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SELECTIVE SERVICE—Processing Post-Induction Notice Conscientious Objectors' Claims—*Ehlert v. United States*[1]

William Ward Ehlert was convicted by the District Court for the Northern District of California for failure to submit to induction into the Armed Forces in violation of the Military Selective Service Act of 1967.[2] At his trial, Ehlert moved for acquittal asserting that his local board had refused to reopen his draft classification.

By statute, the only opportunities a registrant has for *judicial* review of his local board's refusal to reopen his classification are to raise that refusal as a defense to his indictment for failure to submit to induction at trial, or to base a habeas corpus proceeding on that refusal after he has been inducted.[3] The scope allowed the courts for such review is limited to the question of whether or not the decision of the local board had a "basis in fact."[4] If the court determines that there was a "basis in fact" for the local board's decision, it must be sustained. William Ehlert challenged his local board's refusal to reopen his classification, and the district court was obliged to review that refusal within this limited context.

The facts show that Ehlert received his Order to Report for Induction[5] June 14, 1964. It was not until afterwards that he filed his conscientious objection claim.[6] His local board considered the claim and subsequently notified[7] Ehlert that it refused to reopen his classification based upon its determination that "the information submitted on SSS form 150 was not a change in your status which was beyond your control."[8]

The phrasing of the local board's notification refers to Selective Service regulation 1625.2[9] which grants a local board the discretion to reopen and reconsider a registrant's classification based on "facts not con-

1. Ehlert v. United States, 402 U.S. 99 (1971).
2. 50 U.S.C. App. § 462 (a) (Supp. V, 1970).
3. *Id.* § 461.
4. *Id.*
5. SSS Form No. 252.
6. SSS Form No. 150.
7. By Selective Service regulation, if reopening of a registrant's classification is not granted, the only requirement is that the local board notify the registrant of the denial. 32 C.F.R. § 1625.4.
8. Ehlert v. United States, 422 F.2d 332, 333 (9th Cir. 1970), quoting the local board's notification to Ehlert.
9. 32 C.F.R. § 1625.2.

sidered when the registrant was classified, which, if true, would justify a change in the registrant's draft classification. . . ."[10] However, this discretion is limited by a proviso that reopening a registrant's draft classification after the Order to Report for Induction has been mailed is prohibited, "unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."[11] Ehlert's local board found that his conscientious objection claim was not a change in his status which was beyond his control and, therefore, refused to reopen his classification.

Ehlert subsequently refused to submit to induction, and he challenged the local board's finding at his trial. The district court denied his challenge, ruling that changes in status involving conscientious objection are not beyond the control of the registrant.[12] Ehlert then appealed to the United States Court of Appeals asserting that ruling as error.

In an en banc decision,[13] the United States Court of Appeals for the Ninth Circuit held "that a crystallization of, or a change in, a registrant's views on conscientious objection is not a change in his status resulting from circumstances over which he has no control. . . ."[14] The district court's judgment was affirmed.

The court's opinion was primarily oriented to the practical problems which would confront local boards in handling post-induction order conscientious objection claims. It specified that the Selective Service regulation allowed post-induction notice reopening of a classification only in those situations in which a registrant could present objective evidence of a change in his status beyond his control, such as in cases involving claims for "extreme hardship"[15] or "sole surviving son"[16] exemptions. The fact that there would be a span of time between a registrant's receipt of his Order to Report and his actual induction during which he would not be able to make a conscientious objection claim was not deemed relevant since such a claim would not be manifested by similarly objective evidence. Because the court ruled a post-induction notice claim was out of the purview of the regulation, it did not directly consider

10. *Id.*
11. *Id.*
12. Ehlert v. United States, 422 F.2d at 333.
13. Thirteen judges sat to decide this case. In addition to the court's opinion, there were two major concurring opinions joined in by five judges and a dissenting opinion joined in by five others.
14. Ehlert v. United States, 422 F.2d at 335.
15. 32 C.F.R. § 1622.30(b).
16. *Id.* § 1622.40(a)(10).

the question of whether a change in conscience is beyond one's control. The only allusion to that question was the statement that: "Presumptively, every human is a rational being, having a free will and in complete charge of his own thinking."[17]

The United States Supreme Court granted certiorari[18] to the Ninth Circuit on Ehlert's petition. The Court specified in its decision that its purpose in granting certiorari was "to resolve a conflict among the circuits over the interpretation of the governing Selective Service regulation [1625.2]."[19] The Court pointed out by footnote[20] that, at the time of its decision, the Fourth,[21] Fifth,[22] and Sixth[23] Circuits were in accord with the Ninth Circuit's decision in *Ehlert*. The First,[24] Second,[25] Third,[26] Seventh,[27] and Tenth[28] Circuits held the contrary. The United States Supreme Court affirmed the decision of the Ninth Circuit, holding:

> [T]hat the Court of Appeals did not misconstrue the Selective Service regulation in holding that it barred presentation to the local board of a [conscientious objection] claim that allegedly arose between mailing of a notice of induction and the scheduled induction date.[29]

THE MAJORITY OPINION

In arriving at this conclusion, the Court focused its attention on the problems caused by late conscientious objection claims. In the Military Selective Service Act of 1967, Congress gave the President the authority "to prescribe the necessary rules and regulations to carry out the provisions . . . [of the Act]."[30] Implicit in this authority is the power to make rules concerning the timeliness of claims of exemption from service. The regulations as to timeliness must be reasonable, and the Court stated its belief that:

> A regulation explicitly providing that no conscientious objector claim could be considered by a local board unless filed before

17. Ehlert v. United States, 422 F.2d at 334.
18. Ehlert v. United States, 397 U.S. 1074 (1970).
19. Ehlert v. United States, 402 U.S. at 101.
20. *Id.*, n.3 at 101.
21. United States v. Al-Jamied Mohammad, 364 F.2d 223 (4th Cir. 1966).
22. Davis v. United States, 374 F.2d 1 (5th Cir. 1967).
23. United States v. Taylor, 351 F.2d 228 (6th Cir. 1965).
24. United States v. Stoppelman, 406 F.2d 127 (1st Cir. 1969) (dictum).
25. United States v. Gearey, 368 F.2d 144 (2d Cir. 1966), *cert. denied*, 389 U.S. 959 (1967).
26. Scott v. Commanding Officer, 431 F.2d 1132 (3d Cir. 1970).
27. United States v. Nordlof, 440 F.2d 840 (7th Cir. 1971).
28. Keene v. United States, 266 F.2d 378 (10th Cir. 1959).
29. Ehlert v. United States, 402 U.S. at 107-08.
30. 50 U.S.C. App. § 460(b)(1).

> the mailing of an induction notice would . . . be perfectly valid *provided that* no inductee could be ordered to combatant training or service before a prompt, fair, and proper in-service determination of his claim." (Emphasis added.)[31]

The proviso in the Court's hypothetical regulation was meant to safeguard "[t]he only unconditional right conferred by statute upon conscientious objectors [which] is exemption from *combatant* training and service."[32]

Even though such an explicit regulation would leave a period of time between the mailing of the induction notice and the actual induction in which a conscientious objection claim could not be considered by the local board, the Court relied on the availability of a forum for "late" conscientious objectors under military law to sustain its reasonableness. The Court specifically based its conclusion that post-induction notice conscientious objection claims are barred from being presented to the local board on the assurance of the General Counsel of the Army that presentation of such claims are allowed in the military.[33] This assurance satisfied the majority of the Court that a forum would be available for the "late" conscientious objector to present his claim.

With a forum assured, the Court changed its focus from its hypothetical regulation, which would absolutely bar a local board from considering post-induction notice conscientious objection claims, to Selective Service regulation 1625.2. On its face, that regulation bars reopening of a registrant's classification after the mailing of the Order to Report for Induction for *any* claim, unless the local board first specifically finds that the claim amounts to a change in the registrant's status resulting from circumstances beyond his control.[34] The majority of the Court found the language of the regulation ambiguous. In its search for the meaning of the regulation, although it conceded that the Government's construction of the language of the regulation was not the only possible one, the Court felt "obligated to regard as controlling a reasonable, consistently applied administrative interpretation if the Government's be such."[35] Therefore, it adopted what it considered to be the Government's reasonable interpretation confining the application of the regulation "to those 'objectively identifiable' and 'extraneous' circumstances . . ."[36] such as injury to the registrant or death in his family making him a sole surviving son.

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31. Ehlert v. United States, 402 U.S. at 101.
32. *Id.* at 102, citing 50 U.S.C. App. § 456(j) (Supp. V, 1970).
33. *Id.* at 107.
34. *See* p. 334 *supra.*
35. Ehlert v. United States, 402 U.S. at 105.
36. *Id.*

As a result of this line of reasoning, the United States Supreme Court reached its holding.[37] The immediate effect of this decision was to uphold William Ehlert's conviction for failure to submit to induction. The long-reaching effect of the *Ehlert* decision will be to unify the law of the ten circuits of the United States Court of Appeals. Now that the Supreme Court has decided the issue of post-induction notice conscientious objection claims, they will be a simple matter for local boards to regulate. Any post-induction notice conscientious objection claimant will have to wait until he is in the Armed Services to raise his claim.

THE LANGUAGE OF THE REGULATION

The Supreme Court has streamlined the process of the Selective Service System by its decision in *Ehlert*, and yet the means by which this decision was reached are not free from question. This article will attempt to discuss some criticisms of the decision and, ultimately, to provide an alternate solution to the problems presented when conscientious objection claims are not made until after the receipt of the Order to Report for Induction.

As mentioned above,[38] by the Military Selective Service Act of 1967, Congress delegated authority to the President to make the rules to carry out the provisions of the Act. The executive branch of the government has drafted such regulations for the administration of that statute through the Selective Service System. Although the Court felt that its hypothetical regulation, which *explicitly* barred a local board's consideration of a conscientious objection claim unless it was filed before the mailing of an induction notice, "would be entirely reasonable as a timeliness rule,"[39] that is not the regulation that was drafted.

The language of the proviso in 1625.2 applies when a registrant makes a claim after the mailing of the induction notice. On its face, the proviso is broadly phrased and seems to deny reopening for *any* post-induction notice claim unless the local board first makes its specific finding that there has been a change in the registrant's status resulting from circumstances beyond his control. It cannot be disputed that "the regulation was meant to cover at least such nonvolitional changes as injury to the registrant or death in his family making him the sole surviving son."[40] Indeed, its broad language indicates that it covers *all* "nonvolitional changes."

37. *See* p. 335 *supra.*
38. *Id.*
39. Ehlert v. United States, 402 U.S. at 102.
40. *Id.* at 104.

The majority of the Court found the language of the regulation ambiguous. This was largely due to the Government's urging "that the regulation be confined to . . . 'objectively identifiable' and 'extraneous' events and circumstances."[41] Because the Court determined that the language of the regulation was "not free from doubt, [it was] obligated to regard as controlling a reasonable, consistently applied administrative interpretation if the Government's be such."[42] Therefore, the Government's suggested restriction of the meaning of the regulation was adopted, excluding post-induction notice conscientious objection claims from its purview.

There is reason to believe that the Government's was not a consistently applied administrative interpretation. Justice Brennan, in his dissenting opinion, pointed out that:

> Judicial interpretation of an ambiguous regulation is to be informed by reference to *administrative practice* in interpreting and applying a regulation, not by reference to positions taken for the purpose of litigation.[43]

He went on to point out that "the national Selective Service office has apparently made no national administrative interpretation of the regulation";[44] that the state Selective Service headquarters of only North Carolina and California have interpreted the regulation; and that their interpretations require local boards to consider whether a late conscientious objection claim was a change in conscience over which the registrant had no control.[45]

In addition, there is some question of the reasonableness of the Government's interpretation of the regulation. As will be developed in greater detail subsequently, there is a serious question whether a moral decision that an individual cannot participate in armed conflict is a decision which is within his control. Only if this question can indeed be deemed doubtful should administrative practice be at all relevant.[46]

The Military Forum

After choosing to exclude changes in conscience from the purview of Selective Service regulation 1625.2, the Supreme Court relied on the availability of military jurisdiction as the forum for processing those

41. *Id.* at 104-05.
42. *See* p. 336 *supra.*
43. Ehlert v. United States, 402 U.S. at 119.
44. *Id.*
45. *Id.* at 120.
46. Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315 (1933).

conscientious objection claims which crystallize between the mailing of the Order to Report for Induction and the actual induction.[47] In so doing, the Court emphasized the need for some forum for post-induction notice conscientious objectors:

> It would be wholly arbitrary to deny the late crystallizer a full opportunity to obtain a determination on the merits of his claim to exemption . . . just because his conscientious scruples took shape during a brief period in legal limbo.[48]

The Department of Justice conveyed to the Court the assurance of the General Counsel of the Army guaranteeing a military forum for those whose conscientious objection crystallizes in the period between induction notice and induction. The majority of the Court indicated that its decision would vary if "neither the local board nor the military had made available a full opportunity to present a prima facie conscientious objection claim. . . ."[49]

Absent the assurance of the General Counsel this result can be challenged on the basis of the Army Regulations. Army Regulation No. 635-20, § 3b provides:

> Federal courts have held that a claim to exemption from military service under Selective Service laws must be interposed prior to notice of induction, and failure to make timely claim for exemption constitutes waiver of the right to claim. . . . Requests for discharge after entering military service will not be favorably considered when—(1) Based on conscientious objection which existed, but which was not claimed prior to notice of induction, enlistment or appointment. (2) Based on conscientious objection claimed and denied by the Selective Service System prior to induction.[50]

As the Court of Appeals speculated in *United States v. Nordlof,* Army Regulation No. 635-20, § 3b(2) "might be interpreted to preclude claims that crystallized prior to induction but were denied by the Selective Service System because made after an induction order was mailed."[51]

Even with the Army's assurance, it is uncharacteristic for the Supreme Court to rely on military law when civilian jurisdiction is available. In *O'Callahan v. Parker*[52] it was held that a serviceman should be tried by civilian courts for a crime which was not service-connected but which was committed while he was in the Army. The Court recog-

47. *See* p. 336 *supra.*
48. Ehlert v. United States, 402 U.S. at 104.
49. *Id.* at 107.
50. Army Regulation No. 635-20, ¶ 3b. It is interesting to note that the Supreme Court cites only section (1) of this regulation, omitting (2). Ehlert v. United States, 402 U.S. at 106-07, n.10.
51. United States v. Nordlof, 440 F.2d at 845.
52. 395 U.S. 258 (1969).

nized that discipline was served by the military justice system but stipulated that: "[T]he justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty."[53] The Court's opinion in *O'Callahan* also cited an earlier decision *Toth v. Quarles,*[54] questioning the efficacy of the military justice system:

> [T]rial of soldiers to maintain discipline is merely incidental to an army's primary fighting function . . . . [I]t still remains true that military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.[55]

It is in this spirit that Justice Douglas dissented from the Court's decision in *Ehlert.* His analysis of the history of hostility in the Armed Services toward conscientious objectors led him to conclude that: "In a choice between civilian and military fact-finders dealing in an area of conscience clearly the former are to be preferred."[56] His conviction that "the military mind is educated to other values . . ."[57] than those on which conscientious objection is based undermines the guarantee of fair treatment for in-service conscientious objectors.

Furthermore, when a conscientious objection claim matures prior to induction, the registrant is still a civilian, even though that claim was not filed until after the Order to Report had been mailed. Although judicial review of Selective Service procedures is extremely limited, there are still occasions in which the judiciary may review the administrative decisions of the Selective Service System.[58] If these claims are to be processed only under military jurisdiction, the only appellate recourse from an adverse decision is within that same system.

In addition, there is an interesting paradox which may result from the Court's reliance on military jurisdiction to determine post-induction notice conscientious objection claims. The genuine conscientious objector may not find it amenable to his conscience to enter the Armed Services under any circumstances, choosing to refuse induction with the consequent jail sentence rather than to support a war effort by even being a part of the organization waging the war.[59] If this particular type of conscientious objector's beliefs crystallized after his induction notice

53. *Id.* at 265.
54. 350 U.S. 11 (1955).
55. *Id.* at 17, cited in O'Callahan v. Parker, 395 U.S. at 262.
56. Ehlert v. United States, 402 U.S. at 113.
57. *Id.* at 112.
58. *See* p. 333 *supra.*
59. United States v. Freeman, 388 F.2d 246, 248 (7th Cir. 1967).

had been mailed, he would be deprived of any alternative to imprisonment by the *Ehlert* decision.

Great weight was given to practical considerations in the Court's opinion in *Ehlert* restricting the meaning of the language of 1625.2. The Court decided that, "[I]t is wholly rational to confine it to those 'objectively identifiable' and 'extraneous' circumstances that are most likely to prove manageable without putting undue burdens on the administration of the Selective Service System."[60] It is submitted that this concern with the expeditious functioning of the Selective Service System must be balanced against the protection afforded religious beliefs in this country—generally by our Constitution[61] and specifically by the legislative exemption from military service of those opposed to war by virtue of their religious beliefs.[62]

In his dissent in *United States v. Nugent*,[63] Justice Frankfurter gave voice to this underlying concern:

> Considering the traditionally high respect that dissent, and particularly religious dissent, has enjoyed in our view of a free society, this Court ought not to reject a construction of congressional language which assures justice in cases where the sincerity of another's religious convictions is at stake. . . . The enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore prevailed in this country, to be overborne by military exigencies.[64]

The Control of Conscience Issue

Given a literal reading of its broad language, Selective Service regulation 1625.2 applies, on its face, to post-induction notice reopening of classifications for *all* nonvolitional changes in status. The focus of the *Ehlert* decision should have been on whether a post-induction notice conscientious objection claim fits the regulation as it exists.[65] In order to fall within the regulation's proviso[66] lifting the ban on reopening classifications after the Order to Report has been mailed, it must be determined whether a conscientious objection claim represents a change in status resulting from circumstances over which the

60. Ehlert v. United States, 402 U.S. at 105.
61. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." U.S. Constitution, Amend. I.
62. 50 U.S.C. App. § 456(j) (Supp. V, 1970). There have been like provisions in draft laws adopted by the United States Congress dating back to 1864.
63. 346 U.S. 1 (1952).
64. *Id.* at 12.
65. *See* p. 337 *supra.*
66. *See* p. 334 *supra.*

registrant had no control. The district court and Court of Appeals both found that changes in status amounting to conscientious objection were not changes resulting from circumstances beyond the registrant's control as a matter of law. The Supreme Court granted certiorari "to resolve a conflict among the circuits";[67] and, in the Court of Appeals decisions cited[68] to represent the conflict, the difference in results was consistently based on each circuit's decision as to whether a registrant did or did not have control over a change in his conscience.

The Ninth Circuit's opinion in *Ehlert* is typical of the opinions of the circuits which have held that a change in conscience is not a change in status resulting from circumstances beyond the control of the registrant. The only reference to conscience in that opinion was made indirectly in the court's assumption that every human is a rational being with a free will and in complete charge of his own thinking.[69] There was no real consideration of the nature of conscience nor of its controllability, and yet the court was able to conclude that post-induction notice conscientious objection claims were not changes in status resulting from circumstances outside the registrant's control.

On the other hand, the Second Circuit, in *United States v. Gearey*, reached the opposite conclusion without considering the nature of conscience and its controllability. It assumed that a change in conscience was beyond the registrant's control. The holding in that case was:

> If the Board finds . . . that the applicant's beliefs ripened only after he received his notice, and that his beliefs qualify him for classification as a conscientious objector then a change in status would have occurred "resulting from circumstances over which the registrant had no control" . . . .[70]

There have been some more detailed analyses of the nature of conscience in this line of cases. In *Scott v. Commanding Officer*, the majority opinion glossed over the question of conscience and its control with the categorical statement that: "By common definition, beliefs of conscience are always beyond one's control. . . ."[71] In his concurring opinion, Judge Aldisert took the majority to task for its sweeping rule and simplistic analysis of a complex behavioral science problem. His analysis was steeped in the theories of such luminaries in psychology and philosophy as William James, Bertrand Russell, and David Hume among others. He distinguished between the rational, intellectual activity

67. Ehlert v. United States, 402 U.S. at 101.
68. Cases cited notes 20-28 *supra*.
69. Ehlert v. United States, 422 F.2d at 334.
70. United States v. Gearey, 368 F.2d at 150.
71. 431 F.2d at 1136.

of the deliberative process which is controlled and the process of conclusion which is not clearly within control. It was his decision that evidence which is honestly considered in the deliberative process will *compel* a particular conclusion which is, therefore, outside the deliberator's control. As a result of this analysis, Judge Aldisert concluded that the acquisition of conscientious objection beliefs may be beyond a registrant's control, but that this is a fact determination, depending on how he arrived at his beliefs, to be made by the local board.

In the Ninth Circuit's opinion in *Ehlert*, Judge Merrill, dissenting, disagreed with what he considered the majority opinion's implication that it is within the control of a true conscientious objector not to become one, believing instead that, "[A] conviction honestly dictated by conscience cannot be banished at the will of the holder. . . ."[72]

In *United States v. Nordlof*, the Seventh Circuit gave a comparatively detailed analysis of the nature of conscience, agreeing with Judges Aldisert and Merrill. In the *Nordlof* court's analysis of conscience, the involuntariness, compulsion, and lack of control implicit in the definition of conscience were emphasized. The court pointed out that man's ability to control his conscience does not follow from his ability to control his own thinking, even assuming that the latter is possible:

> We can perhaps control our thinking concerning whether and to what extent a moral duty exists prior to the operation of conscience on a moral issue. We can also control, when faced with the moral issue, whether or not to follow the dictates of conscience. But, as Kant points out, when a moral issue presents itself and demands action, "then conscience speaks involuntarily and inevitably."[73]

Besides Kant, the court also cited[74] other philosophical and theological authorities such as Aquinas, Bonhoeffer, and Jung in support of its opinion that the better view appears to be that conscience is beyond the control of its subject.

The Supreme Court *did* resolve the conflict among the circuits. But it did so by merely adopting what it found to be the administrative practice on the subject. The Court could have accomplished the same result—that is, barring post-induction notice conscientious objection claims—by deciding that such a claim is not a change in a registrant's status resulting from circumstances outside his control. If the Court

72. Ehlert v. United States, 422 F.2d at 339. Justice Brennan cites Judge Merrill's considerations of conscience with approval in his dissenting opinion. Ehlert v. United States, 402 U.S. at 120.
73. United States v. Nordlof, 440 F.2d at 844.
74. *Id.*, n.5.

had done that, there would be little opportunity for question, since that is the basis for the controversy among the circuits. However, the majority of the Court chose not to take sides in the controversy over the ability to control conscience.[75] In the words of Justice Brennan, the Court found it "unnecessary to come to grips with this issue."[76]

Most probably the "control of conscience" issue is moot as a result of *Ehlert*; but, if the language of 1625.2 were the basis for decision, it would be paramount.

THE PROPOSED ALTERNATIVE

If conscience were found to be beyond the control of its subject which is what the *Nordlof* court considered the better view,[77] it would be a simple matter for local boards to process conscientious objection claims filed after the Order to Report for Induction had been mailed. The problem with post-induction notice claims is that in order to reopen, under the 1625.2 proviso, the local board must first specifically find that the claim represents a change in the registrant's status resulting from circumstances over which he had no control.

In *Nordlof* the Court of Appeals for the Seventh Circuit outlined what it considered the proper procedure for a local board to follow when it is faced with the problem of reopening such a claim.[78] The board must first determine, from the registrant's application for conscientious objector status, *when* his beliefs matured. If they matured prior to the mailing of the Order to Report, his claim made after it will be denied since the registrant would have had the opportunity to make his claim beforehand.[79]

However, if the conscientious objection claim shows that the registrant's beliefs matured after his induction notice was mailed, the local board must then determine whether the claim adds any new information to his file. If there is no new information, reopening of his classification will be denied because there would be no evidence of a "change in the registrant's status" required by the proviso. If the registrant's claim does add new information to his file, the board must then decide whether that information discloses a prima facie case for classification as a conscientious objector.[80]

75. Ehlert v. United States, 402 U.S. at 105.
76. *Id.* at 119.
77. *See* p. 343 *supra.*
78. United States v. Nordlof, 440 F.2d at 846, n.12.
79. United States v. Angelico, 427 F.2d 288 (7th Cir. 1970). *See also* United States v. Gearey, 368 F.2d at 149.
80. For a registrant to make a prima facie conscientious objection claim, he must

If a prima facie case is not presented, the local board will deny the reopening of the registrant's classification because there could be no basis for exemption. On the other hand, if there is a prima facie case, the board must then look to the remainder of the registrant's file for facts which may refute his claim, particularly prior inconsistent statements. If that is the case, the local board may deny reopening of his classification. If there is no such refutation, the court indicated that "the board must reopen."[81]

Although this procedure is contrary to the Supreme Court's decision in *Ehlert*, it is consistent with the language of Selective Service regulation 1625.2. It also protects the registrant's right to make his prima facie conscientious objection claim, for which an opportunity must be provided,[82] but it allows that claim to be made within a civilian jurisdiction. Because he remains within the Selective Service System, the registrant will have a right to judicial review of an adverse decision if the statutory limitations on judicial review are met.

Furthermore, the anticipated danger of registrants' delaying in making all conscientious objection claims will not materialize since, under the first step in the procedure, the local board must decide that the claimant's conscientious objection crystallized *after* the mailing of the Order to Report for Induction. Once that determination has been made, the local board would handle the post-induction notice conscientious objection claim as though it had been filed earlier in which case the burdens on the board would be the same.[83]

By following the language of 1625.2, this procedure safeguards the registrant's right to present his conscientious objection claim and guarantees a civilian forum subject to judicial review for its determination. These protections are within the spirit of the law described above by Justice Frankfurter.[84]

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show that he is one "who by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 50 U.S.C. App. § 456(j) (Supp. V, 1970). The recent decisions of United States v. Seeger, 380 U.S. 163 (1965), and Welsh v. United States, 398 U.S. 333 (1970) deal with the various meanings which can be attributed to "religious training and belief" and with conscientious objection in general. These subjects are beyond the narrow scope of this article on the *procedural* aspects of a conscientious objection claim, made after the mailing of the Order to Report.

81. United States v. Nordlof, 440 F.2d at 846, n.12.

82. *See* p. 339 *supra.*

83. The Court, in Mulloy v. United States, 398 U.S. 410 (1970), held that it was an abuse of its discretion for a local board to refuse to reopen a registrant's classification when he presented a prima facie case for conscientious objector status prior to the mailing of the Order to Report for Induction.

84. *See* p. 341 *supra.*