

# Selective Service: Some Certain Problems and Some Tentative Answers

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The Selective Service System's own view of its role is eloquently described by General Lewis B. Hershey, Director of the System since 1941:

The national interest may have a "right" to the deferment of a registrant, but an individual has no "right" except the right to military service to which he has been by law precommitted.<sup>1</sup>

. . . .

Selective Service—one of America's oldest institutions—touches nearly every segment of our society and our economy. Yet, the obligations and privileges, set forth in the law and regulations, and the operation of the System are understood by relatively few Americans.<sup>2</sup>

General Hershey views himself, then, as administering a system of universal military liability which has profound impact upon our society—a system in which there are no individual rights, and about which most Americans, including those subject to it, are ignorant. This article critically examines the System's view of itself and underscores the consequences of ignorance on the part not only of regis-

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1. Hershey, *The Operation of the Selective Service System*, CURRENT HISTORY, July 1968, at 1, 3.

2. SELECTIVE SERVICE SYSTEM, *THE SELECTIVE SERVICE SYSTEM: ITS CONCEPT, HISTORY AND OPERATION* v (1967).

trants, but of those involved in the administration of the System, particularly at the local level. The article is primarily descriptive of the System today, but will include some critical observations upon its performance. Rather than providing any deep or profound insights, the purpose is the narrower one of introducing the reader to the Selective Service System. More detailed treatment of every point may be found in the material cited in the footnotes and in the *Selective Service Law Reporter*.<sup>3</sup>

### *Introduction to the System*

The Selective Service System consists of 4092 local boards,<sup>4</sup> an appeal board in each federal judicial district,<sup>5</sup> a National Selective Service Appeal Board,<sup>6</sup> a State Director for each state, district, and territory of the United States,<sup>7</sup> and a national Director.<sup>8</sup> In addition, there are clerks,<sup>9</sup> government appeal agents,<sup>10</sup> medical advisors<sup>11</sup> and various advisory committees at the state and national levels.<sup>12</sup> Through this labyrinthine structure each young American of 18 must find his way or be subject to an order to report for induction. He must register

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3. The *Selective Service Law Reporter*, a project of the nonprofit Public Law Education Institute, was founded in 1968 to provide a complete reporter and practice guide service to attorneys and counselors, to encourage legal research and writing in this field, and to help remedy the acute shortage of trained and qualified persons providing timely and accurate advice to the nation's 36,000,000 Selective Service registrants. One author of this article is editor-in-chief of the *Reporter*, and most of the citations of authority in this article are to materials contained in the *Reporter*, which is cited herein as SSLR. The Selective Service Regulations, 32 C.F.R. pt. 1600 *et seq.* (1968), are cited in customary style.

4. The number 4092 was furnished over the telephone by an employee of the Selective Service System in August 1968.

5. SSLR, Practice Manual ¶ 41. There is an appeal board for each federal judicial district in New York State, and one for each *portion* of a judicial district in New York City. 32 C.F.R. § 1604.21 (1968).

6. SSLR, Practice Manual ¶ 39.

7. *Id.* ¶ 40. New York City is designated a "State" for the purposes of the Selective Service System, as is each of the Territories (Guam, Puerto Rico, Canal Zone, Virgin Islands) and the District of Columbia. *Id.*

8. *Id.* ¶ 37. The rule-making powers of the national Director of Selective Service are discussed at *id.* ¶¶ 31-34.

9. *Id.* ¶ 48.

10. *Id.* ¶ 45. The government appeal agent, who is, if possible, a person with legal training and experience, is to advise registrants and local boards concerning the law and regulations. The conflict of interest posed by his dual responsibility, and the other problems posed by the actual performance of government appeal agents, are discussed at note 36 *infra* and accompanying text.

11. *Id.* ¶ 47. Each local board is to have a medical advisor, as is each State Director. The medical advisor to the local board evaluates the physical condition of registrants who claim to have a disqualifying medical condition. *See id.* ¶¶ 1108-13.

12. *See id.* ¶ 43 (National Security Council role in graduate and occupational deferment policy), ¶ 44 (National Advisory Committee, Medical). In addition, each State Director may have an advisory committee on medical, dental, and allied specialists and on occupational deferments.

with a local board at 18<sup>13</sup> and then be classified by the board in one of the available categories.<sup>14</sup> Since he has the burden of proving his eligibility for a classification lower than I-A (available for combatant military service),<sup>15</sup> he must assemble and file with the board all the evidence he thinks entitles him to be deferred or exempted from service.<sup>16</sup> He must conduct his personal appearance before the local board, the one formal chance he has to meet the System face-to-face, without the aid of legal counsel.<sup>17</sup> The local board, on the other hand, is free to collect information from any source it wishes, even to the extent of using the subpoena power.<sup>18</sup> Moreover, the registrant is not permitted to confront adverse witnesses, but must rely upon his right to inspect his Selective Service file,<sup>19</sup> in which his local board is required to place all evidence used as a basis for its classification decision.<sup>20</sup>

If the local board decides against the registrant's claim for deferment or exemption,<sup>21</sup> he may take his case to the appeal board for the judicial district in which his local board sits.<sup>22</sup> The appeal board considers the case solely on the basis of the file sent to it by the local board.<sup>23</sup> If the appeal board decides against the registrant by unanimous vote, his appeal rights are terminated,<sup>24</sup> but if there is a dissent he may appeal to the National Selective Service Appeal Board.<sup>25</sup> Even in the event of a unanimous vote, however, either the State or national Director may take an appeal on the registrant's behalf or on behalf of the System.<sup>26</sup> Indeed, these two officials at any time may appeal from a decision by a local or appeal board,<sup>27</sup> or they can

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13. The registration requirement is fairly straightforward for citizens, although there is considerable doubt as to the extent to which a registrant must cooperate in furnishing information to Selective Service System officials when he presents himself for registration. The registration requirement as applied to aliens is laden with technical difficulties. See *id.* ¶¶ 1007-15.

14. The classifications are explained and discussed at *id.* ¶¶ 1032-71.1.

15. See *id.* ¶ 1033. The registrant did not always have the burden of proving himself eligible for a class lower than I-A. Shattuck, *Record Keeping Obligations of Local Boards*, 1 SSLR 4015, 4016 (1968).

16. SSLR, Practice Manual ¶¶ 1016-31.

17. See *id.* ¶¶ 1003-06, 1079-84. In 1968, legislation was introduced to provide a right to counsel in all Selective Service proceedings. The origin, course and demise of this bill are reported in the *SSLR Newsletter*, 1 SSLR 3, 12 (1968).

18. SSLR, Practice Manual ¶¶ 1028-31.

19. See *id.* ¶¶ 1072-78. See generally Shattuck, *supra* note 15.

20. Shattuck, *supra* note 15, at 4024-25; see *Niznik v. United States*, 173 F.2d 328 (6th Cir.), *cert. denied*, 337 U.S. 925 (1949); 32 C.F.R. § 1626.13 (1968).

21. The distinction between deferments and exemptions is sometimes stated as follows: Deferments are temporary, a "delay in going into service," while an exemption is relatively permanent. *E.g.*, SELECTIVE SERVICE SYSTEM, *supra* note 2, at 5. Thus, students are "deferred" for the period of their studies; ministers are "exempt." The various deferments and exemptions are listed in Local Board Memorandum 38. See SSLR, Practice Manual ¶ 19. A deferment extends a registrant's liability to age 35, but an exemption does not.

22. SSLR, Practice Manual ¶¶ 1085-89. The registrant has the right, under certain circumstances, to transfer his appeal. *Id.* Like the local board, the appeal board consists of volunteers appointed by the President on recommendation of the appropriate governor or comparable official. *Id.* ¶ 41.

23. *Id.* ¶ 1087.

24. *Id.* ¶¶ 1090-94.

25. *Id.*

26. *Id.* ¶ 1091.

27. *Id.* ¶¶ 37, 40.

direct that the appeal board reconsider its decision.<sup>28</sup>

Once a registrant has been through the initial classification process, he may request that the board reopen his classification upon presentation of information which, if true, would justify placing him in a different classification.<sup>29</sup> The board may, under the regulations, simply decline to reopen and thereby terminate the registrant's rights in the matter.<sup>30</sup> If the board does reopen, however, the registrant has the same rights of personal appearance and appeal as he had initially, even if after reopening the board retains him in the same classification.<sup>31</sup> The power to frustrate appeal rights by simply declining to reopen has been the subject of some criticism. A majority of the courts of appeals have held that reopening may not be arbitrarily denied, but there is a divergence of views as to the applicable standard for testing the validity of a denial of reopening.<sup>32</sup>

In proving his claim, the registrant must contend with 45 pages of statute, 300 pages of regulations, 100 pages of advisory Local Board Memorandums issued by the Director, and a great quantity of other regulatory material issued by the National Headquarters and assorted Selective Service officials in his state.<sup>33</sup> If he needs help, he can talk to his local board clerk,<sup>34</sup> who also may not know all the subtleties of Selective Service procedure,<sup>35</sup> or he can talk to a government appeal agent, a volunteer lawyer who advises registrants regarding their rights under the law. The appeals agent has a divided loyalty, however;<sup>36</sup> he has been told by the Director to breach confidences reposed in him by the registrant concerning possible violations of the Selective Service law.<sup>37</sup> Perhaps this would not be so objectionable if he were clearly described in Selective Service literature as possibly having an interest adverse to that of the registrant, but the official forms describe him merely as "legal counsel" for registrants wishing advice about the System.<sup>38</sup> The term "legal counsel," it need hardly be noted, connotes confidentiality and undivided loyalty.<sup>39</sup>

Despite these administrative obstacles in the registrant's path, the courts have consistently afforded Selective Service decisions the

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28. *Id.*

29. *Id.* ¶¶ 1095-97.

30. *Id.* ¶¶ 1095-96.

31. *Id.* ¶ 1095.

32. Cases are collected *id.* ¶ 1096 n.3.

33. This material is collected and reprinted in SSLR's Statutes & Regulatory Material Section, 1 SSLR 2001 *et seq.*

34. The possibilities and problems of getting accurate and timely advice from board clerks are suggested in SSLR, Practice Manual ¶ 48.

35. *Id.*

36. *See id.* ¶ 45.

37. *See id.* ¶ 45 n.5 and accompanying text.

38. *E.g.*, SSS Form 2, reprinted at 1 SSLR 2156:1.

39. SSLR, Practice Manual ¶ 45 n.6.

narrowest judicial review known to the law: The System's decision is "final" unless it has no basis in fact, is premised upon an error of law, was reached after prejudicial denial of a procedural right afforded by the regulations or by due process of law, or was based upon an unconstitutional statutory provision.<sup>40</sup> More important, however, the statute and judicial decisions virtually preclude the registrant from obtaining judicial review unless he either refuses to submit to induction and raises board error as a defense in a criminal prosecution, or submits to induction and then petitions for habeas corpus.<sup>41</sup> In either event he is required to risk loss of liberty in order to gain judicial scrutiny of his allegations of illegality, a circumstance which is not tolerated in any other field of administrative law. Indeed, the rigor of such a restraint on judicial review has recently led a distinguished district judge to hold unconstitutional the statutory provision codifying the judge-made restrictions on judicial review.<sup>42</sup>

In order to understand the System better, perhaps a hypothetical fact situation is in order. The example which follows is based upon a composite of actual cases within the authors' experience.

### *A Sample Case History*

#### *The Case of Ralph Registrant*

Ralph Registrant, a young man of 18, registered within five days of his 18th birthday<sup>43</sup> at Local Board No. 26 in Dodge City, Wyotana. He was at the time a student at Wyotana Tech, a four year institution which grants a bachelor's degree. The local board clerk, Miranda Rule, told Ralph that he was required to fill out the Classification Questionnaire, SSS Form 100, which she gave him.<sup>44</sup> In addition she provided him with a Form 104<sup>45</sup> on which to request a student deferment. Ralph asked what the form meant, because it seemed rather complicated, containing a long quotation from something called the

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40. The judicial review of Selective Service decisions is discussed in SSLR, Practice Manual §§ 2408-10. The leading case on "finality" of board decisions is *Estep v. United States*, 327 U.S. 114 (1946).

41. This "end of the line" rule is discussed in SSLR, Practice Manual § 2454, and in Griffiths, *Some Notes on the Solicitor General's Memorandum in Oestereich*, 1 SSLR 4012, 4014 (1968).

42. *Petersen v. Clark*, 285 F. Supp. 700 (N.D. Cal. 1968) (Zirpoli, J.). Since the above was written, the Supreme Court has held that in all but limited circumstances, the limitation on judicial review is constitutional. *Clark v. Gabriel*, 37 U.S.L.W. 3217 (U.S. Dec. 16, 1968); *Oestereich v. Selective Service Local Bd. No. 11*, 37 U.S.L.W. 4053 (U.S. Dec. 16, 1968). The full impact of these decisions remains to be evaluated. However, it appears that board action which is "blatantly lawless" in violation of a registrant's statutory right to exemption or (perhaps) deferment will entitle him to pre-induction judicial review.

43. SSLR, Practice Manual § 1008.

44. The Classification Questionnaire, reprinted at SSLR 2156:3-6, is discussed at SSLR, Practice Manual §§ 1017-27.

45. SSS Form 104, reprinted at SSLR 2156:7-8, is titled "Request for Undergraduate Student Deferment." It was issued in consequence of the 1967 amendments to the Selective Service law, which provide for a deferment for any undergraduate who meets certain conditions and who "requests" deferment. See SSLR, Practice Manual § 1057.

"Military Selective Service Act of 1967,"<sup>46</sup> but Mrs. Rule said she didn't really know—that Titus Oates, the board chairman, had told her that all students should fill it out. Hence, Ralph filled out and returned his Forms 100 and 104, his school sent in a Form 109 (Student Certificate), and Ralph was duly classified II-S. He did not appeal the classification.

All of this occurred in Ralph's freshman year, the academic year 1967-68. During the summer of 1968, however, Ralph decided that he wanted to become a minister, and was accepted for enrollment into the Ethical Humanism School, conditional upon his attaining a bachelor's degree at Wyotana Tech. Within ten days Ralph wrote his local board and informed them of this fact, whereupon the board classified him

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46. The 1967 amendments to the Selective Service law, in addition to providing for a mandatory student deferment for undergraduates, provided that request and receipt of the deferment carried certain penalties. Briefly, the recipient of a requested II-S loses his right to a deferment based on fatherhood, and loses his right to a I-S deferment after receiving his baccalaureate (which might permit him to finish a year of graduate school). He also becomes a part of the "prime age group" for induction if the Secretary of Defense should ever levy a call for induction by age groups. Military Selective Service Act of 1967, § 6(h)(1), 50 U.S.C. App. § 456(h)(1) (Supp. III, 1965-67). However, the language of the Act is by no means clear that this is the consequence of requesting and receiving a II-S. The portion of the Act reprinted on SSS Form 104 is as follows (the reader will note that it scarcely informs the registrant of the consequences of his request):

The Military Selective Service Act of 1967 provides in pertinent part as follows:

Section 6. (h) (1) Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. \* \* \* No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, \* \* \* except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. \* \* \* Any person who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term "prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

The registrant signs at the bottom that he has read and understood the provision quoted. He thereby waives his rights to a III-A and I-S, as stated above. There is doubt, however, that such a "waiver" is the kind of knowing and intelligent giving up of a right to deferment or exemption which ought to be required. See *SSLR Newsletter*, 1 *SSLR* 18-19 (1968).

IV-D<sup>47</sup> (divinity student).

During the fall term of 1968, Ralph joined an organization at his school devoted to ending the war in Vietnam and to protesting the course of American foreign policy generally. The organization was also encouraging young men to refuse to submit to induction and to raise in their defenses the alleged unconstitutionality of the draft and the illegality of the war in Vietnam.<sup>48</sup> On November 4, 1968, the group held a sit-in at the draft board office in Athens, the city where Wyoana Tech is located. When Ralph's local board heard that he had participated in the sit-in, Titus Oates, the board chairman, called the Athens chief of police, who reported that Ralph was in jail on a trespass charge.<sup>49</sup>

Titus then contacted the other board members to discuss what should be done about Ralph. He was unable to reach Dewitt Process, a retired attorney who was a member of the board, but did reach the other board member, Elizabeth Strata, who agreed that Ralph should be declared a delinquent<sup>50</sup> for interfering with the operation of

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47. A registrant pre-enrolled in a "recognized" divinity school is entitled to the same IV-D exemption as a seminarian or minister. See SSLR, Practice Manual ¶ 1069. A IV-D classification is an exemption, not a deferment. Local Board Memorandum 38.

48. A registrant must, in order to test the legality of his I-A classification and order to report for induction, refuse to submit to induction and raise the alleged illegality in defense of a criminal charge of refusal to submit, or enter the armed forces and then seek habeas corpus. Indeed, § 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. § 460(b)(3) (Supp. III, 1965-67), explicitly states that there shall be no judicial review of the classification or processing of any registrant except as a defense to a *criminal prosecution*. Since defense of a criminal prosecution is an acceptable—and today, the principal—means of testing the legality of System orders, the legality of counseling young men to refuse induction in order to create a test case is certainly defensible as well. See *Keegan v. United States*, 325 U.S. 478 (1945); SSLR, Practice Manual ¶ 25. But see note 42 *supra*.

49. The sit-in might have been considered to be a hindrance to the local board in its activities, and thus prosecutable as a felony under § 12(a) of the Military Selective Service Act of 1967, 50 U.S.C. App. § 462(a) (Supp. III, 1965-67). However, on the better view, such a charge would require proof of a specific intent to hinder the board in its activities rather than, for example, a general desire to protest the war. See *Chambers v. United States*, 391 F.2d 455 (5th Cir. 1968); SSLR, Practice Manual ¶¶ 2626-29; cf. *Bagley v. United States*, 136 F.2d 567 (5th Cir. 1943).

50. The delinquency regulations are designed to force a registrant to comply with duties owed the Selective Service System relating to his classification, such as furnishing required information concerning his whereabouts and status. If a registrant fails to perform such duties, he is reclassified I-A and may be ordered to report for induction ahead of all other registrants. The delinquency regulations nowhere specify the duties whose violation will result in a declaration of delinquency, nor do they explicitly provide for removal from delinquency status in the event the registrant brings himself into compliance with the regulations. They therefore raise serious constitutional problems. See *United States v. Eisdorfer*, 1 SSLR 3115 (E.D.N.Y. 1968); *Wolff v. Selective Service Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967); *Griffiths, Punitive Reclassification of Registrants Who Turn in Their Draft Cards*, 1 SSLR 4001 (1968). First, use of delinquency status to order a registrant for priority induction based upon a past act which he can in no way repair or undo, without the safeguards afforded by a judicial trial, may be a denial of due process. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1962). Second, delinquency proceedings directed at protest activity raise special problems because of the inhibiting effect upon freedom of expression of a local board claim of power to use its ill-defined administrative powers to reach such conduct. See *Freedman v. Maryland*, 380 U.S. 51 (1965); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Wolff v. Selective Service Local Bd. No. 16*, 372

the Athens board. Titus then had Mrs. Rule type up a notice of classification informing Ralph that he was I-A. The notice was mailed November 5. A couple of days later she sent him a delinquency notice Form 304, which said in the appropriate blank: "You have been obstructing the draft by your activities."<sup>51</sup> Mrs. Rule was not specifically instructed by Titus to send the Form 304, but merely had heard that such a form should be sent. When Ralph received his new notice of classification and the delinquency notice, he wrote to his local board and said that he had come to reject war and that he wanted to claim conscientious objector status. Thus on November 10, Mrs. Rule sent him a Form 150,<sup>52</sup> which he filled out and returned within ten days, signing the form in the space for claiming I-O status.

On the form, Ralph stated that he did not believe in a Supreme Being. In answer to question 2 of Series II,<sup>53</sup> "nature of your belief," he said: "I believe in the working out on this earth of principles of goodness and charity in men's relations with one another, and the realization through this process of spiritual values and ethical values." In answering question 3, "source of your belief," he said: "I have been accepted at a school where I will learn to be a minister. In my studies I am constantly examining the tenets of the faith I have chosen. The writings of Paul Tillich and David Saville Muzzey have been of particular relevance to me." To question 4, "religious advisor," he replied: "The leader of the Ethical Humanist group, George Garvey, is my principal source of guidance." To question 5, "use of force," he answered: "I believe that I would use a deadly force to defend myself and members of my family against attack." To question 6, "consistency and depth" of convictions, he answered: "The behavior which demonstrates the depth of my views is my commitment to enter the ministry. Also, I have been very active in opposing this criminal war which we are fighting in Vietnam. I went to jail in protest against the barbarous system of the draft." To question 7, regarding public expression of views, he said: "See answer to question 6."

As references, Ralph listed George Garvey, a professor at his college,

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F.2d 817 (2d Cir. 1967). The procedures governing delinquency are set out at SSLR, Practice Manual ¶¶ 1098-1107. See also note 72 *infra*.

51. SSS Form 304 is a standard form used to inform a registrant of what specific conduct he has engaged in which is claimed to be a proper basis for invocation of the delinquency power. The instructions on the form expressly state this to be the case (SSS Form 304 is reprinted at SSLR 2156:25). See *Wills v. United States*, 384 F.2d 943, 945 (9th Cir. 1967), *cert. denied*, 392 U.S. 908 (1958).

52. SSS Form 150 has, since Ralph's experience, been rewritten to reflect changes in the law, and the detailed short answer questions have been replaced by a series of more thoughtful questions calling for short essay-type answers on the registrant's beliefs.

53. The form in use at the time of Ralph's experience is reproduced at SSLR 2156:13. See also SSLR, Practice Manual ¶¶ 1042-47.



and the leader of the peace group of which he was a member. In answering the questions dealing with his participation in organizations, he described his work with the Ethical Humanism Society and with the student peace group.<sup>54</sup> He stated that he was never in the military.<sup>55</sup> As to the official statements of the Society<sup>56</sup> on war, Ralph appended a position paper drafted in 1967, entitled "Whither the Prospect of Holocaust?" by George Garvey. The paper attacked the Vietnam War and the draft, and contained the statement that until men refused to fight the working out of a good society on this earth could not come to pass. It concluded:

And so we have seen that rejection of the ideology of violent change is essential to the creation of the good society and to the realization of man's highest aspirations. Similarly, we must eschew the sacerdotal whizbang of anthropomorphic fundamentalism. This is the "escape from the den" of which Plato wrote; this is the creation on the "city of God" through the realization of the "godness" that is in all of us.

With his Form 150, Ralph sent a letter saying that he would like to meet with the board. A meeting was set for November 28 at 8:30 p.m. When Ralph arrived, all three board members were present. He took the opportunity to look at his Selective Service file, which contained only the following:

1. His Form 100, Classification Questionnaire.
2. His Request for Student Deferment, Form 104, and Form 109<sup>57</sup>

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54. This answer, combined with the answer to question 6 above, might be taken by the board to demonstrate that the registrant does not have the gentleness of spirit thought meet for a conscientious objector. Such an interpretation would be wrong, however, as has been noted by courts and others in emphasizing that the CO provisions do not require that a registrant be a pacifist. See *Sicurella v. United States*, 348 U.S. 385 (1955). See also the report of the hearing officer in *In re Arrece Webb*, SSN No. 22-59-46-44 (N.D. Miss. 1967) (unreported) (on file with Selective Service Law Reporter), noting that a registrant's participation in civil rights organizations in Mississippi showed a commitment to his convictions consistent with CO status. The registrant's dilemma—pushiness about his views versus gentleness in advocating them—was noted in *United States v. Washington*, 392 F.2d 37 (6th Cir. 1968).

55. Participation in the military may or may not be a circumstance which will disqualify one from CO status. See *Borisuk v. United States*, 206 F.2d 338 (3d Cir. 1953); SSLR, Practice Manual ¶ 1079. Of course, soldiers who become conscientious objectors while in the armed forces may be discharged. Department of Defense Directive 1300.6 (May 10, 1968), reprinted at SSLR 2325, which would appear to be a concession that willingness to be in the military at one time does not automatically bar one from being considered a conscientious objector thereafter. See also *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968), describing the applicable standards in a CO discharge case.

56. The rationale for inquiry into the official position of the registrant's church has never been very clear, given the clear command of the statute and the legislative judgment behind it that the registrant's individual beliefs rather than those of his religious organization are determinative of his entitlement of conscientious objector status, in contradistinction to the situation which prevailed in World War I and the Civil War. In those wars, the statute provided the conscientious objector exemption only for those who were members of historic peace churches and subscribed to the pacifist tenets of their churches. See *United States v. Seeger*, 380 U.S. 163, 172 (1965); *Hearings on Extension of the Universal Military Training and Service Act Before the House Comm. on Armed Services*, 90th Cong., 1st Sess. 2650 (1967) (testimony of Lt. Gen. Lewis B. Hershey).

57. Form 109 is the form on which colleges, universities and similar institutions of learning notify a local board that a particular registrant is enrolled. The Form does not automatically entitle the registrant to a II-S deferment. He must in addition request such deferment on the Form 104. See notes 45-46 *supra* and accompanying text.

for 1967-68 and 1968-69.

3. A notation that a Notice of Classification was sent to him on November 5, "per telephone call of Mr. Oates."<sup>58</sup>
4. A notation that a Form 304 was sent, and a copy of the Form.
5. Ralph's request for Form 150, the Form 150 and Ralph's letter.
6. A copy of Mrs. Rule's letter to Ralph about the November 28 meeting.

Ralph told the board that he had brought George Garvey with him, and asked why he was being classified I-A. In response, Mr. Oates described what he had done upon hearing about Ralph's arrest. Ralph then said he thought he'd like a lawyer, because it all seemed very complicated to him; Mr. Process told him he could see the board's government appeal agent, who was a lawyer and who would advise him of his rights. The board offered to adjourn for a few minutes to permit Ralph to talk to the appeal agent, Gideon Wainwright.

Ralph went into a small office and talked with Mr. Wainwright. Wainwright asked him what had happened at the Athens sit-in, and Ralph outlined to him his role in planning it. They then discussed Ralph's conscientious objector claim and his ministerial preparation. At the end, Wainwright told Ralph that unless he could convince the board that he should be removed from delinquency status, he had a slim chance of getting consideration of either of his claims.

When Ralph went back before the board, he told them that he wanted to be removed from delinquency status, because he didn't think it was right to punish him for sitting-in since he had already spent two days in jail on the trespass charge. He then asked the board if they would listen to Mr. Garvey, who had been waiting outside all this time. Mrs. Strata said she did not think it was important, since they already had this pamphlet by Mr. Garvey. "Yes," said Mr. Process, "Lizzie Strata has read that thing, and she has told us all about this Garvey." Ralph protested, "Well, he would tell you how much work I've been doing preparing for the ministry and how sincere he thinks I am," but Oates merely said, "We'll take it as read that you are sincere in believing whatever it is that you say you believe. That's not the point."

At that point, Ralph said, "I guess you're not going to do anything about my I-A." Mr. Oates looked first at Mrs. Strata, then at Mr. Process and back to Ralph, and said "I guess that's right." With that, Ralph took out his I-A notice of classification and threw it on the

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58. This commendable bit of candor by the board clerk may prove to be the board's undoing, see note 97 *infra* and accompanying text, but it is in conformity with the regulation which requires that all oral information received by the board shall be reduced to writing and placed in the registrant's file. Shattuck, *supra* note 15, at 4019.

table in front of Mr. Oates, saying "Well then, you can take this!" He then left the room, since the board members sort of signified that the meeting was over. The next day he received a new notice of classification, classifying him I-A. Ralph then went to see a lawyer.

### *What To Do About Ralph*

Ralph's case raises some of the most difficult technical problems a registrant must face. Consider these, for example:

1. *Waiver of Important Rights.* The 1967 amendments to the draft law provide that all undergraduates are entitled, upon request,<sup>59</sup> to a II-S deferment in order to complete the baccalaureate, subject to certain conditions concerning full time attendance, normal progress and so forth.<sup>60</sup> However, request and receipt of the deferment not only extends the registrant's liability for induction to age 35 (as with any deferment),<sup>61</sup> but also renders him ineligible thereafter for a fatherhood III-A or a I-S(C) deferment.<sup>62</sup> Moreover, he will be considered a member of the "prime age group" in the event the Department of Defense institutes calls by age group rather than according to the present "oldest first" formula.<sup>63</sup>

The board clerk explained none of these consequences to Ralph, even though the Form 104 he filled out is replete with legal jargon and would not inform even the careful reader of the consequences of signing it. In a similar situation, the application by an alien for relief from training and service, Form 130,<sup>64</sup> states in italics that the alien making application will be debarred from becoming an American citizen. Yet even with this attempt to notify the alien of the consequences of signing his name some courts nevertheless have held aliens admissible to citizenship upon the ground that they did not understand the consequences of signing Form 130 or did not make a

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59. See Local Board Memorandum 84; SSLR, Practice Manual ¶ 1057.

60. SSLR, Practice Manual ¶ 1057.

61. Military Selective Service Act of 1967, § 6(h) (2), 50 U.S.C. App. § 456 (h) (2) (Supp. III, 1965-67); the classifications considered "deferments" (rather than "exemptions"), and which entail extended liability, are listed in Local Board Memorandum 38.

62. See SSLR, Practice Manual ¶ 1057; Military Selective Act of 1967, § 6(h) (1), 50 U.S.C. App. § 456(h) (1) (Supp. III, 1965-67).

63. The "oldest first" formula requires the selection, from among those registrants in Classes I-A and I-A-O who have been examined and found qualified for service, of registrants for induction in the following order: delinquents, oldest first; volunteers under 26, oldest first; registrants who are single or who became married after August 26, 1965, oldest first, from 26 down to 19; registrants married before August 26, 1965, oldest first, from 26 down to 19; registrants with extended liability, youngest first from 26 on up. There are two other lower categories, but they need not concern us. The over-26 group has not been reached in the 20 years of Selective Service calls from 1948 to the present. The order of call is set out in 32 C.F.R. § 1631.7(a). See SSLR, Practice Manual ¶¶ 1121-22. Under a "prime age group" call, as defined in 32 C.F.R. § 1631.7(b), a given age category ("19 year olds" or "20 year olds," for example) would be designated as the group from which induction would take place after induction of delinquents and volunteers. Those who had II-S deferments under the 1967 amendments to the Act would be integrated with the prime age group by day of birth and considered as constructive 19 or 20 year olds.

64. A sample copy of this form is reprinted at SSLR 2156: 12.

free and voluntary decision.<sup>65</sup> But Selective Service persists in the view that its Form 104 is sufficient to put students on notice of the consequences when they request the II-S deferment.

2. *The Ministerial Exemption.* The Military Selective Service Act of 1967 provides that a registrant enrolled or pre-enrolled in a "recognized" theological or divinity school is entitled to be deferred. Local Board Memorandum No. 56<sup>66</sup> provides that the local board must determine whether a divinity school is to be "recognized," and outlines a procedure for securing advice from the appropriate State Director. Such a procedure lends itself to abuse, for it invites judgments about divinity schools based upon criteria derived from traditional religious thought. In short, the definition raises serious problems under the establishment clause of the first amendment, particularly when a nontraditional religious faith is under consideration.<sup>67</sup>

3. *Delinquency Proceedings.* Delinquency proceedings are a means for the local board to compel compliance with Selective Service regulations through use of the sanction of reclassification and acceleration for priority induction. A registrant declared delinquent will be reclassified as available for service, and will, if his classification is not upset on appeal or withdrawn by the local board, be inducted first in the order of call, even before volunteers for induction.<sup>68</sup> Moreover, he has no extra procedural rights upon being declared delinquent. This adjudication of delinquency poses serious constitutional issues which deserve analysis.

First, many local boards have been declaring delinquent, and processing for immediate induction, registrants who engage in antiwar protests which the board believes to be illegal.<sup>69</sup> In fact, General Hershey has encouraged such action,<sup>70</sup> and, in addition, has directed the reclassification of registrants who turn in their "draft cards"—notices of classification and registration certificates.<sup>71</sup> Such a use of the delinquency power is questionable: It constitutes an arrogation by the board to itself of power to punish registrants for past acts which they can in no way repair or undo. The delinquency regulations, however, apparently were not designed for that purpose but for the purpose of enabling boards to compel registrants to comply with regulations relating to supplying information to the board for use in the classification process.<sup>72</sup> Viewed in this manner, the delin-

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65. Cases are cited and discussed at SSLR, Practice Manual ¶8 n.3.

66. SSLR, Practice Manual ¶ 1069.

67. See *id.* ¶ 1067.

68. See generally *id.* ¶¶ 1098-1107.

69. See, e.g., *Wolff v. Selective Service Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967).

70. Letter to all Local Boards, October 26, 1967, reprinted in *N.Y. Times*, Dec. 10, 1967, at 1, col. 4.

71. Local Board Memorandum 85.

72. See Griffiths, *Punitive Reclassification of Registrants Who Turn in*

quency regulations supplement the presumption that the registrant is I-A until he shows himself entitled to deferment or exemption<sup>73</sup> by providing a means to compel him to furnish such information.

This limited use of delinquency proceedings narrows the scope of permissible criticism. Nevertheless, in the not atypical case of Ralph the board failed to provide him with prompt and adequate notice of the grounds for his reclassification, failed to consider his suspected delinquency at a formal meeting, and failed to record the basis for its decision in a memorandum to be placed in Ralph's file. In short, the board accorded Ralph none of the procedural protections which we consider essential to a fair decision.<sup>74</sup> Notwithstanding the propriety of the grounds for making Ralph delinquent, the board's procedure effectively foreclosed Ralph from making a meaningful and prompt response to the board's action.

Beyond the procedural imperfections, however, the statute and Constitution forbid the use of delinquency proceedings to get at past acts;<sup>75</sup> reclassification for "illegal" actions is indistinguishable analytically from punishment for commission of a crime. Although one may reject the idea that military service is "punishment,"<sup>76</sup> conclusional assertions cannot obscure the fact that it is also a two-year infringement of liberty, which in the situation posed above is being dealt out with punitive intent. If that is so, then it certainly is significant that delinquency proceedings provide none of the safeguards customarily associated with the imposition of punishment. Not only does the absence of notice, counsel, confrontation, cross-examination, compulsory process and public trial raise serious doubts about the constitutional validity of using delinquency proceedings to punish past acts, but, in addition, the presence of an arbitrary power in an independent body bound to no formal procedures and insulated from effective judicial review deters registrants from the full and free exercise of their first amendment rights of speech and association.<sup>77</sup>

4. *The Conscientious Objector.* Exemptions from compulsory service for conscientious objectors have existed from the days of the colonial militia.<sup>78</sup> Today the Act provides that any registrant who,

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*Their Draft Cards*, 1 SSLR 4001 (1968). The Griffiths argument was set out in Brief for Petitioner at 45-68, *Oestereich v. Selective Service Local Bd. No. 11*, No. 46 (U.S. 1968), and accepted almost entirely by the Solicitor General in Brief for Respondents at 44-58. The Solicitor General's position was in turn adopted in part by the Supreme Court in its decision in *Oestereich*, 37 U.S.L.W. 4053 (U.S. Dec. 16, 1968). The Court held in *Oestereich* that the delinquency procedure could not be used to strip a registrant of a classification to which the Act entitled him, and cast doubt upon the validity of the delinquency procedures generally, noting that they are promulgated without specific statutory authority and provide no standards to guide the local board in applying them.

73. The presumption is discussed in SSLR, Practice Manual ¶¶ 1032-33, 1072-78.

74. See SSLR, Practice Manual ¶¶ 1072-78.

75. See authorities cited note 72 *supra*.

76. Hershey, *supra* note 1, at 3-4.

77. See generally *Wolff v. Selective Service Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967); note 72 *supra*.

78. See *United States v. Seeger*, 380 U.S. 163, 170 (1965).

by reason of "religious training and belief," is "conscientiously opposed to participation in any form," may be assigned to noncombatant service or, if he is opposed to noncombatant service, to alternative civilian work in the national health, safety and interest.<sup>79</sup>

An exhaustive study of the significant issues raised by the conscientious objector exemption is not possible here.<sup>80</sup> Several problems, however, have come to the fore in recent months. The most pressing of these concerns the registrant who objects vehemently to the war in Vietnam but who is unsure about his opposition to other wars or professes outright a willingness to fight in other wars. The statute requires objection to participation in war "in any form," and the authoritative case law states that "in any form" modifies "participation," not "war."<sup>81</sup> "War," in turn, is defined as a conflict between organized political groups, thereby excluding both self-defense and defense of family on the one hand and spiritual war on the other.<sup>82</sup> Therefore, as a practical matter, Jehovah's Witnesses who would fight (albeit not with "carnal" weapons)<sup>83</sup> at Armageddon, and would fight in defense of family, friends and ministry, are qualified for the CO classification.<sup>84</sup> But, say some authorities, Catholic registrants who hold to the "just war" theory are not entitled to CO status because their opposition does not extend to war "in any form."<sup>85</sup> Such a view of Catholic theology seems simplistic in the extreme.<sup>86</sup> Moreover, since Jehovah's Witnesses would also fight in any war in which God commanded them to fight, there is little difference between the official Catholic stance and the Jehovah's Witness position, although it is true (at least the Supreme Court said it was true) that God has not issued any such command to the Jehovah's Witnesses at any time during recorded history.<sup>87</sup> These definitional difficulties seem unamenable to solution within any but a constitutional analysis.

One must begin, it seems, with the principle that exemption from military service is a first amendment right for those whose religion forbids such service. No court has yet expressly said so, and the

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79. Military Selective Service Act of 1967, § 6(j), 50 U.S.C. APP. § 456(j) (Supp. III, 1965-67), discussed in SSLR, Practice Manual ¶¶ 1034-48.

80. A bibliography of legal and nonlegal books and articles on conscientious objection has been prepared by Solomon G. Smith, Reference Librarian, Yale Law Library, and is available from the library.

81. *Taffs v. United States*, 208 F.2d 329, 331 (8th Cir. 1953), cited with approval in *Sicurella v. United States*, 348 U.S. 385, 389 n.\* (1955).

82. *Sicurella v. United States*, 348 U.S. 385 (1955); SSLR, Practice Manual ¶ 1039.

83. *Sicurella*, 348 U.S. at 389-90.

84. *Id.*

85. *E.g.*, *United States v. Spiro*, 384 F.2d 159 (3d Cir. 1967).

86. *See, e.g.*, BANTIN, *CHRISTIAN ATTITUDES TOWARDS WAR AND PEACE* (1960) (especially ch. 4); DOUGLAS, *THE NONVIOLENT CROSS* (1968); ZAHN, *WAR, CONSCIENCE AND DISSENT* (1967).

87. *Sicurella*, 348 U.S. at 390-91.

System's prevailing philosophy is that all deferments and exemptions are a matter of legislative grace and not of statutory or constitutional right.<sup>88</sup> But in other contexts the courts have not been reluctant to inquire whether performance of a statutory duty might be excused in the case of one whose religious views preclude his doing the duty.<sup>89</sup> No clear guiding principle emerges from these "free exercise" cases, but they do suggest that unless the state can demonstrate that some overriding governmental interest would be substantially infringed by permitting exemption of religious objectors, the exemption must be sustained upon constitutional grounds quite independent of statute. Moreover, lest the state promote an establishment of religion, the criteria for exemption must be drawn so as not to discriminate in favor of older, more well-established sects.<sup>90</sup> If this analysis should prevail, it is but a short step to exempt sincere religious objectors to a particular war. The constitutional test logically would be the same whether the objection went to one war or to all.

This constitutional problem does not exhaust the field of inquiry, however. Perhaps no classification so arouses the ire of local board members as the I-O.<sup>91</sup> Yet board member prejudice is difficult to prove. There is no transcript of local board proceedings, and the registrant is generally forbidden to take a lawyer with him. Moreover, since determination of a conscientious objector claim depends so heavily upon the board's subjective judgment of a registrant's sincerity, judicial review is generally even less helpful than in other Selective Service areas.<sup>92</sup> The problem was made easier in Ralph's case by the board chairman's statement disavowing an intention to rely upon insincerity in denying the claim, but the practical problems of proving that the board chairman made such a disavowal will bedevil Ralph's lawyer should the case ever go to court.<sup>93</sup>

5. *The Government Appeal Agent.* The government appeal agent in Ralph's case is faced with the problem now confronting all government appeal agents—what is his relationship to the registrant he sees? If he claims to give legal counsel, then he is afoul of the ABA's guidelines on the subject since in fact he is not a law counselor due to his divided loyalty.<sup>94</sup> This double loyalty, and the Hershey direc-

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88. E.g., *Clay v. United States*, 397 F.2d 901 (5th Cir. 1968), *petition for cert. filed*, 37 U.S.L.W. 3056 (U.S. July 5, 1968) (No. 271).

89. E.g., *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (Indian religionists need not obey legal prohibition against use of peyote). The leading case is, of course, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

90. See, e.g., *United States v. Seeger*, 380 U.S. 163, 174 (1965); Clancy & Weiss, *The Conscientious Objector Exemption: Problems in Conceptual Clarity and Constitutional Considerations*, 17 *MAINE L. REV.* 143 (1965).

91. The Marshall Commission found that 55 per cent of all board members in one state were opposed to the I-O classification. NATIONAL ADVISORY COMM'N ON SELECTIVE SERVICE, *IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE?* 29 (1967).

92. See *Witmer v. United States*, 348 U.S. 375 (1955); *United States v. Washington*, 392 F.2d 37 (6th Cir. 1968).

93. Does lack of a record which might be the basis for proving prejudice raise a constitutional issue? There is a suggestion to this effect in *In re Gault*, 387 U.S. 1, 58 (1967).

94. The divided loyalty of the agent is spelled out in the regulations,

tive referred to above,<sup>95</sup> point up the registrant's dilemma. Moreover, many government appeal agents are unable to give thorough and accurate advice because they do not possess adequate specialized knowledge of Selective Service procedure. This need for independent counsel with expertise in Selective Service matters is evident, and will be discussed further below.<sup>96</sup>

6. *Procedural Defects.* The System itself is full of procedural horrors that are compounded by myriad departures from the minimal requirements of the regulations. Failure to hold a formal meeting,<sup>97</sup> failure to allow all members to participate in a decision,<sup>98</sup> turning over the power to decide classification to the board clerk,<sup>99</sup> failure to note the information which is the basis for classification<sup>100</sup>—these and other defects crop up time and again. Nevertheless, the greater procedural difficulties arise from the structure of the system itself. A later section of this article will examine these problems.

### *Deeper Problems and the Crisis in the System*

The discussion above is introductory to the practical problem of Selective Service law and practice. But the System has deeper problems, which seriously undermine registrants' confidence in its basic fairness and which call into question the propriety and constitutionality of a system of conscription today.

### *Theater of the Absurd—4092 Local Performances*

As an official System pamphlet states: "The Selective Service law is deliberately designed to place responsibility for the mobilization of manpower in the local communities, with broad discretion given to members of the local boards."<sup>101</sup> Added to this are four other important facts: (1) the regulations are quite vague;<sup>102</sup> (2) the typical

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which make it his duty to represent both the registrant and the Selective Service System. The relevant ethical considerations are set out with citations of authority in SSLR, Practice Manual ¶ 45.

95. Note 37 *supra*.

96. Note 127 *infra* and accompanying text.

97. *United States v. Walsh*, 279 F. Supp. 115 (D. Mass. 1968).

98. *Id.*

99. *Compare Brede v. United States*, 396 F.2d 155 (9th Cir. 1968) with *United States v. Peterson*, 53 F. Supp. 760 (N.D. Cal. 1944).

100. See Shattuck, *Record Keeping Obligations of Local Boards*, 1 SSLR 4015 (1968).

101. SELECTIVE SERVICE SYSTEM, THE SELECTIVE SERVICE SYSTEM: ITS CONCEPT, HISTORY AND OPERATION 10 (1967).

102. Appreciation of their vagueness can come only through reading them. However, one might note two indicia of vagueness: the radically divergent interpretations given the same regulation by different State Directors, and the variation in patterns of occupational deferment, two matters discussed in the Marshall Commission report. NATIONAL ADVISORY COMM'N ON SELECTIVE SERVICE, *supra* note 91, at 29. See also DAVIS & DOLBEARE, *LITTLE GROUPS OF NEIGHBORS* (1968).



board member is 58, white, middle-class and without legal training;<sup>103</sup> (3) the overriding rule of the System is informality;<sup>104</sup> and (4) in most cases neither local boards nor appeal boards are required to give reasons for their decisions. Moreover, while the regulations are published in the *Federal Register*,<sup>105</sup> the bulk of the System's regulatory output is not codified in the form of regulations and so published and consequently is available only by subscription from the Government Printing Office<sup>106</sup> or (as to most material) by visiting a local board<sup>107</sup> or (as to an appreciable quantity of material) the office of the State Director.<sup>108</sup> Most Selective Service determinations are, therefore, discretionary decisions which for the most part cannot be measured by formal criteria of validity and which, as a result, are usually unamenable to contemporary review.

Studies of Selective Service procedure have drawn together the limited empirical evidence of the impact of Selective Service structure on the quality and character of its decision-making process.<sup>109</sup> But the conclusions of these studies are not surprising when seen in a somewhat broader framework.

Selective Service decisions are properly termed "low-visibility."<sup>110</sup> The welfare worker with the power to grant or withhold a check,<sup>111</sup>

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103. NATIONAL ADVISORY COMM'N ON SELECTIVE SERVICE, *supra* note 91, at 19.

104. There are a number of examples of this "informality" in the cases. *See, e.g., Niznik v. United States*, 173 F.2d 328 (6th Cir.), *cert. denied*, 337 U.S. 925 (1949); *United States v. Walsh*, 279 F. Supp. 115 (D. Mass. 1967).

105. *See* SSLR, Practice Manual ¶¶ 31-35, for a discussion of the Federal Register publication provisions of the Administrative Procedure Act, 5 U.S.C. § 552 (1964).

106. As in the case of Local Board Memorandums. The subscriber will find, however, that the GPO is months behind in sending out amendments to LBM's, and that many of these amendments can have a vital effect on the rights of registrants.

107. This is the case with Operations Bulletins (mimeographed advisory bulletins issued by the Director), and copies of other advisory material put out by the National Headquarters, and as to such items as sample copies of Selective Service forms.

108. The principle items available only at the offices of the State Directors are the advisory memoranda issued by each Director. These memoranda interpret, and may sometimes qualify, the terms of the regulations. *See* SSLR, Practice Manual ¶¶ 31-35.

109. NATIONAL ADVISORY COMM'N ON SELECTIVE SERVICE, *supra* note 91; DAVIS & DOLBEARE, *supra* note 102 (the authors were researchers for the Marshall Commission).

110. The term has been applied by many authors. *See, e.g., Rosenblum, Low Visibility Decision-Making by Administrative Agencies: The Problem of Radio Spectrum Allocation*, 18 AD. LAW REV., Fall 1965, at 19, 20:

A number of criteria bear on the visibility of decisions by regulatory agencies. These include:

—opportunity for participation by representatives of the parties affected and by representatives of the general public in the process by which decisions are reached, e.g., open hearings;

—availability of information about the criteria for decision-making and the identity of the decision-makers, e.g., publication of rules, standards, and procedures in the Federal Register;

—availability of decisions and opinions explaining them, e.g., opinions written by the decision-makers and published in agency reports, the Federal Register, and other readily available media;

—institutionalization of the right to review, e.g., judicial review.

111. Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479 (1966).

the policeman with the powers to stop and to arrest,<sup>112</sup> and the local board member with power to reclassify are three of a kind in American jurisprudence. Each possesses great power, to be exercised under a broad grant of discretion and subject to little supervision. Moreover, each of them is largely untouched, through ignorance or lack of concern, or both, by the judicial review law of his field of endeavor. And the evidence shows that each of them abuses his power to a significant extent. The editors of the *University of Pennsylvania Law Review* long ago<sup>113</sup> found that which a three city "police watch" confirmed:<sup>114</sup> Persons with discretionary power over liberty, subject to minimal review, abuse that power. Police in the streets develop their own criteria for exercising the power to stop or to arrest, and these criteria, based upon hunch, prejudice and snap judgment, readily supplant the statutory standards defining offenses and the constitutional standard of probable cause for arrest and search. The welfare worker provides another point of reference. The crisis in welfare administration, like the crises confronting the Selective Service System and the police departments of our major cities, results from a lack of formal criteria and the pervasive attitude that welfare clients have no rights but only privileges, and that the largess of government may be denied on the whim of the lowliest administrator.<sup>115</sup>

The Selective Service System combines, in the person of the local board member, the "largess" theory of the welfare administrator with the self-righteous, crusading attitude of the "tough cop." Extensive experience with local boards leads one to the view that the typical local board member<sup>116</sup> firmly believes not only that no registrant has the right to be other than I-A, but that any registrant who too ardently seeks to be deferred or exempted is a bit on the unpatriotic side. And conscientious objectors, one has the impression, send boards into paroxysms of indignation, a conclusion supported by evidence that 55 per cent of the local board members in one state surveyed thought CO's should not be exempt.<sup>117</sup>

The Selective Service System has three answers to such charges. First, it is said, since the registrant has no "right" to be deferred, denial of a deferment or exemption works no "legal wrong" upon

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112. Reiss, *Police Brutality—Answers to Key Questions*, TRANS-ACTION, July-Aug. 1968, at 10; Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182 (1952).

113. Note, *supra* note 112.

114. Reiss, *supra* note 112.

115. See generally Bendich, *Privacy, Poverty, and the Constitution*, 54 CALIF. L. REV. 407 (1966).

116. The "average" or composite local board member, the Marshall Commission found, is male, 58, a veteran, white and middle class. NATIONAL ADVISORY COMM'N ON SELECTIVE SERVICE, *supra* note 91, at 19.

117. Note 91 *supra*.

him. Everyone is committed to military service, the argument runs, and his deferment or exemption is a matter of largess. This claim has no merit. The idea that every American male is "precommitted" to military service is the product of General Hershey's own fertile imagination.<sup>118</sup> Certainly Congress does not take this view, for it has renamed the draft law the "Military Selective Service Act of 1967," thereby underscoring the non-universal character of conscripted service.<sup>119</sup>

Moreover, even if deferments and exemptions are a matter of "grace," they must still be designed and administered so as neither to condition deferment upon relinquishing a constitutional right nor to discriminate arbitrarily between those who are entitled to deferment or a procedural protection and those who are not. "It is too late in the day to doubt that the libert[y] of . . . expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."<sup>120</sup> As Professor O'Neil has demonstrated, the old-line analysis of government-granted benefits as "privileges" rather than "rights" has no contemporary vitality as an analytical tool.<sup>121</sup>

The second Selective Service answer is to point to instances in which board discretion has worked to the benefit of registrants or provided necessary flexibility. This line of argument is interesting but unpersuasive when compared to the ample evidence of abuse of power in the System.<sup>122</sup> That the System, by virtue of board discretion, possesses some ability to meet unusual situations cannot excuse its structural defects.

As a third answer, the Selective Service System often refers to the local board as a group of the registrant's friends and neighbors, meeting informally to decide what is best for him and for the country. This argument, it has been often and conclusively shown, is absurd.<sup>123</sup> A registrant remains subject to the jurisdiction of the local board with which he first registered at 18, regardless of the number of times he has moved or how far he may be from that original local board. Moreover, the concept of friends and neighbors is ludicrously in-

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118. There is an assertion in 10 U.S.C. § 311 (1964) that all male citizens of the United States constitute a part of the "militia of the United States," a provision which traces roots to the early days of the Republic. Such a provision is, however, a long way from being a legislative declaration of universal military training and service.

119. The change in the title of the Act from the "Universal Military Training and Service Act" was intended to betoken a congressional judgment that the character of service is "selective." See CIVILIAN ADVISORY PANEL ON MILITARY MANPOWER PROCUREMENT, REPORT TO COMMITTEE ON ARMED SERVICES, 90th Cong., 1st Sess. 10 (Comm. Print 1967).

120. *Sherbert v. Verner*, 394 U.S. 398, 404 (1963).

121. O'Neil, *Review of Selective Service Reclassifications*, 37 Geo. Wash. L. Rev. 536 (1968), *infra* this Symposium. See also Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

122. See, e.g., *Niznik v. United States*, 173 F.2d 328 (6th Cir.), *cert. denied*, 337 U.S. 925 (1949); NATIONAL ADVISORY COMM'N ON SELECTIVE SERVICE, *supra* note 91.

123. Most recently, the argument has been examined in DAVIS & DOLBEARE, *supra* note 102.

appropriate in all but the smallest towns. Finally, most registrants would no doubt prefer to have their cases judged by objective standards under fair procedures rather than submit to a judgment of neighbors a generation or two older than themselves.

What is the solution to the low-visibility decision which impinges upon important rights? First, the System's governing theoretical principles must begin to reflect the new constitutional theories of "unconstitutional conditions" and the developing judicial insistence upon fair procedure even in the administration of systems of largess.<sup>124</sup> That is, the System, through the same process of indoctrination which has produced present board attitudes, must come to regard the classification structure as bestowing benefits upon registrants which it is not free to deny them except in accordance with fair procedures and nondiscriminatory substantive criteria.<sup>125</sup> There is, however, little hope at present for the broad structural and personnel reforms necessary to effect such a change.

Second, the judicialization of Selective Service is a distinct possibility and would be an undeniable boon. Formal procedures may be difficult to institute in the fields of welfare and police conduct, but an elaborate structure of personal appearances and appeals already exists in the Selective Service System. There is no reason to refrain from insisting that the System recognize the importance in such proceedings of the procedural safeguards generally thought indispensable in fair administrative hearings. Indeed, because the System does not deal with corporate licensees equipped with house counsel (as does the FCC, for example), Selective Service should combine a rigorous adherence to fair procedure with an assiduous devotion to its public information responsibilities. The prohibition on representation by counsel, the unlimited grant of power to rely upon hearsay evidence, the provision giving the board discretion not to hear witnesses, the pattern of board reluctance to permit the registrant to record the personal appearance, and the lamentable absence of authoritative and widely-available information on Selective Service rules and procedures are examples of procedural faults which can be remedied even within the present administrative structure.<sup>126</sup> The Pres-

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124. O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966).

125. The System's employees and unpaid volunteer workers (e.g., board members) are bombarded with literature from National Headquarters which reflects the attitude that registrants have no rights except the right to be inducted, and which denigrates judicial efforts to strengthen the procedural protections afforded by the regulations. The reader who doubts this assertion should peruse twelve consecutive issues of *Selective Service*, the System's monthly newspaper, with particular attention to the Director's monthly front-page column. It seems clear that this same system of indoctrination could be turned to different uses, given new personnel in the National Office.

126. The President has broad rule-making authority under the Act. See SSLR, Practice Manual ¶¶ 31-32.

ident has the power to issue regulations to this effect merely by publishing them in the *Federal Register*.

Third, the System's expectations regarding the quality of its own performance can be raised by pressures from outside the System. This approach to the problem relies not upon action by Congress or the President—or even upon significant new court decisions—but upon the resourcefulness of attorneys and lay counselors. Experience has shown that many local boards are more careful to adhere to the rules and to be as fair as the regulations permit when an attorney is at the registrant's side. The lawyer can draft papers, send letters to the local board inquiring about procedural irregularity, negotiate with Selective Service officials at the state and national levels, and, if nothing else, make his presence known at an early time. His presence serves the same function as a lawyer in the police station during a lineup: He monitors the proceedings and thereby leads the public officials to be careful in handling those under their control.<sup>127</sup> This function of the lawyer or counselor is important enough that the bar should be paying attention. Unfortunately it is not. Nevertheless, individual lawyers and established counseling organizations<sup>128</sup> have set up community counseling projects and have begun to train counselors. Such programs deserve the broadest possible support,<sup>129</sup> for their work must increase if the large draft calls continue. Of course, the ability of lawyers to fully protect the interests of registrants will come only upon recognition of the right to counsel before the System—the right to penetrate the curtain which cloaks the registrant's personal appearance, at which the local board meets with the registrant to decide upon his classification.

Fourth, the rules concerning the availability of judicial review must be liberalized to permit earlier judicial scrutiny of alleged deprivations of statutory or constitutional rights. The deterrent effect of a judicial declaration of illegality is enhanced if it comes in the middle of the classification process, not months or years after it is at an end.<sup>130</sup> The threat of interlocutory relief against the board would lead it to tread more carefully and to seek advice more often from state or

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127. See *United States v. Wade*, 388 U.S. 218 (1967), the first express statement of the lawyer's role in this regard. See also SSLR, Practice Manual ¶¶ 1003-66.

128. The counseling organizations are listed at 1 SSLR 5027. These organizations, or many of them, maintain lists of qualified lawyers willing to undertake draft cases.

129. Many counseling and legal defense organizations are tax-exempt. See INT. REV. CODE of 1954, § 501(c)(3).

130. The "judicial review law" of administrative procedure has little effect on the day-to-day operation of administrative agencies. See SSLR, Practice Manual ¶ 1003. But generally judicial declarations come long after the administrative process is at its end, rather than while it is still going on. With agencies such as the FCC, this is perhaps inevitable—the end of the process is, for example, the granting or denial of a license, and it is the legality of that last act which is at stake. See *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). With the Selective Service System, there is typically a time period of some months to some years between the registrant finally being classified I-A and his being ordered to report for induction, and it is the classification action against which attack is generally sought. That is, the legal issues are sharply drawn long before the order to step forward.

national headquarters as to the proper course to follow.

These suggested changes are modest indeed, but they are resisted upon the ground that the System is too busy. The Marshall Commission suggests the contrary, but even accepting the "too busy" argument on its face, we must recall that this is nominally a time of peace and that perhaps some slight delay in the System's workings is tolerable even to the hawkish amongst us.

### *The Special Problems of the Poor and the Black*

Edgar and Jean Cahn, profoundly original thinkers and deeply involved activists, predicted two years ago that no substantial interest in the procedural and substantive unfairness of the draft would develop until the children of the white middle class began to feel threatened by it.<sup>131</sup> Their prediction has come true. The 1967 restrictions on graduate student deferments<sup>132</sup> and the tougher deferment policy which has attended increased draft calls<sup>133</sup> have threatened the children of the middle class. At the same time there has been a dramatic increase in sentiment favoring modification of the Selective Service System and a significant increase in draft counseling activity. The evidence suggests that these events are interconnected. By far the greater number of lawyers and counselors entering the Selective Service field are oriented to the problems of the white middle class registrants, and this is reinforced by the fact that the vast majority of their clients are from this group. While there has been a significant increase in the number of black, Puerto Rican, Mexican-American and poor white draft protesters and resisters, legal and counseling services have not been available to this group in sufficient amount and quality.<sup>134</sup> Moreover, many such youths are unaware of grounds for deferment or exemption, a situation which in all too many cases is exacerbated by the failure of Selective Serv-

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131. Address by Jean Camper Cahn, Annual Conference on World Affairs, Univ. of Colo., 1966, referred to in an address by Edgar Cahn, Georgetown Law School, Sept. 4, 1968.

132. See National Security Council Memorandum for the Director of Selective Service, Feb. 15, 1968. See also 32 C.F.R. § 1622.26 (1968); SSLR, Practice Manual ¶ 1058.

133. The System concedes, as it must, that deferment policy gets tougher when draft calls go up. SELECTIVE SERVICE SYSTEM, THE SELECTIVE SERVICE SYSTEM: ITS CONCEPT, HISTORY AND OPERATION 30 (1967).

134. The Neighborhood Legal Services programs could provide this service, but cannot do so unaided. Efforts by old-line, white-dominated counseling organizations to enter the ghetto have not met with notable success. The answer seems to be for indigenous organizations to set up counseling centers, with the help of Neighborhood Legal Services personnel. A few organizations are worth special mention in this connection: Southern Legal Assistance Project (Atlanta, Ga.); Mexican-American Legal Defense Fund (San Antonio, Tex.); Western Center on Law and Poverty (Los Angeles, Calif.); National Lawyers Guild (New York, New York); Emergency Civil Liberties Committee (New York, New York).

ice to provide accurate and complete information. Ghetto registrants who remain I-A although entitled to lower classifications are scooped up into the military by Armed Forces recruiters, who regularly scan the lists of I-A registrants and lead them to believe that enlistment will maximize their choices in the face of an inevitable prospect of military service. Alternatively, black and poor white registrants who oppose the draft or American foreign policy frequently fail to exhaust their administrative remedies or to report for induction, thus making a defense to their criminal prosecutions far more difficult by foreclosing available grounds of judicial review. Moreover, these registrants in most cases are represented by appointed attorneys with no expertise in Selective Service matters and are induced either to enlist in order to avoid indictment or to plead guilty for a more lenient sentence. On the other hand, even when the cases do proceed to trial, the registrant is usually given low quality legal representation. These painful facts point to a need for neighborhood legal services offices, civil rights groups, law schools, draft organizations, peace groups, churches and schools to organize and advertise counseling and legal services in ghetto communities. Just as military recruiters scan the I-A lists, so must these groups.

To again refer to the work of Edgar and Jean Cahn, here is a field in which the answer is not more legal services in the old mold, but new ways of providing legal services through making the potential client community aware of its rights, building organizational forms relying heavily upon volunteer lay participation and development of expertise to deal with the special classification problems of ghetto residents, including dependency deferments, occupational deferments, student deferments in nontypical contexts and broadened definitions of conscientious objection to war.<sup>135</sup>

The ghetto provides a significant test of both Selective Service System performance and the ability of persons and groups who profess to care about the draft to deal with the problems raised by that performance. The System's performance is best monitored in the ghetto because the defects in its structure are most glaringly manifested there. Denials of procedural due process work most harshly against those without legal representation to secure meaningful review of their claims; without representation they are unable to build closely documented records in their Selective Service files and do not have the ability to press their claims by insistent demands at various levels of the System. The complexity of the System's procedural machinery and classification criteria appear in the ghetto community as they truly are: snares not only for the "unwary" registrant, but for every registrant. Moreover, like the ghetto policeman and the ghetto welfare administrator, the ghetto draft board is hidden from

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135. The lay counselor's role is discussed in SSLR, Practice Manual ¶ 1005. The problems of the student who does not attend a full time four-year college, the problem of the apprentice and the employed registrant seeking deferment, and of conscientious objection in special circumstances are discussed in *id.* ¶¶ 1034-48, 1054-55, 1057.

public view, with the result that it has a low self-expectation concerning the quality of its performance and a high degree of untrammelled discretion over the lives and liberty of its registrants.

### *Should We Conscript?*

Even thoroughgoing reform—unlikely as that is—cannot deal with the profound sense of injustice generated by the System's performance. The time has come to question whether there is historical and constitutional justification for a system of conscription.

The Selective Service System not only serves to draft young men for military service; it exercises a pervasive influence upon personal and career choices for all registrants. The System recognizes that it forces young men who wish to be deferred or exempted into occupations and activities which the executive branch conceives to be in the national interest, and it gladly plays this role of "channelling" manpower. In a 1965 memorandum, the System aptly described the impact of its power upon the reluctant registrant:

In the less patriotic and more selfish individual it engenders a sense of fear, uncertainty, and dissatisfaction which motivates him, nevertheless, in the same direction. He complains of the uncertainty which he must endure; he would like to be able to do as he pleases; he would appreciate a certain future with no prospect of military service or civilian contribution, but he complies with the needs of the national health, safety or interest—or is denied deferment.

Throughout his career as a student, the pressure—the threat of loss of deferment—continues. It continues with equal intensity after graduation. His local board requires periodic reports to find out what he is up to. He is impelled to pursue his skill rather than embark upon some less important enterprise and is encouraged to apply his skill in an essential activity in the national interest. The loss of deferred status is the consequence for the individual who acquired the skill and either does not use it or uses it in a nonessential activity.<sup>136</sup>

Is the allocation of such pervasive power over careers to *any* governmental agency consistent with a decent respect for individual liberty?

Despite General Hershey's statement that Selective Service is one of our "oldest" institutions,<sup>137</sup> there is respectable historical evidence that we were as a nation led late and reluctantly to adopt conscription. The colonial militias were raised upon the principle that every able-bodied man owed some service, although conscientious objectors were generally excepted. But from the beginning, the national government was not thought to have power to compel military service. Instead, the militias of the states were to be the chief mainstay of the

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136. Reprinted in memorandum prepared by the National Lawyers Guild entitled "Law Students and the Draft."

137. Text accompanying note 2 *supra*.



federal military force if its needs surpassed the capacity of its small standing army. This judgment was reflected in the provisions of article I giving Congress power over the militias to a limited extent and under carefully defined circumstances.<sup>138</sup> Although a challenge to the Civil War draft upon these grounds was unsuccessful,<sup>139</sup> there is eloquent testimony in speeches and writings of American leaders and others that conscription was not consonant with the American ideal of freedom.<sup>140</sup>

Those inducted into the armed forces are all young, and a disproportionate number are drawn from among the poor. They are conscripted into service for pay far lower than the market value of their services in civilian life. John Kenneth Galbraith has remarked of this phenomenon:

The draft survives principally as a device by which we use compulsion to get young men to serve at less than the market rate of pay. We shift the cost of military service from the well-to-do taxpayer who benefits by lower taxes to the impecunious young draftee. This is a highly regressive arrangement that we would not tolerate in any other area. Presumably, freedom of choice here as elsewhere would be worth paying for.<sup>141</sup>

The difference between what a conscript soldier is paid and the market value of his services may be termed a dollars and cents measure of his peonage or involuntary, uncompensated service. This aspect of conscription has been insufficiently considered by courts in rejecting thirteenth amendment arguments against conscription.<sup>142</sup>

There have, of course, been other constitutional critiques of the draft. The most telling critique, however, arises not from any specific constitutional provision but from the impact of the draft upon the separation of powers. The Framers of the Constitution were concerned with executive usurpation of power committed to the legislature, fearing that a President might seek to take unto himself the powers which the English Crown had enjoyed and exercised, particularly in the field of foreign affairs.<sup>143</sup> For that reason, Congress was given the power to declare war, there was a two-year limit on appropriations for the sustenance of the army, and the power to raise an army was given to Congress.<sup>144</sup> Without doubt, what the Framers feared has come about. The President, not Congress, is the principal warmaker and director of American foreign policy today. And he is immeasurably aided in these tasks by his power to conscript—to set the draft calls higher or lower and to change classification standards by regulation, thereby controlling the size of the armed forces and the uses to which they will be put. A conscript army, in short, is one

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138. See SSLR, Practice Manual ¶¶ 2, 2303.

139. *Kneedler v. Lane*, 45 Pa. 238 (1863), discussed at SSLR, Practice Manual ¶ 2303.

140. SSLR, Practice Manual ¶ 2303, citing authorities.

141. Quoted in Oi, *Can We Afford the Draft?*, CURRENT HISTORY, July 1968, at 34, 36.

142. SSLR, Practice Manual ¶ 2304.

143. See, e.g., 3 STORY, COMMENTARIES ON THE CONSTITUTION § 1166 (1st ed. 1833).

144. See THE FEDERALIST NOS. 23-27 (Hamilton).

means by which old men usurp the power to declare wars for young men to fight. Such a system of conscription flouts a basic teaching of one of our earliest and most sagacious constitutional scholars—that in a republic it should be difficult to make war but easy to make peace.<sup>145</sup>

### *Some Concluding Observations*

Resistance and opposition to the draft are growing, in part at least, because of the ugliness of American foreign policy in Vietnam and elsewhere. But they also arise from the sense of frustration, powerlessness and alienation generated as the system of conscription moves, remorselessly and ineluctably, toward its monthly goal of putting a few thousand more young men under arms. Meanwhile, prosecutions for Selective Service offenses continue to increase, along with the length of sentences of those convicted.<sup>146</sup> We have not witnessed such events since World War I, when the wave of prosecutions for sedition and draft offenses created an atmosphere of fear and repression which had profound impact upon the nation's political life. As Zechariah Chafee recorded it:

[T]ens of thousands among those "forward-looking men and women" to whom President Wilson had appealed in earlier years were bewildered and depressed and silenced by the negation of freedom in the twenty-year sentences requested by his legal subordinates from complacent judges. So we had plenty of patriotism and very little criticism, except of the slowness of munition production. Wrong courses were followed like the despatch of troops to Archangel in 1918, which fatally alienated Russia from Wilson's aims for a peaceful Europe. Harmful facts like the secret treaties were concealed while they could have been cured, only to bob up later and wreck everything. What was equally disastrous, right positions, like our support of the League of Nations before the armistice, were taken unthinkingly merely because the President favored them; then they collapsed as soon as the excitement was over, because they had not depth and had never been hardened by the hammerblows of open discussion. And so when we attained military victory, we did not know what to do with it. No well-informed public opinion existed to carry through Wilson's war aims for a new world order to render impossible the recurrence of disaster.<sup>147</sup>

We face today a similar crisis in freedom to dissent from the course of American foreign policy. Because it is the instrument by which men are obtained to fight, because it exercises great power over the lives of those subject to its command, and because it has chosen to suppress dissent over the war in Vietnam, Selective Service stands not merely as the symbol, but as the embodiment, of much that is unfair and arbitrary and wrong.

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145. STORY, *supra* note 143.

146. Successive annual reports of the Administrative Office of the United States Courts provide this information.

147. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 561-62 (1942).