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MINIMUM DUE PROCESS STANDARDS IN SELECTIVE SERVICE CASES—PART I

By ANN FAGAN GINGER*

EDITOR'S NOTE: This critical analysis of the present procedures of the Selective Service System in classifying and ordering men inducted for service in the armed forces is presented in two parts. Part I is designed to provide the practicing attorney with an overview of the Selective Service System from the time of an 18-year-old's initial registration, through classification procedures, administrative appeals, reclassification, and induction order or prosecution for refusing induction. Much of the information contained in this part is not generally accessible to the attorney who takes his first draft case, and has been gathered by the author through several years of work on Selective Service cases.

Part II, to be published in the November 1968 issue of the Journal (Vol. 20, No. 1), includes a chart summarizing the standards of due process and fair procedure required by the Constitution and Administrative Procedure Act, and indicating which of these standards are being met by the Selective Service System. The article concludes with an attempt to answer two questions: What standards should govern the System? How can the System provide procedures to meet these standards?

FUNDAMENTAL problems of due process of law and basic fairness arise from any study of, or experience with, Selective Service law and practice. Every lawyer handling a draft case, and every scholar perusing the 1967 Report of the National Advisory Commission appointed by President Johnson to study the draft law runs into these problems. They require discussion at this time for several reasons.

There is a great increase in the number of criminal prosecutions being brought against young men who, having gone through the administrative procedures of the Selective Service System, have refused to accept the classification they were given and the resulting order of induction into the United States Army. The Department of Justice reports that in the fiscal year 1967, 1,648 criminal cases were filed charging violations of the Selective Service law, more than three times as many as in fiscal 1965. The number may be further increased as the Department of Justice carries out the intention expressed by


1 NATIONAL ADVISORY COMM’N ON SELECTIVE SERVICE, IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? (1967) [hereinafter cited as MARSHALL COMM’N REP. after its chairman, Burke Marshall].


[1313]
Congress in the Military Selective Service Act of 1967\(^3\) to proceed expeditiously with prosecutions under the Act.\(^4\) If local boards, following the October 26, 1967 letter\(^5\) from General Lewis B. Hershey, Director of the Selective Service System, declare delinquent, reclassify, and order inducted all men, of whatever classification, who work in antiwar organizations,\(^6\) participate in antiwar demonstrations,\(^7\) or burn\(^8\) or return\(^9\) their draft cards, the number will be increased still further.\(^10\)

Until 1966, draft calls were relatively low and relatively few were prosecuted for draft refusal.\(^11\) The litigation on draft law questions was limited in the main to Jehovah's Witnesses denied conscientious objector or ministerial status, some of whom also complained about denials of procedural due process.\(^12\) However, despite the Supreme Court's increasing concern that due process be provided from the beginning\(^13\) to the end\(^14\) of criminal and juvenile\(^15\) cases, relatively


\(^6\) E.g., John Ratliff was reclassified by Local Board No. 76, Tulsa, Okla., because of his "activity as [a] member of SDS." National Student Ass'n v. Hershey (pending, D.D.C.), 13 Civ. Lib. Dock. No. 127.101 (1968) (allegation in complaint).


\(^10\) However, this article does not discuss the special types of legal issues raised by these cases. For further information, follow the developments in National Student Ass'n v. Hershey (pending, D.D.C.), 13 Civ. Lib. Dock. No. 127.101 (1968), and O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967), cert. granted, 389 U.S. 814 (1967) (No. 223, 1967 Term).

\(^11\) The total number of conscientious objectors convicted of Selective Service Act violations from 1948 to 1968 has been approximated minimally at 510. The Court Reporter, 19 NEWS NOTES OF THE CENT. COMM. OF CONSCIENTIOUS OBJECTORS No. 6, at 4 (1967).

\(^12\) E.g., inaccurate resumes of FBI reports furnished conscientious objects, instead of complete reports, raised in Simmons v. United States, 348 U.S. 397 (1955), and more recently in DeRemer v. United States, 340 F.2d 712 (8th Cir. 1965).


\(^15\) See, e.g., In re Gault, 387 U.S. 1 (1967) (due process required in juvenile proceedings).
little work has been done on the fundamentals of due process in Selective Service cases.

The question of due process in draft cases may have more general importance than at first appears. The Selective Service System is the first major government agency most youth encounter as independent adults. Their reactions to each interview with a draft board clerk, each personal appearance before the local board, and each form and letter received, are long remembered. If they feel that they are being treated unfairly at every stage, these impressions will affect their decisions later when they become voters and still later when they are of the age to govern this country. Conversely, if the youth participate in a system that does in form and in fact provide due process of law, and fair and impartial treatment, they will carry this concept with them into their later life.

Caveat: This discussion is intended to be descriptive and suggestive, rather than definitive, due to limits of both time and space. The Selective Service System cannot be comprehended or analyzed quickly. The statute is not short; it contains many lengthy paragraphs covering numerous subjects, without subheadings, and the regulations are also numerous; both are poorly indexed. There are no published opinions at the administrative level, and the practices of the local boards are not easily discoverable, nor are they uniform. Court opinions have not yet considered the System in the light of the broadened concepts of due process of law enunciated by the Supreme Court in related fields during the past decade, and the 1967 Act changed the statutory language considerably. These two factors render earlier opinions and law review materials relatively obsolete, although some old opinions do stand the test of time, particularly Mr. Justice Murphy's famous concurrence in Estep v. United States.

For this reason, few cases and materials are cited. Textual footnotes have been minimized to make for easier reading, but in the process the opportunity to mention interesting peripheral matters

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16 Youths who are accused or convicted felons or who are on probation or parole generally are classified 1-Y or IV-F, and are not commonly called to serve. Cf. 32 C.F.R. §§ 1622.17, 1622.44 (1967).

17 Uniformity is not considered a virtue by the System. See, e.g., MARSHALL COMM'N REP. 19-20, 27, 31.

18 327 U.S. 114, 125 (1946).

has been lost. Wherever possible, references have been made to the study of the System by the Marshall Commission. Much fuller documentation of points of interest can be found in the many Congressional materials published in connection with debate and passage of the 1967 Act.

There is more affirmative draft law litigation pending now than at any time in history, and more due process points are being raised in pretrial and trial of criminal charges. As decisions come down in this litigation, the System will undoubtedly be subjected to the kind of close scrutiny its importance requires.

Questions To Be Answered

Within these severe limitations, it is necessary first to consider the nature of the Selective Service System. This leads to a brief look at the procedures followed by agencies that are somewhat analogous to the System, and a lengthy description of the functioning of the System, with attention to the presence or absence of the customary standards of due process at each stage. Then it must be determined whether it was the intent of Congress, in providing for “selective” rather than “universal” service, to require the System to establish a fair procedure for making the selections. This leaves a formidable series of questions to be asked and answered. They are posed at the conclusion of Part I; an effort to answer them will be made in Part II. In Estep v. United States in 1946, Mr. Justice Murphy assumed an affirmative answer to the key question: Are individuals who are subject to important administrative determinations of their status to be accorded at least as much due process as corporations receive when they face important administrative determinations?

The Nature of the Selective Service System

The System Must Meet Quotas

The Selective Service System is an administrative agency charged with the duty to provide a variable number of qualified men to be inducted into the armed forces each time a call is received from the Department of Defense, a separate administrative agency bound by

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20 For example, the channeling function of the System is not discussed here. On this topic, see, e.g., SELECTIVE SERVICE SYSTEM (NAT'L HRTNS.), THE SELECTIVE SERVICE SYSTEM: ITS CONCEPT, HISTORY AND OPERATION 27-28 (1967); Defendant's Motion to Dismiss Indictment at 1-6, United States v. O'Connor, No. 41279 (pending, N.D. Cal.), 13 Civ. Lib. Dock. No. 127.11 (1968); L. HERSHEY, OUTLINE OF HISTORICAL BACKGROUND OF SELECTIVE SERVICE, 30-31 (rev. ed. 1965); Channeling (GPO 899-125) (mimeo).


22 See cases reported in 13 Civ. Lib. Dock. Nos. 120. to 129. (1968).

23 327 U.S. 114, 125 (1946) (concurring opinion).

a different kind of law (military) enforced by a different judicial system (from courts-martial through the United States Court of Military Appeals). No part of the System can appeal from a call for any reason. Calls are announced some months in advance; all levels of the System gear themselves accordingly. Each local board is given a monthly quota to induct, based on its pool of men classified I-A. The board must follow a complicated and inexact system for selecting the I-A's to be inducted, and must also place a certain number in class I-A each month to meet later calls. Meeting these quotas is part of the job of the draft board members.

In its primary function of manpower procurement, the System is quite different from other administrative and judicial agencies. For example, the Internal Revenue Service is not required to collect a prescribed amount of money from any one type of tax, or from all forms of taxation, in a given period. The Tax Court is not required to hand down judgments requiring payment of a certain amount of money for taxes from a certain number of taxpayers in a given period. The Immigration and Naturalization Service is not required by any other agency, or by its own rules, to deport a certain number of aliens each month, although, like the System, everyone in its jurisdiction (that is, every alien resident in the United States) is required to register with it. Similarly, no court is given or gives itself a quota of felons to be convicted each month.

The System Adjudicates Status

From the viewpoint of the individual registrant, it is the responsibility of the System to determine his status. This determination is made by his local draft board on the basis of information he supplies on forms issued by the System, directives received from the national director of the System, and statutory and regulatory categories. The board notifies him of its decision and orders him to act according to the status it prescribes. That is, if he is classified I-O, he must do alternative civilian service; if I-A, he must do military service after induction into the Army. In this respect the System is similar to other agencies, discussed below.

The System Places Burden of Proof on Registrant

From the outset the System places the burden of proof on the individuals within its jurisdiction. All men who register with the

27 Cf. 5 U.S.C. § 556(d) (Supp. II, 1965-1966): "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof ...."
System are presumed to fit into class I-A, unless they allege and prove that they are entitled to another classification.\textsuperscript{28} Since any youth can seek to enlist in the armed forces if he is willing to serve, and thus avoid the whole draft process, it can be argued that young men who do not enlist consider I-A the least desirable class. Certainly those who actively seek another classification do so consider it.

On the other hand, from the point of view of the armed forces, it is the right, privilege and duty of every citizen to defend his country, and it would be inequitable for the System to act in any way that assumed that some youth could not serve.

The System's Orders Are Enforced Only by Criminal Process

If the registrant refuses to accept his classification, and refuses to obey the orders of the board, the System refers his case to the United States Attorney for expeditious criminal prosecution.\textsuperscript{29} This is wholly unlike the Internal Revenue procedure by which a taxpayer may contest a tax either by paying the tax in full and seeking a refund, or by refusing to pay the tax and litigating his liability.\textsuperscript{30} It is also unlike an administrative determination that a drug company stop using certain words on a label, or that a company engaged in interstate commerce pay prescribed minimum wages, either of which orders can be contested judicially without risking criminal sanctions.\textsuperscript{31} The draft process, however, begins with an administrative decision as to status and can end with 5 years' imprisonment and a $10,000 fine in the first judicial review of the administrative decision seemingly permitted under the 1967 Act.\textsuperscript{32}

Analogous Agencies

Are there any analogous government agencies whose procedures can be profitably studied to determine what procedures the System should follow?

At first glance, there are several agencies that determine status in proceedings that are not clearly judicial or legislative in character, and that do not end with a punishment of fine or imprisonment. There are two agencies in the executive branch—the Immigration and Naturalization Service and the Subversive Activities Control Board; two in the legislative branch—the House Committee on Un-Ameri-

\textsuperscript{28} 32 C.F.R. § 1622.10 (1967).
\textsuperscript{30} This point will be developed further in Part II, 20 Hastings L.J.—(Nov. 1968).
can Activities and the Subcommittee on Internal Security of the Senate Judiciary Committee; and two agencies in the judicial branch—the juvenile courts and the Adult Authority or other prison parole agency.

Each of these agencies has argued at various times, precisely because they do not have the power to punish, that it need not accord to the individuals who come before it the due process to which they would be entitled if they were before a criminal court. The Supreme Court, in the past 20 years, has ruled that each of these agencies must accord certain rights guaranteed in the Bill of Rights even if the status decided by the agency is not a punishment, the orders to the individual arising from that status do not involve punishment, and the limitations on the actions of the individual arising from the status are not technically penalties.

Are there other administrative agencies related to the defense function of the federal government that follow procedures that might be relevant to those of the System? Certainly the procurement of money is directly related to defense; it is necessary to pay the service men as well as to purchase materiel. The Internal Revenue Service does not change its procedures during a national emergency or war. At all times it is covered by the Administrative Procedure Act except for the Act's provisions concerning hearings, which are not applied because a formal court, the Tax Court, has been established to fulfill the functions normally filled by an administrative hearing. The procedures of the Internal Revenue Service, from beginning to end, assume the right to counsel and the availability of counsel.

**Functioning of the Selective Service System**

*From the Point of View of the Registrant*

**Form 100**

The law requires every male in the United States to register for the draft at age 18, but sends him no notice of this. Registration is

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33 *I.e.*, deportable alien (Immigration & Naturalization Service); member of Communist organization (Subversive Activities Control Board); un-American (HUAC); delinquent youth (juvenile courts); parole violator (e.g. California Adult Authority).


35 *E.g.*, supervisory parole of deportable aliens, see United States v. Witkovich, 353 U.S. 194, 201 (1957); inability to use a passport, Aptheker v. Secretary of State, 378 U.S. 500 (1964); inability to work in a defense plant, United States v. Robel, 389 U.S. 258 (1967).
accomplished by his going to the local draft board office and registering with the clerk. After registration, the clerk sends the registrant SSS Form 100, a basic classification questionnaire, which he is to fill out and return within 10 days of the date it is sent to him. The form is quite short and contains little explanatory material. The answers the registrant gives on this form serve as the basis for the board’s classifying him.

Failure to register at age 18 is a criminal offense. Failure to complete Form 100 results in a finding of delinquency and an immediate reclassification and order of induction. Answering the questions on Form 100 provides proof that the registrant is 18 and subject to the draft law. The form seeks also information on the registrant’s schooling, family status, and educational and medical history. It is not accompanied by an instruction booklet describing the Selective Service System, similar to the annual tax instruction booklets, written in layman’s language, which are sent to taxpayers. After publication of the Marshall Commission report, which criticized the System for its public relations inadequacies, the System issued several short pamphlets describing some aspects of Selective Service. One pamphlet advises the registrant:

Where To Get Help
Anytime you want information not given to you in notices or other mail, ask any Local Board Clerk, your Government Appeal Agent, your Advisor to Registrants, or your State Director. All will be happy to help you.

These leaflets and the classification form do not suggest that the registrant may need the assistance of a lawyer in order to determine the classification for which he should apply; that he has a right not to answer questions that might incriminate him; or that anything he writes on the form can be used against him later in a federal criminal prosecution.

The classification form does not explain that it can be read by persons other than the local board and registrant. It does not quote from the regulation which permits examination and copying of any registrant’s file by any person in the Selective Service System, United States Attorney’s office, the FBI, or any other federal or state agency, or by any other person who has received permission from the Director of the System. A registrant who discloses any sexual deviation, political activity or criminal behavior on this or any form does so on
what amounts to a public record.

The form does not list offices or phone numbers where the registrant can obtain expert impartial answers to questions or advice on how to describe his situation accurately and effectively on the form. There is no mention on Form 100, or on any other form given to the registrant, or on the walls at the draft board, that there is a book of regulations or a statute that can be consulted for information on procedures or classifications. Even for the registrant who seeks legal advice there are limitations, since there is no service, governmental or private, to which a lawyer can subscribe to keep abreast of administrative developments in draft law. At best the attorney can subscribe to an inexpensive service of the Government Printing Office and obtain the regulations and Local Board Memos, but many months elapse between publication of a new regulation in the Federal Register and the receipt of a copy of the regulation by a subscriber.

Form 100 does not list all classifications to which a registrant may be entitled; it does not describe the qualifications for each classification, or the consequences of being placed in each classification. If the registrant provides sufficient information to indicate that he may be entitled to a deferment, the clerk of the local board will send him another form seeking more specific facts on that claim. However, Form 100 does not ask for certain kinds of information the registrant should give in order to qualify for certain types of classifications, nor does it indicate to the clerk that certain registrants will need a second form.

For example, it is more or less common knowledge that a married man who is living at home with his wife and minor child is entitled to a III-A deferment;[42] although the facts establishing this classification are requested on Form 100, relatively few 18-year-olds will be eligible for III-A for this reason. However, the draft law has also always provided for "hardship" deferments for men who have people dependent on them for assistance that cannot be replaced by the payment of the Army allotment check sent to draftees.[43] If a registrant has parents who are receiving aid of any kind from a governmental or private agency, are blind, mentally ill, hospitalized, or have severe psychiatric problems, induction of an 18-year-old son may leave a void in the family structure that cannot be filled. No mention is made of deferments based on "hardship" on Form 100. Nor does the form mention that a youth should list any children he has, whether or not legitimate, although he may be contributing to

their support and emotional stability. The form does not mention, either, that the father of a child living in his home is not entitled to a III-A deferment for which he would otherwise qualify if he has requested and received a II-S (student) deferment since July 1, 1967.

The form does not provide space for a youth to mention his plans to attend a college as soon as he has earned enough money, or his plan to participate in a meaningful apprenticeship program that does not come within the present limits of programs acceptable to the System but for which a case for deferment could be made.

If a registrant does not understand the questions on Form 100, he is likely to go to the place where he got the form, the local draft board, and to the person who registered him, the board clerk, for answers. The clerks customarily give the impression that they know the answers to questions; and, of course, the unpaid volunteer draft board members are not present at the board during working hours, so they cannot be consulted by a puzzled registrant.

Clerks to local boards are paid civil service employees with no required training in administrative law, statutory construction, or constitutional principles. Many clerks have served with local boards since World War II. They are not given instructions on the significance of changes in the draft act, new regulations, new Local Board Memos, or confidential communications from General Hershey. Since the regulations do not contain full or partial texts or discussions of United States Supreme Court opinions in draft law cases, there is no method by which draft board clerks are made aware of their existence, or are encouraged to read them. Yet the clerk's preparation of the cases for the board's review is, in effect, an initial classification.

Local Draft Boards

All decisions on classification of registrants are made by local draft boards, subject to an appeal procedure discussed below. A clear picture of the composition, attitudes, and methods of work of the 4,080 local boards is now available from the study made by the Mar-

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44 It is possible that a registrant may be entitled to a III-A deferment on the ground of extreme hardship if his dependents are emotionally unstable. See The New Draft Law: A Manual for Lawyers and Counselors 235:27-29 (A. Ginger ed. 1967) (Nat'l Lawyers Guild, Box 673, Berkeley, Cal. 94701).
48 Id.
49 Id.
shall Commission. Probably as an outcome of this study, Congress amended the draft law\(^{50}\) and the Service amended its regulations\(^{51}\) so that some changes in composition have already taken place in some draft boards since July 1, 1967, the effective date of the new act. The following description assumes that all required statutory changes have been implemented.

The local board consists of three or more people who probably do not know the registrant or his family on a personal basis. They serve a large geographic area and may not even be from the community from which the registrant comes,\(^{52}\) particularly if the community is a ghetto area that has changed composition recently.\(^{53}\) Most of the board members are men,\(^{54}\) are veterans of military service,\(^{55}\) are white,\(^{56}\) and are white collar workers,\(^{57}\) although few are lawyers or administrators with experience in interpreting statutes and regulations.\(^{58}\) They are well over 30 years of age\(^{59}\) and have served on the board for many years.\(^{60}\) They are not given a course of instruction on their duties nor a handbook describing the System and its operation.

Since they are unpaid volunteers with other full-time employment, and are not offered brush-up courses on the law, they may not have studied the new statute passed July 1, 1967, or the regulations issued under it. They may not have studied the over 100 Local Board Memos issued by General Hershey or his confidential letters to local boards. It is extremely doubtful that they have all read recent United States Supreme Court or courts of appeals decisions on draft cases. There are no standards for competence and no education or experience qualifications for draft board members.

\(^{52}\) In San Francisco, 6 of the city’s 40 board members live in the same district in which they serve. See Hunn, Draft Boards—A Guardian Probe, The [San Francisco] Bay Guardian, Dec. 19, 1967, map at 3, cols. 3-5.
\(^{53}\) Margolis, Trying A Case Under the Selective Service Law, 26 GUILD PRACTITIONER 100, 103 (1967).
\(^{54}\) At the time of the Marshall Commission Report, all members of local boards were male. MARSHALL COMM’N REP. 19. However, Selec. Serv. Act § 8(b), amending 50 App. U.S.C. § 460(b)(3) (1964), provides that “[n]o citizen shall be denied membership . . . on account of sex.”
\(^{55}\) MARSHALL COMM’N REP. 19, Table 1.3 at 74.
\(^{56}\) Id. at 19, Table 1.6 at 75.
\(^{57}\) Id. at 19, Table 1.5 at 75.
\(^{58}\) See id.
\(^{59}\) Id. at 19, Table 1.1 at 73.
\(^{60}\) See id. at 19, Table 1.2 at 73. See generally Hunn, Draft Boards—A Guardian Probe, The [San Francisco] Bay Guardian, Dec. 19, 1967, at 1, col. 2 (study of members of San Francisco’s 10 draft boards).
The local boards meet in private. Only recently has it been required that the names of the members be posted in local board offices; some board chairmen may authorize clerks to release the local addresses of board members. There is no procedure by which citizens can observe or scrutinize the decisions or methods of work of board members, and there is no annual evaluation of the procedures followed or of the correctness of local board decisions by the state directors, General Hershey, or an independent agency.

Classification Procedure

The local board is the first and most important decision-making body in the case of each registrant. It acts as does a judge in a judicial proceeding or a hearing officer in another administrative agency. Its original determination in each case is prescribed by the regulations: it must decide that each registrant is I-A unless his Form 100 shows that he is entitled to an obvious deferment, e.g., as an undergraduate college student under 24 years of age (II-S), as the father of a child who has not had a II-S deferment since July 1, 1967 (III-A), or as a minister (IV-D). I-A is the residual classification of each registrant.

When the registrant does not supply sufficient information on his Form 100 (or other form) to permit his classification, the local board is required to act as investigator. The board has subpoena power. It is not known to what extent local boards use this power, or authorize their clerks to obtain information not in the record of the registrants through queries to persons other than the registrants.

Each local board handles between 28 and 55,000 registrants at any given time. According to one study, San Francisco boards averaged less than one minute's consideration per case during 1967.
The classification of the registrant by the local board is sent to
the registrant on a classification form \(\text{SSS Form 110}\), without ex-
planation. If the registrant claimed a deferment on his \(\text{Form 100}\),
or in subsequent communications with the board, the board does not
discuss this claim or give the reasons for rejecting it.

The notice to the registrant giving his status as I-A announces
that he may appeal within 30 days. Since spring 1967, many boards
have added a statement that the registrant may talk to the legal
advisor to the local board, a volunteer who is not required to be a
lawyer. The form does not state whether the advisor is a lawyer. Many boards do not have legal advisors, relying instead on local
board clerks and appeal agents, discussed below. Nothing is said on
the form suggesting the wisdom of the registrant talking to an attor-
ney other than the board's legal advisor or to a draft counseling
agency.

**Personal Appearance**

After an adverse decision and receipt of a \(\text{Form 110}\), the registrant
can either seek a personal appearance before the local board to ask
the board to change its classification, or he can appeal to the appeal
board, or he can do both. The notice of his right to appeal does
not contain a set of instructions concerning the appeal or personal
appearance, or a list of references to relevant material that might
assist the registrant in preparing for these procedures, such as the
statute, \(\text{SSS Regulations}\), or \(\text{Local Board Memos}\).

If the registrant seeks a personal appearance, he can appear in
person before the local board. Since he disagrees with the previ-
ous decision of the board, to him it is an adversary proceeding.

There is no procedure for challenging board members for ignor-
ance of the law, or of comparative religion, although such ignorance
may result in erroneous classifications. Neither can they be chal-
lenged for prejudice against the registrant because of his race, reli-
gion, haircut, apparel, or for general opposition to granting conscien-
tious objector or other types of deferments.

The registrant is specifically denied the assistance of counsel at
the personal appearance. He has no right to present witnesses in

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70 SSS Form 217 (Rev. 5-11-67).
71 See id.
Reg. 6961 (1967).
73 Id. § 1624.1(a), as amended, Exec. Order No. 11,350, 32 Fed. Reg. 6961
(1967).
75 Cf. MARSHALL COMM'N REP. 108-09.
76 32 C.F.R. § 1624.1(b) (1967). One board's explanation of its refusal
his behalf; this is discretionary with the board.\textsuperscript{77} He cannot cross-examine any private person, or board clerk, who may have spoken against his getting the deferment for which he applied. He is not told what, if any, evidence was presented to the board that affected its original decision. The board furnishes no stenographer to record the discussion at the personal appearance, and he cannot bring into the hearing a professional stenographer or tape recorder.\textsuperscript{78} He may be permitted to bring a friend to sit and listen so that he can later record what he recalls. The only transcript or record of the conduct of the appearance is made by the registrant himself, and should be submitted to the local board immediately after the appearance;\textsuperscript{79} it then becomes part of his file. However, the registrant is not told to submit such a report.

The personal appearance is never open to the public. Specific requests to attend board meetings for general informational purposes, and not due to interest in the particular cases to be considered, have been rejected.\textsuperscript{80} Similarly, requests by registrants to have open personal appearances which can be attended by family, friends, and the public, have been rejected even when the registrant has specifically waived his right to privacy.\textsuperscript{81}

The board members make no statement at the opening of the hearing concerning the rights of the registrant or the fact that anything he says may be used against him administratively by the System or in a later criminal prosecution. The advisor to the registrant is never present, although the local board may request the government appeal agent to attend.\textsuperscript{82}

The personal appearance has no form or structure. Frequently it opens with the registrant introducing himself to the board members and asking their names, which sometimes are not given. Local boards are not given instructions on the conduct of these appearances, nor to permit counsel at a personal appearance: "Since the registrant is under oath at the appearance, it is the policy, that the registrant represents himself."

Letter from Local Bd. No. 82, North Hollywood, Cal., to H. Berman, SS 4-82-43-1351, Feb. 23, 1968, on file in Meiklejohn Civil Liberties Library, Berkeley.

\textsuperscript{77} 32 C.F.R. § 1624.1(b) (1967).

\textsuperscript{78} See, e.g., account of personal appearance of John R. Miller, SS 4-42-43-326, before Local Bd. No. 42, San Francisco, on Jan. 23, 1968, at 2, in Meiklejohn Civil Liberties Library, Berkeley.


\textsuperscript{80} See, e.g., correspondence between Mrs. Donald C. Lee of Oakland, Cal., and local boards and the California and National Headquarters of the Selective Service System, Aug.-Oct. 1967, on file in Meiklejohn Civil Liberties Library, Berkeley.

\textsuperscript{81} Cf. letter from Local Bd. No. 82, North Hollywood, Cal., to H. Berman, SS 4-82-43-1351, supra note 76.

\textsuperscript{82} 32 C.F.R. § 1694.71(d) (2) (1967).
do they give instructions to registrants on what to do or say. Frequently the registrant goes to the appearance prepared to answer questions asked by the board members who, instead, are prepared to answer questions the registrant asks them. The board may impose any time limitations on the appearance they deem appropriate.

Since no indication was given to the registrant why his requested classification was rejected, he cannot know what he needs to prove in order to reverse the decision of the board members.

**Board's Decision**

The decision by the board after this personal appearance can be based on matters outside the record—the recommendation of the board clerk, confidential communications from General Hershey, and all other information "pertinent to the classification of a registrant, presented to it." There are no standards of proof to be met; there is no requirement, as in procedures followed by agencies governed by the Administrative Procedure Act, that reliable, probative and substantial evidence support the decision. The board is simply directed to consider the new information which it receives and, if the local board determines that such new information justifies a change in the registrant's classification, the local board shall reopen and classify the registrant anew. If the local board determines that such new information does not justify a change in the registrant's classification, it shall not reopen the registrant's classification.

The decision of one local board may be based on criteria or attitudes quite different from those of another board in the same area. There is no effort at uniformity of decision, since this is not considered a virtue. The important thing about local boards is that they are local men and women from the community, according to the proponents (particularly General Hershey) of the local board system.

Each decision by a local board is made with knowledge of future monthly calls, which vary from month to month and year to year, and are set by military agencies unconnected with the local board.

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83 E.g., account of personal appearance of John R. Miller, *supra* note 78, at 3.
84 32 C.F.R. § 1624.2(b) (1967).
86 32 C.F.R. § 1622.1(c) (1967).
88 32 C.F.R. § 1624.2(c) (1967).
89 See discussion of Sen. Morse's proposed amendment to the 1967 Act to encourage national criteria and uniformity of standards for classification, 113 Cong. Rec. 6761-79, 6773-74 (daily ed. May 11, 1967). (The amendment was defeated by a vote of 6 to 68. *Id.* at 6774).
After the personal appearance, the decision of the board is sent to the registrant without stating the reason for granting or denying the requested classification. The board’s notice tells the registrant he may appeal the classification within 30 days, and mentions that he is entitled to talk to an appeal agent from the appeal board. It does not state that the appeal agent has the dual responsibility to advise the registrant and the appeal board, and in no case does it advise whether the appeal agent is a lawyer. The registrant is not advised that he might profit from advice from a private attorney or draft counseling agency. Nor is he notified that General Hershey has ordered appeal agents (as well as legal advisors) to report any information they receive, from interviews with registrants or otherwise, concerning possible delinquency or statutory violations, in order to expedite reclassification, induction, or prosecution.

Appeal Board

When the registrant files his appeal with his local board, his file is sent to the appeal board, which usually consists of five members who are not subject to challenge. They must be citizens who are not members of the armed forces or the reserves, who are between 30 and 75 years old, with less than 25 years of service on the board. They must be residents of the area and representative of its activities, including one member each from industry and labor, one physician and one lawyer, and perhaps one from agriculture.

The registrant is not permitted to appear before the appeal board in person or by counsel. The board “shall not receive or consider any information other than the following: (1) Information contained in the record received from the local board. (2) General information concerning economic, industrial and social conditions.” Neither the Act nor the regulations spell out the standard of proof to be followed by the appeal board in considering classifications made by the local board.

In several jurisdictions where appeal board practices were studied in connection with criminal charges against registrants for draft refusal, it developed that the boards, staffed by volunteers, met once or twice a month to consider a tremendous volume of files. They decided a case every 10 seconds in a 4- or 5-hour session.

94 Id.
96 Margolis, Trying a Case under the Selective Service Law, 26 GUILD PRACTITIONER 100, 103 (1967).
If the decision of the appeal board is not unanimous, the registrant can appeal to the President. This is the third unstructured appeal. The registrant is given no form to fill out and no charges to answer.

Discretion of Director

The first "Miscellaneous Provision" in the SSS Regulations provides:

The Director of Selective Service, notwithstanding any other provisions of the regulations in this [classification] chapter, may direct that any registrant shall be classified or reclassified without regard to his eligibility for a particular classification.

Perhaps under the authority of this regulation, on October 26, 1967, General Lewis B. Hershey, Director of the System, sent a letter to all members of the System, which became public in November. General Hershey described the basic purpose of the System and the bases for reclassification in the letter, set out here in full:

The basic purpose and the objective of the Selective Service System is the survival of the United States. The principal means used to that end is the military obligation placed by law upon all males of specified age groups. The complexities of the means of assuring survival are recognized by the broad authority for deferment from military service in the National health, safety, or interest.

Important facts too often forgotten or ignored are that the military obligation for liable age groups is universal and that deferments are given only when they serve the National interest. It is obvious that any action that violates the Military Selective Service Act or the Regulations, or the related processes cannot be in the National interest. It follows that those who violate them should be denied deferment in the National interest. It also follows that illegal activity which interferes with recruiting or causes refusal of duty in the military or naval forces could not by any stretch of the imagination be construed as being in support of the National interest.

The Selective Service System has always recognized that it was created to provide registrants for the Armed Forces, rather than to secure their punishment for disobedience of the Act and Regulations. There occasionally will be registrants, however, who will refuse to comply with their legal responsibilities, or who will fail to report as ordered, or refuse to be inducted. For these registrants, prosecution in the courts of the United States must follow with promptness and effectiveness. All members of the Selective Service System must give every possible assistance to every law enforcement agency and especially to United States Attorneys.

It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions, or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not to destroy,
the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens.

Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and in some instances, even to violation of the Act and Regulations. Any material of this nature received in National Headquarters or any other segment of the System should be sent to State Directors for forwarding to appropriate Local Boards for their consideration.

A Local Board, upon receipt of this information, may reopen the classification of the registrant, classify him anew, and if evidence of violation of the Act and Regulations is established, also to declare the registrant to be a delinquent and to process him accordingly. This should include all registrants with remaining liability up to 35 years of age.

If the United States Attorney should desire to prosecute before the Local Board has ordered the registrant for induction, full cooperation will be given him and developments in the case should be reported to the State Director and by him to National Headquarters.

Evidence received from any source indicating efforts by nonRegistrants to prevent induction or in any way interfere illegally with the operation of the Military Selective Service Act or with recruiting or its related processes, will be reported in as great detail as facts are available to State Headquarters and National Headquarters so that they may be made available to United States Attorneys.

Registrants presently in Class IV-F or I-Y who have already been reported for delinquency, if they are found still to be delinquent, should again be ordered to report for physical examination to ascertain whether they may be acceptable in the light of current circumstances.

All elements of the Selective Service System are urged to expedite responsive classifications and the processing of delinquents to the greatest possible extent consistent with sound procedure. 99

One more aspect of the discretion of members of the System is set forth in the regulations:

Compliance by a local board or any other agency of the Selective Service System with any or all of the procedures prescribed by the regulations in this part [on delinquents] is not a condition precedent to the prosecution of any person under the provisions of section 12 of the Military Selective Service Act of 1967.100

Procedures in Conscientious Objector Cases

The procedure just described applies to all registrants, including applicants for conscientious objector status (I-O and I-A-O). However, a few more steps in CO cases must be described to present a


full picture of the due process problems in the Selective Service System.\(^{101}\)

When the 18-year-old registrant fills out the first classification questionnaire, it contains a paragraph entitled "Series VIII" which says:

\begin{quote}
(Do not sign this series unless you claim to be a conscientious objector)

I claim to be a conscientious objector by reason of my religious training and belief and therefore request the local board to furnish me a Special Form for Conscientious Objector (SSS Form 150).\(^{102}\)
\end{quote}

There is no explanation of the words "conscientious objector" or the phrase "by reason of religious training and belief." The words in an earlier version of Form 100, "I am conscientiously opposed to participation in war,"\(^{103}\) have been deleted. There is no suggestion on the form that the registrant may need advice in order to know whether he is qualified to sign this part of the form. The statutory definition of CO is not reprinted in the form; there is no reference to up-to-date material the registrant might consult to find an accurate definition of CO, such as the new statutory definition or the Supreme Court's definition in *United States v. Seeger*.\(^{104}\)

If any 18-year-old registrant does sign his name to Series VIII, he shortly receives a copy of SSS Form 150,\(^{105}\) which he must fill out and return within 10 days of the date it was mailed to him. The first item on the form requires a choice between I-A-O and I-O status, phrased as follows:

\begin{quote}
Series I.—CLAIM FOR EXEMPTION

\ldots

(A) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service in the Armed Forces.

(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces.
\end{quote}

Then the form gives the instruction: "Every item in this series must be completed. If more space is needed use extra sheets of paper," and asks:

\(^{101}\) *See generally* Handbooks for Conscientious Objectors (9th ed. A. Tatum 1967) (published by Central Committee for Conscientious Objectors).

\(^{102}\) Classification Questionnaire, SSS Form 100 (revised 9-15-66).

\(^{103}\) *Id.* (revised 3-22-61) (emphasis added).


\(^{105}\) Special Form for Conscientious Objector, SSS Form No. 150 (revised 2-9-59).
Series II.—RELIGIOUS TRAINING AND BELIEF

1. Do you believe in a Supreme Being? □ Yes □ No.

2. Describe the nature of your belief which is the basis of your claim made in Series I above [quoted supra], and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

3. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

4. Give the name and present address of the individual upon whom you rely most for religious guidance.

6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above?

Series III.—GENERAL BACKGROUND

5(a) State the religious denomination or sect of your father.

(b) State the religious denomination or sect of your mother.

Series IV.—PARTICIPATION IN ORGANIZATIONS

2. Are you a member of a religious sect or organization? □ Yes □ No.

(e) Describe carefully the creed or official statements of said religious sect or organization [to which you belong] in relation to participation in war.

The registrant answers these questions with the philosophical, religious, and rhetorical skill of an 18-year-old. Lawyers and draft counselors frequently describe the difficulties their clients have with these questions, whether they are 34-year-old doctors, 25-year-old philosophy or English majors, or 18-year-old high school dropouts. The form has not been changed since 1959. It does not reflect the decision of the Supreme Court in United States v. Seeger, which would require deletion of several of the questions listed above, changes in other listed questions, and a different tone to the form in general, recognizing the existence of sincere conscientious objectors.

The author’s experience is that registrants with an excellent command of the language and considerable education seek to write clear and meaningful answers to each question on the form; this takes considerable thought and redrafting, frequently resulting in lengthy essays. Registrants with little ability to communicate ideas and feelings by means of writing become more inhibited when faced with Form 150. They have difficulty putting down any meaningful answers.

without ties to organized churches.\textsuperscript{108} The form does not reflect the language of the 1967 statute that changed the definition of CO by deleting the italicized words:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. . . .\textsuperscript{109}

None of the words in the section are defined on the form, and there is no instruction booklet accompanying the form.

A careful reading of the form indicates that it is solely concerned with the religiosity of the registrant. No question asks for a discussion of the registrant's attitude about participation in war or in the mass use of armed force by soldiers to achieve a national objective, that is, war. The closest the form comes to asking about the registrant's belief in the use of military force is question 5, which says: "Under what circumstances, if any, do you believe in the use of force?" Many registrants have difficulty answering this question because they do not see "force" as solely related to "military force"; they consider the use of force a fact of physical or social life.

The form does not suggest that the registrant should supplement his answers on the form by filing letters in support of his claim. The form does not indicate the method by which the truth of the facts alleged by the registrant on the form will be investigated or the sincerity of the registrant ascertained by the local board. However, Series V says:

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war . . .

and provides for the names, addresses, occupations, and relationships of four persons.

Until July 1, 1967, the Act required the FBI to investigate each CO applicant who appealed the denial of a CO classification;\textsuperscript{110} all references were interviewed, as well as former employers and teachers listed elsewhere on the form. The FBI then prepared a report of its investigation which was given to the System; the registrant received only a resumé of the report, with all names of informants deleted and their identities somewhat masked. Several CO appli-


cants litigated the inadequacy and inaccuracy of the resumés. The 1967 Act eliminated this FBI investigation and report. There is now no procedure spelled out in the regulations or known to the public by which the validity of CO claims is investigated by the local board or any other part of the System. If no such investigations are being made by competent investigators, the continued use of Series V may mislead applicants so that they fail to ask references to send letters to the local board.

Many registrants do not fill out Series VIII at age 18 despite their conscientious objection to participation in war. Some CO's who have not been counseled and who are eligible for a II-S deferment or who expect to be disqualified on physical grounds assume they should not fill out the CO form until their other deferments are exhausted. And, in fact, under the regulations the CO application cannot be considered by the local board until other deferments have been exhausted, although it should be filed as soon as a registrant arrives at the CO position. Many CO’s firmly believe that applying for the Form 150 will prejudice their local boards against them and make it difficult for them to get other classifications to which they are entitled, such as II-S, IV-F, or I-Y. Some other registrants who are sincere pacifists and would qualify for CO status have never heard of the phrase “conscientious objection,” of I-O status, or of “alternative civilian service,” and the language of Series VIII on Form 100 does not strike them as being applicable to them until someone discusses it with them. Others know they are conscientiously opposed to participation in war, but know that they are not Quakers or members of any other peace church and therefore “know” they do not qualify and cannot sign.

Still others have no thoughts about conscientious objection to war at age 18. In this society there is a strong stigma attached to being a coward, and few youths at 18 are prepared to risk any challenge to their recently acquired manhood by admitting they are CO's or are thinking about philosophical problems of killing other human beings. After a few years in college or working, sometimes after becoming fathers, some young men of 20 or 22 discover that they cannot kill another human being; others decide they cannot kill in the present war. Some of these men learn about applying for CO status and request Form 150. A few come to this decision after being reclassified I-A, others on receipt of an induction order, and still

111 See cases cited note 12 supra.
112 See note 110 supra.
113 See 32 C.F.R. § 1623.2 (1967).
others only after enlisting or being inducted.\textsuperscript{115}

Any registrant who requests a copy of Form 150 after age 18 will be sent the form to complete and return. However, this will be considered “late filing” of the form by the local board, and the most important task for the registrant will be to convince the board that he is sincere in his antiwar beliefs despite his failure to fill out the form at age 18.

Under the 1967 Act, an applicant for CO status is treated the same as an applicant for any other type of deferment. If his request for I-O classification is rejected, he can request a personal appearance before his local board where the procedures described above prevail. On passage of the 1967 Act, the System amended the regulations to delete any discussion of the “Supreme Being” requirement.\textsuperscript{116} The regulations do not now contain any guidelines or standards for decisions on CO applications.

If the board again rejects the request for I-O status, the registrant may appeal to the appeal board, which decides the case without personal appearance by the registrant or his counsel, on the basis of the material in the file, and “general information concerning economic, industrial, and social conditions.”\textsuperscript{117}

The registrant may take a presidential appeal if the decision of the appeal board is not unanimous.\textsuperscript{118}

\textit{Special Problems of Black Registrants}

A Negro registrant from Watts or any other ghetto is more likely to be drafted after being found acceptable to the Army than a white youth.\textsuperscript{119} He is more likely to be killed in Vietnam\textsuperscript{120} than a white registrant. These are facts found by the Marshall Commission. Whether they prove that the System does not discriminate against black registrants and abides by the constitutional and statutory requirement of equal protection,\textsuperscript{121} or whether they prove unequal

\textsuperscript{115} See the procedures for applying for discharges from the armed services on the basis of having come to a conscientious objector position after entry into the service, AR 655-20, at issue in Brown v. McNamara, 263 F. Supp. 686 (D.N.J. 1967), appeal docketed, No. 16,454, 3d Cir. (July 1967).
\textsuperscript{119} Marshall Comm'n Rep. 22.
\textsuperscript{120} See id. at 26.
treatment\textsuperscript{122} may depend on whether one views compulsory military service as an opportunity to obtain an education and to serve one's country or as punishment or deprivation of liberty.\textsuperscript{123}

In any event, a registrant from any minority group is likely to go through the procedures just described encumbered by problems in addition to those faced by the white middle class registrant.\textsuperscript{124} Briefly stated, a black or brown\textsuperscript{125} registrant is less likely to be familiar with filling in forms and keeping copies of communications to and from the System. He is much less likely to have heard of conscientious objection to participation in war, or of SSS Form 150 on which to apply for it. Although he is more likely to be planning to contribute to the support of his parents, brothers and sisters, he is less likely to be aware that this entitles him to a III-A deferment, and he is more likely to be unemployed for a considerable period.\textsuperscript{126} He is more likely to be trying to get into an apprenticeship program that might entitle him to a II-A occupational deferment, and less likely to get in.\textsuperscript{127} He is also less likely to have had a thorough physical examination or to know the nature of physical disabilities from which he suffers.\textsuperscript{128} He probably has moved several times and will be unable to obtain old medical or other records. He probably cannot find an expert to consult about how to fill out classification Form 100 in order to describe accurately the reasons he should be deferred at age 18, or to express his right to a II-A, II-S, or III-A on the basis of the "deferred dreams"\textsuperscript{129} our society presently requires of virtually all members of minority groups.

If a black registrant surmounts many of these obstacles and ob-

\textsuperscript{122} For example, black registrants are less likely to plan to qualify for a II-S deferment because they cannot attend college full-time, for economic reasons. See U.S. Comm'n on Civil Rights, Racial Isolation in the Public Schools 79, 87 (1967).

\textsuperscript{123} See generally Dawley, Special Problems of Black Draftees, 26 Guild Practitioner 107 (1967).


\textsuperscript{126} C. Silberman, Crisis in Black and White 237 (1964).


\textsuperscript{129} Cf. L. Hughes, Montage of a Dream Deferred, in Selected Poems of Langston Hughes (comp. 1951):

What happens to a dream deferred?
Does it dry up like a raisin in the sun?
Or fester like a sore—and then run?
Does it stink like rotten meat?
Or crust and sugar over—like a syrupy sweet?
Or does it explode?
tains the forms to apply for a medical, occupational, dependency, or CO deferment, he is not likely to find on his local board or appeal board any member who understands and empathizes with his life style. Assuming that all 4,080 local boards have been reconstituted since July 1, 1967 to increase the proportion of minority group members, he may still face a board chaired by a white racist.\textsuperscript{130}

\textbf{Physical Examination}

If the appeal to the appeal board fails and there is no successful presidential appeal, the registrant will receive an order from his local board to report for a physical examination.\textsuperscript{131} Prior to the examination, there is almost no opportunity for a registrant to discover what physical defects result in classifications of IV-F (permanently unacceptable for physical reasons) or I-Y (temporarily unacceptable, to be reviewed periodically). Registrants are not told that there is a list of Medical Fitness Standards for Induction in Peacetime Army\textsuperscript{132} and, if they discover the existence of such a list,\textsuperscript{133} they cannot obtain copies of it by asking their local boards, the state director, the national director, or the Surgeon General’s office. Attorneys who have requested the list by name from these sources have, after some correspondence, obtained copies of a list, unannotated and without the recent supplements. The reason for keeping the list confidential is nowhere stated.\textsuperscript{134}

Army physical examinations are not conducted by the System; they are conducted by the Army at its induction centers. The System directs the civilian registrant to submit to the Defense Department examination under threat of a delinquency notice and immediate induction.\textsuperscript{135} The Defense Department has worked out a careful series of tests which each registrant must take individually over a number of hours. The examination is structured to tell the Defense Department whether the registrant can carry out the kinds of tasks he may be assigned as a draftee in the Army, and includes examina-

\textsuperscript{130} See Brief for Appellant, United States v. Du Vernay, No. 24,132 (5th Cir., filed appx. Oct., 1967) (on file in Melikian Civil Liberties Library, Berkeley), in which appellant alleges the draft board chairman has organizational ties with the Ku Klux Klan.

\textsuperscript{131} 32 C.F.R. § 1628.10 (1967).


\textsuperscript{133} Mentioned in 32 C.F.R. § 1628.1 (1967).


tions and tests of major parts of the body, IQ tests, and an emotional
evaluation, all given by trained doctors.136

This is the first structured, lengthy, exhaustive investigation of
any aspect of the registrant's eligibility for deferment or induction.
Attorneys with experience on draft cases have concluded that some-
times it is the worst place to prove a disabling physical defect because
of the mass nature of the examination. Letters from private physi-
cians taken to the examination tend to be given to the wrong official.
Often a member of the military requests the letter rather than an
examining doctor concerned with the specialty discussed in the letter.
However, the registrant who takes a letter or report from his phy-
sician concerning his defects or diseases will usually receive closer
attention (and perhaps even a consultation with a specialist) than
one who arrives empty-handed. Nevertheless, obvious defects that the
Army later finds are not infrequently overlooked at the examine-
tion. Some experienced counsel allege that “CO” is stamped on the
outside of the file of each registrant who has applied for I-O or I-A-O
status and that this may prejudice the decision on physical suit-
ability for service.

Loyalty-Security Examination

At the physical examination, the registrant is customarily given
a DD Form 98,137 designed to indicate whether the registrant is
acceptable to the Defense Department in terms of political be-
liefs, affiliations or memberships. The form lists all of the organiza-
tions on the Attorney General's list and asks the registrant a number
of questions about his relationship with the organizations or with
people related to them. Registrants report that an Army officer
usually tells the registrants to write “no” in answer to each question
and to sign their names at the bottom.

The form contains this language:

You are advised that in accordance with the Fifth Amendment of the
Constitution of the United States you cannot be compelled to furnish
any statements which you may reasonably believe may lead to your
prosecution for a crime. This is the only reason for which you may
avail yourself of the privilege afforded by the Fifth Amendment in
refusing to answer questions under Part IV below. Claiming the
Fifth Amendment will not by itself constitute sufficient grounds to
exempt you from military service for reasons of security. You are

136 But see Leong v. Woods, No. 921235 (Los Angeles Co. Super. Ct., filed
Nov. 9, 1967), alleging medical malpractice against a doctor at the induction
center examination who found plaintiff acceptable for military service despite
his serious and persistent psychiatric disorders. The complaint is on file in
the Meiklejohn Civil Liberties Library, Berkeley.

137 Armed Forces Security Questionnaire (June 1, 1959) (reprinted in full
in THE NEW DRAFT LAW: A MANUAL FOR LAWYERS AND COUNSELORS, supra
note 44, 235:67-::69).
not required to answer any questions in this questionnaire, the answer to which might be incriminating. If you do claim the privilege granted by the Fifth Amendment in refusing to answer any questions, you should make a statement to that effect after the question involved.

If a registrant answers anything other than "no" to any question, or if he refuses to answer any question on the basis suggested, or on any other basis (first amendment freedom of thought, right of privacy), he is usually taken out of the normal processing and called into a room where he is questioned by someone from Military Intelligence, and occasionally, also by a psychiatrist. From that point forward, the procedure is similar to any other government loyalty-security check. The standards used by Military Intelligence are no more precise than those used by civil service.

After some months, the registrant receives a notification from the Defense Department, not from the System, that he is acceptable or unacceptable on security grounds. If he is found unacceptable, he will not be drafted unless he appeals from the classification, has a successful hearing and is declared acceptable.

Conclusion of SSS Procedure

Sometime after successful completion of the physical examination, the local board sends the registrant an induction order. At this point, all of the procedures of the SSS have been concluded. Nothing remains to be done by the System; it remains only for the registrant to appear for induction under the order. The procedure is thus different from that followed at the time of Falbo v. United States, when the physical examination took place at the time the registrant appeared for induction, and many who appeared for induction were rejected at that point.

Under current procedures, 10 to 15 percent of the registrants are rejected when they report for induction. The possibility that the registrant will not be inducted rests primarily with the inductee at this point. He may refuse induction. Or he may refuse to fill out DD Form 398, which contains loyalty-security questions similar to those on DD Form 98. If he does the latter, the military authorities at the induction center may process him for induction anyway (particularly if he had previously been cleared after refusal to fill out Form DD 98); they may call their central loyalty-security

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139 320 U.S. 549 (1944).
140 See id. at 533 & n.7.
141 MARSHALL COMM'N REP. 201.
142 Family History Questionnaire (pertinent questions on the form reprinted in THE NEW DRAFT LAW: A MANUAL FOR LAWYERS AND COUNSELORS, supra note 44, at 235:69).
data center and quickly decide whether to induct him anyway, or they may send him home and conduct a regular Military Intelligence check. These alternatives are open to the Army only if the registrant behaves in a certain manner, and none of the alternatives requires any further action by the Selective Service System, which completed its work concerning the registrant when it ordered him inducted.

**Delinquency**

When a registrant performs certain acts, such as returning his draft card to his local board, or fails to perform certain acts, such as appearing for his physical examination, the local board may send him a delinquency warning:

1. You are hereby notified that this Local Board is considering declaring you to be a delinquent because of your failure to perform the following duty or duties required of you under the selective service law: [e.g., to have in your possession a valid registration certificate and a valid registration card].

2. You are hereby directed to report to this Local Board immediately in person or by mail, or to take this notice to the Local Board nearest you for advice as to what you should do.

3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act, as amended, and such failure may result in your being declared delinquent. A delinquent registrant loses his eligibility for deferment and may be placed in a class immediately available for service. He is ordered for induction ahead of other registrants.

4. This Local Board may excuse your delinquency status if it finds that the reason for noncompliance was not willful and you comply. In any event, this document becomes part of your permanent selective service file and should such delinquency be excused any further noncompliance on your part could result in your immediate induction.\(^{143}\)

The warning may be followed by a delinquency notice, or the notice may be sent without the warning. The language in the delinquency notice is identical to the language in the warning, except that paragraph one announces that the local board "has declared" the registrant a delinquent, and paragraph 3 reads:

3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act, as amended, which is punishable by imprisonment for as much as 5 years or a fine of as much as $10,000, or by both such fine and imprisonment. You may be classified in class I-A as a delinquent and ordered to report for induction.\(^{144}\)

These forms indicate an awareness on the part of the board that the registrant has committed an act or failed to perform an act that may result in his immediate reclassification and induction or his prosecution for draft refusal. Yet neither form suggests that the

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\(^{143}\) Cal. Selective Service System, Delinquency Warning, Cal. form No. 304 (undated).

\(^{144}\) Delinquency Notice, SSS Form No. 304 (5-26-65).
registrant consult with an attorney, that he has a right to bring counsel with him when he reports to the local board "for advice as to what you should do," that when he reports he will have the right to remain silent and the right to exercise the privilege against self-incrimination, that anything he says when he reports may be used against him in a later criminal prosecution (or a later administrative proceeding within the System), or that he may stop the proceedings at any time in order to consult his attorney.145

Yet a finding of delinquency is clearly the first step in a series of actions by the System that will inevitably result in the registrant's becoming a defendant in a federal criminal case unless the registrant renounces his previous action and performs the act he previously refused to perform, or the government, for its own reasons, chooses not to prosecute him. The fact that delinquency is a stage in the administrative proceedings cannot change the fact that it is also a stage in the criminal proceedings.146

The language in the delinquency warning and notice indicates that the System recognizes that the registrant who receives these forms has reached a critical stage in the criminal proceedings, under the standards set in Escobedo v. Illinois.147 If so, the rule of United States v. Wade148 would seem to be applicable:

In sum, the principle of Powell v. Alabama149 and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.150

In a companion case to Miranda v. Arizona,151 the federal government admitted in its brief that it had "no doubt ... that it is possible for a suspect's Fifth Amendment right to be violated during in-custody questioning by a law-enforcement officer."152 Considering the age and probable inexperience of the delinquent registrants, the general failure to consult counsel prior to going to the local board, and the prohibition against bringing counsel to the local board for a personal appearance, it seems likely that some or all registrants may

149 287 U.S. 45 (1932).
150 378 U.S. at 227.
152 Id. at 463 (quoting from brief, Westover v. United States, 384 U.S. 436 (1966)).
have their fifth amendment rights violated during questioning by someone from the local board when they comply with the delinquency warning or notice and report for pretrial confrontation under circumstances in which the registrants believe they must answer.\textsuperscript{153}

\textit{Appearance for Induction}

Under the 1967 Act, a registrant who wants to challenge any action of the System (such as the local board's rejection of his application for a deferment or exemption on any ground, the appeal board's affirmance of that rejection, the decision on a presidential appeal, or the finding of delinquency), can do so only by making himself liable for criminal prosecution for refusal of induction.\textsuperscript{154} Under decisions since \textit{Falbo v. United States},\textsuperscript{155} the registrant must appear at the induction center at the appointed time and refuse to take the symbolic step forward into the Army and the oath in order to exhaust his administrative remedies. Failure to do this allegedly will result in his being unable to raise in a later criminal prosecution for draft refusal all of the issues concerning the administrative process.\textsuperscript{156}

If the registrant appears for induction and refuses to take the step forward, frequently he is asked to sign a statement indicating that he has refused induction. That is, the registrant is customarily required to incriminate himself both by the act of refusal and in writing. A registrant who announces to the authorities in charge of the induction center at the beginning of the proceedings that he plans to refuse induction is not warned that anything he says or does or writes can and will be used against him in a court, that he has a right to the assistance of counsel and to consult counsel before deciding whether to sign the statement concerning his refusal, that he has a right to ask counsel to accompany him to the FBI interview conducted later the same day, or that he has a right to refuse to sign the statement. Similarly, the registrant who makes no announcement but simply does not complete the induction process is given no warning. The file is sent to the local board and then to the state director of Selective Service, who reviews the file and recommends further action by the board (reclassification or reopening,\textsuperscript{157} if there

\textsuperscript{153} Compare the description of reactions of Yale undergraduate and graduate students to questioning by FBI agents in connection with the return of draft cards at Yale. Faculty Note, \textit{77 Yale L.J.} 300 (1967). \textit{See also} Local Board Memorandum No. 85 (Oct. 24, 1967).

\textsuperscript{154} See text accompanying notes 160-64 \textit{infra}.

\textsuperscript{155} 320 U.S. 549 (1944).

\textsuperscript{156} \textit{See Estep v. United States}, 327 U.S. 114, 115-16, 123 (1946). However, in some cases defense counsel have raised all issues despite failure of the defendant to appear for refusal of induction. \textit{See, e.g.}, Margolis, \textit{Trying a Case Under the Selective Service Law}, \textit{26 Guild Practitioner} 100 (1967).

are flagrant errors in procedure) or recommends that the board forward the file to the United States Attorney, where it is reviewed further.

**Criminal Charge**

When the administrative determination is adverse to the registrant, there is no way to compromise a draft case, as can be done with a tax case, for instance. The System will not settle for a registrant continuing to work for the government in a nonmilitary occupation, such as a school teacher, when the Defense Department increases the quotas enough so that registrants must be reclassified from II-A to I-A. If a registrant is not willing to perform military service for the government when ordered to do so, and the government rejects his offer to perform alternate civilian service as a CO, he cannot pay money and hire a substitute, as he once could. Nor can he enter the service with the understanding that he is willing to defend the continental United States but that he is unwilling to fight overseas in wars he considers unnecessary, a demand that seems to go back to Magna Carta.

At no point is there the kind of judicial review available in a lawsuit concerning matters of property, tort, or contracts. At no point is there a plenary hearing before an impartial tribunal on the merits of the registrant's claim for deferment. The 1967 Act seems to eliminate all judicial review in noncriminal preinduction proceedings, although the constitutionality of this section is now before three-judge courts convened in the Northern District of California and the Southern District of New York, and on a peti-

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159 See Magna Carta, Ch. 16, discussed in W. McKechnie, Magna Carta: A Commentary on the Great Charter of King John with an Historical Introduction 306-08, 86-88 (1965) and proposal by Sen. Gruening to amend the 1967 Act to prohibit the sending of drafted men to fight in Viet Nam without their approval. 113 Cong. Rec. 6,754, 6,756 (daily ed. May 11, 1967).
160 See Select. Serv. Act § 8(c), amending 50 App. U.S.C. § 460(b)(3) (1964): "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: Provided, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant." Cf. Iracl v. Scanlon, 202 F. Supp. 42 (E.D.N.Y. 1961).
162 Boyd v. Clark, No. 67 Civ. 2529 (S.D.N.Y., filed June 29, 1967) (amended complaint, supplemental memorandum in support of motion for
tion for certiorari pending before the United States Supreme Court.\textsuperscript{163}

When the registrant is charged with violation of the Act, either by information or indictment, the issues in the criminal case are limited by the prosecution to three: (1) is this defendant the person who was ordered inducted; (2) did this defendant refuse induction; (3) is there no "basis in fact"\textsuperscript{164} for the classification by the draft board.

\textbf{From the Point of View of the Local Draft Board}

The Selective Service System is an administrative agency supervised by a Director appointed by the President and responsible directly to him.\textsuperscript{165} Since passage of the peacetime draft law of 1940, this position has been held by General Lewis B. Hershey, whose name has become synonymous with the draft.

The Director prescribes regulations and issues forms with the force of regulations.\textsuperscript{166} The regulations are published in the \textit{Federal Register} without notice or hearing and can be changed at any time by the Director. They may be changed when System practices are criticized by government committees.\textsuperscript{167} How promptly local boards receive copies of new regulations and \textit{Local Board Memos} is not known to the author.

In addition, the Director sends to members of the System letters and memos that are neither regulations nor \textit{Local Board Memos}. These letters are considered by many local board clerks to be confidential and will not be shown to registrants or their counsel on request. (This refusal sometimes continues after the letters are published in the daily newspapers.)\textsuperscript{168}

Under the regulations, calls are placed by the Secretary of


\textsuperscript{164} Select. Serv. Act § 8(c), \textit{amending} 50 App. U.S.C. § 460(b)(3) (1964), provides in part that judicial review "shall go to the question of . . . jurisdiction . . . only when there is no basis in fact for the classification . . . ."


\textsuperscript{166} 32 C.F.R. § 1606.51 (1967).


Defense with the Director of the System, who allocates among the several states the number of men to be inducted. The state directors allocate the number of men required from each local board. There is no procedure by which a local board or a state director can appeal from its allotted number. The local boards make the order of selection for induction on the basis of the regulations and deliver the men for induction.

The selective nature of the process is built into the system as well as being part of the name of the agency. Problems with fairness of selection have long been apparent, and the Marshall Commission report is entitled, significantly: In Pursuit of Equity: Who Serves When Not All Serve? Most of the proposals of the Marshall Commission to insure greater equity were not included in the 1967 Act, nor were a number of due process reforms suggested by Senator Morse.

**Intent of Congress**

After some argument, the 1967 draft law was entitled the Military Selective Service Act of 1967. The title accurately reflects the nature of the system it covers: a selective system of military service, not a universal system. The Act lists categories of men who do not need to register with the System, categories of men who do not need to serve while they are engaged in work of certain kinds, and a category of men who do not need to serve in the military. Under the Act, selection of men to fit into each category is given to the local civilian boards, with the civilian appeal procedure already described.

Congress declared in the Act its intentions on the method by which these selections are to be made:

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3. Id. § 1631.6 (1967).
5. Id. § 1632.1 (1967).
11. See 50 App. U.S.C. § 460(b) (3) (1964), as amended, Sele. Serv. Act § 8. Query: Does 32 C.F.R. § 1622.60 (1967) contradict this plan for civilian operation of the System by giving unfettered discretion on all classifications to the Director, who comes from the military and whose ties to the armed forces may not have been completely severed?
The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.\footnote{180}

This section is quoted in the regulations: "Classification is the key to selection and it must be accomplished in the spirit of the ... Act ..."\footnote{181}

Elsewhere in the Act the concept of fairness in procedures is also mentioned. One section discusses the utilization of industry to obtain prompt delivery of military materials whose procurement has been authorized by Congress, and directs the President to grant "a fair share" of the orders to American small business, and that "fair and just compensation" shall be paid for such articles.\footnote{182} The System has not issued any regulations under these sections so that it is not possible to know what procedures might be devised for insuring fairness.

It is significant, then, that Congress has provided that fairness shall be the rule in each of the three fields of procurement required by a military action: men, materiel, and money. The Director acknowledged this direction in the regulations issued to govern the procurement of men.\footnote{183}

More Questions To Be Answered

Regardless of congressional intent, the Constitution guarantees certain minimum standards of due process, and Congress has guaranteed others in the Administrative Procedure Act,\footnote{184} made applicable to most federal administrative agencies, though not to the Selective Service System.\footnote{185} These minimum standards will be summarized in a chart in Part II, together with the constitutional, decisional, and statutory authority for each. The chart will then indicate which of these standards the System is now required to meet under the Act, its regulations, Local Board Memos, or other directives from General Hershey.

\footnote{180}{50 APP. U.S.C. § 451(c) (1964).}
\footnote{181}{32 C.F.R. § 1622.1(b) (1967).}
\footnote{182}{50 APP. U.S.C. §§ 468(a), (d).}
\footnote{183}{But cf. Amendment No. 523 submitted by Sen. Long (Mo.) to S. 1195, 90th Cong., 2d Sess. (1967), to establish an Office of Administrative Ombudsman with jurisdiction over certain federal agencies, to add the Selective Service System to its jurisdiction because "I have been hearing more and more complaints about the operation of the Selective Service System. To date, it does not appear that the System is altogether responsive to them." 114 CONG. REC. 935 (daily ed. Feb. 6, 1968).}
This analysis leads to a series of questions concerning criminal due process and the federal administrative proceedings conducted by the System:

Should the due process standards guaranteed in a federal criminal case govern a proceeding that will become a federal criminal case if the administrative decision is contested? If so, what is the critical stage at which the administrative proceeding becomes the first step in the criminal case? Does the intent of the agency to punish certain registrants for their behavior change the character of the administrative proceedings as to those registrants, making them eligible, at an earlier stage in the administrative proceedings, for the due process accorded criminal defendants? And if the registrants exercise the liberties guaranteed under the first amendment to express their opposition to the war, can the System declare them delinquent and pave the way for their induction or prosecution without according them due process required in criminal cases? In addition, if conscription would result in deprivation of the liberty of a registrant, can he demand the procedural due process to which he would be entitled if conscription were labelled "punishment"?

The next series of questions concerns standards of administrative fairness and the System:

If the federal criminal due process standards in federal criminal cases should not govern the System, should the minimum standards of fair procedure required by the Administrative Procedure Act govern this agency, now exempt from all of the formal requirements of that Act? If not, what are the minimum standards of fair procedure for an agency not fully covered by the Act, such as the Immigration and Naturalization Service? Are its functions similar enough to those of the Selective Service System to warrant its minimum standards governing the System?

If none of these models will fit the System, what standards should govern it? Is it necessary for the local board to be an impartial decision-making agency, like a court or hearing officer? Is it possible for the board to reach each individual decision on classification in a fair and impartial manner when it is aware that it must meet its share of a call based on military needs rather than on its previous classifications? Is it necessary to have an effective right to appeal from the local board to a higher administrative agency? Since the System boasts that "There is no broader or more
easily effected appeal privilege in any similar governmental structure,"\textsuperscript{180} can it find a way to provide, not only the mechanics of appeal, but the essence of effective administrative appeals?

The final question is a pragmatic one, but it must be posed: If the System is not now meeting the requisite standards in the processing and classification of every American male between the ages of 18 and 36, can it solve the practical problems of providing procedural fairness to each?

\textsuperscript{180} \textsc{Selective Service System, Taking Appeals from Selective Service Classifications} (1967).