# FAIRNESS AND DUE PROCESS UNDER THE SELECTIVE SERVICE SYSTEM

> The Universal Military Training and Service Act . . . is a comprehensive statute designed to provide an *orderly, efficient* and *fair* procedure for marshalling the available manpower of the country . . . .[1]

This is the goal of the Selective Service System as seen by the administrators charged with fulfilling its statutory purpose. The question raised is whether the administration of the process overemphasizes efficiency at the expense of fairness to individuals.

This Comment will focus on three problem areas: change in status after the original classification; right to advisors or counsel; and treatment of the delinquent—including the first amendment implications in dealing with the noncooperating or civilly disobedient draftee. Before commencing with a discussion of these problems, the issues of right to judicial review, exhaustion of administrative remedies and the scope of judicial review will be considered as integral to an understanding of the legal problems within the Selective Service process.

In times of national emergency when manpower is fully mobilized, the pressures and demands of the Selective Service System are markedly different from the pressures present in times when the System is truly "selective" and the great majority of eligible registrants is not being called into active service. Current law is geared to meet any potential emergency without a change in procedure. One theme of this Comment centers on the proposition that different problems are presented in operating a selective service system in times when less than full mobilization is desired and that inadequate consideration has been given to providing different procedures in such times. This dichotomy could be achieved in the act by providing for a basic set of procedures with the provision that certain procedural changes would become operative upon declaration of war or national emergency by Congress.[2] Throughout this Comment this "triggering mechanism" will be suggested as appropriate in the context of specific problem areas.

---

[1] SELECTIVE SERVICE SYSTEM, LEGAL ASPECTS OF SELECTIVE SERVICE § 1 (1963). (Emphasis added.) This is a publication of the Selective Service System designed for the use of government appeal agents and for the convenience of United States Attorneys, many of whom infrequently encounter Selective Service cases.

[2] These two events are already incorporated into the Selective Service Act as a triggering mechanism whereby certain wartime procedures come into effect. See, *e.g.*, Selective Service Act of 1948, § 4(c)(1), 62 Stat. 606 (1948), as amended, 50 U.S.C. APP. § 454(c)(1) (1964) (enlistments shall not be extended without consent of enlistee until after a declaration of war or national emergency by the Congress); § 4(d)(2), 62 Stat. 607 (1948), as amended, 50 U.S.C. APP. § 454(d)(2) (1964) (persons having performed certain active or reserve obligations cannot be ordered to active duty except in time of war or national emergency declared by the Congress).

## I. Right to Judicial Review and the Exhaustion Doctrine

The Selective Service Act states that the decision of Selective Service authorities[3] in connection with the classification of registrants "shall be final." This "finality" provision was in the Draft Acts of 1917,[4] 1940[5] and our current law, which is based on the Act of 1948.[6]

Prior to the 1940 act, a registrant was considered to be under military jurisdiction as soon as he was mailed his induction notice, even though his actual induction took place at a later date.[7] If the registrant failed to receive his notice, he unknowingly became a deserter and was subject to military court-martial proceedings.[8] In criminal prosecutions of draft evaders during World War I the question of judicial review of classifications apparently did not arise.[9] However, there was general agreement that a writ of habeas corpus was available after induction where the classification had been arbitrary or had not been based on substantial evidence.[10]

The act of 1940 and the present act provide that a registrant is not subject to military jurisdiction until he is actually inducted.[11] Moreover,

---

[3] Selective Service authorities in this context essentially means the local board and the appeal board. These boards are by law composed of civilians who are appointed by the President on the recommendation of the Governor. 32 C.F.R. § 1604.22 (1962) (appeal board); 32 C.F.R. § 1604.52 (1962) (local board). The members are not compensated. 32 C.F.R. § 1603.3 (1962). The local board has the initial responsibility for registration, classification, deferment and induction of the registrant. There is one appeal board for each judicial district. 32 C.F.R. § 1604.52(a) (1962). Appeals are usually based on the record before the local board. 32 C.F.R. § 1626.24 (1962). The appeal board uses this record but classifies the registrant de novo. 32 C.F.R. § 1626.26 (Supp. 1964); Selective Service System, Legal Aspects of Selective Service § 42 (1963); *cf.* Selective Service Act of 1948, § 10(b)(3), 62 Stat. 619 (1948), as amended, 50 U.S.C. App. § 460(b)(3) (1964).

[4] Act of May 18, 1917, ch. 15, § 4, 40 Stat. 80.

[5] Act of Sept. 16, 1940, ch. 720, § 10(a)(2), 54 Stat. 893.

[6] Selective Service Act of 1948, § 10(b)(3), 62 Stat. 620 (1948), as amended, 50 U.S.C. App. § 460(b)(3) (1964).

[7] Act of May 18, 1917, ch. 15, § 2, 40 Stat. 78. This act provided: "All persons drafted into the service of the United States . . . shall, from the date of said draft or acceptance, be subject to the laws and regulations governing the Regular Army . . . ."

[8] In Franke v. Murray, 248 Fed. 865 (8th Cir. 1918), the court held that under the 1917 statute a registrant became subject to the laws and regulations governing the Army, including the Articles of War, from the date of the induction order. The laws governing voluntary enlistments, under which it was necessary to take an oath, were not considered applicable to the draft. The case was a habeas corpus proceeding by a service member who had been denied an exemption as a member of a religious sect forbidding its members to participate in war. The writ of habeas corpus was discharged, and the registrant was remanded to the custody of the military.

[9] See Bell, *Selective Service and the Courts*, 28 A.B.A.J. 164, 167 (1942).

[10] See, *e.g.*, Arbitman v. Woodside, 258 Fed. 441 (4th Cir. 1919). Despite the availability of habeas corpus it appears that in only two cases in addition to Arbitman v. Woodside, *supra*, did the court actually order the draftee released from the army. *Ex parte* Cohen, 254 Fed. 711 (E.D. Va. 1918); *Ex parte* Beck, 245 Fed. 967 (D. Mont. 1917). In most of the other cases the court undertook a review of the evidence on which the boards made their decisions and then concluded that their findings were not arbitrary or capricious or an abuse of discretion and dismissed the writ. See cases collected in Note, *Judicial Review of Selective Service Board Classifications by Habeas Corpus*, 10 Geo. Wash. L. Rev. 827, 829 n.7 (1942).

[11] Section 12(a), 62 Stat. 622 (1948), 50 U.S.C. App. § 462(a) (1964); Act of Sept. 11, 1940, ch. 718, § 11, 54 Stat. 895.

a congressional report noted that in order to obtain a judicial determination the registrant must submit to induction and raise the issue by habeas corpus,[12] thus suggesting that Congress did not intend for the finality provision in the post-1940 acts totally to exclude judicial review.

The Supreme Court faced the right to review issue under the 1940 act in the 1944 case of *Falbo v. United States*.[13] That case came up as a criminal prosecution against a Jehovah's Witness who had willfully failed to obey a local board order to report, as a conscientious objector, for assignment to work of national importance as an alternative to military service. The draftee had previously been denied total exemption under the act as a minister by Selective Service authorities, and he alleged that this denial was erroneous. The lower court refused to consider Falbo's defense that the order was illegal. The Supreme Court, avoiding the constitutional issue, affirmed the board and held that Falbo was not entitled to judicial review because he had failed to exhaust his administrative remedies in refusing to report for induction. The Court reasoned that, had he reported as ordered, he might still have been rejected at the induction center.[14]

Two years later in the case of *Estep v. United States*,[15] the Supreme Court faced the issue of judicial review head on. That case involved a Jehovah's Witness who, like Falbo, had been denied a ministerial exemption. The draftee here, however, had reported for induction and had been accepted, and then had refused to submit to induction. Delivering the opinion of the Court, in which two other Justices joined, Mr. Justice Douglas said that congressional silence as to judicial review was not necessarily to be construed as a denial of the power of federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them.[16] The opinion stated:

> We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction. . . . We cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards "final" as to provide that a

---

[12] See H.R. REP. No. 36, 79th Cong., 1st Sess. 4-5 (1945).

[13] 320 U.S. 549 (1944).

[14] Citing the section of the act providing that no man shall be inducted who is not physically and mentally fit for such training, the Court went on to point out:

> We are informed by the government that pursuant to this section approximately forty per cent of the selectees who report . . . for induction . . . are rejected, and that, as of October 15, 1943, six hundred and ten of the eight thousand selectees who had reported for civilian work of national importance had been rejected.

*Id.* at 553 n.7.

[15] 327 U.S. 114 (1946).

[16] See Gegiow v. Uhl, 239 U.S. 3 (1915) (Holmes, J.); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).

> citizen of this country should go to jail for not obeying an unlawful order of an administrative agency.[17]

The Court said that not to allow judicial review here when the board lacked jurisdiction and yet to allow habeas corpus after induction would be "sending men to jail when it was apparent they would have to be released tomorrow." [18]

Mr. Justice Frankfurter, concurring, said that "final means final" and that the majority's reliance on the jurisdictional argument revived "all the casuistic difficulties spawned by the doctrine of 'jurisdictional fact.'" [19] He rested reversal on certain errors in the trial. Since Mr. Chief Justice Stone and Mr. Justice Burton in their dissent saw no constitutional implications and since Mr. Justice Jackson did not sit, six of the eight sitting Justices were willing to discuss the issue as one of statutory construction.[20] Only Justices Murphy and Rutledge, concurring, felt that the constitutional right to judicial review in a criminal prosecution was involved. Mr. Justice Rutledge said:

> But as I do not think Congress can make it a crime punishable by federal judicial power to violate an administrative order without affording an adequate opportunity to show its constitutional invalidity . . . so even more do I not think Congress can make criminal the disobedience to such an order allowing no opportunity whatever for showing its unconstitutionality. . . . It would make the judicial function a rubber stamp in criminal cases for administrative or executive action.[21]

The Court in later decisions clarified its holding that when the draftee has exhausted his administrative remedies [22] by reporting for induction,[23]

[17] 327 U.S. at 121-22.

[18] *Id.* at 125.

[19] *Id.* at 142. Mr. Justice Frankfurter was referring to the so-called doctrine of Crowell v. Benson, 285 U.S. 22 (1932), which in its most general terms might be stated: *"When a fact is the asserted constitutional basis for the exercise of the power in question, the court must itself make a finding of the fact and may in its discretion take evidence as to the fact."* JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 624 (1965) (emphasis in original).

[20] See HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 323-25 (1953); note 49 *infra*, criticizing the majority's statutory construction approach.

[21] 327 U.S. at 133-34.

[22] A registrant has failed to exhaust his administrative remedies when, for example: he fails to appeal from the last classification given by his local board, see, *e.g.*, Skinner v. United States, 215 F.2d 767 (9th Cir. 1954), *cert. denied*, 348 U.S. 981 (1955); or he neglects to present to the appeal board his claim that the local board was guilty of misconduct in connection with his classification, see, *e.g.*, Davis v. United States, 203 F.2d 853 (8th Cir.), *cert. denied*, 345 U.S. 996 (1953); or he neglects to keep his local board informed as to his eligibility for a dependency classification, see, *e.g.*, Hirsh v. Adair, 113 F. Supp. 116 (E.D. Pa. 1953) (possible bad faith of the registrant also noted).

[23] The registrant must report for induction to exhaust his administrative remedies but must not be inducted. At one time this line was so narrow that a conscientious objector anxious to comply with the exhaustion doctrine reported for induction only

he may, as a defense to a criminal prosecution, attack the board's order as arbitrary and illegal. If he has already been inducted into the service, he of course still has available review by habeas corpus.[24]

The fact that the registrant must either go into the army and raise the issue by habeas corpus or risk possible conviction in a criminal trial for violating the act is somewhat disturbing. The harshness of limiting the pre-induction right to judicial review to defending in a criminal action is partially mitigated, however, by the administrative practice of allowing the prosecuted draftee to go into the service rather than to jail.[25] As the Director of the Selective Service has pointed out, the purpose of the system is to provide manpower for the military services not for the penitentiary.[26]

The reason why it is thought necessary to limit pre-induction judicial review to the criminal prosecution is bound up in the exhaustion and ripeness doctrines of administrative law. A registrant not qualifying for any deferment or exemption will be given an original classification of I-A. He will not be called for a physical, however, until the draft board calls his age group, and present practice is to call according to age, oldest first.[27] Furthermore, even after the physical the registrant may never be inducted. Therefore, judicial review previous to notice of induction would involve unnecessary litigation. Moreover, in times of national emergency the demands of the system in terms of speed and efficiency cannot afford this premature litigation. Besides the fact that the volume of litigation would delay the whole process, this early right to judicial review would also allow the individual registrant to delay his own imminent induction by litigating a frivolous claim. Since in wartime everyone serves for the duration, this respite gives the draft evader a shorter period of service.

While these factors probably weigh in favor of a limited right to judicial review during great national emergencies, a different problem arises in the nonemergency situation where manpower needs are not as great. Assume a registrant is given a I-A classification which he feels is erroneous either because of physical reasons or because he qualifies for another exemption or a deferment. Cases have held that a declaratory

---

to find that, after being found physically acceptable, he was read the oath of induction which he refused to take and told, "You are in the army now." Fortunately the Supreme Court freed him on habeas, holding that he was not subject to military jurisdiction since "actually inducted" within the meaning of the act is when the draftee "in obedience to the order of his board and after the Army has found him acceptable for service undergoes whatever ceremony or requirements of admission the War Department has prescribed." Billings v. Truesdell, 321 U.S. 542, 559 (1942).

The induction "ceremony" today is definite enough that a registrant will not be inducted inadvertently. See Corrigan v. Secretary of Army, 211 F.2d 293 (9th Cir. 1954).

[24] Eagle v. United States *ex rel.* Samuels, 329 U.S. 304 (1946). Since *Estep*, however, the habeas corpus remedy is rarely used. See Tietz, *Jehovah's Witnesses: Conscientious Objectors*, 28 So. CAL. L. REV. 123, 134 (1955).

[25] See text accompanying notes 123-25 *infra*.

[26] *Ibid.*

[27] Phone Conversation With Clerk of a Local Draft Board, in Philadelphia, Pennsylvania, Feb. 12, 1966.

judgment to contest the classification does not lie,[28] and since he has not been called he is not entitled to judicial review in a criminal prosecution for failure to report for induction. At a time when manpower needs are low a person classified I-A may be called immediately after classification, a long time after or never at all. Because of the uncertainty of his position the registrant may be unable to make any future plans, and, moreover, many employers may refuse to hire someone who may be forced to leave on a minute's notice.

It might be argued that the triggering mechanism could alleviate this problem. A wider right to judicial review could be enacted by Congress with the proviso that the present provisions would go back into effect upon a declaration of war or national emergency. However, because of the large amount of litigation (much of which might be wasteful) resulting from an earlier right to review, it is thought that the uncertainty problem does not merit such a drastic cure. Today the volatility of the cold war situation by necessity results in a certain amount of uncertainty; but this uncertainty can be minimized by having local boards provide as candid an estimate as is possible under the board's current quota as to the registrant's probable induction date.

## II. Scope of Judicial Review

The Supreme Court in *Estep*, along with providing a right to judicial review in Selective Service cases, set down the scope of review to be afforded under the act. The majority opinion said that the provision making decisions of local boards "final" means that:

> Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by local boards was justified. The decisions of local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.[29]

The Administrative Procedure Act, stating the usual standard of review,[30] provides that the reviewing court shall set aside agency action "unsupported by substantial evidence," and that "in making the foregoing deter-

[28] See, *e.g.*, United States v. Rumsa, 212 F.2d 927, 937-38 (7th Cir.), *cert. denied*, 348 U.S. 838 (1954); Hirsh v. Adair, 113 F. Supp. 116 (E.D. Pa. 1953).

[29] 327 U.S. at 122. The same year, in Eagle v. United States *ex rel.* Samuels, 329 U.S. 304, 311-12 (1946), the Supreme Court stated that the *Estep* scope of review would control in habeas corpus proceedings by registrants claiming to have been improperly inducted.

[30] The Selective Service Act excludes itself from the operation of the Administrative Procedure Act except as to the requirements for publication of regulations and

minations the court shall review the whole record or such portions thereof as may be cited by any party . . . ." [31]

The *Estep* "any basis in fact" standard is an attempt at a narrower review than the substantial evidence test.[32] Each standard for review is itself difficult to define; thus the difference between them might best be expressed in terms of the mood or intellectual stance a judge brings to bear upon the administrative record.[33] A realization that the *Estep* standard is meant to be narrower than the usual judicial review of administrative fact finding should force the judge to approach Selective Service cases with even more of a predisposition toward upholding the board than he has in other cases, if it is conscientiously possible to do so.

Despite *Estep*, however, it does not appear that the scope of review in draft cases differs significantly from that in other cases. An examination of lower court decisions reveals that while courts cite the "any basis in fact" review in draft cases, some judges do not seem to be applying a test any narrower than that of substantial evidence.[34] In addition, Selective Service cases often involve conscientious objectors where the crucial issue is usually one of credibility, the review of which is traditionally narrow in all cases.[35] It has been said that "whether made by jury, judge, or agency

---

other public information. § 13(b), 62 Stat. 623 (1948), 50 U.S.C. APP. § 463(b) (1964). The Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1964), is a comprehensive statute dealing with many aspects of procedure of which the scope of judicial review is only one small part.

[31] Section 10(e), 60 Stat. 244 (1946), 5 U.S.C. § 1009(e) (1964). Compare the language of the MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 12(7):

> The court may . . . reverse or modify the decision [of the agency] if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions or decisions are . . . unsupported by competent, material, and substantial evidence in view of the entire record as submitted. . . .

[32] The scope of review by a court of appeals of a district court decision is governed by the "clearly erroneous" standard, a narrower scope of review than the "substantial evidence test." See Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (Frankfurter, J.), for the Supreme Court's construction of the substantial evidence test. See also Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233 (1951).

[33] It might be argued that the difference between "substantial evidence" and "any basis in fact" lies in the "whole record concept." The Administrative Procedure Act provides that in applying the substantial evidence test "the court shall review the whole record or such portions thereof as may be cited by any party . . . ." § 10(e), 60 Stat. 244 (1946), 5 U.S.C. § 1009(e) (1964). The Supreme Court in Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951), in construing this concept felt that the "whole record concept" was a rejection of the approach of some lower courts which looked only at the evidence in support of the findings and ignored the rest of the record. It is possible that the "any basis in fact" review means that courts should not look to the "whole record." It is unlikely, however, that courts today would maintain that they could *review* a decision by scanning the record for an isolated fact supporting the agency's finding without considering the context or the overwhelming evidence to the contrary. The "any basis in fact" standard implies a narrower review than substantial evidence, but not one so mechanically applied.

[34] While most of the cases do not appear to turn on the scope of review applied, the language and reasoning of the opinions indicate a substantial evidence review. See, *e.g.*, Capehart v. United States, 237 F.2d 388 (4th Cir.) (per curiam), *cert. denied*, 352 U.S. 971 (1956); Annett v. United States, 205 F.2d 689 (10th Cir. 1953).

[35] See, *e.g.*, Witmer v. United States, 348 U.S. 375 (1955).

a determination of credibility is nonreviewable unless there is uncontrovertible documentary evidence or physical fact which contradicts it." [36]

The extent of review on the credibility issue in draft cases was left somewhat in doubt by the 1953 Supreme Court decision in *Dickinson v. United States*.[37] In that case the Court reiterated that the test is not substantial evidence but reversed the local board because the "uncontroverted evidence" [38] supporting the claim by the draftee to be a Jehovah's Witness placed him prima facie within the statutory exemption for ministers and because "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." [39] The dissenting Justices felt that the majority was forcing the board to "build a record" that the draftee misrepresented his case.[40] It is possible that the decision meant to force the local board either to put in affirmative evidence or to spell out the basis for its findings in order to widen the scope of review in credibility cases. It is at least as likely, however, that the decision meant only that on the facts in the record the registrant was an ordained minister as a matter of law and that his sincerity in becoming a minister was immaterial. Under this interpretation the Court was correcting an error of law rather than finding no basis in fact for the board's decision.[41]

In a 1955 conscientious objector case the Supreme Court distinguished *Dickinson* as a minister case where the board must put in objective evidence before denying an exemption.[42] The Court said that the nature of the

---

[36] Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020, 1031 (1956). *But see* 4 DAVIS, ADMINISTRATIVE LAW TREATISE § 29.06, at 145 (1958), stating that "administrative determinations of credibility are often set aside because the reviewing court firmly believes that the evidence supporting the determination is clearly less credible than the opposing evidence."

[37] 346 U.S. 389 (1953); see Wiggins v. United States, 261 F.2d 113 (5th Cir. 1958); United States v. Hagaman, 213 F.2d 86 (3d Cir. 1954) (3-3 decision on credibility question). *Compare* cases cited *supra, with* United States v. Simmons, 213 F.2d 901, 903 (7th Cir. 1954), *rev'd on other grounds*, 348 U.S. 397 (1955).

[38] The court below in affirming the conviction apparently thought the local board was free to disbelieve Dickinson's testimonial and documentary evidence even in the absence of any impeaching or contradictory evidence. . . . The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. We have found none here.

Dickinson v. United States, 348 U.S. 389, 396 (1953).

[39] *Id.* at 397.

[40] *Id.* at 399.

[41] The distinction between questions of fact and questions of law, despite its difficulty of application to specific cases, is integral to an understanding of the administrative process. See generally 4 DAVIS, ADMINISTRATIVE LAW TREATISE chs. 29, 30 (1958); Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899 (1943). The dogma is that questions of fact are for the agency, and, if the agency's findings are supported by substantial evidence or in Selective Service cases have "any basis in fact," they should be upheld. On the other hand, questions of law are for the court, at least in the sense that where the court feels the agency's interpretation is not consistent with its view of the statutory purpose of the act involved, the court may itself determine the question of law. See Administrative Procedure Act § 10(e), 60 Stat. 244 (1946), 5 U.S.C. § 1009(e) (1964); JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 546-618 (1965).

[42] Witmer v. United States, 348 U.S. 375, 381-82 (1955).

registrant's case determines the type of evidence needed to rebut his claim, and, since the issue in a conscientious objector case is the registrant's sincerity, the board does not need the affirmative record called for in *Dickinson*. The Court upheld the board and stated that "it is well to remember that it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies." [43] While the Court paid lip service to the *Estep* scope of review, it is difficult to see, from the language of the opinion, any difference in the scope of review applied from that used under the substantial evidence test.[44]

In the 1960's, however, some circuit courts reached decisions which may well have turned on the extremely narrow scope of review applied.[45] The most significant decision came in a Second Circuit case [46] in which a Jehovah's Witness had been denied a conscientious objector classification. Judge Friendly pointed out the "dilemma" of the court in deciding whether the Selective Service authorities were acting rationally and in good faith in disbelieving the registrant's sincerity, in the absence of conduct inconsistent with the registrant's assertion. He continued:

> We resolve it [the dilemma] for this case by finding enough in the printed record to support the determination of lack of sincerity of conscientious objection even though Corliss' association with the [Jehovah's] Witnesses long antedated his liability for military service and there was no evidence of conduct inconsistent with his claim of sympathy with that sect. . . .
>
> . . . .
>
> We think, therefore, there is enough, although barely enough, to sustain a determination that, in the language of the hearing officer, although Corliss was "sincere in his devotion to his religious sect and the principles for which it stands he did not appear to have a genuine personal conviction as to why he should not bear arms or participate in war." [47]

---

[43] *Id.* at 380-81.

[44] *Compare* Witmer v. United States, 348 U.S. 375, 383 (1955) ("where there was conflicting evidence or where two inferences could be drawn from the same testimony" the finding must stand), *with* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (under the substantial evidence test "even as to matters not requiring . . . expertise a court may [not] displace . . . the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.").

[45] See, *e.g.*, Keffer v. United States, 313 F.2d 773 (9th Cir. 1963) (any basis in fact in the whole record including the FBI Resume and the Department of Justice recommendation would uphold board's denial of registrant's conscientious objector claim); United States v. Mohammed, 288 F.2d 236 (7th Cir.), *cert. denied*, 368 U.S. 820, *rehearing denied*, 368 U.S. 922 (1961) (Negro claiming to be student for ministry at University of Islam and assistant minister in a temple denied exemption); United States v. Corliss, 173 F. Supp. 677 (1959), *aff'd*, 280 F.2d 808, 812 (2d Cir.) (Friendly, J.), *cert. denied*, 364 U.S. 884 (1960) (three Justices would have granted certiorari).

[46] United States v. Corliss, *supra* note 45.

[47] *Id.* at 815-16.

The case points out the difficulty for a judge in reaching an intellectual stance narrower than the substantial evidence test.

Commentators, as well as members of the Court, have been very critical of this narrow scope of review in draft cases. Professor Jaffe[48] has noted that, whatever the statutory formula, courts are strongly moved to administer the law according to their concept of the proper function of judicial review. Within the limits of their jurisdiction, they tend to impose certain accepted postulates of justice as embodied in the legal system. One of these is that a finding supported by less than substantial evidence does not meet the "minimum test of legality." If judicial review can be constitutionally excluded,[49] then judicial responsibility is not engaged, but once judicial review is admitted the court cannot conscientiously enforce an order based on less than substantial evidence. In a Selective Service case a year after *Estep* Mr. Justice Murphy, joined by Mr. Justice Rutledge, stated in his dissent: "If respect for human dignity means anything, only evidence of a substantial nature warrants approval of the draft board classification in a criminal proceeding." [50]

This criticism seems well founded; however, in light of the fact that the Supreme Court has consistently—through its latest draft case last year [51]—cited *Estep* for the standard of review, it is unlikely that the Court will change its position in the near future. One reason why the Court might shy away from widening the scope of review is the fear that this would substantially increase the volume of litigation—a result which would be particularly hazardous in time of national emergency. It also might be felt that the problem is not onerous enough to call for a change since the majority of lower court decisions do not appear to turn on the scope of review applied. These reasons coupled with the lack of any significant political pressure for change at this time make it unlikely that Congress will amend the act to provide for the substantial evidence standard of review. Should the need be felt, however, this would be an appropriate context in which to incorporate the triggering mechanism, using the substantial evidence test as the scope of review in normal times, with the *Estep* scope of review going into effect upon a declaration of war or national emergency. However, so long as the laws remains unchanged, the narrow scope of review of factual findings in Selective Service cases necessitates that courts demand strict adherence to procedural safeguards in the act and regulations.

---

[48] Jaffe, *Judicial Review: Questions of Fact*, 69 HARV. L. REV. 1020, 1050 (1956).

[49] It is clear that the right to habeas corpus after induction is a constitutional requisite. U.S. CONST. art. I, § 9; see cases cited in note 10 *supra*. Although the majority of the Court in *Estep* placed the right to judicial review in a criminal enforcement proceeding on statutory grounds, see text accompanying note 17 *supra*, Justices Murphy and Rutledge were of the opinion that review was constitutionally required, see text accompanying note 21 *supra*. This latter view is approved in HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 317-19 (1953).

[50] Cox v. United States, 332 U.S. 442, 458 (1947).

[51] United States v. Seeger, 380 U.S. 163, 185 (1965).

## III. Problems in Obtaining a Classification Change

### *A. Reopening the Original Classification*

The Selective Service regulations recognize that "no classification is permanent" [52] and provide that:

> The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification . . . .[53]

When the local board reopens a classification its action on the request has the effect of an original classification,[54] whether or not the classification is changed, thus entitling the registrant to appeal the action to the appeal board.[55]

This procedure is deceptively simple but is subject to substantial abuse by the local board. Assume the registrant is originally classified I-A. Sometime later serious illness strikes his family and he writes his local board seeking a hardship deferment.[56] The local board soon thereafter mails him the following answer:[57] "We are in receipt of the affidavits you sent but we regret to inform you that we have decided against the reopening of your classification." The registrant looks at the regulation and finds that he has no right of appeal to the appeal board since his classification was never reopened.[58] If he looks at the act, he will find that the Selective Service board determinations are "final."[59] Without legal advice, and maybe even with it, the registrant feels there is nothing further he can do, and soon thereafter he is inducted.

This example illustrates two kinds of potential abuse in the reopening procedure. The first is that although the board's letter was phrased in terms of a denial of a reopening of the draftee's classification, it may have

---

[52] 32 C.F.R. § 1625.1 (1962).

[53] 32 C.F.R. § 1625.2 (1962); see 32 C.F.R. § 1625.4 (1962) (providing that "if the local board is of the opinion" either that the request to reopen presents no new facts or that the new facts, if true, would not justify reclassification, it shall not reopen the classification).

[54] 32 C.F.R. § 1625.11 (1962).

[55] 32 C.F.R. § 1625.13 (1962).

[56] 32 C.F.R. § 1622.30 (1962), as amended, 32 C.F.R. § 1626.2 (Supp. 1965).

[57] 32 C.F.R. § 1625.4 (1962) provides that when reopening is denied: "the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such request and the action taken thereon is required."

[58] See 32 C.F.R. § 1625.13 (1962).

[59] Section 10(b)(3), 62 Stat. 620 (1948), as amended, 50 U.S.C. App. § 460(b)(3) (1964).

been a denial of classification on the merits, and, if so, the draftee should have been allowed an appeal. The second problem is that the local board, by refusing to reopen, avoided judicial review on whether the classification had "any basis in fact."

The fact that Congress might constitutionally do away with appeal boards in all draft cases is not determinative of the issue here. The statute provides that local boards "shall . . . have the power . . . to hear and determine, subject to the *right of appeal to appeal boards herein authorized*, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service" under the act.[60] The act further provides that "the decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe." [61] While the regulation promulgated by the Selective Service states that the local board "may" reopen if the information accompanying the request presents facts not considered on the original classification which, if true, would justify a change in classification,[62] the local board cannot act arbitrarily.[63]

If the registrant alleges facts which have occurred subsequent to his original classification, he cannot be denied a reopening merely because the local board does not believe him. Once the board looks to the truth or falsity of the registrant's allegation, then it has in fact classified the draftee anew, even if the board calls this procedure denial of a reopening. The regulations in carrying out the statutory purpose of the act have provided that on a reclassification the registrant must be afforded an appeal to the appeal board.[64] If the board in fact has reclassified the draftee, a court should insist that the draftee be allowed an appeal regardless of the label the local board places on its action. Under the regulations [65] the registrant should be afforded his statutory right of appeal unless the local board states in the record that the facts alleged are insufficient as a matter of law even if they are true in fact. This is essential in order to allow judicial review of the local board's decision. If the local board has in fact reclassified the registrant, then the board should not be able to escape the *Estep* requirement that its decisions have some basis in fact simply by labeling its action a denial of a reopening.[66]

Some courts have looked behind the local board's use of the term "denial of a reopening" to insure that if the registrant was actually re-

[60] *Ibid.* (Emphasis added.)

[61] *Ibid.*

[62] See text accompanying note 53 *supra.*

[63] See, *e.g.*, Olvera v. United States, 223 F.2d 880, 883 (5th Cir. 1955), where the court held that the local board's refusal to reopen for the reason that "we won't reopen because we don't have to," was arbitrary and unreasonable and deprived it of jurisdiction to proceed further against him. Moreover, the court said that the imposition by the court of a sentence of imprisonment for disobedience of the order deprived him of his liberty without due process of law.

[64] 32 C.F.R. § 1625.13 (1962).

[65] See 32 C.F.R. § 1625.2 (1962); 32 C.F.R. § 1625.4 (1962).

[66] See, *e.g.*, United States v. Ransom, 223 F.2d 15, 17 (7th Cir. 1955).

classified, he was afforded all the procedural safeguards of a reclassification.[67] Others, however, merely state that the decision to reopen or not is within the discretion of the local board.[68] The former position, which looks to the substance of the board's action rather than to its label, is more in line with the thrust of the act, the purpose of the regulation and sound judicial process.

Registrants are currently subject to the Selective Service process from ages eighteen to twenty-six,[69] and those who have once been deferred are within the system until they are thirty-five.[70] The registrant's situation obviously could change radically in this eight to seventeen year period.[71] Therefore, the procedures as to the reopening of classifications might well affect a significant number of registrants. It is the responsibility of the local boards to apply this procedure properly under the act and the regulations.[72] It is the duty of the courts to look to the substance of the local board's action and insure that it has properly fulfilled its responsibility.[73]

### *B. The Late Conscientious Objector Claim*[74]

Section 6(j) of the act provides:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the

[67] See, *e.g.*, Olvera v. United States, 223 F.2d 880 (5th Cir. 1955); United States v. Ransom, *supra* note 66; United States v. Scott, 137 F. Supp. 449 (E.D. Wis. 1956); *cf.* United States v. Vincelli, 215 F.2d 210 (2d Cir. 1954). In *Vincelli*, a local board treated the registrant's claim for a change of classification as a denial of a reopening but sent his file to the appeal board without giving the registrant notice. The court held that the local board's treatment of the reclassification as a denial of a reopening deprived the registrant of his right to an appearance before the local board. 32 C.F.R. § 1625.13 (1962). The court went on to say that while the language of the reopening regulation, 32 C.F.R. § 1625.2 (1962), is permissive, this does not mean that the local board may refuse to reopen arbitrarily, but requires it to exercise sound discretion. This, said the court, "requires, when the basis of an application is not clearly frivolous, an inquiry designed to test the asserted facts sufficiently to give the board a rational basis on which to put decision." 215 F.2d at 212-13.

[68] See, *e.g.*, Smith v. United States, 157 F.2d 176, 181 (4th Cir.), *cert. denied*, 329 U.S. 776 (1946); United States v. Messerman, 128 F. Supp. 759 (M.D. Pa. 1955); SELECTIVE SERVICE SYSTEM, LEGAL ASPECTS OF SELECTIVE SERVICE § 41 (1963).

[69] Universal Military Training & Service Act § 4(a), 65 Stat. 76 (1951), as amended, 50 U.S.C. APP. § 454(a) (1964).

[70] Section 6(h), 65 Stat. 84 (1951), as amended, 50 U.S.C. APP. § 456(h) (1964).

[71] For example, he could become a full time student, a minister, engaged in an occupation deferable under the act or a conscientious objector. In addition, his wife may have a baby, family problems might necessitate a hardship deferment or his physical condition might change.

[72] Although an abuse of this procedure would be more harmful if applied to a registrant entitled to an exemption under the act than one who is merely deferred, no distinction should be made between these two classes of registrants.

[73] Even recognition of the reopening problem by all the courts would not completely solve it. The registrant, upon receiving the notice from the local board that his classification will not be reopened, is unlikely to be aware that any further action is possible. The normal registrant, without legal counsel or advice, see pp. 1029-34 *infra*, is likely to take the local board notice as final out of his natural respect for what appears to be an official command, and therefore most cases will probably not even get to court. *Cf.* United States v. Schwartz, 143 F. Supp. 639, 640 (E.D.N.Y. 1956).

[74] For the role of the conscientious objector under selective service, see generally CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS, HANDBOOK FOR CONSCIENTIOUS

> armed forces . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.[75]

This provision and the sections dealing with exemptions for ministers of religion [76] have been involved in the bulk of the litigation under the Selective Service Acts. The procedures for claiming conscientious objector status are different from those for the usual classification. The registrant receives his first opportunity to state his claim for objector status by requesting a special form on his classification questionnaire. The local board usually classifies the registrant solely on the basis of the written form and accompanying affidavits, but many conscientious objectors are called for interviews. If the registrant is denied his requested classification, he may ask for a hearing with the local board.[77] Following the hearing, the local board considers the new information and decides whether to reopen the classification and reclassify. In any event a new notice of classification is mailed to the registrant and, as distinguished from those claiming other classifications, the conscientious objector is given an explicit right to an appeal in the act itself.[78]

The registrant's file is then transmitted to the appeal board. If the appeal board tentatively determines that the registrant is not entitled to a conscientious objector classification, it transmits the entire file to the Department of Justice for an advisory recommendation.[79] After an FBI investigation in which people who know the registrant are interviewed, a hearing officer will contact the registrant, supply him with a synopsis of the FBI report and the rest of his file and interview him. The hearing officer then makes a recommendation as to the sincerity of the registrant to the Department of Justice, which in turn sends an advisory recommendation to the appeal board stating why it believes that the registrant's conscientious objector claim should or should not be sustained.

Although only advisory, the Department of Justice recommendation is almost without exception accepted by the appeal board.[80] The Department's recommendation usually, but not always, concurs with that of its hearing officer.[81] This participation by the Department of Justice is no

---

OBJECTORS (8th ed. 1965) [hereinafter cited as HANDBOOK]; SELECTIVE SERVICE SYSTEM, LEGAL ASPECTS OF SELECTIVE SERVICE §§ 13-19 (1963); SIBLEY & JACOB, CONSCRIPTION OF CONSCIENCE: THE AMERICAN STATE AND THE CONSCIENTIOUS OBJECTOR, 1940-1947 (1952); Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409 (1952).

[75] Section 6(j), 62 Stat. 612 (1948), 50 U.S.C. APP. § 456(j) (1964).

[76] Section 6(g), 62 Stat. 611 (1948), 50 U.S.C. APP. § 456(g) (1964).

[77] 32 C.F.R. § 1624.1 (Supp. 1965), gives all registrants a right of appearance before the local board.

[78] § 6(j), 62 Stat. 613 (1948), 50 U.S.C. APP. § 456(j) (1964); see text accompanying note 60 *supra* (giving statutory appeal provision applying to other registrants).

[79] See 62 Stat. 612, 50 U.S.C. APP. § 456(j) (1964).

[80] See HANDBOOK 24.

[81] *Ibid.*

doubt designed to introduce into the process a government agency less institutionally connected with the military than the Selective Service System and less hostile to the granting of conscientious objector status. This intrusion by a disinterested body is unique to the conscientious objector exemption.

Although this extra safeguard is provided in conscientious objector cases, there sometimes are problems in obtaining a Justice Department hearing. If a conscientious objector claim is made before an induction order is issued, the local board will reopen the classification and consider the registrant's claim. If the board refuses, the registrant has a right of appeal.[82] Some men, however, realize only upon receipt of an order to report for induction that they are conscientious objectors, and either cannot bear arms or must refuse induction.[83] Others have been conscientious objectors for some time but have never informed their local board. If a claim is made after an induction order has been issued, although previous to actual induction, the local board in all probability will refuse to reopen classification. The majority of courts has upheld this practice,[84] relying on regulation 1625.2, the general rule applying to the qualifications for reopening any registrant's classification.[85] The regulation states that the classification shall not be reopened "after the local board has mailed such registrant an Order to Report for Induction . . . ." [86] A minority of courts, however, relying on the basic conscientious objector provision in the act,[87] holds that "while regulation 1625.2 is not invalid on its face, it can have no applicability to a claim of conscientious objection, whenever made, so as to deprive the objector of a hearing at which he may prove his good faith." [88] These courts construe the right to a Justice Department hearing embodied in the act as one which "is not to be defeated by procedural regulations." [89]

While the statute itself does not explicitly face the issue, the overall statutory purpose with regard to conscientious objectors favors the minority view.[90] The elaborate extra safeguards given throughout the act to ob-

---

[82] Section 6(j), 62 Stat. 613 (1948), 50 U.S.C. APP. § 456(j) (1964).

[83] HANDBOOK 34-35.

[84] See, *e.g.*, Boyd v. United States, 269 F.2d 607 (9th Cir. 1959); Keene v. United States, 266 F.2d 378 (10th Cir. 1959); United States v. Monroe, 150 F. Supp. 785 (S.D. Cal. 1957).

[85] See text accompanying note 53 *supra*.

[86] 32 C.F.R. § 1625.2 (1962). The regulation further provides that a post-induction order classification can be reopened if "the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant has no control." Although some courts have said that a late conscientious objector claim may be a circumstance over which the registrant has no control, *e.g.*, United States v. Brown, 129 F. Supp. 237, 239 (D.N.J. 1955), others have called such an interpretation "strained," *e.g.*, United States v. Schoebel, 201 F.2d 31, 33 (7th Cir. 1953).

[87] See text accompanying note 75 *supra*.

[88] United States v. Underwood, 151 F. Supp. 874, 876 (E.D. Pa. 1955).

[89] *Ibid.*

[90] See generally Comment, *Pre-Induction Availability of the Right To Claim Conscientious Objector Exemption*, 72 YALE L.J. 1459 (1963), supporting the minority view on the basis of the overall structure of the act.

jectors [91] and the clear congressional purpose to have the independent arm of the Justice Department intervene in such cases should not be cut off at any time previous to actual induction.

The policy argument for the majority view is that the regulation must be upheld, for "otherwise, the whole machinery of the selective service process may conceivably be disrupted by last minute changes in status for purposes of avoidance." [92] It is difficult to see how any significant disrupting effect would occur. A generous estimate of conscientious objectors from 1940-1947 placed them at 0.30 of one per cent of total registrants.[93] Furthermore, it is likely that the overwhelming majority of these made their claim to conscientious objector status in a timely fashion thus avoiding the post-induction problem. Moreover, the slim chance of success at this point, even given the hearing, should deter almost all insincere objectors. The objector in trying to prove his sincerity in a Justice Department hearing at this late date will have the added burden of giving convincing answers to the questions: Why is this claim being filed now instead of earlier? What is the recent influence? Why the sudden insight?

One kind of claim that would not be deterred by the slim chance of success, however, is the fraudulent claim by the unscrupulous registrant who would put forward his claim in wartime merely to delay his own induction. One possible way of minimizing this difficulty would be to have a special accelerated procedure whereby all post-induction notice claims are given first priority by appeal boards, hearing examiners and the courts. Although this accelerated procedure should prove adequate, another possibility would be to adopt the minority view—which is in accordance with the statutory purpose as the act now stands—only under nonemergency conditions. Should Congress then adopt the basic trigger mechanism structure previously suggested, a regulation could be drafted stating that in time of national emergency local boards could deny post-induction notice objector claims where it appeared that they were frivolous and filed solely to delay induction.

Regardless of whether either of these proposals is adopted, the evident purpose of the present act favors the minority view that the objector making his claim after receiving his induction notice should have the same procedural safeguards as any other conscientious objector.

## IV. Right to Advisors or Counsel

The Selective Service regulations provide that:

> No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its

---

[91] See, *e.g.*, § 6(j), 62 Stat. 612 (1948), 50 U.S.C. App. § 456(j) (1964).

[92] Keene v. United States, 266 F.2d 378, 384 (10th Cir. 1959).

[93] Sibly & Jacob, Conscription of Conscience: The American State and the Conscientious Objector, 1940-1947, at 84 (1952).

> discretion, permit any person to appear before it with or on behalf of a registrant . . . no registrant may be represented before the local board by anyone acting as attorney or legal counsel.[94]

Before discussing the meaning and merits of this regulation, it is necessary to consider what procedures for informing and advising the registrant are provided by the act and regulations. The act provides that each local board shall have assigned to it a government appeals agent,[95] usually a local lawyer, who serves without compensation and who is to be "equally diligent in protecting the interests of the Government and the rights of the registrant in all matters." [96] As would be expected, however, many appeals agents working directly with the local board tend to identify with the local board.[97]

Under the 1948 act the regulations originally provided that advisors "shall be appointed" to "advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liability under the selective service law." [98] It also provided that the names and addresses of advisors "shall be conspicuously posted." [99] In *Steele v. United States* [100] the Third Circuit held that this provision was not required by the Constitution but was a right granted by the legislature, and therefore failure to meet the requirement must be coupled with prejudice to constitute reversible error. The court, however, went on to say:

> This is a criminal case, and in such cases, because of the severity of the sanction involved, courts traditionally have been hypercautious lest injustice be perpetrated. . . .
>
> . . . .
>
> We take the view that the burden is on the Government to establish as part of its case that deprivation of the right to counsel and aid of advisors could in no way have harmed the appellant. In this we think the Government has failed, for the evidence, as we read it, indicates a reasonable possibility, if not probability of

---

[94] 32 C.F.R. § 1624.1(b) (1962).

[95] 32 C.F.R. § 1604.71 (1962).

[96] 32 C.F.R. § 1604.71(5) (1962).

[97] Letter from Executive Secretary of the Central Committee for Conscientious Objectors to the *University of Pennsylvania Law Review*, Feb. 9, 1966, on file in Biddle Law Library, University of Pennsylvania. *But see* Letter from Executive Secretary of National Service Board for Religious Objectors to the *University of Pennsylvania Law Review*, Feb. 14, 1966, on file in Biddle Law Library, University of Pennsylvania: "The experience with Appeal Agents has varied. Some have been very helpful to registrants who went to them for information and counsel. Others have tended to identify with the local boards. However, my impression is that those who have made serious approaches to Appeal Agents have usually obtained real help."

[98] 13 Fed. Reg. 4179 (1948), as amended, 20 Fed. Reg. 735 (1955).

[99] *Ibid.*

[100] 240 F.2d 142 (1st Cir. 1956) (criminal prosecution against conscientious objector for failure to report for civilian work where the registrant, a Jehovah's Witness, claimed a ministerial exemption).

> prejudice to the defendant-appellant, and that we believe is all that is required to entitle him to acquittal.[101]

The majority of the circuits, however, have placed upon the draftee the burden of showing that failure of the local board to provide advisors prejudiced his case.[102]

Effective January 31, 1955, the regulation stating that "advisors . . . shall be appointed" was amended to read "may be appointed." [103] In light of the complexity of the regulations, the lack of knowledge the average registrant has with regard to the process and the fact that counsel is not permitted before the local board, it is puzzling why any system of advisors would be thought unnecessary. The Selective Service authorities state that: "It was found that government appeal agents were satisfactorily performing advisor functions in many communities, and that, because of his legal training and close work with the local board, registrants tended to seek his advice." [104] From an institutional standpoint the appeal agents' close relationship with the local board is as much of a problem as an asset. Moreover, the cases in which the board was reversed because failure to provide advisors may have prejudiced the registrant [105] are symptomatic that there is some need.[106] This is especially so if it is assumed that only a small portion of those who may have been hurt actually litigated the issue.

The traditional reasoning for not allowing counsel in local board proceedings is that the proceedings "are nonjudicial in nature and clearly non-criminal," and "therefore, to extend the right of counsel to an individual who is concerned in a non-judicial and non-criminal proceeding would be an unwarranted extension of an individual's right to counsel." [107] It is true that the local board procedure is administrative, not judicial. Yet it should be noted that the Administrative Procedure Act makes pro-

---

[101] Steele v. United States, 240 F.2d 142, 146 (1st Cir. 1957).

[102] See, *e.g.*, United States v. Manns, 232 F.2d 709 (7th Cir. 1956); Rowton v. United States, 229 F.2d 421 (6th Cir.), *cert. denied*, 351 U.S. 930 (1957).

[103] 32 C.F.R. § 1604.41 (1962).

[104] The Selective Service authorities also pointed out that the information on the reverse side of the registration card advises the draftee to go to the nearest local board for information and advice. The board says that this was another factor accounting for some of the nonuse of registrant advisors. Letter from Selective Service System to the *University of Pennsylvania Law Review*, Feb. 18, 1966, on file in Biddle Law Library, University of Pennsylvania.

[105] See, *e.g.*, Steele v. United States, 240 F.2d 142 (1st Cir. 1956); United States v. Howe, 144 F. Supp. 342 (D. Mass. 1956).

[106] The Selective Service says that there are 8,185 advisors appointed in the system as of December 31, 1965, for 4,063 local boards. These authorities went on to say, however, that: "While this amounts to a national average of a little more than two advisors per local board, some State Directors have found that the services of government appeal agents are adequate to meet the requirements of the registrants." Letter from the Selective Service System to the *University of Pennsylvania Law Review*, Feb. 18, 1966, on file in Biddle Law Library, University of Pennsylvania.

[107] United States v. Sturgis, 342 F.2d 328, 332 (3d Cir.), *cert. denied*, 382 U.S. 879 (1965). See United States v. Pitt, 144 F.2d 169, 172 (3d Cir. 1944).

vision for counsel [108] and that today there is even a right to counsel in an immigration hearing, an area often criticized as affording inadequate procedural safeguards.[109] Although the local board hearing is not criminal, it is here that the administrative record is made,[110] and, should the registrant later wish to contest his classification in court, he will be doing so in a criminal enforcement proceeding. Moreover, the court on review will be applying the "any basis in fact" test of *Estep*, thus putting an even greater premium on procedural regularity below.

The real reason for providing that the registrant shall not be represented by counsel is the compelling need to have the system work quickly and without interruption; the local board cannot hold a formal trial under the established rules of evidence for every registrant who wishes to contest his classification. In part this stems from the reasons underlying the exhaustion of administrative remedies doctrine in draft cases. Also, under wartime conditions, the registrant should not be able to delay his own induction by litigating frivolous claims. Since there is no constitutional requirement that counsel be provided in the board hearings,[111] allowing those who so desired to be represented by counsel would allow the wealthier registrant to delay substantially his own induction and perhaps also the whole process. Another reason is that many of the cases before the local boards turn on the sincerity of the registrant, and thus he should present his own case and not have it presented for him by his attorney.[112]

In view of these considerations, it is probably not unreasonable to prohibit *representation* by counsel in board proceedings. This is not to say, however, that the board should not allow the registrant to have counsel present at local board hearings. The regulation provides that "no registrant may be *represented* before the local board by anyone *acting as* attorney or legal counsel." [113] The regulation further provides that the local board

---

[108] 60 Stat. 240 (1946), 5 U.S.C. § 1005(a) (1964); see note 30 *supra* (nonapplicability of the Administrative Procedure Act to Selective Service proceedings).

[109] See Gordon, *Right to Counsel in Immigration Proceedings*, 45 MINN. L. REV. 875 (1961).

[110] There is no verbatim record of local board proceedings. In the event that the registrant appeals, the record before the appeal board will contain only a report by the local board's secretary and what the registrant submits in writing on his behalf. See 32 C.F.R. § 1624.2 (1962); 32 C.F.R. § 1626.12 (1962); 32 C.F.R. § 1626.24 (1962). Therefore, should the registrant request and be willing to pay for a court reporter or other suitable transcript of the local board hearing, he should be allowed to do so. This would insure a true, accurate and complete record of the proceeding for future administrative or judicial review. See Complaint No. 27886, filed in the case of Miller v. Selective Service System, — F. Supp. — (E.D. Mich. 1966), where such a request was denied by a local board. The registrant had participated in the Michigan sit-in, see text accompanying note 179 *infra*, and had been classified I-A.

[111] See, *e.g.*, Steele v. United States, 240 F.2d 142, 145 (1st Cir. 1956).

[112] *But cf. Ex parte* Fabiani, 105 F. Supp. 139, 148 (E.D. Pa. 1952), where the court said that the regulation providing that no person may be represented before the local board by anyone acting as counsel envisaged the usual situation where the registrant himself was in the United States and was fit and available to speak for himself. The registrant here was a medical student attending school in Europe.

[113] 32 C.F.R. § 1624.1(b) (1962). (Emphasis added.)

has discretion to permit any person to appear before it with or on behalf of a registrant.[114] The "burden on the system" argument against allowing the registrant to be represented by counsel falls when applied to counsel appearing as a witness or an observer. The registrant would still speak for himself, and counsel's right to speak would be within the discretion of the board. A few local boards appear to allow counsel to be present without any noticeable burden on the system.[115]

There are many positive benefits to be served by allowing the presence of counsel at local board hearings. The registrant untrained in the law might not notice what a court would view as a prejudicial procedural irregularity. The procedures to be followed by a registrant are complicated, and many rights can be waived or lost through ignorance or carelessness.[116] The attorney seeing the whole process would be in a better position to advise the registrant. Moreover, the spokesman for an organization engaged in representing conscientious objectors has noted:

> Many local boards deal with the registrant completely differently in the presence of an adult witness than when they have a registrant by himself. They are less inclined deliberately to give misinformation, and more inclined to look up points rather than relying on their memory.[117]

Thus the presence of an adult witness would serve some purpose even though he were not an attorney, although an attorney would clearly be preferable. Moreover, a clear presentation of all relevant facts before the local board might result in even fewer appeals—thus relieving part of the burden of the time consuming appeal procedure.

---

[114] 32 C.F.R. § 1624.1(b) (1962). It has been held that refusal of a local draft board to hear a registrant's proffered witnesses is not a violation of his constitutional or statutory rights. See, *e.g.*, Uffleman v. United States, 230 F.2d 297 (9th Cir. 1956); Harris v. Ross, 146 F.2d 355 (5th Cir. 1944). See also Letter from Executive Secretary of Central Committee for Conscientious Objectors to the *University of Pennsylvania Law Review*, Feb. 9, 1966, on file in Biddle Law Library, University of Pennsylvania: "I would estimate that perhaps forty percent of the local boards do not permit witnesses of any kind, and that about half of the local boards who do permit witnesses interview them separately, so that the witness is not present when the registrant is being questioned."

[115] See Complaint No. 27886, filed in Miller v. Selective Service System, — F. Supp. — (E.D. Mich. 1966), referring to other local boards in the Detroit metropolitan area which "have permitted legal counsel to be present, and make presentation to the Board, all without any unnecessary delay or other adverse effect."

In the Justice Department hearing in conscientious objector cases "the registrant is entitled to one advisor, who may be a friend, a relative, a draft counselor, or an attorney, *to sit with him throughout the entire hearing.*" The advisor "cannot represent the registrant in the usual meaning of representation before a judicial hearing. There can be no argument concerning the proceedings and no objections to questions." HANDBOOK 24-25. (Emphasis in original.)

[116] "A registrant who knows what he is doing and how to do it will avoid many serious pitfalls. Hundreds of sincere conscientious objectors have gone to prison since 1940 because of their ignorance or carelessness." *Id.* at 6.

[117] Letter from Executive Secretary of the Central Committee for Conscientious Objectors to the *University of Pennsylvania Law Review*, Feb. 9, 1966, on file in Biddle Law Library, University of Pennsylvania.

It is apparent that the practice under the current regulations with regard to the counselling of draftees is wholly inadequate. The process cannot rely on the government appeals agent who has joint allegiance to the board and the registrant. The advisor system has been made discretionary and thus cannot be relied upon. Even though counsel may, under the regulations, be admitted as an observer or witness at the discretion of the local board, it is quite possible that the case in which permission is denied might be just the case where it is most needed. Therefore, the regulation should be changed to provide that if the registrant should so request, the local board must allow counsel to be present in an advisory capacity. The proposed regulation might read:

> The registrant shall have the right to bring any one person to the local board hearing in an advisory capacity. The board may, at its discretion, permit any other persons to appear before it with or on behalf of the registrant. The advisor may be an attorney but he may be denied the right to speak at the board's discretion.

Even under the present regulations courts, viewing the case in a criminal prosecution for failure to comply with the order of the local board, should not enforce an order where the registrant may have been prejudiced before the local board because of inadequate advice or counsel. The premise of the present system is that the registrant will be adequately advised by the government appeals agent, the board members or, where provided, the local board advisors. Therefore, when these prove inadequate and the registrant can show that he may have been prejudiced, the local board should be held to have abused its discretion under the present regulation[118] if it refused to allow the registrant to have an attorney-advisor present at the hearing.

## V. Treatment of the Delinquent

### *A. The General Procedure*

The regulations define a "delinquent" as "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." [119] Any delinquent between draft age limits may be classified I-A and ordered to report for induction regardless of other circumstances.[120] When so classified the delinquent is entitled to an appeal.[121] If he loses on appeal of his I-A classification, he then goes to the top of the list and will be called even ahead of volunteers.[122]

---

[118] See note 94 *supra* and accompanying text.

[119] 32 C.F.R. § 1602.4 (1962).

[120] 32 C.F.R. § 1642.13 (Supp. 1965).

[121] 32 C.F.R. § 1642.14(c) (1962).

[122] 32 C.F.R. § 1631.7 (Supp. 1965), as amended, Exec. Order No. 11241, 30 Fed. Reg. 3983 (1965).

Normally the local board will give the draftee a last chance to comply with the draft law, before referring the case to the United States Attorney and thus into the jurisdiction of the Department of Justice.[123] The Selective Service states that the purpose of this procedure is to:

> [P]revent, wherever possible, prosecutions for minor infractions of rules during his selective service processing, thereby reducing the number of cases that reach the courts and also giving the registrant, before being prosecuted, an opportunity to report for service in the armed forces.[124]

The reasoning is that:

> Since the purpose of the law is to provide men for the military establishment rather than for the penitentiaries . . . when a registrant is willing to be inducted, he should not be prosecuted for minor offenses committed during his processing.[125]

Therefore most prosecutions of delinquents take the form of enforcement proceedings for failure to report for induction.[126]

In addition to refusals to report for induction, failure to register is also prosecuted with some frequency.[127] "These prosecutions almost always end with the defendant submitting to registration and only in rare cases does the court prepare a formal opinion." [128] If the defendant is required by law to register, there is almost no defense for failure to do so.[129]

Other offenses include failure by a registrant to keep his local board advised of a change of address [130] and making false statements regarding liability or nonliability under the act.[131] The Supreme Court has three times reversed lower court convictions for failure to keep the local board advised of a change of address, upholding the draftee where it appeared

---

123 HANDBOOK 49.

124 SELECTIVE SERVICE SYSTEM, LEGAL ASPECTS OF SELECTIVE SERVICE § 55, at 42 (1963).

125 *Ibid.*

126 See, *e.g.*, United States v. Mitchell, 246 F. Supp. 874 (D. Conn. 1965), which was the most publicized of the recent delinquency cases taking this posture. In this case the head of the "End the Draft" Committee unsuccessfully argued that he could not submit to the draft because if he did he would be guilty of complicity in crimes defined by the Charter of International Military Tribunal, specifically, wars of aggression and the acts of inhumanity under the Nuremberg law. *Id.* at 882.

127 See, *e.g.*, Cannon v. United States, 181 F.2d 354 (9th Cir.), *cert. denied*, 340 U.S. 892 (1950).

128 SELECTIVE SERVICE SYSTEM, LEGAL ASPECTS OF SELECTIVE SERVICE § 55, at 42 (1963).

129 See, *e.g.*, Richter v. United States, 181 F.2d 591 (9th Cir.), *cert. denied*, 340 U.S. 892 (1950).

130 See, *e.g.*, Bartchy v. United States, 319 U.S. 484 (1943).

131 See, *e.g.*, United States v. Termini, 267 F.2d 18 (2d Cir.), *cert. denied*, 361 U.S. 822 (1959); United States v. Rubinstein, 166 F.2d 249 (2d Cir.), *cert. denied*, 333 U.S. 868 (1948).

that he had made a good faith effort and was not clearly motivated by draft avoidance.[132]

The offenses and penalties section of the act includes in its coverage those "who . . . shall knowingly fail or neglect or refuse to perform" a duty provided by the act or who engage in other proscribed conduct, making them punishable by imprisonment of up to five years and a 10,000 dollar fine.[133] The potential five year sentence coupled with the administrative practice of dropping prosecution where the delinquent complies results in pushing the draftee toward compliance without resort to the judicial process.

### *B. The Draft Card*

#### 1. Nonpossession

Since 1943 the regulations have required the registrant to have his registration card in his personal possession at all times.[134] While there are cases dealing with the unlawful possession of stolen draft cards,[135] there are only two reported cases involving the prosecution of a draftee for failure to have his registration card in his personal possession.[136] In the 1951 case of *United States v. Kime*,[137] the draftee mailed his card to his local board with a letter stating: "I cannot conform with . . . the law requiring me to carry the . . . registration certificate in my possession at all times, nor will I advise the local board of any change of address." [138] The draftee, who had been assigned to nonmilitary duty as

---

[132] Bartchy v. United States, 319 U.S. 484, 489 (1943), where the Court said:

> The regulation . . . is satisfied when the registrant, in good faith, provides a chain of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance.
>
> The District Court and the Court of Appeals concluded that the petitioner had not shown diligence in keeping the board advised of his whereabouts and had affirmatively endeavored to avoid delivery of the communication. We do not think either of these inferences is justified by the record.

Venus v. United States, 287 F.2d 304 (9th Cir. 1960), *rev'd per curiam*, 368 U.S. 345 (1961); Ward v. United States, 195 F.2d 441 (5th Cir. 1952), *rev'd per curiam*, 344 U.S. 924 (1953). *But see* Stumpf v. Sanford, 145 F.2d 270 (5th Cir. 1944) (per curiam), *cert. denied*, 324 U.S. 876 (1945) (application for certiorari was not made within the time provided by law), where the court in a habeas corpus proceeding held that, while the fact that the registrant had enlisted in the Canadian army and was not required to deal further with his board might have been a defense in the local board proceeding, it was still the duty of the registrant to claim this deferment and to advise the board of his changed address. The court further upheld the district court's finding that the registrant had intelligently waived counsel. In light of the *Venus* and *Ward* cases it is doubtful that the Supreme Court today would uphold a conviction on these facts.

[133] 62 Stat. 622 (1948), 50 U.S.C. APP. § 462 (1964).

[134] 32 C.F.R. § 1617.1 (1962); 32 C.F.R. § 1623.5 (1962).

[135] See, *e.g.*, United States v. Turner, 246 F.2d 228 (2d Cir. 1957); United States v. Naughten, 195 F. Supp. 157 (N.D. Cal. 1961).

[136] United States v. Kime, 188 F.2d 677 (7th Cir.), *cert. denied*, 342 U.S. 823 (1951); United States v. Hertlein, 143 F. Supp. 742, 746 (E.D. Wis. 1956).

[137] 188 F.2d 677 (7th Cir.), *cert. denied*, 342 U.S. 823 (1951).

[138] 188 F.2d at 678.

a conscientious objector under the 1940 Act, urged that he was motivated by his religious beliefs and that the draft card possession regulation therefore violated his first amendment rights. The Seventh Circuit found this argument "untenable" and affirmed Kime's conviction.[139]

In a 1956 district court criminal prosecution for failure to report for induction, the registrant was also convicted for failure to have his registration card in his possession and was found not guilty of failure to possess his classification card.[140] The facts were, in the court's words, "strikingly similar" [141] to those in *Kime*. The registrant, whose objections to serving in the army were based on philosophical and humanitarian views rather than on religious belief, wrote the following to his local board:

> To be under any classification . . . would automatically imply my approval and acceptance of the Selective Service System; I cannot conscientiously ask or allow the State to conden*s*cendingly [*sic*] admit me to a special classification provided for a bothersome tiny minority of men "who conscientiously object to war," . . . I have no choice but to separate myself from the . . . System and proclaim that I no longer consider myself under its control. I thereby enclose my draft cards as an expression of my new freedom. I also will not report for my physical examination . . . . These acts I do fully aware of their consequences.[142]

Since there probably are myriad violators of this law [143] and only these two reported cases, it is no doubt the general policy of the Selective Service and the Justice Department not to prosecute.[144] This is consistent

---

[139] The court went on to say that:

> A party's religious belief cannot be accepted as a justification for conduct which is made punishable by the law of the land. To permit such justification would be to make the professed doctrine of religious belief superior to the law of the land and in effect would permit every objector to become a law unto himself.

*Ibid.* See Richter v. United States, 181 F.2d 591 (9th Cir.), *cert. denied*, 340 U.S. 892 (1950), rejecting a first amendment defense and upholding convictions for failure to register; United States v. Henderson, 180 F.2d 711 (7th Cir.), *cert. denied*, 339 U.S. 963 (1950).

[140] United States v. Hertlein, 143 F. Supp. 742 (E.D. Wis. 1956).

[141] *Id.* at 746.

[142] *Id.* at 743-44.

[143] Judge Tyler, denying a motion to dismiss in the first draft card burning case, stated: "[N]or is it of any consequence that almost certainly thousands of men in recent decades, *including the writer*, have unwittingly failed to carry their cards at all times without ever having been called to show or produce them." United States v. Miller, Civil No. 27886, S.D.N.Y., Dec. 16, 1965 (opinion on motion to dismiss). (Emphasis added.) In the published opinion the italicized words were omitted. 249 F. Supp. 59, 64 (S.D.N.Y. 1965).

[144] Speaking about the small group of so-called "noncooperators," an organization engaged in advising conscientious objectors states:

> Generally these men return their draft cards to the local boards with letters of explanation. Often the local board will return the card, explaining that it must be carried by the registrant. One should be patient with his local board, which may be genuinely perplexed. In two recent cases the registrants returned their cards torn in two, and were issued new ones. . . .

with the preference of these authorities for prosecuting for failure to report for induction rather than for more minor infractions of the rules,[145] even though all offenses carry the same potential five year sentence under the act.

The requirement that a person must carry his draft cards in his "personal possession at all times" does not immediately call to mind the administrative purpose sought to be served. The Selective Service authorities state that the regulation was to "overcome the difficulty" that in time of war "law enforcement officers could not tell the difference between a registrant in good standing with his local board and one who was delinquent." [146] This presents the rather disconcerting picture of police officers in time of war stopping men on the streets to check their classification. While a congressional judgment [147] that this is necessary is "rational"

---

> Should the registrant persist in his non-cooperation, he will be declared delinquent, and ordered to report for induction whether or not he has . . . undergone a pre-induction physical. . . . It is impossible to predict what a particular board will do in a specific case, but it is safe to predict that it eventually will report the non-cooperator to the United States Attorney for prosecution.

HANDBOOK 45.

[145] See notes 124-25 *supra* and accompanying text.

[146] The complete context of the Selective Service statement was:

> During the early part of World War II, it was found that there was a number of registrants who had become "lost" to the Selective Service System because their registration cards had become lost or misdirected in the mails, while others, after registering, just "dropped out of sight" when they failed to keep their local boards advised of their current addresses. They had complied with the requirement of the law regarding registration, and usually had with them their registration certificate. The result was that law enforcement officers could not tell the difference between a registrant in good standing with his local board and one who was delinquent. In order to overcome this difficulty, a regulation was promulgated which required every registrant . . . to carry with him his Classification Notice.

Letter from the Selective Service System to the *University of Pennsylvania Law Review*, Feb. 18, 1966, on file in Biddle Law Library, University of Pennsylvania.

Judge Tyler in the first draft card burning case gave the additional and curious reason that:

> [I]t is not unreasonable to infer that advantage may accrue to an individual registrant in such continued retention of the Notice, particularly, for example, upon the not impossible occasion—almost too horrible to contemplate—of an erroneous bureaucratic assumption of a higher classification than that actually assigned by the local board and happily inscribed upon that Notice safely tucked in the registrant's wallet.

United States v. Miller, 249 F. Supp. 59, 63 (S.D.N.Y. 1965) (opinion on motion to dismiss).

[147] The possession requirement is not expressly stated in the act but is in a regulation promulgated by the Selective Service. The delegation by Congress to the Selective Service to promulgate regulations in accordance with the act has been consistently upheld. See, *e.g.*, Arver v. United States, 245 U.S. 366 (1918). Moreover, the act provides that one

> who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both.

62 Stat. 622 (1948), 50 U.S.C. APP. § 462 (1964).

enough to meet basic due process requirements [148] it is indeed regrettable that such a requirement is thought necessary.[149]

The fact that the possession requirement has been enforced in only two cases, both involving blatant noncooperators,[150] and the probability that there are thousands if not hundreds of thousands of unintentional lawbreakers, suggest that the authorities see no need to enforce the requirement against unintentional violators. Moreover, the act refers only to one who "knowingly violates or evades" the act or the regulations promulgated pursuant to it.[151] This requirement of violating the act "knowingly" should call for wrongful intent to evade the possession requirement.[152] This is consistent with the approach of the Supreme Court in reversing convictions for failure to advise the board of a change of address: even when an intent to evade the requirement was found by both the district court and the court of appeals the Supreme Court has often found that the record did not show the requisite intent.[153] Furthermore, a statute construed to cover unintentional nonpossessors would lend itself, because of their number, to selective enforcement. Should the requirement be used only against those with unpopular views, constitutional problems would be raised.[154] Therefore it is likely that a federal court would read a "willfulness" requirement into any prosecution for failure to possess a draft card.

If only willful violators can be convicted for nonpossession, then, even if the present administrative policy is changed and the Selective Service starts prosecuting violators, the statute does not lend itself to substantial abuse.[155] Moreover, prosecutions against willful noncooperators should

---

[148] *Cf.* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955).

[149] Query why it would not be adequate to have this requirement go into effect only when a wartime emergency has been declared. See text accompanying note 2 *supra*. One might question whether the exigencies of the "cold war" to which we have become accustomed necessitate any more than that the draft cards be kept at the registrant's home with his birth certificate and other official papers.

[150] See note 136 *supra*.

[151] 62 Stat. 622 (1948), 50 U.S.C. APP. § 462 (1964).

[152] See, *e.g.*, Graves v. United States, 252 F.2d 878 (9th Cir. 1958); Ward v. United States, 195 F.2d 441, 443 (5th Cir. 1952), *rev'd per curiam*, 344 U.S. 924 (1953).

[153] See note 132 *supra* and accompanying text.

[154] *Cf.* NAACP v. Button, 371 U.S. 415, 435 (1963), holding unconstitutionally vague a Virginia statute (prohibiting the improper solicitation of any legal or professional business) which was being enforced against the NAACP legal fund. The Court said: "It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes." See Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

[155] The problem of discriminatory enforcement exists to a certain extent under all statutes. See Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1141 (1961), which discusses the proof problems involved in state cases and concludes:

> The problems of proof—including the unlikelihood of obtaining direct proof, the difficulty of amassing sufficiently persuasive statistical evidence to support an inference of intent to discriminate, and the improbability of securing evidence of motive sufficient to transform a showing that others have not been prosecuted into proof of purposeful discrimination—are somewhat prohibitive in themselves and may be insurmountable in the face of the present judicial reluctance to be persuaded that state enforcement agencies have in fact violated the constitutional right to nondiscrimination.

continue to be quite rare since the noncooperator can just as easily be prosecuted for failure to report for induction, which carries the same penalty as the nonpossession of draft cards.

### 2. Destruction

Section 462(b)(3) of the act makes liable for prosecution a person "who forges, alters, or in any manner changes any . . . certificate . . . ." [156] On August 5, 1965, Congressman G. Mendel Rivers of the Armed Services Committee introduced an amendment to include under this provision anyone who "knowingly destroys" or "knowingly mutilates" a draft registration card.[157] Within eight days, without hearings and with two short committee reports and floor comments by two Representatives and a Senator, the amendment hurried through Congress and on August 30 was signed into law by the President.[158] On October 19, 1965, David J. Miller was indicted under this section for burning his classification card in protest against American policy in Viet Nam.[159]

The major argument of the defendant was that the 1965 amendment violated his first amendment rights in that his act of burning his draft card was "symbolic speech" entitled to the same degree of protection as verbal speech.[160] He argued that "speech critical of government policy, whatever its characterization—defiant, contemptuous, or mocking—cannot be prohibited, no matter what its form of expression, so long as its form is a peaceful one." [161] He further argued that the sole purpose of the amendment was to chill political protest as the amendment served no other purpose.[162] After a two day trial without a jury, Judge Tyler found Miller guilty, stating that "the Federal statute taken by itself had nothing to do

---

[156] 62 Stat. 622 (1948), 50 U.S.C. APP. § 462(b)(3) (1964).

[157] H.R. 10306, 89th Cong., 1st Sess. (1965).

[158] 79 Stat. 586 (1965), 50 U.S.C.A. APP. § 462(b)(3) (Supp. 1965).

[159] Brief for United States, p. 2, United States v. Miller, 249 F. Supp. 59 (S.D. N.Y. 1965).

[160] Brief for Defendant, p. 16, United States v. Miller, 249 F. Supp. 59 (S.D. N.Y. 1965).

[161] *Id.* at 18.

[162] *Id.* at 28. Miller relied heavily on the floor statements made in support of the bill. See, *e.g.*, 111 CONG. REC. 19135 (daily ed. Aug. 10, 1965), where Representative Rivers stated:

> The purpose of the bill is clear. It merely amends the draft law by adding the words "knowingly destroys and knowingly mutilates" draft cards. . . . It is a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards. . . .
>
> This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own Government.

As the opinion in United States v. Miller, 249 F. Supp. 59, 64 (S.D.N.Y. 1965), points out, the fact that some members of Congress possessed motives totally unrelated to proper legislative purposes is irrelevant if the clear language and effect of the statute relate to legitimate congressional ends under the war powers. *Cf.* Barenblatt v. United States, 360 U.S. 109, 132 (1959); Sonzinsky v. United States, 300 U.S. 506, 513-14 (1937); McCray v. United States, 195 U.S. 27, 56-59 (1904).

with free speech." [163] He added, however, with classic understatement that the law was not "earthshakingly necessary." [164]

Probably the strongest case authority supporting Miller's "symbolic speech" argument is *Stromberg v. California*,[165] where the Supreme Court held that a state statute against displaying any "sign, symbol or emblem of opposition to organized government" [166] was unconstitutionally vague. In this case the state had convicted a member of the Young Communist League for displaying a red flag at a summer camp. The Court said: "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity [for free political discussion] is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." [167] Subsequent to the *Miller* trial the Supreme Court, in striking down a Louisiana breach of the peace statute applied to Negroes holding a "stand-in" in a segregated library, said:

> As this Court has repeatedly stated . . .[168] these rights [first amendment] are not to be confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities.[169]

The Court went on to state that the statute had been "deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest the unconstitutional segregation of a public facility." [170]

While these cases recognize the existence of "symbolic speech," protected by the first amendment, they do not extend far enough to include Miller's activities under that rubric. Both involved state statutes of unusually broad coverage. *Miller* arose under federal law, and the statute prohibiting the destruction or mutilation of draft cards is quite specific, covering a limited situation, especially since it was already illegal for the registrant to "forge or change" the draft card.[171] Moreover, the sole purpose of the statute in *Stromberg* was to prohibit symbolic speech, and both it and the Louisiana statute lent themselves to selective enforcement against

---

[163] N.Y. Times, Feb. 11, 1966, p. 6, col. 1 (remarks prior to written opinion).
[164] *Ibid.*
[165] 283 U.S. 359 (1931).
[166] *Id.* at 361.
[167] *Id.* at 369.
[168] The Court here cites NAACP v. Button, 371 U.S. 415, 428-31 (1963) (for a full discussion see note 154 *supra*); Garner v. Louisiana, 368 U.S. 157, 201 (1961) (Harlan, J., concurring) (sit-in at all white lunch counter viewed as much a part of the "free trade in ideas" as is verbal expression); NAACP v. Alabama, 357 U.S. 449, 460-63 (1958) (state attempt to compel NAACP to disclose its membership lists struck down as likely to constitute an effective restraint on its members' freedom of association); Stromberg v. California, 283 U.S. 359, 369 (1931) (see text accompanying note 165 *supra*).
[169] Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (5-4 decision, three Justices joining in the opinion of the Court).
[170] *Ibid.*
[171] See note 156 *supra*.

even more clearly protected expression than that involved on the facts of the two cases.

Furthermore, Miller did not challenge the draft card possession requirement, which implicitly made the burning of draft cards illegal even before the recent statute was passed.[172] Miller's conduct was as willful a violation of the nonpossession regulation as mailing the draft card back to the local board.[173] While there is some question about the need for the personal possession regulation,[174] a requirement that the registrant keep his draft cards at his home or with his other personal effects clearly would be administratively justifiable.

Miller's ability to protest against the draft and American foreign policy was not significantly impaired by the draft card burning amendment. Furthermore, Miller's argument taken to its logical extreme would sanction the violation of any law for the purpose of protesting against it.[175] Thus although certain activities cannot be proscribed because they are protected expressions of "symbolic speech," the willful destruction of a draft card would not seem to be among them.

This is not to say, however, that the draft card destruction amendment was either necessary[176] or wise; it was clearly neither. It may be that many in Congress considered it a "sop" to those angered by anti-war protests who might otherwise have demanded more. Whatever the justification for the amendment, Miller clearly violated it, and the three year suspended sentence[177] he received was certainly adequate to fulfill its limited purposes.[178]

---

[172] See note 134 *supra* and accompanying text.

[173] See notes 137-38 *supra* and accompanying text.

[174] See note 149 *supra*.

[175] *Cf.* Brown v. Louisiana, 383 U.S. 131, 164-68 (1966) (Black, J., dissenting).

[176] See Philadelphia Evening Bulletin, Oct. 29, 1965, p. 5, col. 2, reporting a speech by Lt. Gen. Lewis B. Hershey, Director of the Selective Service System, where the General is reported to have stated that the law was not necessary.

[177] Miller received a three year suspended sentence and was placed on probation for two years. As conditions of probation, Judge Tyler ordered Miller to obtain a new draft card within two weeks and to carry it; to obey all lawful orders of his Selective Service board and, if called to serve, to submit to induction. Miller, who has never claimed conscientious objector status, was reported to have said: "I have no intention of obeying any of the judge's directives, even if I have to go to jail." N.Y. Times, March 16, 1966, p. C-11, cols. 2-6.

While Miller was the first indicted under the act, James E. Wilson, who unlike Miller pleaded guilty, was the first sentenced for violation of it. Wilson received a two year suspended sentence and two years' probation. Wilson was reported to have been stunned by the sentence as he had virtually pleaded to be sent to jail. Judge Edward Weinfeld told Wilson that the law through its conscientious objector provisions afforded ample protection to those who have moral scruples against participation in wars. Judge Weinfeld aptly added:

> You have the right of dissent. You have the right to disagree with those in authority. You have the right of disapproval of governmental policy.
>
> But you have no right to violate the law simply because you disagree with it. If you have that right, then so does every other citizen.
>
> And if each one is to decide for himself that he will obey only the laws that accord with his views and conscience, then instead of order, we have disorder. Instead of justice, we have injustice. Instead of a free society, we have anarchy.

N.Y. Times, March 5, 1966, p. 3, col. 6.

[178] Should a draft card burner receive the maximum five year penalty under the act he might argue that the punishment was "cruel and unusual" in violation of the

### C. *"Interference" With the Draft Process*

On October 15, 1965, approximately forty University of Michigan students participated in a demonstration protesting the policies and activities of the United States Government in Viet Nam. The protest took the form of a peaceful "sit-in" upon the premises of Local Board Number 85 in Ann Arbor, Michigan.[179] No attempt was made to impede or hamper the normal operations of the local board.[180] After the sit-in had been in progress for some time, the Ann Arbor city police were summoned, and the participants were arrested for violating the state trespass statute.[181] Most were found guilty of misdemeanors in municipal court and were fined and sentenced to jail terms.[182] Soon thereafter the state Selective Service communicated the incident to Local Board 323, where two of the participants were registered.[183] Both registrants were subsequently reclassified from II-S (student deferred because of study) [184] to I-A (available for military service).[185]

The local board stated that the participants had been classified I-A because they were delinquents under the act.[186] It was the board's contention that it had the authority to determine that a registrant was delinquent if

eighth amendment, although the authority is against such an argument. *Cf.* Weems v. United States, 217 U.S. 349 (1910) (striking down a statute prescribing twelve to twenty years' imprisonment for the entry of known false statements in a public record); Rudolph v. Alabama, 375 U.S. 889 (1963) (three Justices dissenting on certiorari denial—Mr. Justice Goldberg said certiorari should have been granted to consider whether the eighth and fourteenth amendments permit the imposition of the death penalty on a convicted rapist who has neither taken or endangered human life). *But cf.* Kramer v. United States, 147 F.2d 756, 760 (6th Cir.), *cert. denied*, 324 U.S. 878 (1945) (conscientious objectors who were convicted of failure to perform duties required by the Selective Service Act were sentenced to the maximum term of penal servitude within the limits of the statute—the court held this did not constitute "cruel and unusual punishment" within the eighth amendment); Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964). Moreover, the penalties were not created with the draft card destruction amendment but are the maximum penalties for all violations of the act, including refusal to report for induction, counseling draft evasion and failure to carry draft cards. See Helton v. United States, 143 F.2d 933 (6th Cir.), *cert. denied*, 323 U.S. 765 (1944) (sentence imposed for violation of the act was within the statutory limit and thus not reviewable).

179 The facts of this case were taken from: Complaint No. 27886, filed in the case of Miller v. Selective Service System, — F. Supp. — (E.D. Mich. 1966); Memorandum of Law, filed with Local Board No. 323 on behalf of Ronald Miller and Richard Sklar, who took part in the protest and were subsequently reclassified I-A. See also N.Y. Times, Feb. 6, 1966, p. 5, cols. 1-4.

180 *Ibid.*

181 MICH. STAT. ANN. § 28.820(1) (1954).

182 See note 179 *supra.*

183 See Letter From Michigan State Director of Selective Service to Local Board 93, Nov. 10, 1965, Exhibit "A" in Complaint No. 27886, Miller v. Selective Service System, — F. Supp. — (E.D. Mich. 1966).

184 32 C.F.R. § 1622.25 (Supp. 1965). Part (a) provides that "in Class II-S shall be placed any registrant whose activity in study is found to be necessary to the maintenance of the national health, safety, or interest." The Selective Service did not argue that the students were not qualified under this section for any reason apart from their conduct in this case.

185 32 C.F.R. § 1622.10 (1962).

186 See note 179 *supra.*

it found that he committed any offense made criminal by the act.[187] The provision of the act relied on by the local board stated that a violation of the Selective Service Act occurs when: "Any person or persons . . . knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules and regulations pursuant thereto . . . ." [188] The board relied on the trespass conviction as evidence that the registrants had violated this provision.[189] The Selective Service maintained that classifying the students I-A was consistent with its policy of affording those who were delinquents an opportunity to report for induction rather than face prosecution for the federal crime.[190]

The problem with the board's position is that the students were not "delinquent" under the Selective Service regulations. Section 1602.4 of the regulations defines "delinquent" as a registrant "who fails or neglects to perform any duty required of him" under the act.[191] The use of these terms is consistent with classifying as "delinquent" those *who fail or neglect to* register,[192] give truthful statements with regard to classification,[193] send the local board any change of address,[194] carry draft cards [195] or report for induction.[196] In each of these instances the registrant's knowing failure to comply is deemed to be an attempt by the registrant to evade his military obligation. Therefore, rather than prosecuting the delinquent, the Selective Service classifies him I-A and orders him to report for induction,[197] thus allowing him to perform the service obligation he was attempting to evade. The registrants here were charged with knowingly interfering "by force or violence or otherwise" with the administration of the act or regulations.[198] Thus, to be delinquent under the regulations, it would be necessary to say that they had *failed or neglected not to interfere.* But while such activity is made criminal under the act, the individual involved has not taken any act to evade his military obligation. The activity is criminal because it interferes with the administration of the overall process, not because the individual was attempting to evade *his* service obligation. The same would be true of the crime of knowingly counseling,

---

187 Letter From Michigan State Director of Selective Service to Local Board 93, Nov. 10, 1965, Exhibit "A" in Complaint No. 27886, Miller v. Selective Service System, — F. Supp. — (E.D. Mich. 1966).

188 62 Stat. 622 (1948), 50 U.S.C. APP. § 462 (1964).

189 See note 179 *supra.*

190 See notes 124-25 *supra* and accompanying text.

191 32 C.F.R. § 1602.4 (1962): "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."

192 See notes 127-29 *supra* and accompanying text.

193 See note 131 *supra* and accompanying text.

194 See notes 130, 132 *supra* and accompanying text.

195 See notes 134, 136 *supra* and accompanying text.

196 See note 126 *supra* and accompanying text.

197 32 C.F.R. § 1642.13 (Supp. 1965).

198 62 Stat. 622 (1948), 50 U.S.C. APP. § 462(a) (1964).

aiding or abetting another to evade his draft obligations.[199] Such a person would be violating the act and should be prosecuted in a court of law, but he should not be inducted as a delinquent. When the registrant knowingly fails or neglects to perform a duty under the act, such that he is deemed to be attempting to evade *his* military obligation, he should be classified as a delinquent and in line with present administrative practice given the option of going into the service or being prosecuted in a court of law.[200] When, however, the registrant is charged with interfering by force or violence with the administration of the Selective Service process the delinquency procedure is inapposite.

In a case where there are definite first amendment overtones,[201] the criminal prosecution should not be in the posture of a court applying a narrow review to an administrative decision. The alleged violator should be tried originally in a court where he will be represented by counsel and afforded the added safeguards of the judicial process. The local boards were not set up to use the "draft" power to "punish" those whose conduct *they* decide violates *any* offense under the Selective Service Act.

When and if this case reaches the courts,[202] the students should be found not guilty of interfering with the draft process. The exact language—"any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration . . . ."[203] of the act—has not yet been interpreted by a court. The language was incorporated into the act when it was revised in 1948. The wording of this section in the 1940 act was: "any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act . . . ."[204] The House Committee report on the 1948 amendment to the penalty section stated that this was "substantially a reenactment" of the 1940 provision except that "certain changes of language have been made to incorporate judicial determinations made pursuant to the predecessor act."[205]

The language of the 1940 act was interpreted in four decisions.[206] In *Bagley v. United States*[207] a registrant who had publicly declared that

---

[199] *Ibid.* See cases cited note 215 *infra.*

[200] See text accompanying notes 124-25 *supra.*

[201] See text accompanying notes 215-18 *infra.*

[202] Some appeal boards have reversed the local boards and declared that the students are not delinquent. Others have upheld the classification of the local board, and some of the Michigan students are presently classified I-A. The merits of the case can get to court, however, only when the draftees are mailed their induction notices and refuse to be inducted. See exhaustion of administrative remedies, notes 22-24 *supra* and accompanying text.

[203] 62 Stat. 622 (1948), 50 U.S.C. APP. § 462(a) (1964).

[204] Act of Sept. 16, 1940, ch. 720, § 11, 54 Stat. 894.

[205] S. REP. No. 1268, 80th Cong., 2d Sess. 20 (1948).

[206] Helton v. United States, 143 F.2d 933 (6th Cir.), *cert. denied*, 323 U.S. 765 (1944); Burwell v. United States, 137 F.2d 155 (4th Cir. 1943) (per curiam); Bagley v. United States, 136 F.2d 567 (5th Cir. 1943); Moore v. United States, 128 F.2d 974 (5th Cir. 1942).

[207] Bagley v. United States, *supra* note 206.

he preferred to serve the Hitler regime rather than the Allied cause during the Second World War was prosecuted under this language. The Fifth Circuit, reversing a conviction in the district court, stated:

> The language in which the act was couched was not put there by accident or inadvertence. It was carefully chosen by Congress when this country was not at war but only preparing for its eventuality in order to insure, the fullest preservation of freedom of opinion and expression, that the act would not be the instrument of partisan prosecution to suppress that freedom, and that prosecutions under it would be brought only where there was forcible rather than ideological opposition to the draft.[208]

The court also stated that the registrant's *later act* of apologizing was relevant to a finding that there was not the requisite intent for the crime charged.[209] On the other hand, in the case of *Helton v. United States*,[210] which involved the same factual situation as the remaining two cases decided under the 1940 act,[211] the Sixth Circuit sustained the conviction of a registrant who physically attacked and injured a Selective Service physician who had qualified the registrant as physically qualified for military service. In that case the registrant physically beat up the doctor on a public street. The court of appeals said:

> An assault upon a member of such a Board, or one of its examining physicians, growing out of his exercise of duty, is an interference by force and violence with the administration of the Act. The orderly functioning of the Board could not continue if its members or physicians were restrained from exercising their free judgment by fear, and if they felt they would not be safe, in the exercise of their duties, from the attacks of those who became vengeful as a result of their official decisions.[212]

While neither of these cases is directly on point, the peaceful protest by the students is a far cry from the violent physical attack in *Helton*, and the *Bagley* case is certainly the stronger analogy. The students appear to have made no attempt to impede or hamper the normal operations of the local board, nor did they have the intent to do so. The sit-in was for the purpose of dramatizing, in a way calculated to attract public attention, the

---

208 *Id.* at 569.

209 *Id.* at 571.

210 143 F.2d 933 (6th Cir.), *cert. denied*, 323 U.S. 765 (1944).

211 Burwell v. United States, 137 F.2d 155, 156 (4th Cir. 1943) (per curiam) registrant assaulted and struck Selective Service physician; jury charge included requirement that the "subject of his grievance was something the doctor had done in the performance of his duties"); Moore v. United States, 128 F.2d 974 (5th Cir. 1942) (registrant assaulted and beat chairman of local draft board).

212 Helton v. United States, 143 F.2d 933, 935 (6th Cir.), *cert. denied*, 323 U.S. 765 (1944).

opposition of the students to the current foreign policy of the government. Moreover, as a matter of interpretation, the statute should not be construed to cover a peaceful sit-in demonstration directed at political protest. Any interference or attempted interference must be "by force or violence or otherwise . . . ." [213] The words "or otherwise" should cover only activity tantamount to "force or violence" and should not bear the burden of supporting a conviction for nonviolent political protest.[214]

The first amendment overtones [215] in the Michigan sit-in case further buttress this statutory construction. Even though this case may not be clearly within the coverage of the first amendment, it is certainly within the penumbral area. To give the words "or otherwise" an expansive reading to cover peaceful political protest may have a coercive effect, inhibiting other expression clearly protected by the first amendment. The public reaction against the Michigan situation prompted the Department of Justice to state that: "Sanctions of the Universal Military & Training Service Act cannot be used in any way to stifle constitutionally protected expression of views." [216] Furthermore, a statute read this broadly too easily lends itself to selective enforcement against the expression of these and other "unpopular views." [217] While federal statutes are rarely held void for vagueness, the federal courts use their power to construe federal statutes as a tool to narrow broad statutory coverage so that it does not impinge on the penumbral area of the first amendment.[218] Therefore, as a matter of constitutional construction, this statute should be interpreted so as not to allow even the threat of prosecution against protected first amendment expression.

---

213 62 Stat. 622 (1948), 50 U.S.C. APP. § 462(a) (1964).

214 The canon of statutory construction known as *"ejusdem generis"* (of that same kind) embodies the idea that concluding general phrases of the "and/or any other . . ." type should normally be limited to the common denominator of the preceding specific instances. MISHKIN & MORRIS, ON LAW IN COURTS 399 (1965).

215 Another area of the Selective Service laws which involves freedom of speech is that of counseling draft evasion. The act states that "any person . . . who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title . . . or who conspires to commit any one or more of such offenses" shall be punishable by up to five years in prison and/or a fine of $10,000. 62 Stat. 622 (1948), 50 U.S.C. APP. § 462(a) (1964). See United States v. Miller, 233 F.2d 171, 172 (2d Cir. 1956) (per curiam); Gara v. United States, 178 F.2d 38 (6th Cir. 1949), *aff'd per curiam by an equally divided court*, 340 U.S. 857 (1950); Warren v. United States, 177 F.2d 596 (10th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 936 n.71 (1963).

216 The Justice Department stated that while they had no control over the Selective Service process itself, the Department would act in accordance with the above view if any case is contested in the courts. Letter from Fred M. Vinson, Jr., Assistant Attorney General, to Professor Herman Schwartz and Other Law Professors Who Signed the Letter to the Department of Justice, Jan. 6, 1966.

217 See note 154 *supra*.

218 See, *e.g.*, Dennis v. United States, 341 U.S. 494, 502 (1951) (federal conviction sustained against first amendment and vagueness claims): "This is a federal statute which we must interpret as well as judge. Herein lies the fallacy of reliance upon the manner in which this Court has treated judgments of state courts. Where the statute as construed by the state courts transgressed the First Amendment, we could not but invalidate the judgments of conviction." See also Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 86 (1960).

This is not to say, however, that the municipal court misdemeanor convictions of the students for trespassing should not be upheld.[219] If any group of forty people who did not have official business to transact with the local board would have been asked to leave, then the students in the sit-in could have been asked to take their demonstration out of the office and, when they refused to do so, could have been prosecuted for trespassing. The Michigan trespass statute is not aimed at political protest. The use of the trespass statute is not analogous to the Supreme Court's recent decision in *Brown v. Louisiana*,[220] where the Court held unconstitutional a Louisiana breach of the peace statute as applied to an orderly "stand-in" in a segregated library. That case can be distinguished for the reason, *inter alia*,[221] that the Negroes had a constitutional right to be in the library since segregated libraries are per se unlawful. Therefore, although the draftees may have violated the Michigan trespass statute, they have not violated the Selective Service Act.

## VI. Conclusion

Even though the narrow scope of judicial review of Selective Service proceedings is an anachronism in the law, it is unlikely that Congress or the Supreme Court will change it in the near future. It is for this reason that courts must be particularly sensitive to procedural irregularity or possible abuse by local boards.

Should Congress hesitate to provide desired procedural safeguards for fear of creating any significant delay in the process during periods of heavy mobilization, some sort of trigger mechanism in the act might provide the answer. By having certain procedures go into effect only when Congress has declared a national emergency, the procedures could be better tailored to fit both the emergency and nonemergency situations.

While the draft process has certain unique problems, it still should provide, wherever possible, the same procedural safeguards deemed necessary in other areas of the administrative process. It is no answer to say that all have a military obligation, and thus errors in classification are of little consequence. The draft process is still a creature of law, and Congress—through the act and by delegating authority to the Selective Service to promulgate regulations not inconsistent with it—has provided that certain situations must be treated in certain ways. It is the responsibility of the courts to control the process through which this is accomplished.

---

219 Mich. Stat. Ann. § 28.820(1) (1954).

220 383 U.S. 131 (1966).

221 Moreover, this was the fourth time in little more than four years that the Supreme Court had reversed convictions by Louisiana courts for alleged violations, in a civil rights context, of that state's breach of the peace statute. Cox v. Louisiana, 379 U.S. 536 (1965) (conviction of leader of some 2000 Negroes who demonstrated in the vicinity of a courthouse and jail to protest the arrest of fellow demonstrators); Taylor v. Louisiana, 370 U.S. 154 (1962) (per curiam) (sit-in by Negroes in a waiting room at a bus depot reserved for whites only); Garner v. Louisiana, 368 U.S. 157 (1961) (sit-ins by Negroes at lunch counters catering only to whites).

Moreover, since pre-induction judicial review is only possible in a felony prosecution, courts must be sure that the administrative record is an adequate predicate for criminal sanctions. In prosecutions for failure to possess draft cards or interference with the draft laws, courts must also be on constant guard that expression within the penumbral area of first amendment protection is not in any way discouraged.

In another context Mr. Justice Frankfurter has said: "especially must we be sensitive to the citizen's rights where the proceeding is nonjudicial because of 'the difference in security of judicial over administrative action . . . .'" [222] Probably the most significant single safeguard a court could demand is that counsel be allowed to act in an advisory capacity at local board proceedings.

Efficiency is one value called for in the Selective Service System, but fairness and due process of law clearly constitute another. The structure of the system makes it subject to great abuse, and its impact is heavy on the lives of those concerned. Congress, the administrators of the Selective Service System and the courts should jointly see to it that efficiency is not overemphasized at the expense of fairness to individuals.

---

[222] United States v. Minker, 350 U.S. 179, 188 (1956) (immigration case).