of peacetime conscription is beyond doubt.[7] The lower federal courts have unanimously held that Congress has such power.[8] Although the United States Supreme Court has not expressly ruled on the

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[4] 245 U.S. 366 (1918). *See also* Kneedler v. Lane, 45 Pa. St. 238 (1863), and Bernstein, *Conscription and the Constitution: The Amazing Case of Kneedler v. Lane*, 53 A.B.A.J. 708 (1967).

[5] Act of May 18, 1917, ch. 15, 40 Stat. 76.

[6] 245 U.S. at 387-88. In Billings v. Truesdell, 321 U.S. 542 (1944), the Court concluded that "[w]e have no doubt of the power of Congress to enlist the manpower of the nation for prosecution of the war . . . ." *Id.* at 556.

[7] "If . . . Congress could only exercise this power to conscript and train men when the country is at war, such action might then be unavailing . . . ." United States v. Henderson, 180 F.2d 711, 713 (7th Cir. 1950) *cert. denied* 339 U.S. 963. *Accord,* Bertelsen v. Cooney, 213 F.2d 275 (5th Cir. 1954) *cert. denied* 348 U.S. 856. *But see* Freeman, *The Constitutionality of Peacetime Conscription*, 31 VA. L. REV. 40 (1945), where, on the basis of the history of the Constitution, it is argued that a peacetime draft is unconstitutional.

[8] *See, e.g.,* United States v. Henderson, 180 F.2d 711 (7th Cir. 1950), *cert. denied* 339 U.S. 963.

issue of peacetime conscription, it has always assumed the existence of the power and in 1968 declared that "[t]he power of Congress to classify and conscript manpower for military service is 'beyond question'."[9]

B. Congressional Delegation of the Power

The Selective Service System was organized under the Selective Service Act of 1948,[10] and is basically similar to the draft law in effect during the Second World War.[11] In 1951, Congress changed the name of the draft law to the Universal Military Training and Service Act,[12] and in 1967, the title was changed to the more realistic Military Selective Service Act.[13] The statute delegates the power to conscript to the Selective Service System, and provides broad guidelines for the organization and operation of the system.

Under the statute, the Selective Service System not only has the power to conscript, but also a broad power to decide who is to be conscripted, subject to some general guidelines provided by the statute. For example, the only statutory requirement which a local board must satisfy in granting an occupational deferment is "the maintenance of the national health, safety, or interest."[14] Although the constitutionality of the congressional grant has never been tested, there is little question, in the light of court decisions in other administrative areas, that the grant to the Selective Service System is constitutional.[15]

The power of the Selective Service System is, however, subject to judicial, executive, and legislative control. Limited judicial review of local board action is available under certain circumstances.[16] The President has the power of appointment and

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[9] United States v. O'Brien, 88 S. Ct. 1673, 1679 (1968). The case involved the validity of a statute prohibiting the mutilation of draft cards; for a discussion of this case see text at notes 89-95 *infra*. Justice Douglas, dissenting, felt that the Court should rule on the constitutionality of a peacetime draft.

[10] Act of June 24, 1948, ch. 675, 62 Stat. 604.

[11] Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885.

[12] 50 U.S.C. APP. §451(a) (1964).

[13] Military Selective Service Act of 1967, Pub. L. No. 90-40 (June 30, 1967).

[14] Military Selective Service Act of 1967, Pub. L. No. 90-40, §6(h)(2) (June 30, 1967).

[15] *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§2.03-.05 (1958). *Cf.* Yakus v. United States, 321 U.S. 414 (1944), where the Court upheld certain delegations of power under the Emergancy Price Control Act of 1942; the procedure which the agency was to follow in making its decisions was set out with some detail by Congress. The Court stated that:

> Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation.

Id. at 426.

[16] *See* text at note 149 *infra*.

removal,[17] and the power to make regulations in accordance with the statute.[18] The legislature has the power to renew or supplement the statute, with a corresponding increase or decrease of delegated power or change of direction; it can control the appropriations to the agency; and the National Director is required to submit to Congress a semiannual report of the operation of the Selective Service System.[19]

In elaborating the general policy of the Act, Congress has declared that:

> [I]n a free society the obligations and privileges of serving . . . should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.[20]
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> [N]ational security requires maximum effort in the fields of scientific research . . . and the fullest possible utilization of . . . scientific, and other critical manpower resources.[21]

Presently, despite the existence of a military conflict in Vietnam, the total military need is less than half of our manpower resources and of these, approximately one third must be involuntarily inducted.[22] The problem, then, is the selection of those who must be conscripted from the available manpower pool. Under the present system, the method of selecting those who must serve is largely dependent upon the social, economic and occupational status of the registrant.

To carry out this system of selection, the Act provides for exemption and deferment of various types of registrants,[23] and, under these provisions, the Selective Service System classifies all registrants into some eighteen different categories.[24] Congress has stated that "deferments have been provided without regard to the individual registrant but with a view toward the benefits accruing to the national interest."[25] On the other hand, exemptions are not connected with "the maintenance of an effec-

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[17] 50 U.S.C. APP. §460(b)(2) (1964).

[18] *Id.* (b)(1).

[19] Military Selective Service Act of 1967, Pub. L. No. 90-40, §10(g) (June 30, 1967).

[20] 50 U.S.C. APP. §451(c) (1964).

[21] *Id.* (e).

[22] *The President's Message on Selective Service to the Congress*, in THE DRAFT 465, 466. The proportion of our total manpower that will have to serve in the future will be even smaller, assuming that existing conditions continue.

[23] 50 U.S.C. APP. §456 (1964).

[24] 32 C.F.R. §§1622.1-.50 (1968).

[25] H. R. REP. NO. 267, 1967 U.S. CODE CONG. & AD. NEWS 1308, 1331. The IV-F classification (unfit for military duty) has also been held to be for the benefit of the government and not a matter of right to the registrant. Korte v. United States, 260 F.2d 633 (9th Cir. 1958), *cert. denied*, 358 U.S. 928 (1959).

tive national economy,"[26] and are probably a concession to the interest of the individual. Neither the Act nor the regulations define or differentiate between deferments and exemptions, and the identical procedure is followed with respect to both types of classification. However, whereas an exemption may place upon the registrant a duty to perform some alternate form of service, a deferment postpones military service.[27] Moreover, the effect of obtaining a deferment, in contrast to an exemption, is to increase the period that the registrant will be liable for induction. Thus, a registrant who has at any time been placed in class I-D (members of reserve units or students taking military training) is liable to be drafted until he is 28, while a registrant who has obtained any other deferment is liable until he is 35.[28] But all classifications are subject to change, and the Act provides that no exemption or deferment "shall continue after the cause therefore ceases to exist."[29]

The courts view exemptions and deferments as a matter of legislative grace, and not a right.[30] The view of the present National Director, General Hershey, goes somewhat further: "[e]very registrant is presumed by law, to be 'available' . . . . No registrant has a 'right' to a deferment. His 'right,' by law, is a 'privilege' to serve."[31]

Although most exemptions and deferments have not provoked much controversy,[32] student and occupational deferments

[26] 50 U.S.C. APP. §451(c) (1964). The conscientious objector exemption, for example, is probably not beneficial to the national interest, although it is held to be a matter of legislative grace rather than a matter of right. United States v. Seeger, 380 U.S. 163 (1965). In that case, the Supreme Court extended the exemption to include conscientious objection based upon nonreligious belief, "the test . . . is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." *Id.* at 165-66. Although this exemption still requires that the objector be opposed to war in any form, there has been pressure for recognition of the objector opposed only to some wars. *See, e.g.*, J. PEMBERTON, JR., *The Equality In the Exemption of Conscientious Objectors*, in THE DRAFT 66, 68.

[27] 32 C.F.R. §1622.1(b) (1968). The procedure of selection is outlined in the text at note 62 *infra.*

[28] 32 C.F.R. §1622.1(a)(1)-(3) (1968).

[29] 50 U.S.C. APP. §456(k) (1964). The regulations require the registrant to notify his board of any change of circumstance within ten days. 32 C.F.R. §1625.1(b) (1968).

[30] *See, e.g.*, Clark v. United States, 236 F.2d 13 (9th Cir. 1956), *cert. denied*, 352 U.S. 882. However, the board must consider the evidence thoroughly and without prejudice; where it proceeds arbitrarily, it loses its jurisdiction over the registrant. United States v. Peebles, 220 F.2d 114 (7th Cir. 1955).

[31] L. HERSHEY, *A Fact Paper on Selective Service*, in THE DRAFT 3, 4.

[32] There has been little controversy, for example, of the ministerial exemption, which is apparently granted because of religious pressure. "The test for a ministerial exemption is whether regularly, as a vocation, the registrant teaches and preaches the principles of his sect and conducts public worship in the tradition of his religion." United States v. Singleton, 282 F. Supp. 762, 765 (S.D.N.Y. 1968).

have recently been subjected to criticism.[33] Until 1967, the granting of student deferments was almost completely within the discretion of the local board, although the National Director could make recommendations.[34] Such deferments were granted as a matter of course by most local boards to college and graduate students. As a result, a smaller percentage of college graduates, compared to non-graduates, have served in the armed forces.[35]

In 1967, in response to the criticism leveled at graduate student deferments, the statute was amended to provide for mandatory and non-discretionary deferments for the college student until he either graduates, becomes twenty-four, or fails to pursue a satisfactory full-time course, whichever occurs first.[36] Registrants who are deferred under this provision are not eligible for any further deferments "except for extreme hardship to dependents, or for graduate study, occupation or employment necessary to the maintenance of the national health, safety, or interest . . . ."[37] Graduate deferments will be given only to students in medicine or related fields, or other areas "identified by the Director . . . upon advice of the National Security Council."[38]

Occupational deferments are based upon the same statutory criteria that pre-1967 student deferments were based upon.[39] These statutory criteria are made somewhat more explicit by the regulations, which require that three conditions must be fulfilled to entitle a registrant to an occupational deferment: he must be engaged in an activity which is necessary to the national interest; he cannot be replaced because of a shortage in such activity; and his removal must cause a material loss of effectiveness in such activity.[40] Subject to these general conditions, the

[33] *See* THE DRAFT at 449, and *The President's Message on Selective Service to the Congress*, in THE DRAFT 465, 470.

[34] The only statutory criterion was "the maintenance of the national health, safety, or interest." 50 U.S.C. APP. §456(h) (1964).

[35] According to one survey, 30 per cent of those with less than an eighth grade education have served, 74 per cent of those with high school, 71 per cent of those with college degrees only, and 26.6 per cent of those with some graduate school have served. *The Present System of Selective Service*, in THE DRAFT 302, 312.

[36] Military Selective Service Act of 1967, Pub. L. No. 90-40, §6(h)(1) (June 30, 1967).

[37] *Id.* Thus, a registrant who has had a II-S deferment after July, 1967, is not eligible for a dependency deferment, but may obtain an extreme hardship deferment. 32 C.F.R. §1622.30(a)-(b) (1968).

[38] 32 C.F.R. §1622.26(a) (1968). It is estimated that as a result of the elimination of most graduate deferments, there will be a drop of up to 70 per cent in male enrollment in graduate schools next fall. Newsweek, March 25, 1968, at 63.

[39] They must be necessary to the "maintenance of the national health, safety, or interest." 50 U.S.C. APP. §456(h) (1964).

[40] 32 C.F.R. §1622.23(a) (1968).

local boards presently have much of the discretion of determining the exact nature of occupational deferments.[41]

C. The Structure of the Selective Service System

The Selective Service System is a decentralized agency,[42] consisting of the national headquarters, the various state headquarters, a number of local and appeal boards,[43] and the National Appeal Board.[44] The national and state headquarters and the local boards are responsible for carrying out the process of inducting registrants found eligible for service.[45] The corresponding officers are the National Director, a state director and at least three board members for each local board.[46] Although the Selective Service System is a civilian agency and independent of the armed forces, the national and state directors and their staffs are drawn primarily from a military background.[47] On the other hand, local board members are required by statute to be civilians who reside in the county in which the local board is located.[48]

Presently, the local boards have the initial power to classify registrants within their jurisdiction, subject to the rules and regulations prescribed by the President and by the registrant's right to appeal.[49] In addition, the generality of the present classification criteria gives the local boards a wide discretion in determining the scope and nature of many of the classifications.[50] The primary criticism of such a de-centralized system — with more than 4,000 local boards, 56 state headquarters and 95 appeal boards — is that its classification decisions lack uniformity.[51] The present system is, however, defended on the

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[41] This discretion may, however, be limited. *See* text at note 61 *infra.*

[42] It is decentralized in the sense that there is no central department with all the power to classify the registrants; rather, the power is distributed among the numerous local boards.

[43] 50 U.S.C. APP. §460(a) (1964).

[44] The National Appeal Board is created by the regulations. 32 C.F.R. §1604.6 (1968).

[45] For discussion of the process of induction, *see* text at note 77 *infra.*

[46] 50 U.S.C. APP. §460(a)-(b) (1964).

[47] A. EVERS, SELECTIVE SERVICE: A GUIDE TO THE DRAFT 39 (1957). Since the national and state headquarters are primarily responsible for determining the policy of the Selective Service System, the possibility that the policy may be determined in a manner more favorable to the armed forces exists. For example, this may be the reason why registrants who are I-A and over 26 (because of a previous deferment) are not inducted until the I-A pool of registrants under 26 is exhausted.

[48] 50 U.S.C. APP. §460(b)(3) (1964).

[49] *Id.*

[50] For a discussion of the present criteria of some of the classifications, *see* text at notes 32-41 *supra.*

[51] *The President's Message on Selective Service to the Congress*, in THE DRAFT 465, 473. However, uniformity of classification decisions may not be desirable if the economic factors of the area are considered relevant to the national interest. Furthermore, uniformity may apparently be achieved under the present system if the regulations dealing with classification were made more specific.

ground that local boards are more attuned to the social and economic needs of the community and region which ultimately must contribute from its manpower pool.[52]

The Act grants to the President the power to appoint the National Director,[53] the state directors and the local board members.[54] The President also has the power to "prescribe the necessary rules and regulations to carry out the provisions of this title."[55] The Act authorizes the President to delegate these powers,[56] and he has in fact delegated much of his power to the National Director and to the National Appeal Board.[57] The National Director has the power to make rules and regulations which are "necessary for the administration of the Selective Service System,"[58] to "issue such public notices, orders, and instructions . . . necessary for carrying out the functions of the Selective Service System,"[59] and other powers necessary for the internal administration of the system.[60] It therefore seems that the powers delegated to the National Director extend primarily to the regulation of the administrative and housekeeping functions of the system. Apparently, the President has reserved for himself the power to make regulations dealing with the more substantive rights of the registrants, although the advice and opinions of the National Director are surely a material factor in this area.

The Act provides that local boards have the power to determine "all questions or claims with respect to . . . exemption or deferment . . . under this title"[61] and that local board decisions shall be final subject to review of the appeal boards.[62] Al-

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[52] H. R. REP. NO. 267, 1967 U.S. CODE CONG. & AD. NEWS 1308, 1335. However, local board composition does not presently reflect the area which it represents in all cases; local board members are generally from a middle class, business or professional background, regardless of the area which they represent. *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2163 (1966).

[53] 50 U.S.C. APP. §460(a)(3) (1964).

[54] *Id.* §460(b)(2)-(3).

[55] *Id.* §460(b)(1).

[56] "The President is authorized to delegate any authority vested in him under this title . . . and to provide for the subdelegation of any such authority." *Id.* (c).

[57] 32 C.F.R. §1604.1 (1968) delegates some authority to the National Director. The National Appeal Board

> [I]s authorized and directed to perform all the functions and duties vested in the President by that sentence of section 10(b)(3) of . . . the . . . Act of 1967, which reads as follows: 'The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title, and the determination of the President shall be final.'

Id. §1604.6(b).

[58] 32 C.F.R. §1604.1(a) (1968).

[59] *Id.* §1604.1(b).

[60] *Id.* §1604.1(c)-(h).

[61] 50 U.S.C. APP. §460(b)(3) (1964).

[62] *Id.*

though the present regulations dealing with many of the deferments are general, nothing in the Act expressly prohibits the President from rendering more specific the classification criteria. Local boards have the initial power to classify "under rules and regulations prescribed by the President . . . ."[63] The Act also provides that the President may "recommend criteria for the classification of persons subject to induction . . . though the local boards need not classify solely on the basis of any test . . . or means . . . conducted . . . or prepared by" any other governmental agency.[64] It would therefore appear that the President has the choice of acting through the promulgation of regulations which are mandatory or acting more permissively through the avenue of recommendations. Thus, the rule-making power of the local boards to determine the nature of the classifications is potentially limited by the rule-making power of the President.

The adjudicatory power of the local boards is also limited and subject to review at various administrative levels. Initially, local board decisions are reviewed by the regional appeal boards. The Act provides for a minimum of one appeal board for each federal judicial district, composed of civilians.[65] Appeal boards have the power to review the classifications of the local boards where an appeal is allowed by the regulations. In reviewing a classification, an appeal board must look to the entire record of the registrant and to "information concerning economic, industrial, and social conditions"[66] of the area. The decision of the appeal boards is a *de novo* classification,[67] and apparently no presumptions of validity need be attached to the local board decisions. Practical considerations, however, compel the appeal boards to attach credence to local board determinations, and, in fact, appeal board decisions are different from local board decisions in only a small percentage of the cases appealed.[68]

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[63] *Id.* Presently, the function of classification seems to be a mixture of rule-making and adjudicating. In Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908), Justice Holmes stated:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. . . . Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or part of those subject to its power.

Id. at 226. Another test is the generality of application. *See generally* Schwartz, *Procedural Due Process In Federal Administrative Law*, 25 N.Y.U. L. REV. 552, 557 (1950). Although each classification applies to the individual, local boards also decide, in an occupational deferment for example, the present and future needs of the particular industry, and apply their decisions to future classifications based upon the same industry.

[64] 50 U.S.C. APP. §456(h)(2) (1964).

[65] *Id.* §460(b).

[66] 32 C.F.R. §1626.24(b)(2) (1968).

[67] *Id.* §1626.26.

[68] Of 4,340 total appeals in Illinois in 1966, 864 (about 20 per cent) of the original classifications were changed; the remainder were the same as the classifications of the local boards. Letter from James H. Voyles, Deputy

If at least one appeal board member dissents from the appeal board determination, the registrant may appeal to the National Appeal Board,[69] whose power of review stems from the President's power to consider individual classifications.[70]

Moreover, the regulations provide that the National Director,

> [N]otwithstanding any other provisions of the regulations in this chapter [dealing with classification] [the Director] may direct that any registrant shall be classified or reclassified without regard to his eligibility for a particular classification.[71]

Seemingly, the National Director, under this provision, may disregard his own regulations and classify on the basis of criteria known only to him. The scope and legitimacy of the Director's broad power to classify under this sweeping regulation has not been considered by the courts. Aside from the questionable validity of the broadness of the power which the regulation apparently vests in the National Director, there is a more fundamental question as to the legitimacy of any delegation to the National Director of power to make individual decisions of classifications. The Act grants to the President the power to review individual classifications, and he may delegate his power; the Act provides that he may "upon appeal or upon his own motion . . . determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title" and his decision "shall be final."[72] The President has, however, delegated the power to review individual classifications to the National Appeal Board.[73] The question is whether he may in addition grant the power to the National Director.

THE SELECTION PROCEDURE

Briefly summarized, the process of conscription begins with registration.[74] The local board then sends the registrant a questionnaire, which he must fill out and send in. On the basis of this questionnaire, the registrant is classified. If he is dissatisfied with his classification, he may request a personal appearance or appeal within a limited time. If he is originally satisfied

State Director of the Selective Service System, to *The John Marshall Journal of Practice and Procedure*, Oct. 4, 1967, on file in the office of *The John Marshall Journal of Practice and Procedure*. *See also The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2159 n. 234 (1966), *citing*, 1 SELECTIVE SERVICE SYSTEM, THE CLASSIFICATION PROCESS 158 (Special Monograph No. 5, 1950), which concluded that most appeals were routine, with few resulting changes in classification.

[69] 32 C.F.R. §1627.3 (1968).

[70] *Id.* §1604.6(b).

[71] *Id.* §1622.60.

[72] 50 U.S.C. APP. §460(b)(3) (1964).

[73] 32 C.F.R. §1604.6(b) (1968). *See authority cited* at note 57 supra.

[74] For a more detailed discussion *see* text beginning at note 82 *infra*.

but his status changes at a later time, he may request a reopening of his classification. Concerning the procedure and its basis, the National Director stated that:

> The law places upon every registrant the liability and responsibility to register, to provide his local board with adequate evidence to permit a judgment 'in the national interest' (not the registrant's interest), and to serve in the Armed Forces if found to be 'available.'[75]
>
> As with the income tax and other comparable undertakings, popularity is not the primary consideration; fairness must be sought in the relationship between what an individual has that the nation needs at any particular time. Fairness, as a common denominator to the individual desires of each person, *does not exist.*[76]

If a registrant, having taken advantage of the various procedural safeguards, is found ineligible for any deferment or exemption, he will be classified I-A (available for service), given a physical examination, and eventually drafted. The process of conscripting registrants from the I-A pool begins when the Secretary of Defense requests a specified number of men from the National Director.[77] The National Director, in turn, allocates the total number necessary among the states, depending upon the total number of men available for service from that state and the number of volunteers.[78] The state director, using the same principles, divides his quota among the local boards.[79] When a local board receives a quota from state headquarters, it fills this quota by inducting registrants in the following order: (1) delinquents; (2) registrants who volunteer for induction; (3) non-volunteers between the ages of 19 and 26, with the oldest being called first; (4) non-volunteers between the ages of 26 and 35, the youngest being called first; and (5) non-volunteers between the ages of 18½ and 19, oldest being called first.[80] The main impact of the induction process falls upon those available for induction between 19 and 26, and the average age of inductees has been as high as 22½ years prior to the Vietnam conflict.[81]

A. Registration and the Draft Card

The first step in the draft procedure is registration; the statute provides that, with some exceptions, every male over eighteen within the United States must register with his local

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[75] L. HERSHEY, *A Fact Paper on Selective Service*, in THE DRAFT 3, 4.
[76] *Id.* at 5 (emphasis added).
[77] 32 C.F.R. §1631.4 (1968).
[78] *Id.* §1631.2.
[79] *Id.* §1631.6.
[80] *Id.* §1631.7. The Secretary of Defense may, under the present Act and regulations, call younger registrants first, by age groups. 32 C.F.R. §1631.4(b) (1968).
[81] *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2169, n. 290 (1966).

board, and wilful failure to register is a felony.[82] As a matter of administrative convenience, the burden of registering is placed upon the prospective registrant as an essential expedient. To the vast majority of registrants, this burden is neither harsh nor unduly oppressive. Apparently, the penalty for failure to register is designed for those who wish to avoid the draft by keeping their identity secret. However, the handful of cases that have dealt with the registration provision have involved defendants who totally object and conscientiously oppose any contact with the Selective Service System,[83] and who probably would have been eligible for a conscientious objector classification had their beliefs permitted them to cooperate with the registration process. Most of these total objectors have informally notified the draft board of their identity and their intent not to comply with the conscription procedure. It is arguable that the penalty should not apply to those who thus informally provide the draft board with the essential information but merely refuse to formally comply.

Upon registration, a Registration Certificate, commonly referred to as a draft card is issued by the local board. All registrants are required to have this draft card in their possession,[84] presumably for the sake of administrative convenience.[85]

In 1965, Congress added an amendment to the Act which provides that anyone who "knowingly destroys, [or] knowingly mutilates"[86] a draft card or Notice of Classification is guilty of a felony.

The Court of Appeals for the Second Circuit, in *United*

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[82] The burden of registering is placed upon the prospective registrants by the Act. 50 U.S.C. APP. §453 (1964). Failure to comply with any of the duties placed upon those subject to the Act is punishable as a felony, with up to five years in jail or 10,000 dollars fine, or both. *Id.* §462.

[83] In United States v. Norton, 179 F.2d 527 (2d Cir. 1950), the court held where the registrant states that he refuses to register, but cooperates in providing all the necessary information, the registrar has the duty to sign the prospective registrant's name, thus effectively registering him and relieving him of any criminal liability. However, in Michener v. United States, 184 F.2d 712 (10th Cir. 1950), the court held that where the prospective registrant assumes a recalcitrant attitude and refuses to provide the necessary information, the defendant will be found guilty of failure to register. *See also* United States v. Henderson, 180 F.2d 711 (7th Cir. 1950); Richter v. United States, 181 F.2d 591 (9th Cir. 1950), *cert. denied*, 340 U.S. 892.

[84] The possession requirement is placed upon the registrant by the regulations. 32 C.F.R. §1617.1 (1968). The Act provides the penalties for failure to abide by the regulations. 50 U.S.C. APP. §462 (1964). In United States v. Kime, 188 F.2d 677 (7th Cir. 1951), *cert. denied*, 342 U.S. 823, defendant mailed his draft card to his local board, stating that he could not, upon conscientious grounds, comply with the regulations. The court affirmed his conviction for knowingly failing to have in his possession his draft card.

[85] For a discussion of administrative convenience as related to the draft card, *see* United States v. O'Brien, 88 S. Ct. 1673 (1968).

[86] 50 U.S.C. APP. §462(b)(3) (Supp. I, 1965).

States v. *Miller*,[87] upheld the constitutionality of this provision. The defendant, convicted of knowingly mutilating his draft card, contended that the statute was invalid on its face because its legislative history shows that it was meant to suppress dissent rather than to implement any valid purpose of the draft, and that his conduct was protected by the first amendment. The court conceded that the amendment was intended by Congress, at least to some extent, to curtail dissent, but refused to look beyond the face of the statute to determine its constitutional validity. While the court questioned whether draft card burning was symbolic speech, it assumed it to be such for purposes of argument. The amendment, according to the court, was meant to protect:

> [T]he proper functioning of the Selective Service System. In a world where resort to force is still the rule, rather than the exception, this is an interest of the highest order; its importance undoubtedly accounts for the many decisions rejecting First Amendment defenses to Selective Service violations.[88]

The court concluded that the amendment served a legitimate purpose in the administration of the draft, and, weighed against its effect on freedom of speech, was a legitimate exercise of the power of Congress to raise armies.

The Court of Appeals for the First Circuit, in *O'Brien* v. *United States*,[89] reached a different result. The defendant was convicted of wilful mutilation of his draft card. The court, in holding the statute unconstitutional, reasoned that symbolic action should be considered an exercise of speech under the first amendment. The court then concluded that, since the original provision against failure to possess one's draft card sufficiently provided for the necessary administrative efficiency, there was no legitimate basis for additional sanctions against the symbolic acts of draft card mutilation and destruction.

> Speech is, of course, subject to necessary regulation in the legitimate interests of the community . . . but statutes that go beyond the protection of those interests to suppress expressions of dissent are insupportable. . . . We so find this one.[90]

The United States Supreme Court granted certiorari to the government in *O'Brien* in order to resolve this conflict between the circuits.[91] Upon review, the Supreme Court reversed the court of appeals, and held the sanction against mutilation and destruction to be constitutional.[92] The court reasoned that:

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[87] 367 F.2d 72 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967); *accord*, Smith v. United States, 368 F.2d 529 (8th Cir. 1966).

[88] 367 F.2d at 80.

[89] 376 F.2d 538 (1st Cir. 1967), *cert. granted*, 389 U.S. 814.

[90] *Id.* at 541.

[91] 389 U.S. 814 (1967).

[92] United States v. O'Brien, 88 S. Ct. 1673 (1968).

> [E]ven on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction . . . is constitutionally protected activity.[93]

Where speech and nonspeech elements are combined, a strong governmental interest can justify the incidental control of both.

> [A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is not greater than is essential to the furtherance of that interest.[94]

The Court found that a legitimate and substantial governmental interest exists because the destruction of these cards hinders administrative convenience. The fact that alternative means of punishment exist does not invalidate the statute, since effective protection of the governmental interest may call for alternate avenues of prosecution. Furthermore, the essential elements of possession are not identical with those of wilful destruction, as, for example, the mutilation of another's card which could not be held to violate the nonpossession provisions. Finally, the purpose of the amendment as manifested in its legislative history was not considered by the Court to vitiate the provision because the statute appeared valid on its face and because the legislative history was held to reflect the opinion of only some congressmen and was not necessarily a consensus of opinion of the majority who voted for its passage. Justice Douglas, dissenting, did not discuss the validity of the amendment, but felt that the constitutionality of a peacetime draft should first be decided.[95]

B. Classification

Once the registration procedure is completed, the draft board sends the registrant a Classification Questionnaire or, in an appropriate case, the Special Form for Conscientious Objectors.[96] The board classifies the registrant on the basis of information supplied in these forms and any other information in the registrant's file.[97] Based upon the registrant's file, the board has the duty to place the registrant in the lowest classification

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[93] *Id.* at 1678.
[94] *Id.* at 1679.
[95] *Id.* at 1685-86.
[96] 32 C.F.R. §§1621.9, 1621.11 (1968).
[97] *Id.* §1621.12.

for which he is eligible.[98] A classification based upon information not in the registrant's file, such as a local board member's personal knowledge, has been held invalid upon judicial review.[99] A distinction, however, must be made between the board's rule-making function and its judicial function; for example, when the board determines whether a given occupation is vital for the purposes of classification, facts other than those in the registrant's file are relied upon.

A registrant may claim as many different exemptions as he feels he is entitled to.[100] Furthermore, the board has the duty to place the registrant in a classification he did not request if, on the basis of the evidence in his record, he is eligible.[101] The burden, however, is on the registrant to show that he is clearly entitled to the classification he seeks, although the cases indicate that the registrant need not establish his right beyond a reasonable doubt.[102]

C. Personal Appearance and Reopening

Once the registrant's classification has been determined, the board sends him a Notice of Classification.[103] If the registrant feels that the board erred in its classification decision, he may request a personal appearance before the local board in writing within thirty days after the notice was mailed.[104] Generally, the registrant will attempt to present additional evidence favorable to the classification which he desires; however,

> [T]he purpose of the registrant's appearance is not solely to present the local board with new information. It is also to enable the

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[98] Every registrant shall be placed on Class I-A . . . except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I-A-O considered the highest class and Class I-C considered the lowest class . . . .
32 C.F.R. §1623.2 (1968).

[99] *See, e.g.*, United States v. Bender, 206 F.2d 247 (3d Cir. 1953). The regulations require that the local boards enter their classification decision on the designated Selective Service forms. 32 C.F.R. §1623.4 (1968). Apparently, the local board need not explain or give reasons for the classification, and at least one court has so held. *See* United States v. Greene, 220 F.2d 792 (7th Cir. 1955).

[100] *See, e.g.*, United States v. Peebles, 220 F.2d 114 (7th Cir. 1955). Claiming different classifications, especially where they are inconsistent, may reflect upon the sincerity of the registrant where it is relevant.

[101] *See, e.g.*, Franks v. United States, 216 F.2d 266 (9th Cir. 1954), where the court held that the local board erred in not placing the registrant in the I-A-O classification, even though the registrant did not request it.

[102] United States v. Bender, 206 F.2d 247 (3d Cir. 1953). "Each registrant will be considered as available for military service until his eligibility for deferment or exemption . . . is clearly established to the satisfaction of the local board." 32 C.F.R. §1622.1(c) (1968).

[103] 32 C.F.R. §1623.4(a) (1968). Like the draft card, this notice must also be in the registrant's personal possession. *Id.* §1623.5.

[104] *Id.* §1624.1(a). The registrant apparently has a right to a personal appearance whenever he is classified anew by the local board; for example, when his classification is reopened. *Id.* §1625.12.

registrant to discuss his classification with members of the board on the basis of the information already in his file, and to make an oral argument that the information already furnished, when given proper weight, calls for a different classification.[105]

A personal appearance is a matter of right to the registrant, and the board's refusal to grant an appearance is a violation of his right to due process of law.[106] No specific form is required for a request for a personal appearance, and the registrant's request need not be accompanied by additional evidence or reasons for requesting the appearance. However, the registrant does not have the right to prolong the hearing unreasonably.[107] He may bring witnesses or an attorney to observe the proceedings only at the board's discretion.[108] A board's refusal to hear witnesses is not deemed an abuse of discretion where the board does not doubt any of the registrant's facts and it is not shown that the witnesses would have presented any new evidence.[109]

If the registrant is initially satisfied with his classification, but thereafter, because of a change in his circumstances or status, feels that he is now entitled to a reclassification, he may request the local board to reopen his classification within ten days of the changed circumstances.[110]

The regulations provide that a classification will be reopened if "such a request is accompanied by written information presenting facts not considered when the registrant was classified."[111] Because there is no specific form that must be used for the request, there is considerable difficulty in determining what

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[105] Niznik v. United States, 173 F.2d 328, 335 (6th Cir. 1949), *cert. denied*, 337 U.S. 925.

[106] Neal v. United States, 203 F.2d 111 (5th Cir. 1953), *cert. denied*, 345 U.S. 996, in which the court stated that:

> The Selective Service regulations . . . afford a registrant the right to appear before the local draft board and discuss his classification . . . . While it is not the right of a registrant to prolong the hearing unreasonably, it is the duty of the board to hear his evidence and arguments fully, fairly and with reasonable patience, so that it may properly evaluate the facts on the merits.

Id. at 116.

[107] 203 F.2d at 116. *Accord*, Talcott v. Reed, 217 F.2d 360 (9th Cir. 1954).

[108] 32 C.F.R. §1624.1(b) (1968).

[109] Under the Selective Service Regulations . . . the Board has discretion to permit a registrant to introduce the testimony of witnesses. I find no abuse of this discretion in this instance, because there is no indication that the Board doubted any of the facts asserted by the defendant, apart from his assertion that he was a minister.

United States v. Steele, 142 F. Supp. 242, 245 (D. Mass. 1956), *rev'd*, 240 F.2d 142 (1st Cir. 1956) (for failure to appoint advisers; *see* note 121 *infra*).

[110] 32 C.F.R. §1625.1(b) (1968). The Registration Card states that certain new facts must be presented to the local board within a limited time; apparently, failure to present new facts is a breach of the registrant's duty, and as such punishable under the Act or a basis for the board to declare the registrant a delinquent.

[111] 32 *Id.* §1625.2. Thus it seems that the board must consider all the new facts as true to determine if it should reopen; once it reopens, seemingly the only question left is the validity of the new facts.

manner of communication satisfies the requirements of a request to reopen.[112]

Once the board has decided that there has been a request for reopening, it must determine whether the new evidence merits the reopening of the registrant's classification, and if it reopens, whether there is sufficient evidence for a reclassification.[113]

The regulations provide that a classification cannot be reopened after a Notice of Induction has been mailed "unless the local board first specifically finds there has been a change in status resulting from circumstances over which the registrant has no control."[114] However, the statute provides that "[n]othing contained in this title shall be construed to require any person to be subject to combatant training . . . who . . . is conscientiously opposed to participation in war in any form."[115] The courts are split as to whether a conscientious objector, under the foregoing provisions, may have his classification reopened after the Induction Notice has been sent.[116]

D. Sources of Information

A major impediment to the registrant seeking an exemption or deferment is the lack of sufficient sources of information and counsel. While the registrant is plainly notified of his right to a personal appearance and appeal in the Registration Certificate and Notice of Classification, information as to other procedural and substantive rights is difficult to obtain. Local boards are not required to make public the criteria arrived at in their exercise of discretion; nor are they required to make findings and

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[112] Under exceptional circumstances, an oral communication has been held to be a request to reopen. Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956). *See also* United States *ex rel.* Remko v. Read, 123 F.Supp. 272 (W. D. Ky. 1954). *Compare* Taylor v. United States, 285 F.2d 703 (9th Cir. 1960), where the court held that a letter asserting a change in circumstances is not a request to reopen, *with* United States v. Derstine, 129 F. Supp. 117 (E.D. Pa. 1954), in which the court stated that:

> Whenever a registrant in writing makes a request to a Local Board, no matter how ambiguously or unclearly the request is stated, if it indicates in any way a desire for a procedural right, the writing should be construed in favor of the registrant and the procedural right granted . . . .

Id. at 120.

[113] *Compare* United States v. Majher, 250 F.Supp. 106 (S. D. W. Va. 1966), where the court held that a refusal to reopen violates due process only if there is no basis in fact for the refusal, *with* United States v. Scott, 137 F. Supp. 449 (E.D. Wis. 1956), which held that the board must reopen if the registrant has presented a prima facie case for his reclassification. The latter view seems more consistent with the regulations; *see* note 111 *supra.*

[114] 32 C.F.R. §1625.2(b) (1968).

[115] Military Selective Service Act of 1967, Pub. L. No. 90-40, §6(j) (June 30, 1967).

[116] For a full discussion, *see Pre-Induction Availability of the Right to Claim Conscientious Objector Exemption,* 72 YALE L. J. 1459 (1963). *Compare* United States v. Underwood, 151 F. Supp. 874 (E.D. Pa. 1955) *with* Davis v. United States, 374 F.2d 1 (5th Cir. 1967).

give reasons for their conclusions in any individual case. The registrant thus has little specific precedent to guide him.

The registrant cannot, as matter of right, speak with his local board members unless he requests a personal appearance. He cannot meet with them informally, since the local board generally meets only once a month and the clerks will not reveal the members' names or telephone numbers,[117] undoubtedly for fear of subjecting the members to undue pressure and harassment. Furthermore, the apparent purpose of the personal appearance is to provide the board with new evidence and not to provide the registrant with information. And even the right to a formal personal appearance is somewhat diluted, since the regulations provide that the board which obtains jurisdiction over the registrant initially "shall always have jurisdiction . . . unless otherwise directed by the Director . . . ."[118] Thus a registrant who subsequently moves to a distant area is still required to deal with his original board.

The registrant may obtain written information, such as the applicable directives and regulations, by writing to the state or national headquarters. Assuming that the individual is sufficiently aware of this source of information, this method is impersonal and provides only general information which the registrant may have difficulty applying to his own specific situation. Indeed the average layman will probably be confused by the legal language in the regulations. Although there are currently private and unofficial sources of information in some college and urban communities,[119] these are primarily directed at the conscientious objector and not the average registrant.

The regulations provide that "advisors to registrants may be appointed" whose function is "to advise and assist registrants in the preparation of questionnaires and . . . other matters relating to their liabilities under the selective service law."[120] These advisors are provided solely for the benefit of the registrant, and need not protect governmental interests. However, the appointment of advisors is discretionary with the local boards, and the availability of such advisors is not necessarily

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[117] Such was the writer's experience when attempting to contact local board members in the Chicago area.

[118] 32 C.F.R. §1613.12(a) (1968). Furthermore, the personal appearance may be detrimental to the registrant:

> [The registrant] contends that the Local Board members merely directed questions to him which he answered but that they cut short his attempts to elaborate on his answers. . . . It does not appear that the additional material as shown in the letters and statements made by the registrant would have been significantly different from the matters presented to and considered by the Local Board.

United States v. Mientke, 387 F.2d 1009, 1010 (7th Cir. 1967) (*appeal pending*).

[119] For example, the Central Committee for Conscientious Objectors.

[120] 32 C.F.R. §1604.41 (1968).

made known to the registrants even when such appointments are made.[121]

All local boards must appoint a government appeal agent who is "[t]o be equally diligent in protecting the interests of the Government and the rights of the registrant in all matters."[122] He must render legal assistance to the local board when necessary and may, on his own initiative, appeal any local board action. Because the duties of a government appeal agent include the protection of governmental interests which may be at variance with the registrant's personal interests, his actions may not always be helpful to the registrant. Since he may be both a prosecutor and informant, the registrant may hesitate to place his full confidence in him. In one case, the appeal agent cross-examined a registrant at his personal appearance who was applying for a conscientious objector exemption; the court held that this action was not violative of the registrant's due process rights.[123]

If the registrant is sufficiently affluent, he may decide to retain counsel to advise him.[124] The regulations provide however, that "no registrant may be represented before the local board by anyone acting as attorney or legal counsel."[125] The courts have uniformly held that denial of the right to counsel is not unconstitutional because "the proceedings before the Board are non-judicial in nature and they are clearly non-criminal."[126] The primary reason for such denial is fear of delay and litigious interruption if local board proceedings became adversary in nature.[127] It has been urged, however, that the registrant be permitted to have his counsel attend as an observer in order to ascertain whether the local board's actions meet the minimum legal standards and that he may by his mere presence discourage abusive behavior by the local board members.[128]

E. The Right To Appeal

A registrant has the right to appeal within thirty days after

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[121] *Id.* The failure of the local board to post the names of advisors is generally not prejudicial. *See* United States v. Sturgis, 342 F.2d 328 (3d Cir. 1965), *cert. denied*, 382 U.S. 879; Steele v. United States, 240 F.2d 142 (1st Cir. 1956).

[122] 32 C.F.R. §1604.71(d)(5) (1968).

[123] United States v. De Lime, 121 F. Supp. 750 (D. N.J. 1954), *aff'd*, 223 F.2d 96 (3d Cir. 1955).

[124] Perhaps the most valid argument against encouraging attorneys to represent registrants at Selective Service proceedings is that this right would be more available to those who could afford it.

[125] 32 C.F.R. §1624.1(b) (1968).

[126] United States v. Sturgis, 342 F.2d 328, 336 (3d Cir. 1965), *cert. denied*, 382 U.S. 879.

[127] *Fairness and Due Process Under the Selective Service System*, 114 U. PA. L. REV. 1014 (1966).

[128] *Id.* It would seem that, in order to assure these rights to all registrants, the existence of free advisors rather than paid counsel should be encouraged.

notice has been mailed to him: a) of his original classification; or b) of the local board's decision following the registrant's personal appearance; or c) of the local board's decision following a reopening of the registrant's classification.[129] The registrant must give the local board notice of his intention to appeal, but the Selective Service System nowhere defines what constitutes proper notice. Thus the registrant is at his peril with respect to the sufficiency of his notice of intention to appeal.[130] The registrant, in his notice of appeal, has the right to attach any statements he thinks will be useful to the appeal board, and may point out how he thinks the local board erred, but, from a reading of the regulations, new evidence not offered to the local board may not be presented.[131]

As previously discussed,[132] appeal boards are not bound by local board action and may consider the evidence in the registrant's file anew. As a result, the decision of an appeal board is a new classification rather than merely an affirmance or reversal of local board action.[133] The consequence of such *de novo* classification is that local board errors which could have resulted in an invalidation of a classification upon judicial review may be "cured" by the appeal board review.[134] However, the local board error will not be remedied by appeal board action if it somehow prevents the appeal board from considering all the evidence which should be in the file.[135] For example, the failure of a local board to summarize the registrant's oral testimony where it differed from the evidence already in the file has been held to be prejudicial and not remedied by appeal board review, since the appeal board, lacking the additional evidence brought out in the oral testimony, cannot fully reconsider the registrant's classification.[136]

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[129] 32 C.F.R. §1626.2 (1968).

[130] *Id.* §1626.11.

[131] The person appealing may attach to his appeal a statement specifying the matters in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.
Id. §1626.12.

[132] *See, e.g.*, DeRemer v. United States, 340 F.2d 712 (8th Cir. 1965); Tyrrell v. United States, 200 F.2d 8 (9th Cir. 1952), *cert. denied*, 345 U.S. 910.

[133] *See* text at notes 65-68 *supra*, and 32 C.F.R. §1626.26 (1968).

[134] *See, e.g.*, Storey v. United States, 370 F.2d 255, 260 (9th Cir. 1966); United States v. Corliss, 280 F.2d 808 (2d Cir. 1960), *cert. denied*, 364 U.S. 884.

[135] *See, e.g.*, United States v. Stepler, 258 F.2d 310 (3d Cir. 1958).

[136] Niznik v. United States, 173 F.2d 328 (6th Cir. 1949), *cert. denied*, 337 U.S. 925. "Therefore a registrant who fails to have a fair chance for his proper classification on his appearance before the local board has been denied something which cannot be cured through the action of the appeal board." Franks v. United States, 216 F.2d 266, 270 (9th Cir. 1954).

F. The Rights of Other Interested Parties

The averred policy of the draft law is to classify a registrant in terms of the national interest, which includes an effective national economy,[137] rather than in terms of the private rights or needs of the registrant. Consistent with this policy, the government appeal agent may initiate an appeal of a local board decision where he feels that the national interests requires it. And since the usefulness of the individual to the country is the primary concern of the draft board, the local board may initiate a change of the registrant's classification if it feels that his usefulness has changed. Indeed, any person other than the registrant who has an interest, such as a wife or employer, may ask that the registrant be deferred,[138] and may request a personal appearance (although, unlike the registrant himself, he does not have the right to such appearance), and — if he has requested a deferment — may appeal the local board's decision on his request.[139] Conceivably, a registrant may be deferred against his wishes if the local board concludes that he is more useful as a civilian.[140]

G. Penalties

The Military Selective Service Act provides that anyone "charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made . . . who shall knowingly fail or neglect to perform such duty" will be liable for up to five years' imprisonment or $10,000 fine, or both.[141] Thus, any regulations that the Selective Service System may promulgate are criminally enforceable. For example, the requirement to carry a draft card is placed upon the registrant by the regulations rather than the statute,[142] but failure to meet this requirement is criminally punishable.

The Selective Service System has devised an alternate means

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[137] *See* text at note 26 *supra.*

[138] 32 C.F.R. §1621.12(b) (1968).

[139] The registrant, any person who claims to be a dependent of the registrant, any person who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant, or the governmental appeal agent may appeal to an appeal board from the classification . . . ."
32 C.F.R. §1626.2(a) (1968).

[140] Although persons other than registrants may have rights within the Selective Service System, they may not have standing to challenge adverse determinations in a court. Justice Frankfurter, in his concurring opinion in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), set forth the necessary prerequisites in order for one to have standing in a court. In the absence of a statute conferring standing, a case or controversy must exist and the person must have an interest created by statute, the common law, or the constitution.

[141] 50 U.S.C. APP. §462(a) (1964).

[142] *See authority cited* at note 84 *supra.*

for punishing registrants; the local board, when filling its quota, must induct delinquents even before those who have volunteered for induction.[143] The regulations provide:

> A 'delinquent' is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law.[144]

Furthermore, the National Director has the power to reclassify any registrant despite the fact that the registrant may otherwise qualify for a deferment or exemption.[145] The circumstances under which the National Director may use his power to reclassify are not stated in the regulations, but this power may conceivably be used to threaten dissenters.

The statute also punishes one who "knowingly counsels, aids, or abets another to refuse or evade registration or service . . . or any of the requirements"[146] of the act or regulations. It is not necessary that the person counseled actually follow the advice offered.[147] The action sought to be punished by the statute is urging one to break the law rather than informing him of the law and its effect.[148]

JUDICIAL REVIEW

If the registrant is sufficiently dissatisfied with Selective Service System action, he may seek judicial relief. Court review can only be obtained at the proper stage of the administrative process, and is limited in scope. The primary purpose of judicial review of administrative action in general is to check the abuses of the administrator, rather than to substitute the court's judgment for that of the agency.[149] Furthermore, the courts have recognized that unrestricted judicial review may unduly interrupt the process of conscription, which may be called

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[143] 32 C.F.R. §1631.7 (1968).

[144] *Id.* §1602.4.

[145] *See* text at note 71 *supra*. Since the National Director views military service as a privilege, he would probably not view an adverse classification by him as punishment, but rather a privilege conferred upon those he has chosen to reclassify.

[146] 50 U.S.C. APP. §462(a) (1964).

[147] *See, e.g.*, Warren v. United States, 177 F.2d 596 (10th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950).

[148] Advising a registrant of the draft law and its effect is the primary function of advisors and appeal agents within the Selective Service System. However, mere criticism of the Selective Service law and approval of those who violate it is not punishable under this provision. Bond v. Floyd, 385 U.S. 116 (1966). The Court stated that: "[n]o useful purpose would be served by discussing the many decisions of this Court which establish that Bond could not have been convicted for these statements consistently with the First Amendment." *Id.* at 134.

[149] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, 76 (1941). "But the point is that the courts can only check abuses; they cannot supervise all adjudications in order to insure a correct result in each of them." *Id.* at 77.

upon to supply manpower with a minimum of delay.[150]

Prior to 1967, the Act was silent as to the means available to obtain judicial review. The most common method used prior to amendment was a defense to a criminal action brought by the government for failure to comply with the statute or the regulations.[151] Another method used to test the validity of Selective Service System action was a petition for habeas corpus after induction.[152] A third method sometimes used was injunctive relief against Selective Service System action.[153]

The 1967 amendment provides that:

> No judicial review shall be made of the classification or processing of any registrant by local boards [or] appeal boards . . . except as a defense to a criminal prosecution instituted . . . after the registrant has responded either affirmatively or negatively to an order to report for induction.[154]

Habeas corpus relief has been allowed by the courts subsequent to the amendment.[155] But injunctive relief under the amendment may be more difficult to obtain.[156]

A. Timing of Judicial Review

In order that the limited scope of review may be obtained, the administrative action must be ripe for review[157] and the registrant must have exhausted his administrative remedies.[158] The reason for the ripeness requirement is that the courts should only act upon problems which are real and present and is connected with the nature of the judicial function itself.[159] Exhaustion, on the other hand, is also concerned with whether a person should be required to seek administrative rather than judicial relief. Cases dealing with selective service action have hardly ever discussed the ripeness requirement, and have either denied relief on the ground of lack of exhaustion or have apparently assumed

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[150] [T]he courts . . . have been extremely reluctant to bring any phase of the operation of the Selective Service System under judicial scrutiny. The very nature of the Service demands that it operate with maximum efficiency, unimpeded by external interference.
Wolff v. Selective Service Local Board No. 16, 372 F.2d 817, 822 (2d Cir. 1967).

[151] Generally, the registrant who has strong objections against service in the armed forces will report to the induction center but refuse to be inducted, and attack the classification in the subsequent criminal proceeding.

[152] *See, e.g., Ex parte* Albertson, 103 F. Supp. 617 (D.D.C. 1951).

[153] *See, e.g.,* Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (2d Cir. 1967).

[154] Military Selective Service Act of 1967, Pub. L. No. 90-40, §10(b)(c) (June 30, 1967).

[155] *See, e.g.,* United States *ex rel.* Caputo v. Sharp, 282 F. Supp. 362 (E.D. Pa. 1968), where the court allowed a petition for habeas corpus without discussing the amendment.

[156] *See authority cited* at note 154 *supra.*

[157] 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §21.01 (1958).

[158] *Id.* §20.01. This requirement is subject to numerous exceptions. *See also* text at notes 164-69 *infra.*

[159] 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §21.01 (1958).

without discussing that the ripeness requirement has been fulfilled.[160]

The leading Supreme Court case in this area is *Falbo* v. *United States*.[161] The defendant in that case sought to be classified as a minister, and therefore be exempted from service. The local board classified him as a conscientious objector, and ordered him to report to a work camp. He refused to comply with the order, and was convicted. The Supreme Court upheld his conviction, holding that the board order to report to a work camp is only an intermediate step, since the defendant could still have been rejected by the work camp. The Court invoked the exhaustion of administrative remedies doctrine in order to minimize the interruption of the administrative process and prevent delay. The majority of the Court felt that this reason was especially relevant to the draft because of the substantial threat of war at that time and the need for speed in raising manpower.

Justice Murphy, dissenting, reasoned that the order to report to work camp was a final administrative order, since the Selective Service System had at that point performed all its functions and could do no more; there could be no litigious interruption of the administrative process by allowing the registrant to raise his defenses because the case was already in the courts, and the defendant was on the verge of going to jail.

> That an individual should languish in prison for five years without being accorded the opportunity of proving that the prosecution was based upon arbitrary and illegal administrative action is not in keeping with the high standards of our judicial system.[162]

Under further application of the exhaustion of administrative remedies doctrine, if, during the process of classification the registrant fails to take advantage of his right to appeal a local board determination, he will generally be precluded from attacking the validity of his classification by the local board, since it could have been reversed by the appeal board.[163] However, where an appeal by the registrant would have been meaningless under the circumstances, the exhaustion doctrine was not invoked by the court,

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[160] Since most cases challenging selective service action arise when the registrant refuses to be inducted, the problem of ripeness is seldom presented. However, where a registrant seeks judicial relief from the classification process rather than induction, the problem may arise. *See, e.g.*, Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (2d Cir. 1967), where the court stated:

> The Government further argues that this case is not ripe for adjudication because appellants have failed to exhaust their administrative remedies and because they cannot demonstrate irreparable injury.
>
> . . . .
>
> But, while the general run of cases do not present a justiciable controversy [where the action complained of is classification itself], it does not follow that no case can.

Id. at 823.

[161] 320 U.S. 549 (1944).

[162] *Id.* at 560-61.

[163] United States v. Nichols, 241 F.2d 1 (7th Cir. 1957).

and judicial review of the local board's determination was not precluded.[164] Another court reached the same result where the failure to appeal by the registrant was beyond his control.[165] At least one court has held that where the local board error is one of law, the exhaustion doctrine does not apply and the registrant will not be precluded from judicial review by his failure to appeal.[166]

Most courts hold that the registrant must comply with the order to report for induction issued by the local board before he has fully exhausted his administrative remedies, reasoning that he may still be rejected by the army.[167] Some appellate courts have, however, held that a registrant's administrative remedies have been exhausted when the order to report for induction is sent by the local board,[168] since this is the final order issued by the Selective Service System.

However, where the classification process itself abridges sensitive first amendment rights, judicial review of the local board action may be obtained at that point. In *Wolff* v. *Selective Service Local Board No. 16*,[169] a college student was reclassified 1-A after participating in an anti-Vietnam war demonstration at the offices of the local board in Ann Arbor, Michigan, on the grounds that he was a delinquent.[170] He sought an injunction against the draft board on the ground that his first amendment right of freedom of speech was being violated by the local board's reclassification. The district court found that the constitutional right of freedom of speech was in fact affected by the board's action because a registrant who may wish to express his views may be discouraged by the fear of reclassification by his local board. The local board argued that this case was not ripe for judicial decision because the student had not yet been inducted, and had therefore not exhausted his administrative remedies. The court admitted that exhaustion of one's administrative remedies is generally necessary, and litigious interruption before exhaustion is undesirable; however, when "a serious threat to the exercise of First Amendment rights exists, the policy favoring the preservation of these rights must prevail"[171] over the rule requiring exhaustion of administrative remedies.

The 1967 amendment[172] requiring exhaustion of administra-

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[164] Glover v. United States, 286 F.2d 84 (8th Cir. 1961).

[165] Donato v. United States, 302 F.2d 468 (9th Cir. 1962), *cert. denied*, 374 U.S. 828 (1963).

[166] United States v. Carson, 282 F. Supp. 261 (E.D. Ark. 1968).

[167] *See, e.g.*, Moore v. United States, 302 F.2d 929 (9th Cir. 1962).

[168] Tamblyn v. United States, 216 F.2d 345 (5th Cir. 1954), *cert. denied*, 348 U.S. 950 (1955).

[169] 372 F.2d 817 (2d Cir. 1967).

[170] *See* text at notes 143-44 *supra*.

[171] 372 F.2d at 825.

[172] *See authority cited* at note 154 *supra*.

tive remedies and allowing court review only as a defense to a criminal action was apparently directed toward eliminating the few court-developed exceptions to the exhaustion doctrine. The congressional committee which deals with the draft has stated that, "[t]he committee was disturbed by the apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies."[173]

The exact effect of this amendment upon the court-made exceptions to exhaustion remains to be seen, although, because of the drastic effect of preclusion of all judicial review, courts may tend to read exceptions into the statute. However, where the draft board action has not violated constitutional rights, stricter adherence to the exhaustion doctrine will probably be required by the courts; where procedural due process has been infringed upon, exhaustion may still be required in light of the fact that future board action may cure the procedural defect; but where sensitive first amendment rights have been infringed upon, the courts may well find that the statutory requirement does not apply.

B. Availability and Extent of Judicial Review

Until amendment in July, 1967, the statute provided that the decisions of the local boards "shall be final."[174] Despite the apparent clarity of this phrase, the Supreme Court in 1946 concluded that this section did not preclude a court from exercising its power to review the evidence. In *Estep* v. *United States*,[175] the Court held that it had the power to determine whether the Selective Service System has acted within its jurisdiction. The majority did not discuss the constitutionality of preclusion of all judicial review, but rather found that as a matter of statutory interpretation, review of Selective Service System action is available:

> 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.[176]

Justice Murphy, concurring, reasoned that the right to judicial review is a constitutional requirement.

> Before a person may be punished for violating an administrative order due process of law requires that the order be within the authority of the administrative agency and that it not be issued in such a way as to deprive the person of his constitutional rights.[177]

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[173] H. R. REP. NO. 267, 1967 U.S. CODE CONG. & AD. NEWS 1308, 1333.
[174] 50 U.S.C. APP. §460(b)(3) (1964).
[175] 327 U.S. 114 (1946).
[176] *Id.* at 121.
[177] *Id.* at 126-27.

Justice Rutlege, concurring, also concluded that the Constitution requires judicial review of an administrative order when disobedience of the order results in criminal sanctions.

However, the extent of judicial review as defined by the majority is extremely limited, and the court cannot weigh the evidence to determine whether the board's action was justified.

> The decisions of local boards made in conformity with the regulations are final even though . . . 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.[178]

The majority expressly rejected the substantial evidence test adopted by the Administrative Procedure Act.[179] and would reverse an administrative determination of the Selective Service System only if there is no basis in fact for its conclusion. The majority did not define the basis in fact test, although clearly it was meant to be more narrow than the substantial evidence test.

> 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.[180]

However, the basis in fact test has been further defined in subsequent Supreme Court cases.

In *Cox* v. *United States*,[181] the Supreme Court affirmed the convictions of three registrants, classified by their local boards as conscientious objectors, who failed to report to work camp, as required of conscientious objectors. The defendants claimed that their local boards erred in classifying them as conscientious objectors rather than ministers. The Supreme Court, after reaffirming the right to limited judicial review established in *Estep*, held that the local board classifications were valid since there was a basis in fact for each of them in the Selective Service System record:

> The documents show that [two of the defendants] spent only a small portion of their time in religious activities, and this fact alone, without a far stronger showing than is contained in either of the files . . . is sufficient for the board to deny them a minister's classification.[182]

However, the record of the third defendant did not contain any objective evidence upon which the board could have reasonably refused to classify him as a minister. The Supreme Court, however, held that there was a basis in fact for the classification, since:

> The board might have reasonably held that nothing less than defi-

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[178] *Id.* at 122-23.
[179] Act of June 11, 1946, ch. 324, 60 Stat. 237.
[180] Estep v. United States, 327 U.S. 114, 122 (1946).
[181] 332 U.S. 442 (1947).
[182] *Id.* at 451.

> nite evidence of his full devotion of his available time to religious leadership would suffice under these circumstances.[183]

The Court also held that whether there is a basis in fact for the classification is a question of law for the trial judge to decide, and that the evidence must be limited to that heard or passed upon by the board.[184]

Justice Douglas, dissenting, agreed with the majority that a basis in fact would be enough to affirm the local board action, but felt that there was no basis in fact for the classifications in this case, concluding that:

> Their claims to that status are supported by affidavits of their immediate superiors in the local group and by their national headquarters. And each of them was spending substantial time in the religious activity of preaching their faith. If a person is in fact engaging in the ministry, his motives for doing so are quite immaterial.[185]

Justice Murphy also dissented, stating that the scope of judicial review of Selective Service System determinations should be broadened "[i]f respect for human dignity means anything, only evidence of a substantial nature warrants approval of the draft board classification in a criminal proceeding."[186]

Six years later, in *Dickinson* v. *United States*,[187] the Supreme Court expanded the narrow test adopted in *Cox*. The defendant in that case was denied a ministerial exemption by his local board. Like Cox, he spent most of his time performing the duties of a minister, and like Cox, he was a Jehovah's Witness. The Supreme Court adopted the test which Justice Douglas set forth in his dissent in *Cox*.[188] It held that a ministerial exemption, unlike that of a conscientious objector, depends upon objective facts and not the motive of the registrant. Once the registrant establishes these objective facts, the local board cannot refuse him the exemption upon any basis in fact.

> But when 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.[189]

The Supreme Court, in *Witmer* v. *United States*,[190] distin-

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[183] *Id.*

[184] With some exceptions, courts will generally not accept evidence not presented to the agency, since the administrator must have a chance to rule on the new evidence. Professor Davis states that this is an application of the exhaustion of administrative remedies doctrine. K. DAVIS, ADMINISTRATIVE LAW TEXT 356 (1959).

[185] 332 U.S. at 456.

[186] *Id.* at 458.

[187] 346 U.S. 389 (1953).

[188] *See* text at note 185 *supra.*

[189] 346 U.S. at 397.

[190] 348 U.S. 375 (1955).

guished the conscientious objector exemption from the ministerial exemption:

> [T]he registrant (in Dickinson) made out his prima facie case by means of objective facts. . . . Here the registrant cannot make out a prima facie case from objective facts alone, because the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form.[191]

Witmer was decided in 1955, and the Supreme Court has not since then ruled upon the basis in fact test. It is difficult to determine, from a reading of the lower federal court opinions decided since then, any clear delineation between the basis in fact and substantial evidence tests. Thus Professor Davis states that, "[t]he search for a formula which will meaningfully make the scope of review narrower than what is provided by the substantial-evidence rule has not yet met with success."[192]

In addition to reviewing the evidence, courts will also review the degree to which the Selective Service System follows the procedures required by the regulations and by constitutional due process. The system is required by statute to be fair[193] and by the courts on review to meet minimum standards of procedural due process. Most of the cases in this area deal with procedural rights established by the statute or regulations. Thus, the minimum standard which the system must meet absent any regulation is unclear. For example, the due process clause probably requires that a registrant have the right to be heard, and this right then would not be subject to elimination by the legislature or the administrator.

Before the registrant may obtain court relief from procedural errors committed by the local board, the majority of courts require him to establish that the procedural error was prejudicial.[194] Generally, failure of the system to abide by regulations which are exclusively for the benefit of the administration will not bring about reversal by the courts.[195] Thus where the local board clerk used a rubber stamp instead of her signature as required by the regulations, the defendant's right to due process was held not infringed.[196]

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[191] *Id.* at 381.

[192] 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §23.08, at 332 (1958).

[193] For the statutory provisions, *see generally* text at note 20 *supra.*

[194] Both views are discussed in United States v. Sturgis, 342 F.2d 328, 331-32 (3d Cir. 1965), *cert. denied,* 382 U.S. 879.

[195] "It seems clear that not every departure by a local board from standard practice, not each minor slip, deprives a local board of jurisdiction and invalidates its order." United States v. Lybrand, 279 F. Supp. 74, 77 (E.D. N.Y. 1967).

[196] "Absent some showing of prejudice to appellant due to the failure on the part of the Board to comply with the formal procedural directive of a regulation, an order of the Board, otherwise within its power to issue, will not be invalidated." United States v. Lawson, 337 F.2d 800, 812 (3d Cir. 1964), *cert. denied,* 380 U.S. 919 (1965).

CONCLUSION

The function of judicial review — to check administrative abuses — is not being adequately fulfilled by the system of review presently operative in this area, because of the difficulty in obtaining review and because of its limited scope once review is obtained.

Generally, a registrant can only obtain judicial review in a criminal action, and must be willing to accept the consequences of an adverse decision. Furthermore, the expense of litigation, combined with the slight chance of reversal[197] heavily discourages most registrants from seeking judicial review, except perhaps those registrants who have strong moral objections to the service.[198] The argument against broader judicial review of selective service determinations is that litigious interruption would adversely affect the speed and flexibility necessary to meet sudden and unforeseen manpower needs.[199] If the selective service is to provide the needed manpower quickly, it must be able to induct that manpower with speed. If there is merit in this argument, then application of the exhaustive doctrine, at least up to the point of the induction order, would be necessary where no vital constitutional rights have been violated. Nevertheless, the basis in fact test should be abandoned and the scope of judicial review should be broadened and, as Justice Murphy suggested, only evidence of a substantial nature should support draft board action.[200]

However, even if judicial review were optimally expanded, it would nevertheless be limited primarily to correcting procedural abuse of the established processes within the system, and would be relatively powerless to correct or alter many of the procedural and substantive processes themselves, for several reasons. Courts cannot disagree in most instances with the policy prescribed by the legislature and the administrator. And a registrant, even if treated unfairly, is more likely to give in to the system rather than bear the expense and adverse consequences of judicial review. Thus, substantial change in this area can only come through legislative and administrative initiative.

According to the National Director, the Selective Service System has three basic responsibilities:

> 1) To provide the Armed Forces with the number of men they need when they want them.

[197] A reading of the cases shows that few of the local board decisions are reversed by the courts.

[198] Most cases dealing with judicial review involve those seeking conscientious objector or ministerial exemptions. One may speculate that in these areas the ideologic compulsion to seek an exemption is perhaps strong enough to overcome the obstacles.

[199] *See* text at note 179 *supra.*

[200] *See* text at note 186 *supra.*

2) While doing this, to cause as little disturbance as possible in the civilian economy.

3) To guide deferments into areas considered to be in the national interest by competent authority.[201]

Although the National Director does not feel that recognition of the individual's rights is a basic responsibility of the system, Congress has expressly stated otherwise. The Act requires that the system of selection be "fair and just . . . consistent with the maintenance of an effective national economy."[202] While the procedure has been successful in providing the armed forces with the needed manpower, it has failed to fully attain the objectives of promoting the national economy and providing individual fairness to the extent required by statute.

The procedure has failed because the manner in which essential industries and occupations are selected by the system is erratic and does not assure that those deferments actually granted are the most essential to a sound economy. Presently, the local board is vested with much of the power to make occupational deferment judgments, and is guided by regulations which are so general that they give local board members almost unlimited discretion.[203] The method of selecting local board members does not take into account the qualifications necessary to make sound economic decisions; for example, the members are not "blue ribbon" decision makers — they do not necessarily have an extensive business or economic background. And, because local board members generally have predominant outside interests or occupations not connected with the Selective Service System, their decisions may be influenced by the peculiar circumstances in their own profession or occupation.[204]

Nor are the local boards required to follow a set of procedural steps which would bring before them the maximum relevant information and professional opinion upon which a sound judgment may be made. Local boards need not rely upon evidence of economic conditions in their area and may make judgments based upon preconceived and parochial notions of the needs of the economy.

The manner in which information is obtained from the registrant does not assure that the board will have full knowledge of the registrant's circumstances necessary for an effective judgment in every case. The criteria which a local board uses to grant deferments and exemptions are not known by most registrants. For example, local boards do not publicize the occupa-

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[201] L. HERSHEY, *A Fact Paper on Selective Service*, in THE DRAFT 3, 3-4.
[202] 50 U.S.C. APP. §451(c) (1964).
[203] *See* text at note 53 *supra.*
[204] *See generally The Selective Service System: An Administrative Obstacle Course*, 54 CALIF L. REV. 2123 (1966).

tions which they consider essential to the national economy; furthermore, occupational deferments vary from board to board.[205] Thus, a registrant who may have been eligible for an occupational deferment may be unaware of his eligibility, and may not provide the board with enough descriptive information upon which the local board may make an adequate judgment. Furthermore, not every registrant engaged in an essential occupation is assured of being deferred, because the board's judgment is based to some extent upon their estimation of the sincerity of the registrant in entering the occupation.[206]

For these reasons, the present procedure is inadequate in providing the necessary safeguards for a sound economic evaluation. The power to select essential occupations should be removed from the local board members and placed in an agency which is more capable of making sound economic evaluations. The occupations which are deemed essential should be publicized and distributed to the registrants so that all those engaged in these occupations will have an opportunity for deferment. Furthermore, local boards should not be allowed to consider their own estimation of the sincerity of the registrant in entering the occupation. People enter occupations for a variety of reasons, many of which are non-idealistic. Such motives, even if they are purely to avoid the draft, are not necessarily related to the effectiveness of the person in a given occupation, and thus are not proper considerations before the local board members.

As noted earlier, the present procedure is based upon the assumption that each registrant is fully informed, actually or constructively, of his rights and duties within the system and that he has the burden of providing his local board with the relevant information. As one court has aptly stated: "That [a registrant] may have misconceived the Board requirements . . . can neither excuse his failure to present relevant evidence . . . nor cast an affirmative burden on the Board . . . ."[207] In view of the fact that existing sources of information are inadequate,[208] this assumption is unrealistic. As a result of this assumption, many registrants fail to take advantage of rights because of lack of information, and lose rights because they are ignorant of the consequences of the failure to take advantage of them. For example, a registrant may, for some reason, fail to appeal his local board classification, depriving himself of any right to court review, notwithstanding that the average registrant has probably never heard of the doctrine of exhaustion of administrative

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[205] *Id.*

[206] Based upon phone conversations with various local board clerks.

[207] Wood v. United States, 373 F.2d 894, 898 (5th Cir. 1967), *vacated*, 389 U.S. 20.

[208] *See* text following note 116 *supra.*

remedies. Thus, in order to make the assumption of knowledge placed upon the registrant meaningful, procedures which would remedy the present informational gap must be adopted to facilitate the flow of essential information from the system to the registrant. One method that could remedy the informational gap to some extent would be to provide some form of counsel. The appointment of advisors to local boards should be mandatory, and the existence of these advisors should be publicized among the registrants.[209]

Local boards should be required to state in writing the reasons upon which their decisions are made, and these opinions should be made public. Such a procedure would enable appeal boards and the courts to more realistically appraise the fairness of the local board decisions, and would provide the registrants with knowledge of local board requirements for the various classifications.

The present procedure places an unconscious premium on the intellectual and economic status of the registrant. Local board members are generally selected from the middle classes and from a business or professional background, and are not always representative of the areas over which they have jurisdiction.[210] As a result, they may tend to identify with registrants of similar backgrounds, and may have trouble communicating with a registrant from a different social and economic milieu.

The functions of prosecuting and deciding each case presently reside in the local board members. When a registrant requests a personal appearance, the local board has already classified him once. He is, in a sense, attacking their judgment by asking for a personal appearance. Furthermore, since classification criteria may vary, depending to some extent on the current monthly quota, unpredictability is to that extent compounded. Consequently, the personal appearance becomes of questionable value in many cases. Perhaps, in order to make the personal appearance more meaningful, an alternative would be to place this right at the appeal board level. Under such a procedure, the registrant would not be confronting those who have already decided against him, and who must meet a monthly quota.

Under the present system, the average registrant is in a state of uncertainty as to his draft status and as to his eligibility

[209] For existing provisions relating to advisors, *see* text at note 120 *supra*. This method of providing counsel seems preferable to expanding provisions relating to attorneys, because of the costs to registrants that may be involved.

[210] *See The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2163 (1966).

for deferment. Uncertainty in classification is a result of the lack of information among registrants as to classification criteria and the lack of uniformity between draft boards and within the same draft board at different times.[211] However, uncertainty in one's draft status exists because not all eligible registrants are needed.[212] This uncertainty is prolonged because a registrant is generally liable to be drafted until he is twenty-six and, because, the oldest registrants are drafted first.[213] While uncertainty among registrants may be desirable from the point of view of the armed forces, in that it encourages enlistments,[214] it tends to make individual planning of the future more difficult. Predictability of the registrant's draft status could be increased under the present system, by reversing the order of induction from the oldest first to the youngest first.

It is apparent, from the foregoing discussion, that even within the framework of the present system, a higher premium could be placed upon individual dignity without altering the basic objectives or sacrificing the needed flexibility. However, even if the present procedure were redesigned to the fullest possible extent to provide for individual liberty consistent with its other goals, it would still be repugnant to the overall values of our society. The guiding principle of the present system is that only those registrants should be drafted who cannot contribute sufficiently to the national economy and security. The procedure by which the system encourages registrants to enter certain occupations or studies is called channeling, and is thus explained by the National Director:

> Further, Selective Service channels thousands of young men through its deferment procedures into those fields of endeavor where there are shortages of adequately trained personnel. . . . Many younger engineers, scientists, technicians, and other skilled workers have been kept in their jobs through occupational deferments. Young male teachers are induced to remain in the teaching profession through deferment and additional students are attracted into the profession.[215]

No matter how fair the procedure used to determine the status of registrants, the end result would be a tax in the nature of involuntary servitude placed upon those found by the Selective Service System under existing circumstances to be insufficiently

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[211] As stated previously, one factor which a local board probably considers when it classifies registrants is the quota it must meet. Furthermore, a board is in no way bound by the previous decisions it has made and is encouraged to classify on an individual basis rather than set any policy.

[212] Thus, the real problem that any draft system is faced with is who must go.

[213] For a discussion of the method of drafting, *see* text at note 67 *supra*.

[214] *See* THE DRAFT at 304.

[215] H. MARMION, *A Critique of Selective Service with Emphasis on Student Deferment*, in THE DRAFT 54, 59-60, *citing*, ANNUAL REPORT OF THE DIRECTOR OF SELECTIVE SERVICE 18 (1965).

valuable to the maintenance of the national economy and security. As a result of this policy, a smaller proportion of college graduates, compared to non-graduates, has been drafted.[216] It is arguable that those occupational deferments which are a result of the necessities of national security rather than the concept of channeling are necessary. For example, it is clear that the armed forces must be assured of an adequate supply of weapons, and those registrants engaged in the munitions industry could be deferred in order to assure such a supply. However, it seems that the goal of promoting education and entry into fields that have a shortage of qualified personnel could be promoted by alternative means more consistent with our democratic principles.

The Selective Service System views service in the armed forces as a privilege, apparently in the sense that one should be willing to serve one's country. Perhaps for some, service in the armed forces is preferable over civilian life. Probably for most it is a necessary inconvenience which disrupts family life, employment and other trademarks of civilian life and at the same time deprives them of the freedom guaranteed to all other segments of society:

> *Spevack* held that even a lawyer could invoke the Fifth; and *Gault* held that a child should not be imprisoned more casually than a man. There are no second class citizens left — except, perhaps, our men in military service, who are drafted away from home, family, work, and often due process. . . . [Liberty and justice] '[f]or all' includes soldiers, sailors, marines, and airmen too.[217]

Most other administrative agencies are, to some extent, controlled or influenced by those directly affected.[218] However, registrants have no lawful mechanisms for voicing their opinions about the system or its foreign policy uses.[219] The Selective Service System has attempted to punish those registrants who disagree with our present foreign policy.[220] The system is further insulated from those most directly affected by it because the registrants have no means by which they may influence the composition of the local boards or over the policies which are enunciated by the national and state headquarters. Furthermore, registrants cannot effectively present their views to the

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[216] *See authority cited* at note 35 *supra*. It would be interesting to note the social makeup of other classifications, such as the conscientious objector exemption.

[217] Editorial, *Justice for All*, TRIAL, (Feb.-March, 1968), at 3.

[218] W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW CASES & COMMENTS 22 (4th ed. 1960), *reprinting*, W. GARDNER, *The Administrative Process*, LEGAL INSTITUTIONS TODAY AND TOMORROW (M. G. Paulson ed. 1959).

[219] One possible method for allowing greater dissent with governmental foreign policy would be to expand the conscientious objector classification. However, this method would still not provide a voice in the draft policy.

[220] *See generally The States, The Federal Constitution, and The War Protestors*, 53 CORNELL L. REV. 528 (1968).

local board members because contact with them is discouraged under the present system. And registrants have less influence over legislative and executive decisions than the older, more organized segments of our society. Registrants do not, for example, retain lobbyists to promote their interests. Finally, those subject to the draft cannot vote. The result of all these factors combined is that those most directly affected by the draft have least control over the system and its foreign policy uses. Perhaps this lack of control may be a factor in the extra-legal means employed by the younger part of our society to exert some influence on governmental decisions.

The acceptance of a governmental agency which discourages free speech and dissent, which minimizes the individual worth in the name of national interest and which sacrifices due process in the name of flexibility may have an adverse long-range influence upon our basic notions of freedom. The draft is, according to the results of one survey, generally accepted as basically "fair" by a sample of high school students.[221] Acceptance of basically non-democratic principles in one area of governmental action may mean an easier acceptance of such principles in other areas, in the name of national interest. Thus, the threat of external destruction may cause an internal erosion of our basic principles.

Andrew J. Kleczek

[221] L. BRAMSON, *The High School Student, the Draft, and Voluntary National Service Alternatives: Some Survey Data*, in THE DRAFT 177, 180.