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The Procedural Defense in Selective Service Prosecutions: The View from Without and Within

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THE PROCEDURAL DEFENSE IN SELECTIVE SERVICE PROSECUTIONS: THE VIEW FROM WITHOUT AND WITHIN

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The Vietnam war has been a significant factor in the rise of draft resistance litigation. In ever increasing numbers, attorneys throughout Iowa and the nation are being approached by young men seeking guidance concerning their legal rights vis-a-vis local draft boards. This article is designed to acquaint attorneys with the Selective Service System. Professor Sedler emphasizes the procedural aspects of the system and the myriad of regulations to be followed by local boards. It is his contention that many local boards are failing to respect legally established procedural safeguards for registrants. His victory before the Supreme Court in 1970 in Mulloy v. United States is evidence of his expertise in this area.

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I. INTRODUCTION: THE PROCEDURAL DEFENSE IN CONTEMPORARY CONTEXT

One of the many consequences of this nation's military involvement in Vietnam has been the profound change in the attitude toward military service on the part of the young men who are to render it. Not only is military service no longer equated with patriotism,[1] but the avoidance of such service is perfectly respectable and indeed a high priority objective.[2] The "physically unacceptable" classification, which branded one as a sexually inadequate pariah during World War II days, is probably the most sought-after classification today. Instead of flocking to the recruiting station in response to the "Uncle Sam Wants You" posters, the present attitude is that "Uncle Sam will get me only if I have a low lottery number and he can catch me." Military service, then, is not viewed by the present generation of young Americans as something to be performed voluntarily for the benefit of the national state, but as something that is exacted from unwilling conscripts by the very real threat of 5-year prison sentences.[3] Indeed, as Professor Kenneth E. Boulding has suggested, the requirement of compulsory military service may have caused many young people to question the *legitimacy* of the national state itself as an institution.[4] If military service cannot be avoided, the great majority of young men will literally *submit* to induction. If they

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[1] During the last few years I must have been consulted by hundreds of college students whose political views ranged the spectrum from radical to rather conservative, and who have come to me with one thing in mind—how could they legally avoid the draft. Other draft counselors report the same experience, and it is not limited to college students. I have discussed this point with state selective service officials and they reluctantly agree.

[2] It may be true as the poet Horace has said, *"Dulce et decorum est mori patriae"* (Sweet and fitting it is to die for one's country). The attitude of most young men today, however, is better expressed by the following language from Joseph Heller's popular novel, *Catch 22:*

> . . . Open your eyes, Clevinger. It doesn't make a damned bit of difference who wins the war to someone who's dead.
>
> Clevinger sat for a moment as though he'd been slapped. 'Congratulations!' he exclaimed bitterly, the thinnest milk-white line enclosing his lips tightly in a bloodless, squeezing ring. 'I can't think of another attitude that could be depended upon to give greater comfort to the enemy.'
>
> 'The enemy,' retorted Yossarian with weighted precision, 'is anybody who's going to get you killed, no matter which side he's on . . . .' J. HELLER, CATCH 22, at 136 (1962).

[3] The practice of all of the federal judges in Kentucky has been to impose 5-year sentences routinely. In fiscal 1969 the *average* sentence for Selective Service Act violations was 36.3 months. 2 SEL. SERV. L. REP. 65 (1970). *See also* Note, *Sentencing Selective Service Violators: A Judicial Wheel of Fortune,* 5 COLUM. J.L. & SOC. PROB., 164, 178 (Aug. 1969).

[4] Boulding, *The Impact of the Draft on the Legitimacy of the National State,* in THE DRAFT: A HANDBOOK OF FACTS AND ALTERNATIVES 191 (S. Tax ed. 1966).

seek any legal relief, it will be by means open to persons in military service, such as by a petition for a writ of habeas corpus.[5]

There is an ever-increasing minority, however, who will not submit. Some in this group flee to Canada or other countries which will not extradite draft resisters to the United States. But most of them "take their stand at home" and thus face criminal prosecution for their refusal to submit to induction.[6] Many of these will have tried previously to obtain classification as conscientious objectors and perform alternate civilian work in lieu of induction;[7] they will have been unsuccessful. Others will have been unsuccessful in their efforts to obtain other exemptions or deferments.[8] Because of this resistance in the face of increased draft calls necessitated by the Vietnam war,[9] there has been a sharp rise in the number of selective service prosecutions.[10] With this rise in prosecutions, there has developed a cadre

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[5] Practically all of the defenses that can be raised in a criminal prosecution can be raised by habeas corpus after the registrant has submitted to induction. A person in the military whose request for a discharge has been denied by military authorities may also seek judicial review by way of a petition for a writ of habeas corpus. This has given rise to a substantial amount of litigation on the part of "in-service C.O.'s," who are persons who claim to have become conscientious objectors following their entry into service. *See generally* Hansen, *Judicial Review of In-Service Conscientious Objector Claims*, 17 U.C.L.A.L. REV. 975 (1970).

[6] Military Selective Service Act of 1967 § 12(a), 50 U.S.C. App. § 462(a) (Supp. V, 1970) [hereinafter cited as MSSA].

[7] MSSA § 6(j), 50 U.S.C. App. § 456(j) (Supp. V, 1970). A registrant who is found to be opposed only to combatant service rather than to participation in war in any form is classified I-A-O. *See* 32 C.F.R. § 1622.11 (1971). He is inducted along with I-A's, 32 C.F.R. § 1631.7 (1971), and his classification is relevant only to the duties which he performs while in military service. Since this is so, boards are far more willing to give the I-A-O classification. Sometimes they are so "willing" that they have improperly denied a clearly valid I-O claim. *See* United States v. Washington, 392 F.2d 37 (6th Cir. 1968). In practice boards are very hostile to purported claims of conscientious objection. The National Advisory Commission on Selective Service (Marshall Commission) reported that in one state 55 percent of local board members said that no conscientious objector classifications should ever be given. REPORT OF THE NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE 19 (1967) [hereinafter cited as MARSHALL REPORT].

[8] The most commonly claimed exemptions and deferments in this regard are ministerial (usually Jehovah's Witnesses), occupational, and hardship. Prior to the 1967 amendment making undergraduate student deferments mandatory, student deferments were sometimes denied. The classifications are listed in 32 C.F.R. § 1622.2 (1971).

[9] Draft calls increased from 101,300 in 1965 to 336,530 in 1966. The subsequent yearly figures are: 1967 - 288,900; 1968 - 343,000; 1969 - 263,800; 1970 - 209,300. R. FRIEDMAN, THE WISE MINORITY 179-80 (1971).

[10] In fiscal 1970, 3,873 Selective Service prosecutions were begun, 2,901 were concluded, and there were 963 convictions. 3 SEL. SERV. L. REP. 54 (1970). There were 3,305 prosecutions commenced in fiscal 1969, compared to 1,826 begun in

of lawyers who—often without remuneration and almost always with an abiding conviction of the rightness of draft resistance—will defend them.[11] It is to the "selective service" or "draft resistance" bar, as I prefer to call it, that this article will be of primary interest, and to whom, in a sense, it is dedicated.

The article is written from the perspective of an academician who also attempts to be a "part-time draft resistance lawyer,"[12] and who in the latter capacity has litigated some selective service cases[13] and has counseled quite a number of young men about their draft problems. I do not doubt for a moment that this involvement and identification on my part has interfered with my ability to analyze the subject dispassionately and objectively. Unlike the dispassionate and objective legal scholar, I have done something other than read all the cases and literature on the subject and I have not arrived at my conclusions solely in the "cloistered groves of academe."[14] On the other hand, perhaps there are insights to be gained by participation, involvement, and identification, which no amount of reading of cases and law review articles can supply. Perhaps there is an existential as well as an analytical component to legal scholarship. Perhaps there is a real

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fiscal 1968. 2 SEL. SERV. L. REP. 33 (1969). In fiscal 1967, there 1,648 cases, which was more than three times as many as in fiscal 1965. Ginger, *Minimum Due Process Standards in Selective Service Cases* (pt. 1), 19 HAST. L.J. 1313 (1968). Prosecutions during the Korean War years were far less. Those figures are: 1951 - 338; 1952 - 659; 1953 - 771; 1954 - 1015; 1955 - 477.

[11] In some of the larger cities such as San Francisco and New York, Selective Service Lawyers' Panels have been formed. In smaller cities the members of the draft resistance bar generally work closely together.

[12] In an earlier article I referred to myself as a "part-time movement lawyer." Sedler, *The Dombrowski-Type Suit as an Effective Weapon for Social Change: Reflections from Without and Within* (pt. 1), 18 U. KAN. L. REV. 237, 239 (1970). Many of the movement lawyers are also draft resistance lawyers.

[13] This article will discuss four cases involving the procedural defense. In United States v. Pratt, 412 F.2d 426 (6th Cir. 1969), *cert. denied*, 91 S. Ct. 1246 (1971). The author contended that the present selective service law is unconstitutional as beyond the powers of Congress under art. I, § 8, and as violative of due process of law. *Id.* at 427. The "Nuremberg" defenses were also raised. *Id.* The Sixth Circuit gave these arguments short shrift. The defendant, through the author, petitioned the Supreme Court for certiorari in September 1969, and the case is still pending there. Pratt v. United States, No. 45 (U.S., October Term 1970).

[14] My "extracurricular activity" has not met with approval among many members of the "establishment bar;" nor has it met with the approval of the Governor, who is also chairman of the University's Board of Trustees. When I instituted a suit against him in 1968 challenging the Kentucky Un-American Activities Committee, he announced to the press that he was "distressed" that a University of Kentucky law professor was involved as counsel in the case and observed that, "We are going to have to take a long hard look at some of the people to whom our youth are exposed."

difference, for example, between the way a case or a legal problem looks when it appears in the homogenized form of a judicial opinion and the way it looks in real life, particularly from the firing line. Obviously I believe that there is, or I would not be doing it and writing about my experiences in this way.[15] In any event, it is important that the reader understand the perspective and the bias from and with which this article is being written.[16]

The subject of the article is the procedural defense in selective service prosecutions. Functionally this means any defense other than that there was no "basis in fact" for the classification[17] or that the board classified the registrant under an erroneous interpretation of law.[18] More specifically, it involves defenses based on the failure of the local board or the appeal board to follow the procedures set forth in the Military Selective Service Regulations[19] for classifying and inducting registrants, or violations of those elements of fair play and fair hearing which are embodied in the concept of due process of law.[20] If the procedural defense is sustained, the order to report for induction, or the order to report for civilian work in the case of conscientious objectors, is invalid and a registrant cannot be convicted for its violation.[21] At the trial level the court must order a judgment of acquittal.[22]

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[15] The *Dombrowski* article was my first venture in this regard. *See* Sedler, note 12 *supra* and accompanying text.

[16] It is also hoped that this article will provide a handy reference tool for draft resistance lawyers.

[17] *See* MSSA § 10(b)(3), 50 U.S.C. App. § 460(b)(3) (Supp. V, 1970). *See also* Estep v. United States, 327 U.S. 114 (1946).

[18] As to the "erroneous interpretation of law" defense, which I consider a variation of the "no-basis-in fact" defense, see Sicurella v. United States, 348 U.S. 385, 391 (1955); United States v. Tichenor, 403 F.2d 986, 988 (6th Cir. 1968); United States v. Carroll, 398 F.2d 651, 655 (3d Cir. 1968).

[19] The Selective Service regulations are contained in 32 C.F.R. §§ 1600-90 (1971). They are supplemented by Local Board Memoranda and other directives from the National Headquarters of the Selective Service System.

[20] Sometimes the courts refer to a violation of the regulations as depriving the registrant of due process of law. *See* Stain v. United States, 235 F.2d 339, 343 (9th Cir. 1956). As will be pointed out, certain violations can also occur at the induction center, in which case it is Army regulations which are being violated. The effect is the same.

[21] Mulloy v. United States, 398 U.S. 410, 415, 418 (1970).

[22] The existence of the procedural defense will ordinarily be determined by the judge if the case is tried before the jury, as it involves a "matter of law" within the meaning of Cox v. United States, 332 U.S. 442, 452-53 (1947). The jury, however, may determine whether the board denied the registrant a fair hearing. *See* Niznik v. United States, 173 F.2d 328, 336 (6th Cir.), *cert. denied*, 337 U.S. 925 (1949). If the judge sustains the procedural defense and grants a judgment of acquittal, the government cannot appeal. *See* United States v. Sisson, 399 U.S. 267, 291-99 (1970). *See also* United States v. Weller, 91 S. Ct. 602 (1971).

The procedural defense has its genesis in a little-remembered sentence found in the opinion in *Estep v. United States.*[23] In recognizing a limited power of judicial review over selective service proceedings,[24] the Court referred to the jurisdiction of selective service boards and stated that "[t]he question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."[25] It preceded that sentence, however, by observing that "[t]he decisions of the local board *made in conformity with the regulations* are final even though they may be erroneous."[26] That sentence would imply that when the board has violated the regulations, its decisions are not final and its action may be invalidated on that ground apart from whether or not there was a basis in fact for the substantive classification.[27]

In the cases which arose between 1946, when *Estep* was decided, and the time of the Vietnam resistance (I will use 1966 as the starting point),[28] which in comparison to the Vietnam-produced cases were relatively few in number despite some increase in the Korean war period,[29] the procedural defense was recognized and sometimes sustained. In *Simmons v. United States,*[30] for example, decided in 1955, the Supreme Court held that the failure of the Department of Justice to furnish a registrant with a fair resume of an FBI report that the Department was considering in passing on his conscientious objector claim, deprived him of the fair hearing to which he was entitled under

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[23] 327 U.S. 114 (1946).

[24] This review has been described as the "narrowest known to the law." Blalock v. United States, 247 F.2d 615, 619 (4th Cir. 1957).

[25] 327 U.S. at 122-23. Similar language is contained in MSSA § 10(b)(3), 50 U.S.C. App. § 460(b)(3) (Supp. V, 1970).

[26] 327 U.S. at 122 (emphasis added).

[27] There has been an unfortunate tendency on the part of courts to use the basis-in-fact language when referring to action allegedly invalid on procedural grounds. In *Mulloy,* as will be pointed out, the Sixth Circuit applied the basis-in-fact test to determine whether the board abused its discretion in failing to reopen. United States v. Mulloy, 412 F.2d 421, 426 (1969). It was my argument that "[i]t is the function of the courts to determine whether the board *has* followed the regulations, not whether there was a basis in fact for their *refusal* to do so." Brief for Petitioner at 25, Mulloy v. United States, 398 U.S. 410 (1970). As to the difference between the basis-in-fact test when applied to judicial review of a substantive classification and the basis-in-fact test applicable to review of procedural error, see the discussion in Petrie v. United States, 407 F.2d 267, 274 (9th Cir. 1969). The term "basis in fact" should be limited to review of the substantive classification.

[28] Based both on increased draft calls and increased prosecutions. *See* R. FRIEDMAN, *supra* note 9, at 179-80.

[29] *See* authorities cited note 10 *supra.*

[30] 348 U.S. 397 (1955).

the statute.[31] In *Gonzales v. United States*,[32] decided the same day, the Court held that the failure of the Department to furnish the registrant with a copy of its recommendation to the appeal board and to give him a reasonable opportunity to reply was improper, and directed that his conviction for refusing to submit to induction be reversed.[33] While these were the only two Supreme Court decisions going off on procedural grounds, and were decisions limited to the procedures then in effect for processing conscientious objector claims,[34] lower federal courts were also holding that procedural violations on the part of the boards furnished a defense to a criminal prosecution. These decisions are best illustrated, I think, by *Olvera v. United States*,[35] in which the local board refused to reopen a registrant's classification because it felt that it did not have to.[36] The district judge held that this furnished no defense to the prosecution because, if the board had reopened the classification, "it should and would have refused the classification asked."[37] In reversing, the Fifth Circuit stated:

> While at the time the district judge wrote his opinion deciding this case, there may have been warrant in the decided cases for his decision, we are in no doubt that the decisions of the Supreme Court, handed down on

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[31] *Id.* at 404-05. Under the procedure in effect at that time, the Department of Justice was required to hold a hearing with respect to the character and good faith of a registrant seeking conscientious objector status. It then made a recommendation to the appeals board. The Department of Justice hearing procedure was eliminated in the 1967 Act.

[32] 348 U.S. 407 (1955).

[33] *Id.* at 417. The Court cited the provisions of section 451(c), referring to "a system of selection which is fair and just," in support of its conclusion. *Id. Cf.* United States v. Nugent, 346 U.S. 1, 5-6 (1953) ("fair hearing" did not entitle registrant to disclosure of secret F.B.I. reports). The same day the Court decided *Simmons* and *Gonzales*, it decided two other Jehovah's Witnesses cases. In Sicurella v. United States 348 U.S. 385 (1955), it invalidated a classification on the ground that the board had applied an erroneous standard of law. *Id.* at 391. In Witmer v. United States, 348 U.S. 375 (1955), it found that there was a basis in fact for the classification and affirmed the conviction. *Id.* at 383. In Gonzales v. United States, 364 U.S. 59 (1960), the Court held that the registrant was not entitled to see the hearing officer's report to the Department of Justice. *Id.* at 63-64. In United States v. Purvis, 403 F.2d 555 (2d Cir. 1968), the court explained that case on the ground that the Department's recommendation was not based on the hearing officer's report, but on the local board's statement, which was in the registrant's file. *Id.* at 561. The court found that in view of the circumstances present there, it was unfair to deny the registrant access to the report. *Id.* at 562.

[34] Since the Department of Justice hearing procedure was only repealed in 1967, cases may still arise involving registrants who were denied conscientious objector classification under that procedure. Today conscientious objector claims are processed in the same manner as other claims.

[35] 223 F.2d 880 (5th Cir. 1955).

[36] *Id.* at 881 n.1, 883.

[37] *Id.* at 881 n.1.

> March 14, 1955,[38] taken together, have made it clear that this warrant no longer exists. Indeed the principle finally established by the Supreme Court, in its struggle to reconcile the fundamental principles of liberty and due process with the failure of the Selective Training and Service Act to make specific provision for judicial review of board action and for a jury trial on the controlling issue makes it certain that this is so. The principle, that when every requirement of due process has been observed by the board, its fact decisions, unless wholly unsupported, are not subject to review, makes it certain that this is so. Under this principle, it is of the essence of the validity of board orders and of the crime of disobeying them that *all procedural requirements be strictly and faithfully followed, and that a showing of failure to follow them with such strictness and fidelity will invalidate the order of the board and a conviction based thereon.*[39]

The procedural defense was effectively asserted in other lower court cases, usually revolving around the failure of the board to reopen a classification or its denial of an appeal.[40]

It was not until the Vietnam-produced cases, however, that the procedural defense truly came into its own[41] and, in my opinion, became more significant from a practical standpoint than the no-basis-in-fact defense. The view is shared at least among draft resistance lawyers of my acquaintance that the lawyer should first try to find procedural violations and fall back on no basis in fact only as a last resort. In other words, the feeling is that it is much easier to win cases by showing a procedural violation than it is by showing that the classification has no basis in fact.[42] The procedural defense is one which has been developed by the draft resistance lawyers. What has happened is that the lawyers defending these cases have discovered procedural errors which a registrant's board has committed and try them out on the court, so to speak. If the defense is successful, that knowledge will be shared with the other members of the draft resist-

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[38] Witmer v. United States, 348 U.S. 375 (1955); Sicurella v. United States, 348 U.S. 385 (1955); Simmons v. United States, 348 U.S. 397 (1955); Gonzales v. United States, 348 U.S. 407 (1955).

[39] Olvera v. United States, 223 F.2d 880, 881-82 (5th Cir. 1955) (emphasis added).

[40] *See, e.g.*, Townsend v. Zimmerman, 237 F.2d 376, 378 (6th Cir. 1956); Stain v. United States, 235 F.2d 339, 343 (9th Cir. 1956); United States v. Vincelli, 215 F.2d 210, 213 (2d Cir. 1954). *See also* Bejelis v. United States, 206 F.2d 354, 358 (6th Cir. 1953); Davis v. United States, 199 F.2d 689, 691-92 (6th Cir. 1952). Not infrequently, however, the courts would hold alleged procedural violations to be insufficient without any discussion. Registrants were also held barred from asserting procedural defenses because of failure to exhaust administrative remedies.

[41] For this reason we will concentrate on the Vietnam-produced cases although we will in some instances refer to earlier cases. Realistically, many of the older cases may no longer be good law, and in practice most draft resistance lawyers do not pay much attention to them.

[42] This is important when a lawyer is counseling a registrant on his alternatives. When a registrant asks whether he has a good case, the lawyer is not likely to respond affirmatively if the only defense is no-basis-in-fact.

ance bar at least in the same locale, who will then use it in their cases. The publication of the Selective Service Law Reporter by the Public Affairs Institute[43] has made such information available to draft resistance lawyers throughout the country.[44] It has also served as a way of making most selective service decisions available to the courts.[45] Some of the defenses are totally new in the sense that they were not raised in the pre-Vietnam days. Of these some have been fully accepted by the courts[46] while others have had a mixed reception at best.[47] The substantial number of acquittals on procedural grounds,[48] however, attests to the overall success of the defense.

The fact that the defense has been so successful cannot necessarily be attributed to the extraordinary legal skills of the draft resistance bar. Its success must be analyzed with reference to present societal attitudes toward the Vietnam war and the Selective Service System. As one commentator has pointed out:

> An analysis of draft cases decided by the Supreme Court during and after World War II and the Korean War indicates that by and large cases decided during wartime yield to the demands of the military for an expeditious form of conscription. Only after hostilities were terminated was the judiciary receptive to contentions that classification procedures had been defective and that a reasonable measure of judicial review should be available. But while the Vietnam War continues unabated, the Supreme Court and the lower federal courts have repeatedly strengthened the hands of registrants against Selective Service.[49]

It is difficult to believe that the opposition to the war, which, for one reason or another, is becoming increasingly widespread, has not

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[43] It has now reached three lengthy volumes. See the discussion of its importance in Asimow, *Introduction* to Symposium, *Selective Service 1970*, 17 U.C.L.A.L. REV. 893, 905-06 (1970).

[44] I seriously doubt that I would have been aware of the no-meeting defense that I successfully asserted in United States v. Crump, No. 10,709 (E.D. Ky., Sept. 17, 1969), if it had not been for the availability of the *Selective Service Law Reporter*. *See* notes 442-46 *infra* and accompanying text.

[45] This is particularly true of district court decisions, which are often not reported in the Federal Supplement Reporter.

[46] In this category I have placed the giving of reasons for the classification, failure to meet, and the giving of misleading advice.

[47] In this category I have placed improper composition of the local boards and violation of the order of call regulations.

[48] As to acquittals generally, the conviction rate for fiscal 1970 was 33.4 percent compared to 47.2 percent for fiscal 1969. In fiscal 1970, 1,901 cases were concluded, and there were 968 convictions. 3 SEL. SERV. L. REP. 54 (1970). I am not aware of any studies indicating how many acquittals were due to no basis in fact or erroneous interpretation of the law defenses and how many were due to the successful assertion of the procedural defense. All I can say is that the cases indicate a large number of procedural defense acquittals, and my personal view is that they by far exceed the number of no-basis-in-fact acquittals.

[49] *See* Asimow, *supra* note 43, at 895-96.

permeated at least some sectors of the federal judiciary and has not influenced the trend of favorable decisions in draft cases.[50]

Equally significant, I think, has been the increasing opposition to compulsory military service[51] and the serious disenchantment with the administration of the Selective Service System.[52] Its glaring deficiencies and the frequent unfairness and arbitrariness on the part of the boards were well documented in the Marshall Report.[53] This would also be reflected in the cases coming before the courts for decision. A judge's sense of procedural fairness could not avoid being traumatized upon seeing some of the things which boards have done during the classification process.[54] On occasion judges have not hesitated to give vent to their feelings on the matter.[55] Thus, even judges who were not particularly sympathetic to draft resisters could

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[50] May it not also be significant that the great majority of draft resisters are white, middle-class youth, whom at least some judges may be reluctant to brand as "criminals." See the discussion in Tigar & Zweben, *Selective Service: Some Certain Problems and Some Tentative Answers*, 37 GEO. WASH. L. REV. 510, 531-33 (1969).

[51] This view finds support in different ideologies, as signified by the Goldwater-Hatfield bill to repeal the draft. For an economist's view, see Friedman, *Why Not a Volunteer Army*, in THE DRAFT, *supra* note 4, at 200; Oi, *The Costs and Implications of an All-Volunteer Army*, in THE DRAFT, *supra* note 4, at 221. It may be significant that the Nixon administration has promised zero draft calls by 1973. Note that zero draft calls are *not* the same thing as repeal of the draft, since the structure still exists and draft calls can be increased whenever the President wants to commit the nation to another Vietnam. As to the relationship between the existence of the draft and our Vietnam involvement, see Sedler, Book Review, 57 KY. L.J. 302, 311-2 (1969).

[52] This disenchantment was symbolized by its venerable Director, Gen. Lewis B. Hershey. The "firing" of General Hershey constitutes presidential recognition of this disenchantment. His successor, Curtis W. Tarr, has tried very hard to create a very different public image. There have been no Tarr Directives, for example.

[53] MARSHALL REPORT (1967). The Commission proposed a complete overhaul of the system, recommending specifically a consolidated selective service system under more centralized administration. *Id.* at 31. This and most of its other recommendations were studiously ignored by Congress when it enacted the Military Selective Service Act of 1967.

[54] The "built-in procedural deficiency" of the system is well demonstrated in Ginger, note 10 *supra*. *See also* Tigar & Zweben, note 50 *supra*.

[55] *See* Walsh v. Local Board No. 10, 305 F. Supp. 1274 (S.D.N.Y. 1969).

> The draft board's overzealous, highhanded and erroneous handling of this young man's plight hardly inspires confidence in the system. Rather, it is this kind of mistreatment which has alienated the youth of the nation, bred disrespect for law, sparked the disorders which have torn a gap between generations and ripped open the very structure of society. It feeds the clamor for abolition of the whole selective service system, from top to bottom, not only by mounting numbers of defiant young men, but also by the President and many members of congress, where no less than 43 bills to change the draft law are pending. At the very least, those entrusted with the awful power of conscripting the nation's young men

see their way clear to strike down arbitrary and improper action on the part of draft boards.[56]

In terms of a more conventional legal explanation, recognition of the procedural defense has been fostered by the very narrow scope of review of the substantive classification. As one court has observed, "The procedural framework of the draft classification process and the narrowly limited judicial review available to draft registrants make adherence to procedural safeguards crucial to the maintenance of basic fairness."[57] Moreover, the courts feel more at home in evaluating procedural fairness than they do when dealing with the substantive validity of the classification. By invalidating the action on procedural grounds they do not have to come to grips with the substantive classification and will not be put in a position where they have to usurp the function of the Selective Service System.

All of the above factors, as well as the innovative efforts of draft resistance lawyers, have contributed to the increasing effectiveness of the procedural defense. So, too, the fact that there are so many regulations coupled with the nature of the system and attitudes toward procedure, would indicate that procedural violations are likely to occur. This was explicitly recognized by the Ninth Circuit in *Oshatz v. United States*,[58] where it was stated:

> A myriad of regulations specify the procedural steps which must be followed by a registrant, the local board, the appeal board, and military personnel in order to accomplish the induction of a young man into the armed forces, or his exclusion therefrom. Because there are so many regulations, which are often complex, and because the individuals who are expected to comply with the regulations are not legal experts, procedural irregularities are frequent. Even the most casual glance at the case law will reveal a staggering array of deviations from the regulations which have been advanced as defenses to prosecutions for refusal to submit to induction. The defenses have been unsuccessful where the procedural irregularities are minor and the registrant has not been prejudiced because of them. . . . Courts have responded to the necessity of 'balancing between the demands of an effective system for mobilizing the Nation's manpower in times of crisis and the demands of fairness toward the individual registrant.' [citing *Simmons v. United States*] Accordingly,

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into the armed forces in time of war or other military venture owe a duty of the most searching examination of the facts, scrupulous fairness, sensitive care, compassionate hearing, patient consideration, cautious action and deliberate and rational decision within the law. We afford no less to the worst criminal in our society. *Id.* at 1279.

[56] I have also felt that lurking in the back of the minds of some judges, at least, has been an adversary's sense of giving defense counsel something to work with. Since all the government has to prove is the I-A classification, the issuance of the order, and the failure to respond, the defense counsel is severely handicapped unless he is given something of this sort. Unconscious motivation is always a dangerous thing to fool with, and I am not all that serious about this suggestion. Nonetheless, it is something to think about.

[57] United States v. Freeman, 388 F.2d 246, 248 (7th Cir. 1967).

[58] 404 F.2d 9 (9th Cir. 1968).

> defenses based upon irregularities resulting in substantial prejudice to registrants have been sustained.[59]

In retrospect, then, it would seem that the draft resistance lawyers have had many things going for them in their efforts to establish the procedural defense. As the discussion in *Oshatz* demonstrates, those efforts have met with considerable success.

The successful assertion of the procedural defense, however, does not necessarily mean that the draft resistance has been successful. In theory, the matter goes back to the Selective Service System, which can start over again using the proper procedure. If a no-basis-in-fact defense is successful, on the other hand, the registrant will have to be given the desired classification and cannot be ordered for induction. In practical terms, then, some question may be raised as to how valuable it is to prevail on procedural grounds.

The immediate answer, of course, is that the registrant has been acquitted of the criminal charge and, as in any criminal prosecution, that must be the primary objective. Sufficient unto the day is the evil thereof. The next time around the draft board may be more sympathetic toward the registrant and more disposed to grant the requested classification, particularly if the members have been "put through the wringer" during the trial.[60] Even if they are not more sympathetic and the registrant is inducted again, the no-basis-in-fact defense is still available, as are other possible procedural errors that the board may still commit.[61]

A more important benefit of the procedural defense can often be realized, however. By the time the criminal case has been finally resolved, the registrant may have passed his prime period of eligibility and will no longer be subject to induction. In my own case of *Mulloy v. United States*,[62] for example, the Supreme Court's decision was handed down on June 15, 1970. Joe Mulloy's twenty-sixth birthday was celebrated on June 1, 1970. He had, therefore, reached the age of 26 without ever having been "legally" ordered to report for induction, and went to the bottom of the priority list[63] so as to be effectively immune from induction. This is even more significant in the case of registrants who are covered by the one year maximum-exposure rule of the present lottery selection system.[64] Such a regis-

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[59] *Id.* at 12.

[60] Defense counsel will frequently subpoena the board members not only to establish procedural errors, but to establish erroneous interpretation of the law.

[61] In United States v. Crump, No. 10,709 (E.D. Ky., Sept. 17, 1969) "left unused" was the defense of misleading advice as well as the defense of "erroneous interpretation of law."

[62] 398 U.S. 410 (1970).

[63] 32 C.F.R. § 1631.7(b)(6) (1971).

[64] 32 C.F.R. §§ 1631.5, 1631.7(b)(2)-(4) (1971).

trant, who was acquitted in a criminal prosecution, would probably remain subject to induction only if the criminal case were completed and processing began anew in the same year in which he was ordered to report for induction.[65] This is not very likely.[66] Because his number was reached during his prime year of eligibility, he was classified I-A, and he was ordered inducted during that year,[67] the

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[65] It is that year in which he is in the First Priority Selection Group. 32 C.F.R. § 1631.7(b)(3) (1971).

[66] Although selective service prosecutions are to take precedence, MSSA § 12a, 50 U.S.C. App. § 462(a), (Supp. V, 1970), there is frequently a backlog of cases in urban areas, and the ability of the legal system to promote delay needs no documentation. If the conviction is reversed on appeal, this would be a practical impossibility.

[67] The regulation makes provision for an Extended Priority Selection Group, which consists of registrants "who on December 31 were members of the First Priority Selection Group whose random sequence number had been reached but who had not been issued Orders to Report for Induction." 32 C.F.R. § 1631.7(c)(1) (1971). Since our registrant was issued such an order, it would not seem that he would fall into the Extended Priority Selection Group. The only way that he could fall into that Group is if it was said that he was not issued an order to report, because the order to report was invalid due to the procedural violation. This gives a strained meaning to the words of the regulation and is inconsistent with the "one-year maximum exposure" approach that the lottery selection was supposed to herald.

But if the boards were to interpret this differently, and if the courts were to uphold that interpretation, the registrant would fall into the Extended Priority Selection Group, which generally means that the registrant is liable for induction during the first three months of the year following. 32 C.F.R. § 1631.7(d)(5) (1971). However, it is also provided by that subsection that a registrant in the Extended Priority Selection Group who would otherwise have been ordered to report for induction before April 1, but who "could not be issued orders," remains liable and shall be ordered for induction as practicable. The circumstances that would prevent such an order, it is provided, "shall include but not be limited to those arising from a personal appearance, appeal, preinduction physical examination, reconsideration, judicial proceeding, or inability of the local board to act." It could be argued that "judicial proceeding" includes a pending selective service prosecution, but a more logical reading would refer to an ordinary criminal prosecution, since the pendency of such a prosecution prevents issuance of an induction order in the same manner as an appeal and the like. And, of course, our registrant has already been issued an induction order.

I think that I am correct in my interpretation of the regulation and that the registrant would not fall into the Extended Priority Selection Group. But even if I am not, he would be liable for only three months more unless I am also incorrect in my interpretation of the proviso to 32 C.F.R. § 1631.7(d)(5) (1971). It would seem that if the liability of persons who were already inducted, but whose induction was invalid, was to be extended, the regulation would have done so specifically, since it was pretty specific about everything else. I have hedged my statement only because this position has not been clearly established yet, and perhaps may never be. But, as a working hypothesis, I will assume that the successful assertion of the procedural defense on behalf of a registrant subject

registrant's prime period of eligibility will have passed at the end of that year. As to registrants covered by the present lottery system, then, it would seem that the successful assertion of the procedural defense would mean that the draft resistance could almost always be completely successful.

This is not necessarily true for the registrant who was subject to induction under the former system and who had been ordered for induction before the present system went into effect.[68] If such a registrant were acquitted on procedural grounds, he would remain subject to induction until he reached 26. If he were acquitted after the present system went into effect and had not yet turned 26, it would seem that he would come under the present system.[69] If he had a high lottery number, he would, of course, be effectively immune. If he had a low lottery number, he would remain subject to induction, and his prime year of eligibility would be the year in which he was acquitted. If processing began anew during that year, it is possible that he could be ordered for induction (if retained in class I-A) when processing was complete, either during that year or during the first three months of the following year.[70]

In other words, the successful assertion of the procedural defense today will very likely mean that the registrant can avoid military service entirely. If the registrant were inducted under the present system, it is not probable that he would be subject to a second go-round.[71] It would be a fairly rare occurrence, given present conditions, that the prosecution could be completed during the same year in which the induction order could be issued.[72] If he were inducted under the former system, he might be subject to a second go-round only if he had not turned 26 at the time of acquittal and had a low lottery number.

It would be interesting to do an empirical study of what happened to registrants who had successfully asserted the procedural defense

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to the present lottery selection system means, as a practical matter, that the "draft resistance" will have been completely successful.

[68] If the registrant was ordered for induction under the former system and his induction was postponed, he remained liable notwithstanding his number under the new system.

[69] This is because he would have attained his nineteenth year but not his twenty-sixth prior to January 1, 1970. *See* 32 C.F.R. § 1631.5(d) (1971).

[70] He would be in the Extended Priority Selection Group, since he would not have been issued the order to report during the year that he was in the First Priority Selection Group.

[71] This assumes that I am correct in my interpretation of the regulation. *See* note 69 *supra*.

[72] This would only occur if he were brought to trial during the same year and acquitted at the trial.

in the "pre-lottery" days. My own guess would be that the number of registrants who successfully asserted the procedural defense and who were ultimately convicted of draft refusal would be relatively small.[73] As previously indicated, if the registrant overlapped the present system, his vulnerability to subsequent induction would depend on his lottery number, and some may have escaped by getting a high lottery number. Since the order of induction under the former system was oldest first,[74] the chances of the registrant reaching 26 by the time the case was disposed of were substantial,[75] particularly if it were disposed of at the appellate level. In any event, whatever the effect of the successful assertion of the procedural defense during that time, it is likely that the successful assertion of the defense today will enable the registrant to avoid military service entirely.

II. Selective Service Classification and Induction Processes

Before proceeding further with a discussion of the procedural defense it would be helpful to review the operation of the Selective Service System and its classification and induction process. This will help to explain when and how procedural errors can occur and perhaps why they do occur with such frequency. The Selective Service System consists of more than 4000 local boards, an appeal board in each of the federal judicial districts, a National Selective Service Appeal Board, a director for each state, district, and territory, and a National Director of Selective Service.[76] Classification and induction are carried out primarily by the local boards; the role of the directors is primarily advisory.[77] The composition of the boards is very interesting. Although the ethos of the Selective Service System is that boards are made up of "little groups of neighbors",[78] the neighbors on the boards are hardly representative of the general population. About half of the local board members are at least 60 years old,[79] two-thirds

[73] One distinguished registrant, the founder of the Gearey doctrine, was so convicted.

[74] *See* 32 C.F.R. § 1631.7(a)(1) (1970).

[75] Many of these registrants formerly had student deferments and did not make their claim for other classifications until they had completed school.

[76] This is described in Tigar & Zweben, *supra* note 50, at 511.

[77] They do have specific powers, however. The state director, for example, may direct a board to reopen a classification, 32 C.F.R. § 1625.3 (1971), and may also appeal from any determination of a local board at any time. 32 C.F.R. § 1626.1 (1971). He may also appeal to the President. 32 C.F.R. § 1627.1 (1971). The National Director is given the unbelievable power to direct that a registrant shall be classified or reclassified *without regard to his eligibility for a particular classification.* 32 C.F.R. § 1622.60 (1971).

[78] *See* United States v. Nugent, 346 U.S. 1, 8 (1953).

[79] *See* Rabin, *A Strange Brand of Selectivity: Administrative Law Perspectives*

are veterans, and about 70 percent are in white collar occupations.[80] About one-third are college graduates, compared to less than 10 percent of the general population's comparable age group.[81] Fully 96 percent are white,[82] and practically all are male, the latter being required by regulation until recently.[83] In practice, boards tend to be self-perpetuating bodies, with retiring members selecting their own replacements.[84]

The boards are left largely on their own in determining classifications. They receive certain information from the National Director and from the state directors in the form of Local Board Memoranda and the like, but the extent and frequency of such information varies a great deal from state to state, and during the course of a year some boards may receive no guidance and others very little.[85] Moreover, as the Marshall Commission observed, "[b]ecause the System offers wide latitude for critical judgment by the boards themselves, this profusion of guidance does not always articulate a clearly defined policy to the board."[86] The board members are unpaid volunteers whose only professional assistance is provided by relatively low-ranking civil servants. Very few of the board members are lawyers.[87] It should not be surprising, therefore, that there is a tremendous lack of uniformity in the decisions of the more than 4000 boards,[88] so that the classification which a particular registrant receives may depend entirely upon the board with which he is registered.[89]

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on the Processing of Registrants in the Selective Service System, 17 U.C.L.A.L. REV. 1005, 1007 (1970). At the time of the *Marshall Report* the average age of board members was 58, with one-fifth over 70. MARSHALL REPORT 19. Under current regulations no board member may serve for more than 25 years or after he has attained the age of 75. 32 C.F.R. § 1604.52(d) (1971).

[80] *See* Rabin, *supra* note 79, at 1007-08.

[81] MARSHALL REPORT 19.

[82] *See* Rabin, *supra* note 79, at 1008. At the time of the *Marshall Report* only 1.3 percent were Black. MARSHALL REPORT 19.

[83] *See* Rabin, *supra* note 79, at 1008.

[84] *See* J. DAVIS & K. DOLBEARE, LITTLE GROUPS OF NEIGHBORS: THE SELECTIVE SERVICE SYSTEM 67 (1968).

[85] MARSHALL REPORT 27. Perhaps in recent years the guidance has become more specific. But query, do the board members read the material coming in from state and national headquarters, or do they rely on the clerk to do so?

[86] MARSHALL REPORT 27.

[87] The Marshall Commission reported that 13.5 percent of metropolitan board members and 3.3 percent of non-metropolitan board members were lawyers. MARSHALL REPORT 75.

[88] *See* MARSHALL REPORT 26-28. *See also* Note, *An Examination of Fairness in Selective Service Procedure,* 37 GEO. WASH. L. REV. 564, 566-569 (1969).

[89] The registrant retains the same local board irrespective of subsequent changes of residence.

The classification process begins when a young man registers with his local board at the age of 18.[90] At that time he completes a classification questionnaire which ordinarily is the basis for his initial classification. If it does not appear that he is entitled to one of the exemptions or deferments specified by the statute or regulations,[91] he is classified I-A.[92] The burden is on the registrant to claim exemption or deferment, and he must supply the board with sufficient information to substantiate his claim.[93] After the board has classified the registrant,[94] he is notified of his classification and advised that he has the right to have a personal appearance before his board and the right to take an appeal to the appeal board.[95] If he does not exercise either right within 30 days, the initial classification stands.

The purpose of the personal appearance is to give the registrant the opportunity to discuss his classification with the board and try to persuade them that he should have been given the classification he requested. He is specifically denied the right to have counsel present at the personal appearance,[96] and may call witnesses only at the discretion of the board.[97] While he is entitled to see his file,[98] the only way that he can know the reasons for the board's decision is if the board members tell him.[99] Following the personal appearance, the board must again classify him, and if it retains him in the same classi-

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[90] See the discussion of the registration process in Ginger, *supra* note 10, at 1319-22. As to liability for failure to register, *see* Toussie v. United States, 397 U.S. 112, 114 (1970).

[91] For a list of the deferments and exemptions with their attendant classifications, see 32 C.F.R. § 1622.2 (1971).

[92] *See* 32 C.F.R. § 1622.10 (1971).

[93] *See* 32 C.F.R. § 1622.1(c) (1971), to the effect that the mailing of a classification questionnaire is notice that unless information is presented to the local board which will justify the registrant's deferment or exemption, he is to be classified I-A.

[94] The board must vote on the classification. 32 C.F.R. § 1604.56 (1971). As to the responsibilities of the board during the classification process, see the discussion in Ginger, *supra* note 10, at 1324-25.

[95] *See* 32 C.F.R. §§ 1624.1, 1626.2 (1971).

[96] *See* 32 C.F.R. § 1624.1(b) (1971). Most lower federal courts have upheld the denial of counsel in selective service hearings. *E.g.*, United States v. Dicks, 392 F.2d 524, 528 (4th Cir. 1968); Nickerson v. United States, 391 F.2d 760, 762 (10 Cir.), *cert. denied*, 392 U.S. 970 (1968); United States v. Capson, 347 F.2d 959 (10th Cir. 1965). However, the denial of counsel to registrants in selective service proceedings was held unconstitutional in United States v. Weller, 309 F. Supp. 50, 56 (N.D. Cal. 1969), *appeal dismissed*, 401 U.S. 254 (1971). Although the holding was grounded on lack of statutory authority, the opinion contains strong constitutional overtones. *Id.* at 54-56.

[97] *See* 32 C.F.R. § 1624.1(b) (1971).

[98] *See* 32 C.F.R. § 1670.8 (1971).

[99] We will subsequently discuss the procedural defense of "giving of reasons."

fication, he has a further right of appeal to the appeal board, which he must exercise within 30 days after receiving notice of the board's action.[100] The appeal board reviews the classification de novo[101] on the basis of the registrant's file,[102] and may affirm or reverse the decision of the local board. If it votes unanimously to retain him in the same classification, he has no further right of appeal within the Selective Service System. If a member of the appeal board dissents, however, the registrant may appeal to the National Appeal Board.[103]

Obviously no classification is permanent.[104] The board itself will reclassify a registrant when it appears that he is no longer entitled to his deferment or exemption, and he is required to advise the board of any changed circumstances which might affect his classification.[105] The registrant in turn may request that he be reclassified and given a particular deferment or exemption. When he makes such a request, the board first must decide whether it will reopen the classification. If the classification is not reopened, the registrant has no further appeal rights.[106] If the board does reopen the classification and denies the request on the merits, the registrant has the same right of personal appearance and appeal as he did with respect to the initial classification.[107] As will be seen, the failure of the board to reopen a classification has been a fertile ground for the assertion of the procedural defense.

The registrant who is classified I-A is usually ordered for a preinduction physical and, if found acceptable, is subject to induction.[108] Induction quotas are prorated for each state, usually according to the number of registrants in that state classified I-A. The states in turn divide their quotas for each local board.[109] Registrants are inducted according to a specified order of call, now based primarily on the regis-

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[100] *See* 32 C.F.R. § 1626.2(c) (1971).

[101] *See* 32 C.F.R. § 1626.26(a) (1971).

[102] The registrant or any other person appealing is entitled to "attach a statement specifying the matters in which he believes the local board erred," and may "direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file." 32 C.F.R. § 1626.12 (1971).

[103] 32 C.F.R. § 1627.3 (1971).

[104] 32 C.F.R. § 1625.1(a) (1971).

[105] 32 C.F.R. § 1625.1(b) (1971).

[106] *See* United States v. Beaver, 309 F.2d 273, 277 (4th Cir. 1962), *cert. denied,* 371 U.S. 951 (1963). *See also* 32 C.F.R. § 1625.4 (1971).

[107] 32 C.F.R. § 1625.13 (1971).

[108] See the discussion of the physical examination in Ginger, *supra* note 10, at 1337-38.

[109] *See* 32 C.F.R. §§ 1631.1-.6 (1971).

trant's number in the Selective Service lottery.[110] If a registrant refuses to comply with an order to report for induction or refuses induction at the induction center,[111] he is subject to criminal prosecution.[112]

Errors which will provide the basis for the procedural defense can and do occur at any step in this classification and induction process. The likelihood of error is compounded by the way the Selective Service System operates in practice and by what may be called the institutional attitude toward procedure. As pointed out previously, board members are unpaid volunteers who generally meet only for a few hours each month, and most board members are not lawyers. The day-to-day operations are supervised by the clerk of the board, who is a full-time civil service employee of the Selective Service System.[113] It is the clerk's responsibility to structure the monthly workload of the board and to keep the board members informed about the rules, regulations, and other directives which are supposed to establish the guidelines for classification decisions.[114] The clerk also serves as a "buffer" between the registrant and the board members, and it is the clerk to whom the registrant must come for advice.[115]

The caseload varies greatly from board to board.[116] While in a rural community there may be a degree of personal familiarity with the cases,[117] this simply will not be so in an urban area.[118] In the urban situation the board members must rely on what is contained in the file, the assessment of the case by the clerk, and any personal appearance the registrant may have had, in arriving at their classification decisions.[119] Of course the great majority of classifications are routine.[120] A substantial number, however, do require discretionary de-

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[110] *See* 32 C.F.R. § 1631.7 (1971).

[111] The procedure at the induction center is governed by U.S. Army regulations.

[112] *See* MSSA § 12(a), 50 U.S.C. App. § 462(a) (Supp. V, 1970).

[113] *See* 32 C.F.R. §§ 1605.1, 1605.31 (1971).

[114] *See* the discussion in Rabin, *supra* note 79, at 1008.

[115] There is discretion on the part of the National Director to appoint advisors to registrants. 32 C.F.R. § 1604.41 (1971). But even where they are appointed, the registrant is likely to rely on the clerk.

[116] As to the disparities between workloads of local and appeal boards, see MARSHALL REPORT 17, 28.

[117] As has been said, the ethos of Selective Service is that the registrant will be classified by "little groups of neighbors." *See* authority cited note 78, *supra.*

[118] At the time of the *Marshall Report,* there were 63 boards in New York City, which average 20,000 registrants each. The board in North Hollywood, California, had over 54,000 registrants. MARSHALL REPORT 17 & n.4.

[119] *See* the discussion in Rabin, *supra* note 79, at 1009.

[120] As pointed out previously, if the registrant does not establish eligibility for any other classification, he is classified I-A. The largest number of deferments today is student, II-S. Prior to the elimination of the fatherhood deferment, III-A, that deferment was the largest.

cision making, and the system itself is not structured in such a way as to allow adequate time for those decisions and to ensure that the board has considered all of the relevant information.[121] When it comes to following the procedures provided for in the regulations, the board is likely to rely on what the clerk says,[122] and if the clerk's working procedure does not conform to the requirements, the clerk is likely to lead the board members into error.

As might be expected in an administrative system which specifically excludes lawyers from participation and which is exempted in the main from the requirements of the Administrative Procedure Act,[123] proper procedure is not given high priority. The keystone of selective service operations is informality,[124] which, as every lawyer knows, is a way of saying: "We can't be bothered with procedure." There is, moreover, an under the gun attitude carrying over from World War II days, that men must be drafted expeditiously or national defense will crumble and the enemy will be upon us.[125] And since the official policy of Selective Service is that deferments and exemptions are matters of privilege and not right,[126] there is little sympathy with the notion that a registrant has procedural rights when seeking the System's largesse.[127]

The fundamental unfairness of the procedures employed in Selective Service processing have been fully documented and discussed elsewhere.[128] The thrust of that discussion has gone to proposed reforms which would eliminate the fundamental unfairness. From the perspective of a draft resistance lawyer, however, it is precisely because the procedure employed is fundamentally unfair and precisely because of the institutional indifference toward procedure that the procedural defense has been so effective. The injustice which this has produced

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[121] For an interesting analysis of "time spent" on classifications, *see* Margolis, *Trying a Case Under the Selective Service Law*, 26 GUILD PRAC. 100, 103-04 (1967). *See also* Rabin, *supra* note 79, at 1008-09.

[122] *See* the discussion in Rabin, *supra* note 79, at 1008-09.

[123] Universal Military Training & Service Act § 13(b), 50 U.S.C. App. § 463(b) (1964). It is subject only to the public information requirements of section 3.

[124] This would be expected when one is dealing with "little groups of neighbors."

[125] This frequently is given as the justification for denying procedural safeguards such as the presence of attorneys. *See* Note, *The New Draft Law: Its Failures and Future*, 19 CASE W. RES. L. REV. 292, 319-20 (1968).

[126] *See* the discussion in Tigar & Zweben, *supra* note 50, at 527-28.

[127] *Cf.* Goldberg v. Kelly, 397 U.S. 254 (1970).

[128] *See* Ginger, *supra* note 10, at 58; Tigar & Zweben, *supra* note 50, at 5; Note, note 88 *supra*; Note, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123 (1966); Note, *Procedure and Objectives within the Selective Service System*, 2 JOHN MARSHALL J. PRAC. & PROC. 122 (1968); Note, *Fairness and Due Process Under the Selective Service System*, 115 U. PA. L. REV. 1014 (1966).

for registrants as a class has served to benefit those registrants who have chosen to embark upon the path of draft resistance. The system then has fallen upon its own sword and provided an effective weapon for those seeking to avoid its toils.[129]

III. The Procedural Defenses

For purposes of analysis the procedural defenses can be divided into seven broad areas, some of which require extensive discussion and others of which do not. There also will be some overlapping. These areas are as follows: (1) reopening of the classification; (2) stating reasons for the classification; (3) improper action of the board during the classification process; (4) the administrative appeal; (5) the validity of the order to report; (6) improper composition of local boards; and (7) procedures employed at the induction center. I want to emphasize that this functional division is my own and does not have independent significance.

A. Reopening the Classification

It is necessary here to distinguish between reopening of the classification prior to the issuance of an order to report and reopening following the issuance of such order. The applicable regulation, section 1625.2, requires this distinction because it provides that after an order to report has been issued the board may not reopen the classification unless it first specifically finds that there "has been a change in the registrant's status resulting from circumstances over which the registrant had no control."[130] The matter of pre-induction reopening was definitively treated by the Supreme Court last term with its decision in *Mulloy v. United States.*[131] Post-induction reopening was before the Court this term in *Ehlert v. United States,*[132] where the Court upheld the distinction between pre-induction and post-induction reopening, in the case of conscientious objector claims, but as will be pointed out, did not clarify the meaning of "circumstances over which the registrant had no control."

The matter of reopening is very important because of the effect which a reopening has upon further procedural rights of the registrant. If the board refuses to reopen the classification, the registrant cannot appeal that decision.[133] But if it does reopen and denies the claimed

[129] It is an interesting question whether boards subsequently correct the errors which have formed the basis of the procedural defense. Even if they do, there is a "time lag" in that cases coming up today will involve processing which occurred perhaps over a year in the past.

[130] 32 C.F.R. § 1625.2 (1971).

[131] 398 U.S. 410 (1970).

[132] Ehlert v. United States, 91 S. Ct. 1319 (1971).

[133] *See* 32 C.F.R. § 1625.4 (1971).

classification on the merits, the registrant has the same rights of personal appearance and appeal as in the case of the original classification.[134] For the board to refuse to reopen, then, deprives the registrant of an essential procedural right, that of further review within the Selective Service System.[135] The board cannot issue an order to report so long as the registrant has the right to a personal appearance or an appeal notwithstanding that he may be classified I-A.[136] Since this is so, it is not surprising that boards often are not sympathetic to requests for reopening,[137] and may be tempted to deny the claimed classification on the merits under the guise of refusing to reopen.[138] Since the regulation reads "may reopen," the board may interpret it to mean "we have discretion; we can reopen if we want to, but we don't have to." The registrant will contend that the board was required to reopen his classification and that its failure to do so deprived him of essential procedural rights. The stage is set for the assertion of the procedural defense in its clearest form.

1. *Pre-Induction Reopening and Mulloy v. United States: The View from Within*

a. *Factual Background and the District Court*

Since *Mulloy v. United States*,[139] the definitive case on this subject, was my case from beginning to end, this is a particularly appropriate area for me to approach in terms of "the view from within." Joe Mulloy was born in the West End of Louisville, Kentucky, in 1944. The West End is populated predominantly by blacks with some low-income whites. It comes within the jurisdiction of Selective Service Local Board No. 47. When Joe turned 18 he registered with that board, a few years after another registrant by the name of Muhammed Ali, whose classification by the board has also been before the Supreme Court.[140] At Joe's trial the clerk testified that in her 17 years with the board, no registrant had ever been assigned to civilian work as a conscientious objector.[141]

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[134] 32 C.F.R. § 1625.13 (1971).

[135] Mulloy v. United States, 398 U.S. 410, 415 (1970).

[136] 32 C.F.R. §§ 1624.3, 1626.41 (1971).

[137] Prior to the present lottery system of selection, a registrant who turned 26 while an appeal or personal appearance was pending went to the bottom of the order of call and was effectively immune from induction. This is not so today under the recent amendments to 32 C.F.R. § 1631.7(a) (1971).

[138] *See* the discussion in Note, *Fairness and Due Process Under the Selective Service System*, 114 U. PA. L. REV. 1014, 1024-26 (1966).

[139] 398 U.S. 410 (1970).

[140] Clay v. United States, 397 F.2d 901 (5th Cir. 1968), *vacated sub nom.* Giordano v. United States, 394 U.S. 310 (1969) *cert. granted*, 91 S. Ct. 457 (1970).

[141] Ideally her testimony should have been that no registrant had even been

After leaving college in 1966, Joe went to work for the Appalachian Volunteers, an anti-poverty organization operating in eastern Kentucky. He was granted an occupational deferment, which expired in May 1967 and was not thereafter renewed. Joe tried to appeal the resulting I-A classification at that time, but the clerk, claiming that she did not understand he was trying to appeal,[142] failed to send his file to the appeals board. He was ordered to report for induction on June 17, but this was cancelled when the matter was brought to the attention of the State Director, who ordered the board to process the appeal. On August 16 the appeals board voted 5-0 to retain him in the I-A classification.

Joe had been actively engaged in the fight against strip-mining in Pike County, Kentucky, where he was working. On August 11, 1967, his home was raided and he was arrested and charged, along with Alan and Margaret McSurely, with the offense of "teaching sedition." I was involved in the case, *McSurely v. Ratliff*,[143] as attorney for the Kentucky Civil Liberties Union, and have discussed it in detail "from within" elsewhere.[144] Suffice it to say that a three-judge federal court found that the prosecutions were undertaken at least in part for the purpose of inhibiting organizing activities in Pike County and that the statute in question was unconstitutional on its face.[145] On September 14, 1967, the court enjoined all prosecutions under the statute. Joe and his wife, Karen, had been pretty shaken by the experience and went to the home of Karen's parents in Rhode Island to recuperate.

When Joe got back to Kentucky, he found that on September 21 the draft board had issued another order to report. This was despite the fact that the sedition charges were still pending, since the right of the state officials to appeal did not expire until November 17. A charge of flourishing a deadly weapon, which was subsequently dismissed, was also pending against him in Pike County. Because of the pending prosecutions the second order to report for induction was illegal, and again, at the instance of the State Director, the board cancelled it.

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given a conscientious classification. This bombshell, however, came about when I was questioning the clerk as to orders to report for civilian work. She testified that she had never had such orders in her board. I decided to let well enough alone.

[142] In Joe's letter of May 19, 1967, he said, "This letter is an official appeal to you to review and reconsider my request for an occupational deferment." After he had been ordered to report for induction, the clerk wrote him a letter asking whether he wanted a personal appearance or an appeal. The correspondence continued until the state director intervened.

[143] 282 F. Supp. 848 (E.D. Ky. 1967).

[144] Sedler, *The Dombrowski-Type Suit as an Effective Weapon for Social Change: Reflections from Without and Within* (pt. 2), 18 KAN. L. REV. 629, 631-639 (1970).

[145] *Id.* at 638.

While Joe was in Rhode Island he came to grips with the question of his draft status, and, as he wrote in his letter to the board, "after much thinking, seeking, and questioning of my own religious upbringing and political experience I have concluded that I am a conscientious objector and I am therefore opposed to war in any form." I know the kind of person Joe is and I am aware of the internal struggles that many young men go through in deciding whether they will claim conscientious objector status. I also know that some decide that they cannot in good faith make the claim.[146] Some local board officials do not have this knowledge and may assume that if a registrant fails to make his claim for conscientious objection when he first registers at age 18, he cannot be sincere. This clearly was the attitude of Joe's board and probably was the attitude, at least toward Joe, of the district judge, who stated when sentencing Joe to five years imprisonment and a fine of $10,000, that Joe had "suffered an instant conversion when [he] realized that the platoon sergeant was about to blow his whistle."[147]

Joe completed the Selective Service System Form 150 and returned it on October 26, 1967. His claim was that of a "conventional C.O." based on his Catholic religious beliefs and, as the Supreme Court observed, ". . . it is clear that the petitioner's SSS Form 150 and the accompanying letters constituted a prima facie showing that he met the statutory standard for classification as a conscientious objector . . . ."[148] Joe gave very detailed answers to all of the questions on the form, stating among other things that he believed in a Supreme Being and that his religious training taught him that it was "against God's law to kill." He further stated that to be a member of the armed forces of any country would oblige him to kill or indirectly assist in killing. Among the supporting letters was one from a Catholic priest.[149] When Joe submitted the form, he also requested a personal appearance before the board and was advised that, although he was not entitled to appear before the board, the board would grant him a "courtesy interview."

The courtesy interview took place on November 9 and lasted about 10 or 15 minutes.[150] Three out of the four board members were present. Joe claimed that the board members were very hostile and that he was asked questions such as: "Why didn't you file for conscientious

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[146] Don Pratt was one of these.

[147] United States v. Mulloy, 412 F.2d 421, 426 (6th Cir. 1969) (court of appeals quoting the district court judge's remarks with approval).

[148] Mulloy v. United States, 398 U.S. 410, 417 (1970).

[149] The Supreme Court discussed the form and supporting letters in some detail. *Id.* at 412-13.

[150] *Id.* at 413.

objector status earlier? . . . Aren't you just filing to get out of the draft? . . . Don't you feel any obligation to your country?" The board members denied this and in fact testified that they did not ask any questions at all. It is interesting to note that Joe's draft file contained all of the clippings on the sedition case and on his other activities. At the conclusion of the interview, according to the chairman, "The board came to the conclusion that there was no merit to his contention that he was entitled to conscientious objector status." A formal vote was not taken at that time, however, because there was still some question as to the pending charges against Joe in the state courts.[151] A few days later Joe sent a strong letter to the board, detailing his beliefs more fully, stating his opposition to the Vietnam war, and saying among other things:

> I feel that you are going to try to draft me anyway, regardless of my feelings. I have not made up my mind as yet. If I decided to go into the Army I will of course do everything in my power to teach my fellow soldiers the truth about Vietnam and Non-violent principles. I will actively organize resistance. If I choose not to go into the Army I will resist induction and make the biggest stink about it possible. I must do this to bear witness to my beliefs and to cause my fellow citizens to think.

I will discuss more about the courtesy interview and this letter later. In any event, the board met again on January 11, 1968, with four members present,[152] and, as was noted on the Face Sheet, "All information in the file was considered including claim of Conscientious Objector. All Members present felt this information did not warrant re-opening of I-A class." When Joe received notification of the board's action, he wrote to the board on January 21, stating that he considered his case to have been reopened, and that he wanted to appeal its failure to classify him I-O. On January 23, the board replied that it did not consider his case to have been reopened and that he had no right to appeal. At the same time he received an order to report for induction on February 23, 1968. At this point Joe asked me if I would take his case.[153] I agreed and thus began a career of sorts as a draft resistance lawyer.

I had a student assistant do some quick research, and this indicated to me very clearly what would be our essential position: (1) since Joe presented a prima facie case for classification as a conscientious objector, the board was required to reopen the classification; (2) the

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[151] The board apparently realized that it could not induct him in these circumstances.

[152] This meeting included one member who had not been present at the courtesy interview.

[153] As I said earlier, Joe did not consult me until after the board had denied the request for reopening. If I had been advising him during his dealings with the board, I think I would have tried to tone down the letter—at a minimum I would have eliminated "stink."

board could only refuse to reopen the classification by deciding the claim against him on the merits, and if it did that there was a de facto reopening; (3) either way he was entitled to an administrative appeal. It was that position which was ultimately sustained by the Supreme Court some two and a half years later.[154]

Since the Sixth Circuit had previously allowed a pre-induction suit to challenge a failure to reopen in *Townsend v. Zimmerman*,[155] I assumed that I could bring one now unaffected by Section 10(b)(3) of the Selective Service Act.[156] I did so on February 8, 1968, and the court scheduled a hearing on February 16. At that time the government argued that the suit was barred by 10(b)(3) and that on the merits, (1) the board did not in fact reopen, because it assumed the truth of Joe's allegations and assumed that he was sincere, and (2) that he was really renewing the previously rejected request for an occupational deferment and so did not make out a prima facie case for classification as a conscientious objector. I put on the testimony of Joe and the chairman of the board, and Joe's file was introduced into evidence. At the conclusion of the hearing, the district judge denied relief and dismissed the complaint on the utterly incredible ground that the request for classification as a conscientious objector was made *after* Joe had been ordered to report for induction on October 16, totally ignoring the fact that this induction order had been cancelled as having been improperly issued. Even the government had not argued that this was a post-induction claim, and this issue was not raised subsequently. In any event, we were now out of court and faced with an order to report for induction, which Joe was not going to obey. I will not speculate on why the judge did what he did,[157] except to say that I could not believe it at the time. I immediately filed a notice of appeal to the Sixth Circuit along with a motion for an interlocutory injuction pending appeal. That motion was denied on February 22, 1968, and the next day Joe refused to submit to induction.

Joe was indicted by the grand jury on March 11, and was arraigned on March 18. At the time of arraignment I moved to dismiss the indictment on the ground that the order to report for induction was invalid because of the procedural violations.[158] We stipulated that the

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[154] Mulloy v. United States, 398 U.S. 410, 418 (1970).

[155] 237 F.2d 376 (6th Cir. 1956).

[156] The courts are presently divided on this question. *See* notes 606-17 *infra* and accompanying text.

[157] I should have been forewarned. When I spoke to the judge in chambers seeking a hearing after I had filed the suit, his first statement was, "So you have a client who is trying to get out of the draft."

[158] I also raised the same constitutional challenges which I raised in United States v. Pratt, 412 F.2d 426 (6th Cir. 1969). *See* note 13 *supra*.

record in the civil suit should form a part of the record in the criminal proceedings, so that the judge trying the criminal case, who was not the judge who heard the civil suit, could rule on the procedural defense independently. On March 22, 1968, the judge entered an order overruling the motion to dismiss, stating that the actions of the board were proper in all respects.

The case was tried before a jury on April 5. I had unsuccessfully challenged the composition of the jury panel,[159] and perhaps by way of excuse for my poor performance, since the jury was out no more than seven minutes before returning a verdict of guilty, I want to say something about that composition.[160] The median age of the jury panel, purportedly Joe's "peers," was 56. There were three who were above 80 years of age, and nine who were above 70, contrasted with three who were under 40 and one who was under 30. Roughly classified by occupation, there were six corporation officials, including three presidents, six business proprietors, five farmers, eleven professional persons, seven "other business and employees," eight government employees, and five "blue collar workers," consisting of a secretary, a retired shoeshiner, a maintenance worker, a packer, and a retired domestic worker. Of the 68 members from Louisville, 42 lived in the East End, which is the upper-income area with a much smaller population than the West End (lower income and black) or South End (predominantly white, lower middle-class). It was before a jury selected from this panel that I tried to put on the defense that the draft board was biased and that it did not give fair consideration to Joe's claim.

I had hoped to show that the board members were prejudiced against Joe because he was an activist and an anti-poverty worker, as demonstrated by the fact that they had collected all the clipping on the sedition case and Joe's other activities in the file. I was not able to build up much of a record in this regard at all and subsequently abandoned the issue. However, the examination of the draft board members did reveal that they had never really read Joe's file and perhaps had not even read the Form 150. It also revealed that they did not have the faintest understanding of what a conscientious objector was. Thus, I had what I later called my broad-based defense, namely that Joe was denied a full and fair hearing (1) because the board members refused to give full and fair consideration to his claim, in particular by refusing to read with some care his Form 150, and

[159] The Sixth Circuit also dismissed the challenge. United States v. Pratt, 412 F.2d 426, 427 (6th Cir. 1969). I did not pursue it in my Petition for Certiorari in either case.

[160] The composition of the panel was clearly reflected in the jury before whom the case was tried.

(2) because they lacked a minimum understanding of the applicable statute and regulations so as to be able to pass intelligently on his claim.

As I said earlier, the courtesy interview lasted about 10 or 15 minutes, and after it was over the board made the effective decision to deny the claim. What stood out clearly from the trial record was that Joe's file, particularly the Form 150, was not carefully examined by *any* member prior to the interview or at any time thereafter. Board member Downes, for example, testified as follows:

> Q. Prior to the meeting did you read his file, his Selective Service file?
> A. The file is available before he presented himself, yes.
> Q. And you read it?
> A. I scanned it because I am the newest member on this particular board *and I was not familiar with what was in his file at all.*[161]

He did not remember having read the Form 150. The board chairman made it clear that the only consideration of the file that took place, if at all, was that which occurred immediately preceding the interview. He testified that the board members "looked over his file before he came in as we do anybody else."[162] He too did not remember reading the Form 150. Mr. Downes also testified that "[t]he only time I would have had an occasion to even consider the file would have been during one of the Board meetings or before the meeting started." His decision was based, he said, "on the basis of what was discussed, what we were able to glean from his own statements."[163]

When it came to knowledge of the applicable law, the testimony of the board members is equally revealing. I asked board member Downes whether he was "thoroughly familiar with the regulations governing classification of conscientious objectors," and he answered: "I can't say that I'm thoroughly familiar. As I indicated to you before, I am perhaps the youngest person on the particular board." He then stated that he had an understanding of "what a conscientious objector is" in a general sense. This was:

> Well it is my understanding that if a person declares that he is a conscientious objector that rather than going into the military he could serve in some other capacity.[164]

I observed in my brief that if a registrant could obtain conscientious objector status simply by "saying" that he was one, Joe would not have been under a sentence of five years' imprisonment. The dialogue continued:

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[161] Appendix to the Briefs at 75, Mulloy v. United States, 398 U.S. 410 (1970) (emphasis added).

[162] Appendix at 91.

[163] Appendix at 80.

[164] Appendix at 78.

> Q. Well, the draft board has to make that decision, doesn't it? He can't just do it on his own.
> A. The draft Board, I thought now, was involved primarily with determining the availability of people.[165]

Board member Wolking did not know what classification was to be given to conscientious objectors. He also seemed to think that by signing Form 150 Joe had stated that he would not perform alternate civilian service.[166]

The board chairman, an attorney, was completely confused regarding the distinction between classification in class I-O and in class I-A-O. He did not know if a board could classify a person as qualified for non-combatant service only and thought that if the board had found that Joe was a conscientious objector, he would be classified I-A-O.[167] His understanding of a conscientious objector was "one who has conscientious scruples against taking another person's life even under any circumstances."[168] This is patently erroneous, since the statutory definition is based upon opposition to war, and one who would take human life in self-defense may still be classified as a conscientious objector.[169]

I think that I did build up a very good record demonstrating that Joe had been denied a fair hearing. This had just the reverse effect on the jury, who obviously identified with their peers on the board, and seven minutes later they were back with a verdict finding Joe guilty. A few days later Joe was given the absolute maximum sentence of five years imprisonment and a $10,000 fine. Then the judge added an interesting fillip. He ruled that Joe stood committed to pay the fine, and imposed as a condition for his admission to bail upon appeal that he post a supersedeas bond in the amount of $10,000 guaranteeing payment of the fine if the conviction were affirmed. This was in addition to the $2000 bail bond. Such a condition was clearly improper, even without regard to the Bail Reform Act,[170] and the Sixth Circuit later ordered that it be stricken. But this was six weeks later. Thus, Joe Mulloy, who eventually was acquitted, ended up spending some 39 days in jail because of an illegal condition imposed upon his admission to bail.[171]

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[165] Appendix at 78.

[166] Appendix at 85.

[167] Appendix at 90-91.

[168] Appendix at 90.

[169] Taffs v. United States, 208 F.2d 329 (8th Cir. 1953), *cert. denied*, 347 U.S. 928 (1954).

[170] *See* Cain v. United States, 148 F.2d 182 (9th Cir. 1945), *cert. denied*, 329 U.S. 760 (1946).

[171] The same condition was imposed upon Don Pratt's admission to bail. The Sixth Circuit issued an order admitting both Joe and Don to bail upon the posting of the $2000 bond "and without other conditions." It did not indicate that the district judge erred.

b. *The Sixth Circuit Appeal*

When the case came before the Sixth Circuit, I fully expected to obtain a reversal on the issue of reopening. The argument was the same one which I had made all along: the board either abused its discretion in failing to reopen since Joe had made out a prima facie case for classification as a conscientious objector, or it reopened in fact by engaging in evaluative consideration of the merits of the claim under the guise of refusing to reopen. Either way Joe was entitled to an administrative appeal, which was denied to him. I felt, as did the Supreme Court ultimately, that there was abundant authority to support my position. On the question of duty to reopen upon the presentment of a prima facie case, I relied heavily on the Seventh Circuit's decision in *United States v. Freeman*[172] and the Sixth Circuit's own decision in the earlier case of *Townsend v. Zimmerman.*[173] In *Freeman* the defendant gave rather sketchy answers to the questions in the Form 150. He did state, however, that he believed in a Supreme Being, that he was a member of the Islam religion, and that by reason of his religious beliefs he was opposed to participation in war in any form. There was nothing more, and according to the dissenting judge, "[m]ost of this data comes from statements appearing in the printed form which were adopted by the defendant by mark or signature."[174] The court held that what he had stated was sufficient to make out a prima facie case for classification as a conscientious objector, "[s]ince he presented new information in the SSS Form 150 which, if true, entitled him to reclassification."[175] The conviction, therefore, was reversed. In *Townsend,* written by then Judge Potter Stewart, the registrant had been given a III-A classification when he was living with his wife and children. After he and his wife separated, he was reclassified I-A. They later became reconciled and he orally informed the board chairman of this fact. The board failed to reopen his classification on the basis of that information. This was held to be improper, the court observing that section 1625.2 of the regulations required, "when the basis of an application is not clearly frivolous, an inquiry designed to test the asserted facts sufficiently to give the board a rational base on which to put decision."[176] His induction was ordered enjoined.

Other pre-*Mulloy* cases had clearly taken the same position,[177] and as the Supreme Court observed in *Mulloy:*

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[172] 388 F.2d 246 (7th Cir. 1967).

[173] 237 F.2d 376 (6th Cir. 1956).

[174] 388 F.2d at 250.

[175] *Id.* at 249.

[176] 237 F.2d at 377.

[177] *See, e.g.,* Application of Kansas, 385 F.2d 506 (2d Cir. 1967); United States v.

> While differing somewhat in their formulation of precisely just what showing must be made before a board is required to reopen, the courts of appeals in virtually all Federal Circuits have held that where the registrant has set out new facts that establish a prima facie case for a new classification, a board must reopen to determine whether he is entitled to that classification.[178]

In its brief the government was able to cite cases referring to a board's discretion and sustaining a refusal to reopen, but could not cite cases rejecting the prima facie case test.

The second prong of the argument, that the board in fact reopened by engaging in evaluative consideration, was best demonstrated by the Ninth Circuit case of *Miller v. United States.*[179] There the registrant submitted his Form 150, as in *Mulloy,* after an improper order to report for induction had been cancelled. The board refused to reopen on the ground that "[t]he information submitted did not warrant reopening of the classification." It noted that he had previously applied for enlistment in a reserve program, for which he had not been accepted, and as a result, "it was the opinion of the board that the registrant was seeking to avoid induction." In reversing the conviction the court stated:

> It cannot be held that the statements and information in appellant's letter and executed form No. 150, if true, would not be able to provide basis for a conscientious objector classification and so could not justify a consideration of the question of change in his classification. . . . [W]hat the board actually did, as the implications of its minutes reflect, was to engage in evaluative consideration and judgment that, regardless of the prima facie sufficiency of the information submitted, it was not, when probatively weighed against other elements in the situation, entitled to credence as fact.
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> It [the board] shortcut the . . . consideration of whether appellant was entitled to a conscientious objector classification on the merits of the probative elements of its file. It weighed the information contained in the appellant's form against other probative factors (such as his attempted reserve enlistment during the month preceding) and arrived at the judgment that he was not in truth a conscientious objector but was merely seeking to avoid induction.[180]

Burlich, 257 F. Supp. 906 (S.D.N.Y. 1966); United States v. Majher, 250 F. Supp. 106 (S.D.W. Va. 1966); United States v. Hestad, 248 F. Supp. 650 (W.D. Wis. 1965). As to pre-Vietnam cases, see note 40 *supra.* By the time *Mulloy* was at the Supreme Court level, the following cases could be added. United States v. Turner, 421 F.2d 1251 (3d Cir. 1970); Davis v. United States, 410 F.2d 89 (8th Cir. 1969); Howze v. United States, 409 F.2d 27 (9th Cir. 1969); Robertson v. United States, 404 F.2d 1141 (5th Cir. 1968), *rev'd on other grounds en banc,* 417 F.2d 440 (5th Cir. 1969).

[178] 398 U.S. at 415.

[179] 388 F.2d 973 (9th Cir. 1967).

[180] *Id.* at 975-76. A *de facto* reopening was also stressed by the panel discussion in Robertson v. United States, 404 F.2d 1141 (5th Cir. 1968), *rev'd on other grounds en banc,* 417 F.2d 440 (5th Cir. 1969). *See also* United States v. Melrose, 314 F. Supp. 346 (D.S.D. 1969).

I argued analogously that the board here weighed the information contained in Joe's Form 150 and in the supporting letters against other probative factors based on the information contained in the entire file, principally his previous claim for an occupational deferment, and concluded that he was not in truth a conscientious objector but an anti-poverty worker seeking to avoid induction under the guise of being a conscientious objector. After the Sixth Circuit decision in *Mulloy*, the Fourth Circuit held in *United States v. Grier*,[181] that a board had engaged in evaluative consideration and had caused a de facto reopening by making an extensive investigation into a request for reopening on hardship grounds.[182]

On June 10, 1969, the Sixth Circuit unanimously affirmed the conviction.[183] It first pointed out that under section 1625.2 of the regulations the board possessed discretion to determine whether or not it would reopen a classification, but that under section 1625.4 it could not reopen the classification when it was of the opinion that the facts, if true, would not justify a change in the classification.[184] The court then said that we had contended that in determining whether to reopen, the board was limited to consideration of only the Form 150.[185] This was not a fair statement of our position, which was that the Form 150, coupled with the supporting letters, demonstrated a prima facie case for classification as a conscientious objector, which necessarily required a reopening. In any event, the court went on to say that the board had the duty to consider the entire file and to determine the *truth* of the registrant's allegations. It used the example of an allegation that the registrant was living with his family and said that the board was not required to reopen on the basis of that allegation, but that using its investigative powers under section 1625.1(c), it could determine whether or not the allegation was true.[186] It is difficult for me to see what determining verifiable facts has to do with determining conscientious objector status, but I am admittedly biased. The court next referred to the letter that Joe sent to the board after the interview, quoting from it at length, and said that this letter "indicated rather clearly that his objection to serving in the Armed Forces wasf [sic] based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief."[187] So

[181] 415 F.2d 1098 (4th Cir. 1969).

[182] The board requested a report on the registrant's family from the county welfare department. It also requested that the registrant's brother meet with the board and questioned him about the family situation.

[183] Mulloy v. United States, 412 F.2d 421 (6th Cir. 1969).

[184] *Id.* at 424.

[185] *Id.*

[186] *Id.* at 425.

[187] *Id.*

too, it said, the board could consider the fact that Joe had not filed for conscientious objector status when he first registered with the board in 1963. The court referred to a letter from Joe's brother in which it was said, "I believe my brother to be sincere concerning his feelings and he has maintained this position for a number of years," and asked, "If this were true, why did he wait so long to inform the Board?"[188] In determining whether the board abused its discretion, the court applied the basis-in-fact test which is applicable to review of a substantive classification, and found that there was a basis in fact for the board's action in refusing to reopen.[189] As to *Miller* and *Freeman,* on which it had said I relied, it observed that they "involved different facts and were inapposite."[190] The court concluded:

> We are of the opinion that there was a rational basis for the Board's determination that Mulloy had not established a case of conscientious objection, and that the Board did not abuse its discretion in denying his request to reopen the classification. In our judgment he did not make out a prima facie case of conscientious objection, and the additional information that he supplied did not justify a change in his classification. . . .
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> . . . .
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> In our judgment, the courtesy hearing granted did not constitute a reopening of the classification. Other claims of error have been considered and are insufficient to warrant reversal.[191]

To say the least I was stunned by the decision.

An analysis of why a court decided a case the way it did may be questionable when it comes from the losing lawyer. It is clear, I think, that the Sixth Circuit believed that Joe was not a conscientious objector, and I argued in my Supreme Court brief that they engaged in the same evaluative consideration of the claim on the merits as did the local board. The questioning from the bench showed that at least one judge on the Sixth Circuit was incensed by the letter that Joe sent to the board, and it may be significant that that court quoted from the letter at length in the opinion, as well as saying that it indicated that Joe's opposition to war was not religious. If I had to try to explain the decision, I would say that in my admittedly biased opinion the court's approach to the issue of reopening, which was before it, was colored by its view of the substantive question of whether Joe was a conscientious objector, which was not before it. Because the court did not consider Joe to be a conscientious objector, it would have been difficult for it to accept my procedural argument. It is said that, hard cases make bad law, and after *Mulloy* the "law" of the Sixth

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[188] *Id.* at 426.

[189] *Id.*

[190] *Id.* at 425.

[191] *Id.* at 426. My "other arguments" related principally to the denial of a full and fair hearing.

Circuit on the issue of reopening was "bad," at least from the standpoint of a registrant trying to assert that procedural defense.

c. Vindication by the Supreme Court

I will not try to speculate on the factors which may have caused the Supreme Court to grant certiorari. It had never before granted certiorari in a case involving the day-to-day operations of a local board, and I was not optimistic that it would do so in *Mulloy*. But it did, and I could see no reason for its so doing except to reverse the decision of the Sixth Circuit. The fact that the Supreme Court decision was unanimous would lend some credence to this view.

An analysis of a case by the winning lawyer may not be any more persuasive than one by the losing lawyer. I do think it is fair to say, however, that the Supreme Court fully accepted the proposition that we had been asserting from the beginning: that the board was required to reopen because Joe had made out a prima facie case for classification as a conscientious objector and that it could have refused to open only by engaging in evaluative consideration of the claim on the merits. The Court, through Mr. Justice Stewart, stated:

> Where a registrant makes nonfrivolous allegations of facts that have not been previously considered by his Board, and that, if true, would be sufficient under regulation or statute to warrant granting the requested classification, the Board must reopen the registrant's classification unless the truth of these new allegations is conclusively refuted by other reliable information in the registrant's file. [citing *United States v. Burlich*[192]] For in the absence of such refutation there can be no basis for the Board's refusal to reopen except on evaluative determination adverse to the registrant's claim on the merits. And it is just this sort of determination that cannot be made without affording the registrant a chance to be heard and an opportunity for an administrative appeal.[193]

In the Supreme Court the government had virtually conceded that Joe had made out a prima facie claim for conscientious objector status. It now argued that the board could have found that Joe was not sincere. This was a complete departure from its previous position, which was that the board assumed he was sincere, so that there was no evaluative consideration.[194] The Sixth Circuit, in my opinion, assumed that he was not sincere, and I am sure that the board members assumed it too; after all, he did not file when he was 18 and he was a "social activist." Since the original theory of the government's case, however, was that there was neither a prima facie showing nor evaluative consideration, the board members testified that they assumed Joe was sincere. The Supreme Court gave the insincerity argument short shrift, observing that:

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[192] 257 F. Supp. 906 (S.D.N.Y. 1966).

[193] 398 U.S. at 416.

[194] I strongly emphasized the government's departure from its previous position both in my Reply to Brief in Opposition to Certiorari and in my main brief.

> There is, however, but scant evidence in the record that the board's action was based on any such grounds. And, in any event, *it is on precisely such grounds as these that board action cannot be predicated without a reopening of the registrant's classification, and a consequent opportunity for an administrative appeal.*[195]

The Court concluded:

> Since the petitioner presented a nonfrivolous, prima facie claim for a change in classification based on new factual allegations which were not conclusively refuted by other information in his file, it was an abuse of discretion for the board not to reopen his classification, thus depriving him of his right to an administrative appeal. The order to report for induction was accordingly invalid, and his conviction for refusing to submit to induction must be reversed.[196]

With the decision in *Mulloy,* the law applicable to pre-induction reopening should be substantially clearer.

I want to comment on the references to "nonfrivolous allegations of fact" and "allegations conclusively refuted by other reliable information in the registrant's file." Justice Stewart had used the phrase "not clearly frivolous" in the opinion in *Townsend v. Zimmerman,*[197] and also observed in a footnote to *Mulloy* that the board need not reopen when the claim is "plainly incredible."[198] In his questioning from the bench he used the example of a registrant claiming that he was a United States Senator. I agreed that the board would not be required to reopen in those circumstances and drew the analogy to a motion for summary judgment—a board is not required to reopen when there is no genuine issue as to any material fact. Using the same analogy, I said that the board would not have to reopen in a case such as the one where a registrant claimed he was a student at a particular university as of a certain date, and there was a letter in his file from the registrar of that university stating that he was dismissed on that date.[199] In other words, a reopening is required where the new facts, if true, would entitle the registrant to the claimed classification and it cannot be said that "there is no genuine issue as to any material fact." That would encompass both the situation where the registrant claimed to be a United States Senator, which is "clearly frivolous," and the situation where the eligibility for the classification depends on verifiable facts which have conclusively been established to be untrue. Except in these extremely limited circumstances the board must reopen upon the presentment of a prima facie case.

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[195] 398 U.S. at 417 (emphasis added).

[196] 398 U.S. at 418.

[197] 237 F.2d 376, 377 (6th Cir. 1956).

[198] 398 U.S. 410, 418 n.7.

[199] This would cover the example used by the Sixth Circuit in *Mulloy,* of the registrant claiming a fatherhood deferment who, in fact, was no longer living with his family.

d. Unresolved Issues

There are now two remaining problems in this area. The first is the determination of what is sufficient to establish a prima facie case. The second involves determining when there has been a request for a reopening.

(1) Prima Facie Case

Mulloy, a case which is not limited to conscientious objector situations,[200] says that a registrant seeking conscientious objector status establishes a prima facie case when, based on his answers to the Form 150 and the supporting information, if any, he comes within the statutory standard. This requires that on the basis of his religious training and belief he must be opposed to participation in war in any form.[201] In other classifications, the sufficiency of the information will depend on the basis for the deferment sought. It may also make a difference whether the request for the same classification has been made previously.[202] Most of the cases here involve requests for ministerial or hardship deferments. As to ministerial deferments, the standard is "full-time minister of religion" and, as is known, most of the ministerial cases involve Jehovah's Witnesses, all of whom are considered "ministers" by the sect, but not by draft boards or the courts. A refusal to reopen the classification of a Jehovah's Witness has been sustained where the evidence did not show that he was working enough hours to qualify as a full-time minister. Thus, in *Robertson v. United States*[203] the court found that the registrant had been spending only between 30 and 40 hours per month as a Vacation Pioneer and that the Watchtower Society itself would not contend for a IV-D classification for such persons.[204] In *Fore v. United States*[205] the registrant sought a reopening on the basis of a letter showing that he was appointed to serve as a Vacation Pioneer and that he intended to work 75 hours per month at his ministry. The court held that he did not establish a prima facie case because "expression of future intent does

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[200] The district judge in *Mulloy,* however, has held that it is not applicable to requests for occupational deferments, since the board has "discretion" to refuse an occupational deferment. Watson v. Birdsong, Civil No. 6673 (W.D. Ky., Sept. 18, 1970). The case is now on appeal and it will be interesting to see how the Sixth Circuit views *Mulloy.*

[201] MSSA § 6(j), 50 U.S.C. App. § 456(j) (Supp. V, 1970).

[202] I emphasized that Joe had not claimed conscientious objector status previously and gratuitously conceded a higher standard of sufficiency for a claim previously made. *Cf.* Woo v. United States, 350 F.2d 992 (9th Cir. 1965).

[203] 417 F.2d 440 (5th Cir. 1969).

[204] *Id.* at 445.

[205] 395 F.2d 548 (10th Cir. 1968).

not satisfy the requirements for a regular and ordained minister."[206] In these cases it appears that the court's review of the failure to reopen does not differ materially from its review of whether there was a basis in fact for the substantive classification.[207] This seems justifiable, however, because the new facts, even if true, would still not entitle the registrant to the claimed classification. So long as it is clear that the registrant is not devoting enough time to the ministry to be considered a full-time minister, the refusal to reopen would be proper. But if there is an element of judgment involved, in that the amount of time might under the circumstances be sufficient to qualify him for a ministerial exemption, the board must reopen so that the registrant can establish sufficiency at a personal appearance and so that the appeal board can make the same evaluative consideration.

A more difficult question is presented when the board refuses to reopen upon the presentment of a claim for a hardship deferment. The deferment standard is one of "extreme hardship,"[208] and this apparently has caused some courts to demand a fairly high standard of proof before the registrant can be said to have made out a prima facie case. In *United States ex rel. Luster v. McBee*,[209] a pre-*Mulloy* case, the registrant had made the hardship request four times previously and had failed to comply with the board's request that he provide a statement of the incomes and expenses of himself and his mother whom he claimed as a dependent. He did indicate that his sister could not contribute to the mother's support because she had a child of her own for which she could barely provide. The board did cancel an order to report for induction and did grant the registrant a courtesy interview. The court found that nearly all of the information which he presented concerned the financial status of his sister and nephew, whom he was not claiming as dependents. The information which he presented on the financial status of his mother, according to the court, "[w]as substantially the same as the board had before it when it denied his request for a III-A deferment in the fall of 1968."[210] The court also observed that he failed to supply the board with the requested income statements and concluded that the new information which he presented did not make out a prima facie case for a III-A deferment.

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[206] *Id.* at 554. *See also* Merritt v. United States, 401 F.2d 768 (5th Cir. 1968).

[207] *See, e.g.*, McCoy v. United States, 403 F.2d 896 (5th Cir. 1968); Jones v. United States, 387 F.2d 909 (5th Cir. 1968). In *Robertson* the court relied on *McCoy*. Robertson v. United States, 417 F.2d 440, 445-47 (5th Cir. 1969).

[208] 32 C.F.R. § 1622.30(a) (1971). The former fatherhood deferment is abolished except for registrants holding such a deferment at the time of abolition.

[209] 422 F.2d 562 (7th Cir.), *cert. denied*, 91 S. Ct. 74 (1970).

[210] *Id.* at 569.

In contrast, in *United States v. Grier*[211] the claim for a hardship deferment had been made for the first time when the board refused to reopen. The court there found:

> Grier's letter requesting a hardship deferment and his subsequent Selective Service Form No. 118 questionnaire set out for the first time the facts that his mother was a mental invalid, that his brother was enrolled in school, and that his family was, for the most part, dependent upon him for support. No prior information of this nature appeared in Grier's Selective Service file. Thus, Grier's request for a hardship deferment presented new facts not previously considered which would have made out a prima facie case for a hardship classification.[212]

The board had conducted an extensive investigation and then voted not to reopen. Since the registrant had made out a prima facie case, and the board had obviously engaged in evaluative consideration of the claim on the merits, the refusal to reopen was manifestly improper, and the conviction was reversed.[213]

In *Winfield v. Riebel*,[214] a post-*Mulloy* Sixth Circuit case, the court sustained a refusal to reopen on the ground that the registrant had not made out a prima facie case for a hardship deferment. The registrant had claimed a hardship deferment in 1968, and the board conducted an investigation at that time. As a part of this investigation the board asked a public welfare agency for information about the registrant's family. The agency replied that the registrant's mother had informed the agency that he had never sent any money home for the support of his family and that he had written her that he was telling his board that he supported his brothers and sisters in order to avoid being drafted.[215] He was classified I-A by the board and by the appeals board. In July 1969 his mother sent a letter to the board asking that her son's classification be reopened on the ground that the original report of the welfare agency was erroneous. Eventually the board interviewed the mother and some members of the welfare agency, and received money orders, receipts, and checks which the registrant produced to prove his contributions to the family. The board refused to reopen on the ground that the registrant had failed to make out a prima facie case. In sustaining the board's action the court detailed the amount of contributions the registrant had made and showed that they were exceedingly small; the most he contributed in one year was $382, and the family's needs were estimated at $324-328 per month.[216]

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[211] 415 F.2d 1098 (4th Cir. 1969).

[212] *Id.* at 1100.

[213] *Id.* at 1100-01.

[214] 438 F.2d 271 (6th Cir. 1970), 3 SEL. SERV. L. REP. 3534.

[215] *Id.* at 277. He previously had a student deferment and had received a postponement of his induction. *Id.* at 276.

[216] *Id.* at 278. The court also observed that there was no indication that the registrant's contributions could not be replaced by some other family source. *Id.*

I cannot disagree with the decisions in *Winfield* and *Luster*. Because of the insignificance of the contributions in *Winfield*, it could not be said that the registrant had made a substantial contribution within the meaning of the regulation[217] and certainly not that his family would suffer extreme hardship from his induction. There was simply not enough in the new facts to require the board to engage in evaluative consideration before refusing to reopen.[218] *Luster* is a little harder, but can be justified because of the fact that the same claim had been made four times previously and the new evidence was not substantially different. The request of the board for specific additional information and the refusal of the registrant to furnish it should also be significant. These cases may involve degree questions concerning whether the registrant introduced sufficient evidence so that the board would have to engage in evaluative consideration of the merits in order to deny the requested classification. Clearly this test was satisfied in *Grier*, and the refusal to reopen was improper. The factual differences between *Grier* on the one hand and *Winfield* and *Luster* on the other may indicate the point at which the degree of sufficiency will be reached. Perhaps another way to put it, as the Ninth Circuit did in *Howze v. United States*,[219] is: Would the board have a basis in fact to grant the claimed classification on the basis of the information the registrant submitted?[220] If so, the registrant has made out a prima facie case and the board must reopen.[221] In light of *Mulloy* and the procedural policy which the Court enunciated there,[222] any doubts should be resolved in favor of requiring a reopening.[223]

(2) What Constitutes a Request?

In some instances boards have justified their refusal to reopen a classification on the ground that the registrant has not made a written

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[217] *Id.*

[218] *See id.* at 279. The court distinguished Miller v. United States, 388 F.2d 973 (9th Cir. 1967), on the ground that there the claim had been made for the first time and that a prima facie had been presented. Winfield v. Riebel, 438 F.2d 271, 279-80 (6th Cir. 1970).

[219] 409 F.2d 27 (9th Cir. 1969).

[220] *Id.* at 28.

[221] By approaching the problem in terms of a prima facie case, there is no need to consider *de facto* reopening. If a prima facie case is established, the board must reopen; if it is not established, the board cannot be said to have engaged in evaluative consideration.

[222] 398 U.S. 410, 415.

[223] In Straight v. United States, 413 F.2d 263 (9th Cir. 1969), the registrant advised the board that he smoked marihauna, used LSD, and considered himself disloyal to the government of the United States. This was held insufficient to establish a "valid prima facie claim for exemption" on grounds of unsuitability. *Id.* at 264-65.

request for a reopening. Section 1625.2 of the regulations does provide that the board may reopen the classification "upon the written request of the registrant" or other specified persons.[224] That section also provides, however, that the board may reopen the classification upon its own motion. In addition, under section 1625.1(c) it is provided that "[t]he local board shall keep informed of the status of classified registrants." It would seem, therefore, that a logical reading of the regulations would require the board to reopen whenever it is apprized of the fact that a registrant might be entitled to a different classification. The board does reopen on its own to classify a registrant I-A whenever it has reason to believe that the registrant is no longer entitled to an exemption or deferment. For example, when it is notified by an educational institution that a registrant is no longer enrolled in school, the board will invariably reopen the classification. When it is the registrant, however, who claims that his classification should have been reopened to consider his claim for an exemption or deferment and his reclassification from I-A, the board often replies, "He didn't ask for it in writing."

What is surprising is that some courts have indicated their acceptance of this narrow viewpoint. In *Taylor v. United States*[225] the registrant sent the draft board information that he had become a vacation pioneer, but did not specifically request that his classification be reopened. The Ninth Circuit held that there was no request, stating that "[h]e advised, but he did not request."[226] It recently made the same statement in a brief per curiam opinion, stating that the registrant "sent the board some information, but did not ask for a reclassification or assert in any way that he should be reclassified."[227] In *United States v. Tucker*[228] the court referred to a particular letter, which indicated that the registrant had done vacation pioneering and had put in 75 hours per month preaching, as not constituting a request for a reopening. Rather, the court said it constituted an unsuccessful attempt to comply with instructions listed in the classification questionnaire. The court also noted that the registrant must have been aware of the procedures for requesting a reopening, since he had requested one before.[229]

Such an approach is very questionable and has increasingly been

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[224] 32 C.F.R. § 1625.2 (1971).

[225] 285 F.2d 703 (9th Cir. 1960).

[226] *Id.* at 704. *See also* Shaw v. United States, 264 F.2d 118, 120 (9th Cir. 1959).

[227] United States v. Robley, 423 F.2d 613 (9th Cir. 1970).

[228] 374 F.2d 731 (7th Cir. 1967).

[229] *Id.* at 733. There were other letters relating to his ministerial work, but they came after the order to report had been issued. *Id.* at 734.

rejected. In *Townsend v. Zimmerman*[230] an oral communication was held sufficient. In *United States v. Thompson* [231] a letter styled as an "appeal" was held to constitute a written request to reopen.[232] More importantly, so long as the board is on notice that there may be new facts entitling a registrant to a different classification, it should be required to consider reopening. If the information is sufficient to show that the registrant has made out a prima facie case, it should reopen immediately and obtain such further information as may be necessary to determine the merits of the claim. If the information is not sufficient, it should advise the registrant to submit additional information.[233]

A good illustration of the need for inquiry is *United States v. Pollero*.[234] The registrant, who had been classified as a conscientious objector, was sent Form 152, which required him to supply three types of civilian work he might perform in lieu of induction. He returned the form uncompleted, but submitted a letter saying that he intended to refuse civilian work and that he was " . . . going to be ordained a Jehovah's Witness soon and begin the pioneer work." There were subsequent communications in which he indicated that he was enrolled in the theocratic Ministry School. The district court directed a judgment of acquittal on the ground that the board had arbitrarily refused to reopen. In the court's view the board was required to make an inquiry as to the nature and extent of the registrant's studies in order to determine whether he was entitled to classification as a ministerial student. In regard to the absence of a specific request for reopening, the court stated:

> I do not consider it significant that Pollero did not indicate in so many words that he was seeking a IV-D classification. The local board was on notice that Pollero intended to refuse civilian employment and that he sought its aid in allowing him to proceed to become a Pioneer. Only a reclassification from his I-O status could accomplish what defendant sought, and the personnel at the local board were well aware of that fact. Where the registrant has not purposely or negligently declined to request a classification, the standards binding the board are no different than they would be had the registrant specifically asked for the reclassification.[235]

In *United States v. Ford*[236] the facts requiring a reopening came from other sources, and the registrant had made no request at all. His Doctor had sent a letter to the board stating that the registrant was neurotic and that induction might have severely destructive results. His

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[230] 237 F.2d 376 (6th Cir. 1956).

[231] 431 F.2d 1265 (3d Cir. 1970).

[232] *Id.* at 1270. The Court also found that the board treated the letter as a request for a reopening and in effect had denied it. *Id.* at 1270-71.

[233] This is clearly its responsibility. *See* 32 C.F.R. § 1625.1(c) (1971).

[234] 300 F. Supp. 808 (S.D.N.Y. 1969).

[235] *Id.* at 811 n.4.

[236] 431 F.2d 1310 (1st Cir. 1970).

psychiatrist sent a letter stating that the registrant had a pathological personality and that military service would harm him and possibly others. The clerk forwarded the letters to the induction center, where an army psychiatrist, after examining the registrant, found him acceptable. In holding that there was a violation of section 1625.2 of the regulations, the court read *Mulloy* as requiring a reopening upon the presentment of a prima facie case even though no request for a reopening had been made. It emphasized that under section 1625.1(b), the board could reopen on its own motion and that the quantum of proof, which is the presentment of a prima facie case, was the same whether the registrant made the request or the board acted on its own. Because of the right to a personal appearance and appeal attendant upon reopening, "[t]he effect of a board's failure to reopen *upon receipt of new information* is a denial of these essential procedural rights."[237] Thus, said the court: "We see no logical basis for differentiating between cases where the registrant files a request based on non-frivolous grounds and those where, from other sources, information of equivalent weight is supplied. In either case 'whether or not a reopening is granted is a matter of substance'."[238] The failure of the board to consider the letters was not cured, of course, by the subsequent psychiatric examination, since the failure to reopen denied the registrant his procedural rights under the regulations.

In practice, this requirement may mean that the clerk must review all communications from registrants[239] to determine whether the registrant is providing information that would, if true, entitle him to a different classification. The clerk cannot simply file them unless they specifically request a reopening of the classification. This burden will not be great, however, and seems to be required by the clear import of section 1625.1(c) and section 1625.2.

The ultimate effect of *Mulloy,* then, will be to sustain the procedural defense of pre-induction failure to reopen so long as the registrant who has requested a reopening has presented new facts which, if true, would entitle him to the claimed classification or, even when the registrant has not made a specific request, if the board is in the possession of new facts which might entitle him to a different classification.[240]

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[237] *Id.* at 1312 (emphasis added).

[238] *Id.* at 1312-13.

[239] Some anti-war registrants try to "educate" the board and can become prolific letter-writers. This raises the question of whether the duty to examine the communications extend to such registrants.

[240] Where the board is put on notice that the registrant may have a valid claim for a different classification, the burden should be on it to make further inquiry, such as directing the registrant to submit more information. *See* 32 C.F.R. § 1625.1(c) (1971).

2. *Post-Induction Reopening*

Section 1625.2 of the regulations distinguishes between a reopening prior to the receipt of an order to report for induction or civilian work and a reopening following the issuance of such an order.[241] Both with respect to requests for reopening and reopening on the board's own motion, the regulation provides:

> [T]he classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153) unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.[242]

In light of this distinction, then, when the request for reopening[243] is made post-induction, the board is required to reopen only if (1) the registrant made out a prima facie case for the claimed classification (*Mulloy*), (2) the facts giving rise to the claim were due to circumstances beyond the registrant's control, and (3) the facts giving rise to the claim occurred substantially contemporaneously with the issuance of the order or thereafter.[244]

a. Circumstances Beyond the Registrant's Control

The distinction made by section 1625.2 between pre-induction and post-induction reopening has been upheld as a proper exercise of the power of the Selective Service System to make reasonable timeliness rules for the presentation of claims for exemption or deferment.[245] Most of the post-induction cases have involved the question of whether the facts giving rise to the claim were "due to circumstances beyond the registrant's control." In *Clark v. Volatile*[246] the registrant sought an occupational deferment on the ground that he had been offered a teaching position after the issuance of the induction order.[247] He

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241 32 C.F.R. § 1625.2 (1971).

242 *Id.*

243 I will assume that a specific request has been made. What I have said, however, about the duty to inquire may be equally applicable here.

244 If the facts had occurred earlier and were not reported to the board, the board may be justified in refusing to reopen on that ground. *See* United States v. Beaver, 309 F.2d 273, 276 (4th Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); Keene v. United States, 266 F.2d 378, 384 (10th Cir. 1959); United States v. Lemmon, 313 F. Supp. 737, 738 (D. Md. 1970); *cf.* McKart v. United States, 395 U.S. 185 (1969). Under 32 C.F.R. § 1625.1(b) (1971), the registrant is required to report new facts within 10 days after they occur. But so long as they were reported pre-induction, it is doubtful if the failure to comply with the "10 day rule" would have any effect.

245 Ehlert v. United States, 91 S. Ct. 1319 (1971).

246 427 F.2d 7 (3d Cir. 1970).

247 *Id.* at 9.

argued that the availability of the position was generated by the emergency withdrawal of the teacher whose job he had assumed.[248] The Third Circuit observed that the registrant had voluntarily accepted the teaching position so that his becoming a full-time teacher was not involuntary nor beyond his control.[249] The court felt that his teaching status did not result from the sudden vacancy but from his voluntarily choosing to fill that vacancy.[250] In *Kurjan v. Local Board No. 58*,[251] however, a district court case in the same circuit, the court found that a change of status from a graduate student to a salaried employee in an essential occupation which occurred after the issuance of the order, could constitute a change due to circumstances beyond the registrant's control.[252] Since the board did not make the specific finding as to circumstances beyond the registrant's control, the refusal to reopen was held to be improper.[253] These cases illustrate possible differing interpretations of circumstances beyond the control of the registrant in what I call the ordinary classification case.

Practically all of the litigation, however, has revolved around post-induction claims for classification as a conscientious objector, and this issue has been settled by the Supreme Court's decision in *Ehlert v. United States*.[254] Prior to the decision in *Ehlert*, the lower courts were split on the question of whether post-induction crystallization of conscientious-objector beliefs constituted a circumstance beyond the registrant's control. The Second Circuit answered this question in the affirmative in *United States v. Gearey*,[255] holding that the induction order could be a catalyst, causing a registrant "finally to crystallize

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[248] *Id.*

[249] *Id.* at 10.

[250] *Id.* The court also found that the evidence was "insufficient" to establish a de facto reopening. *Id.* at 11.

[251] 314 F. Supp. 213 (E.D. Pa. 1970).

[252] *Id.* at 220.

[253] *Id.* at 220-21. The court also found that the board had engaged in evaluative consideration, thereby reopening de facto. *Id.* at 221-22. *See* notes 294-98 *infra* and accompanying text. As to post-induction reopening of claims for hardship deferments, see Lane v. Allen, 307 F. Supp. 881 (N.D. Ohio 1969). In United States v. Dell'Anno 436 F.2d 1198 (9th Cir. 1971), it was held that the registrant's post-induction impregnation of his fiancee and his subsequent marriage to her was not "due to circumstances beyond the registrant's control" so as to entitle him to a "fatherhood" deferment. *Id.* at 1200. However, in Wright v. Selective Service System Local Board No. 105, 319 F. Supp. 509 (D. Minn. 1970), it was held that where the conception occurred prior to the issuance of the induction order, but was not discovered until afterwards, there was a change in status "due to circumstances beyond the registrant's control." *Id.* at 514-15.

[254] 91 S.Ct. 1319 (1971).

[255] 368 F.2d 144 (2d Cir. 1966). *See also* United States v. Gearey, 379 F.2d 915 (2d Cir. 1967), *cert. denied*, 389 U.S. 959 (1967).

and articulate his once vague sentiments."[256] The Gearey doctrine had been accepted in the Third,[257] Seventh,[258] Tenth,[259] and District of Columbia Circuits,[260] and rejected in the Fourth,[261] Fifth,[262] Sixth,[263] and Ninth Circuits.[264]

In *Ehlert* the Court refused to "take sides in the somewhat theological debates about the nature of 'control' over one's own conscience which the phrasing of this regulation has forced upon so many federal courts."[265] Instead it upheld the regulation as applied to post-induction claims of conscientious objection on the ground that these claims could be asserted through military channels after the registrant had submitted to induction.[266] Although the applicable Army regulation[267] refers only to conscientious objection that "develops subsequent to entry into the military service," the Court accepted the assurances of the government that claims that arose post-induction, but pre-entry, would be processed as well. Since the Court viewed the statutory exemption for conscientious objectors as being one from "combatant training and service," and since the registrant would not be required to undergo combatant training until his claim had been processed by the military authorities,[268] it found that it was "reasonable" to require the registrant to present his claim to the military authorities rather than to his local board.[269] Therefore, under the "reasonably, consistently applied administration-interpretation" test, it was able to hold that section 1625.2 barred board consideration of post-induction conscientious objection claims, and that this bar did not violate any statutory rights of the registrant. Justice Douglas dissented on the

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[256] United States v. Gearey, 368 F.2d 144, 150 (2d Cir. 1966).

[257] Scott v. Volatile, 431 F.2d 1132, 1135 (3d Cir. 1970).

[258] United States v. Nordlof, No. 18051 (7th Cir., Jan. 5, 1971), 3 SEL. SERV. L. REP. 3546 (1971). The court overruled United States v. Schoebel, 201 F.2d 31 (7th Cir. 1953), and later cases which were based upon it.

[259] United States v. Long, 435 F.2d 830, 832 (10th Cir. 1971).

[260] Swift v. Director of Selective Service, No. 24,137 (D.C. Cir., filed Mar. 16, 1971).

[261] *See* United States v. Al-Majied Muhammad, 364 F.2d 223 (4th Cir. 1966).

[262] Davis v. United States, 374 F.2d 1, 4 (5th Cir. 1967).

[263] *See* United States v. Jennison, 402 F.2d 51, 53-54 (6th Cir. 1968), *cert. denied*, 394 U.S. 912 (1969). However, the court also was of the view that the registrant's views had likely matured prior to the issuance of the order to report. 402 F.2d at 54.

[264] Ehlert v. United States, 422 F.2d 332, 335 (9th Cir. 1970), *aff'd*, 91 S. Ct. 1319 (1971).

[265] 91 S. Ct. at 1323.

[266] *Id.* at 1323-24.

[267] AR No. 635-20, ¶3, cited in *Ehlert*, 91 S. Ct. at 1324 n.10.

[268] *See* DOD Dir. No. 1300.6 § VI(B), cited in *Ehlert*, 91 S. Ct. at 1324 n.9.

[269] 91 S. Ct. at 1322-23.

ground that the registrant should be able to present his claim to civilian rather than military authority.[270] Justices Brennan and Marshall dissented on the ground that there was no "consistently applied administrative interpretation," as found by the majority.[271] The three dissenters also argued that crystallization of a belief in conscientious objection was a "circumstance beyond the registrant's control."

On its face, the decision in *Ehlert* merely seems to say that a registrant whose beliefs matured post-induction must assert his claim in service rather than before the local board. The Court apparently was sympathetic to the government's argument that the Selective Service System was in danger of being engulfed by post-induction conscientious objector claims. The decision, however, cuts much more deeply in the context of draft resistance, and it is difficult to believe that the Court was unaware of this fact. The draft resister and the true conscientious objector will *not* submit to induction. He will not give the military authorities the opportunity to pass on his claim and, in effect, the power to subject him to military control if the claim is denied.[272] Since he will not submit to induction, his only hope of avoiding imprisonment is to defend successfully the criminal prosecution for refusal to submit, and one of the most effective defenses—the board's refusal to reopen a classification—has been taken away from those resisters who have filed a conscientious objection claim post-induction. From this standpoint, then, *Ehlert* represents a retreat from *Mulloy*, and in an important class of cases weakens the vitality of the procedural defense.

b. Filing Before Issuance of the Induction Order

It will now become crucial to determine whether a particular claim was filed prior to the issuance of the induction order. This is not as simple a question as it would appear to be. In *Blades v. United States*,[273] for example, the registrant was to report for induction on August 30. On the night of August 29, he mailed the completed Form 150 to the board.[274] The envelope was postmarked August 30, and the Form was received by the board on August 31.[275] On August 30 he refused induction.[276] The court could have held that the Form was

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[270] *Id.* at 1328.

[271] *Id.* at 1330-31.

[272] I would speculate that a registrant might have a better chance with a military Conscientious Objector Review Board than he would with most local boards. But admittedly this is pure speculation, and in any event, the registrant with whom we are concerned will not submit to induction.

[273] 407 F.2d 1397 (9th Cir. 1969).

[274] *Id.* at 1398.

[275] *Id.*

[276] *Id.*

untimely since it was not mailed until after the order for induction was sent. Instead, the court went off on the ground that it was not received until after the date the registrant was to report.[277] In any event, it did hold that a document has not been filed until it is actually received by the board.[278] Applying this reasoning to the issuance of the induction order, the claim would not be considered pre-induction unless it was received by the board prior to the time the induction order has been issued.

In *Mizrahi v. United States*[279] the same court was confronted with a situation involving the following facts:[280] the registrant's letter requesting a reopening of his classification so that he might claim conscientious objector status and asking for the Form 150 was dated February 26, postmarked February 27, and was received by the board on February 28; the order to report for induction was mailed February 28; the Form 150 was mailed on March 2; the completed form was received by the board on March 8. February 27, the date of the postmark, was on a Sunday, and the court said that it was reasonable to assume that it was received on the 28th in the first mail delivery.[281] It was likewise reasonable to assume, said the court, that the order to report was prepared and mailed during the day after the registrant's letter was received.[282] Any doubt was resolved in favor of the registrant. The sending of the letter requesting the reopening and asking for the Form 150 was held to be enough to meet the requirement of "any other written statement claiming that he is a conscientious objector" contained in *Local Board Memorandum 41*,[283] so that the registrant was considered as having claimed conscientious objector status prior to the issuance of the order to report for induction.[284] Thus, it appears that there are questions which remain for judicial decision in this area.

It will also make a difference whether the board has cancelled or postponed an outstanding induction order. In *United States v. Mar-*

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[277] *Id.* at 1399-1400.

[278] The court observed that it was not deciding what would happen if a registrant were to mail the Form in sufficient time to be received in the ordinary course of the mails but it was lost or delayed in transit. 407 F.2d at 1399 n.1. *See also* United States v. Daniell, 435 F.2d 834 (1st Cir. 1970).

[279] 409 F.2d 1219 (9th Cir. 1969).

[280] *Id.* at 1220-23.

[281] *Id.* at 1223-24.

[282] *Id.* at 1224.

[283] *Local Board Memorandum* 41, now rescinded, provided that a registrant should have been considered to have claimed conscientious objector status if he had completed Series VII in the Classification Questionnaire, completed the Form 150, "or filed any other written statement claiming that he is a conscientious objector."

[284] These cases demonstrate to me the artificiality of the distinction drawn by the proviso to 32 C.F.R. § 1625.1 (1971).

tinez[285] the registrant was ordered on March 19 to report for induction on April 9. On March 29, his induction was postponed until May 9.[286] He requested and received the Form 150 on April 9, and filed it on April 19.[287] There were subsequent postponements, the last until October 24. The one on May 21 postponed the induction until further notice. If that order amounted to a cancellation, the Form 150 would have been filed pre-induction. The court held that it did not, since the board again notified him to report for induction on June 18.[288] Under the regulations the local board is authorized to postpone inductions for a total of 120 days.[289] Since the period between the two notifications was only 28 days, the court concluded that there was no cancellation despite the reference to "until further notice."[290]

In *United States v. Lonidier*,[291] however, the defendant had been ordered to report for induction on January 10. He indicated on the security questionnaire[292] that a relative had once been a member of the Communist Party. He was sent home and heard nothing further from his board. On November 6 he filed the Form 150 with the board. Eight days later the board informed him that it had voted not to reopen because it did not specifically find that there had been a change in circumstance over which he had no control. It also informed him that his induction date had been postponed earlier, but that he was to report on December 6. The court found that the board had postponed his induction indefinitely—in point of fact for 328 days—and that this had the effect of cancelling it.[293] Thus, the Form 150 was filed pre-induction and the board was required to reopen upon the presentment of a prima facie case.[294]

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[285] 427 F.2d 1358 (9th Cir.), *cert. denied*, 91 S. Ct. 122 (1970).

[286] *Id.* at 1359.

[287] *Id.*

[288] *Id.* at 1360.

[289] 32 C.F.R. § 1632.2(a) (1971).

[290] 427 F.2d at 1360. The 120-day period was the basis for the decision in Hamilton v. Commanding Officer, 328 F.2d 799 (9th Cir. 1964), and Parrott v. United States, 370 F.2d 388 (9th Cir. 1966).

[291] 427 F.2d 30 (9th Cir. 1970).

[292] *Id.* at 31.

[293] *Id.*

[294] As to cancellation of one order by the issuance of another with the result that a claim for reclassification was made pre-induction, see White v. United States, 422 F.2d 1254, 1255 (9th Cir. 1970). *See also* United States v. Rundle, 413 F.2d 329 (8th Cir. 1969), where the court held that the board was required to reopen upon the presentment of a prima facie case for a student deferment, even though the school quarter would end a few days later. 413 F.2d at 332. In finding prejudice because of the failure to reopen and cancel the induction order (the claim was for a I-S deferment), the court noted that he had filed a claim for I-A-O classification shortly before he was to report for induction, so that if the induction

Thus, it would appear from these two cases just discussed that an extended postponement of the induction may constitute a cancellation in the eyes of a court. Since the regulations allow a 120 day postponement, it is reasonable to assume that other courts faced with a similar issue would follow *Martinez* and would not hold invalid an induction postponed for less than that period. It is an open question what the result would be with a period of over 120 days. A court could follow the *Lonidier* rationale and hold that a de facto cancellation had occurred. It could also rule, however, that the error was harmless. In any event, the issue is a defense which may prove valuable and should be attempted whenever possible.

In view of *Ehlert,* it may now be asked what course is open to the lawyer faced with a case where the registrant has sought a reopening of his classification after an order to report has been issued. *Ehlert,* it must be remembered, is limited to post-induction conscientious objector claims and does not necessarily cover what I have called the ordinary-classification case. A post-induction claim for a hardship or employment deferment, for example, would still raise a question as to whether the circumstances giving rise to the claim were beyond the registrant's control. Or suppose that following the issuance of the order to report, the registrant "sees the light," and wants to become a minister.[295] If he is admitted to a seminary, must the board reopen and classify him as a ministerial student? These questions are not answered by *Ehlert.*

Most cases, of course, will involve post-induction conscientious-objector claims, and *Ehlert* has destroyed the failure-to-reopen defense in those cases. But perhaps it may give rise to another defense in this context, that of the failure to advise a registrant of his rights. As we will see subsequently, misleading advice on the part of the clerk or the board that was prejudicial to the registrant does constitute a defense to the criminal prosecution.[296] Affirmative duties have also been placed on the board, such as advising a registrant that an appeal agent was available,[297] or advising him to complete the Form 150 when it appears that he may be entitled to classification as a conscientious objector,[298] or responding to a request for a reopening, even though the registrant may have been ineligible for the particular classification

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order was cancelled, his I-A-O claim would be pre-induction rather than post-induction. 413 F.2d at 332-34.

[295] In his dissent in *Ehlert,* Justice Douglas used the example of the conversion of the Apostle Paul. 91 S. Ct. at 1325. Similar examples could be given of clergymen who have "received the call."

[296] *See* authorities cited notes 384-424 *infra* and accompanying text.

[297] *See* authority cited note 424 *infra* and accompanying text.

[298] *See* authorities cited notes 366-70 *infra* and accompanying text.

that he sought.[299] *It now appears arguable that if the board cannot consider a post-induction claim for conscientious objector status, but the military authorities can, the board is under a duty to advise the registrant of this fact when it refuses to reopen.* How else is the registrant to know of his in-service remedy unless he is so advised by the board? If he is so advised, he may well decide to submit to induction, knowing that he can raise his claim afterwards. I would contend that since the Supreme Court in *Ehlert* relied on the availability of the in-service remedy to justify the power of the boards to refuse to consider such claims on grounds of "untimeliness," the same justification imposes an affirmative duty on the boards to advise the registrant of his rights in this regard.

Certainly an argument to this effect should be made in the post-induction conscientious-objector cases. Its essential fairness should appeal to many judges, and I would argue that it is the logical corollary of *Ehlert.* In *Ehlert,* the Court observed that, " . . . if . . . a situation should arise in which neither the local board nor the military had made available a full opportunity to present a prima facie conscientious objection claim for determination under established criteria . . . a wholly different case would be presented."[300] If the board does not advise the registrant of this right, it is difficult to see how it can be said that this "full opportunity" has been made available to him. Since advising him of this right imposes no burden on the boards, it should be required.

If this defense is recognized, it will frequently be successful. Prior to *Ehlert,* it was not "working knowledge" that post-induction claims of conscientious objection could be asserted in the military, and it is doubtful if many boards would have advised the registrant to this effect. It may be then, that the failure-to-advise defense will serve the same function for post-induction claims as does the failure-to-reopen defense for claims made pre-induction. At least the effort should be made.

B. Giving Reasons for the Classification

Unlike administrative agencies which are subject to the requirements of the Administrative Procedure Act, selective service boards are not required by statute to "give reasons for the denial of an application."[301] Nor does any regulation affirmatively require that the board give reasons for its decision.[302] The absence of reasons for decisions neces-

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[299] *See* authorities cited notes 371-74 *infra* and accompanying text.

[300] 91 S.Ct. at 1325.

[301] *See* the discussion in Paszel v. Laird, 426 F.2d 1169, 1175 (2d Cir. 1970). *See also* note 255 *supra.*

[302] *See* United States v. Curry, 410 F.2d 1297, 1299 (1st Cir. 1969).

sarily leaves the registrant in the dark. He can consult his file, of course.[303] Furthermore, it is possible that reasons for a particular decision may be contained in the board minutes[304] or otherwise gleaned from the file. Very frequently, however, the reasons for a board's decision will be unknown. Suppose, for example, that a registrant applies for classification as a conscientious objector. He can be denied that classification either on the ground that he does not satisfy the statutory criteria or that, in the opinion of the board, he is not sincere in his beliefs. Even if he knows which of these broad grounds was the basis for the denial, he probably will not know the specific reasons why the board thought he did not satisfy the statutory criteria or was not sincere. It is perfectly possible that the minutes will have read: "Board voted to classify registrant I-A." Similarly, a registrant who is denied any other classification will not know the precise reasons unless the file so indicates or he is told by a board member or the clerk. Furthermore, there is no way by which he can discover why the appeal board decides as it does, since the notification from the appeals board merely states the classification and the vote.[305]

If the registrant does not know the reasons for the local board's decision, he is not in a position on appeal to take advantage of the provisions of section 1626.12 of the regulations, which states that:

> The person appealing may attach to his appeal a statement specifying the matters in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes that the local board has failed to consider or to give sufficient weight . . . .[306]

As a practical matter, the uncounselled registrant is not likely to be aware of this provision anyway. Even if he were aware, it would not be of much utility to him. More significantly, ignorance of the board's reasons limits the ability of the courts to determine whether or not there was a basis in fact for the board's substantive classification. I would imagine that in the pre-Vietnam cases most courts would assume that the board decided on the basis of valid reasons and would try to find a basis in fact to support the decision on any possible ground.

It has been established, however, that when a reason for the decision is given by a board, the decision must be sustained on that basis. So, in the rare case where an appeals board gives a reason for its

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[303] 32 C.F.R. § 1670.8(a)(1) (1971).

[304] The boards are required to keep a record of each meeting on the Minutes of Local Board. 32 C.F.R. § 1604.53 (1971).

[305] 32 C.F.R. § 1626.27(a) (1971). "There is no statute or regulation requiring the appeal board to make any findings of fact or conclusions of law or in any other way indicate reasons for its decision." Gatchell v. United States, 378 F.2d 287, 291 (9th Cir. 1967).

[306] 32 C.F.R. 1626.12 (1971).

decision, and there is no basis in fact[307] for a decision based on that reason, the classification will be without basis in fact, even though it might have been sustainable on other grounds.[308] But if no reasons for the decision are contained in the file or are otherwise available, all that defense counsel can do in a criminal prosecution is call the board members as witnesses and try to elicit the reasons from them.[309] This will help to establish the two substantive defenses of no basis in fact and erroneous standard of law.

Taking administrative action without providing reasons for such action would seem to offend elementary notions of due process of law.[310] But in the past some courts have not seemed to be particularly troubled by this consideration in draft cases.[311] What has happened, however, as the subsequent discussion will indicate, is that the principle that boards need not give reasons for their action has been gradually eroded. At least in cases involving conscientious objector claims, an affirmative requirement of giving reasons has now been imposed. Some courts have held that the absence of reasons in the particular case made it impossible to determine whether there was a basis in fact for the classification, and have found, therefore, that there was not.[312] At least one court has found that the failure to give reasons effectively denied the registrant his right of appeal,[313] stating that:

> In permitting an appeal from the decisions of a Local Board, the regulations governing the Selective Service System provide that the registrant may specify claimed errors. 32 C.F.R. § 1626.12. The opportunity to rebut allegedly incorrect conclusions—here, that defendant was insincere—is essential to a meaningful appeal. . . . Where no facts or inferences upon which the Local Board's conclusion is based are stated, effective rebuttal is impossible. No advocate can persuasively assert grounds for reversal

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[307] *See* United States v. Harris, 302 F. Supp. 1194 (D. Ore. 1968), where the board rejected the registrant's claim for conscientious objector status because he had not been baptized in his religion. This, concluded the court, did not provide a basis in fact for the board's finding of insincerity. *Id.* at 1196.

[308] *See* Gatchell v. United States, 378 F.2d 287, 292-93 (9th Cir. 1967).

[309] They may not remember at all or they may "bluff it." More likely, if some notation has been made, they will probably try to expand upon it. The opportunity for "points" on cross-examination is extensive.

[310] *See generally* Atchison, T. & S.F. Ry. v. United States, 295 U.S. 193, 201-02 (1935).

[311] The general view has been that so long as there is a record from which the court can determine whether there was a basis in fact for the decision, the absence of reasons for the decision is not violative of due process. *See* the discussion in United States v. Morico, 415 F.2d 138, 143 (2d Cir. 1969), *vacated on other grounds*, 399 U.S. 526 (1970).

[312] *See, e.g.*, United States v. Abbott, 425 F.2d 910, 913 (8th Cir. 1970); United States v. Bryant, 293 F. Supp. 922, 933 (W.D. Ark. 1968).

[313] United States v. St. Clair, 293 F. Supp. 337, 345 (E.D.N.Y. 1968).

> when the bases for the decision below are unknown. The right of appeal from an administrative decision, guaranteed by the regulations, was in effect denied.[314]

The right-of-appeal argument, however, does not appear to have been picked up by other courts. Rather, at least in the case of conscientious objector claims, the courts have related the giving of reasons to judicial review of the board's substantive classification. So long as the Department of Justice hearing procedure was in effect, the courts would at least have the report of the hearing officer.[315] It was recognized that the task of the courts would be more difficult when that procedure was abolished.[316] Since the repeal of the Justice Department hearing procedures, the courts have generally dealt with that difficulty by requiring the boards to give reasons for their decision. Now it appears that the failure to give reasons should be per se improper and should constitute a defense to the criminal prosecution. The matter has been well stated by the Ninth Circuit in *United States v. Haughton:*[317]

> The local board may have concluded that Haughton was insincere in his claim, or that Haughton's religious training and beliefs did not, by themselves, lead him to his opposition to war. The board may have relied on information not in the record, contradicting the allegations in Haughton's form 150. Or the board may have erroneously concluded that Haughton's allegations, even if true, did not entitle him to his requested classification. Since the board has not stated the basis for its decision, we cannot determine whether Haughton was properly denied conscientious objector status.[318]

And as the Fourth Circuit observed in *United States v. Broyles:*[319]

> In any case where the board fails to disclose the basis for its decision, we risk blind endorsement of a mistake of law. Where it is clear that a *prima facie* case was established, we conclude that in conscientious objector cases, it is essential to the validity of an order to report that the board state its basis of decision and the reasons therefore, i.e., whether it has found the registrant incredible, or insincere, or of bad faith, and why.[320]

In addition to the Fourth and Ninth Circuits, the requirement of giving reasons in conscientious objector cases[321] has been recognized

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[314] *Id.*

[315] I would imagine that they assumed that the draft board followed the recommendation of the hearing officer, if the Department of Justice recommended denial of the claim.

[316] *See* the discussion in United States v. Back, 409 F.2d 1318, 1320 (2d Cir. 1969).

[317] 413 F.2d 736 (9th Cir. 1969).

[318] *Id.* at 742.

[319] 423 F.2d 1299 (4th Cir. 1970).

[320] *Id.* at 1304.

[321] I am assuming that the courts which have required the giving of reasons for the rejection of post-induction claims would also, on an *a fortiori* basis, require the giving of reasons for the rejection of a pre-induction one. This has been the case in the Second Circuit where *Deere,* a pre-induction case, relied on *Paszel,* a post-induction one.

by the Second,[322] Third,[323] Seventh,[324] and Tenth[325] Circuits, and may be recognized in the Eighth Circuit.[326] It has been rejected in the First Circuit, at least in the context of deprivation of the right of appeal.[327] However, a district court in the First Circuit has held it applicable in the context of determining the basis for the board's decision.[328] Reasons need not be given where the registrant has failed to make out a prima facie case[329] for the claimed classification.[330]

In terms of the effect of the failure to give reasons, the Second Circuit refuses to treat the giving of reasons as essential to the validity of the induction order.[331] It treats the issue of disclosing reasons as one which is related only to the court's ability to determine whether there was a basis in fact for the classification. Instead of ordering the dismissal of the indictment, the Second Circuit remands the case to allow the government to establish the reasons by calling the board members.[332] I would disagree with this approach. It should be recognized that the refusal to give reasons may have prejudiced the registrant with respect to his right of appeal. Moreover, the motivation of the Selective Service System to implement the requirement of disclosing its reasoning will be increased if courts relate compliance with the requirement to the validity of the induction order.

It remains an open question whether the requirement of publishing reasons will be extended to the non-conscientious objector cases. In *Lenhard v. Officer*,[333] a case involving a claim for hardship and occupational deferments, the court found that the failure to give reasons for the denial of the deferments prejudiced the registrant. The rationale was that the registrant could have supplied additional information if he had known why he was denied reclassification. The failure to give reasons also made it difficult for the court to determine whether or not there was a basis in fact for the board's action. There appears

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[322] *See* United States v. Deere, 428 F.2d 1119, 1122 (2d Cir. 1970); Paszel v. Laird, 426 F.2d 1169, 1175 (2d Cir. 1970).

[323] Scott v. Volatile, 431 F.2d 1132, 1137-38 (3d Cir. 1970).

[324] United States v. Lemmens, 430 F.2d 619, 624 (7th Cir. 1970).

[325] *See* United States *ex rel.* Brown v. Resor, 429 F.2d 1340, 1343-44 (10th Cir. 1970).

[326] United States v. Abbott, 425 F.2d 910, 913-14 (8th Cir. 1970) strongly indicates that it would be.

[327] United States v. Curry, 410 F.2d 1297, 1299-1300 (1st Cir. 1969).

[328] United States v. Prince, 310 F. Supp. 1161, 1165-66 (D. Me. 1970).

[329] This means a prima facie case under the *Mulloy* standard.

[330] *See* United States v. Wallace, 435 F.2d 12, 16 (9th Cir. 1970); United States v. Weaver, 423 F.2d 1126, 1127 (9th Cir. 1970).

[331] *See* United States v. Deere, 428 F.2d 1119, 1122 (2d Cir. 1970).

[332] *Id.*

[333] Civil No. 70-C473 (E.D.N.Y., May 18, 1970). 3 SEL. SERV. L. REP. 3111 (1970).

to be no reason why this requirement should not be extended to all cases. The registrant may often be prejudiced by the refusal to give reasons, both in terms of supplying additional information to the board and in terms of exercising his right of appeal. No burden is imposed on the board by making it conform to the basic principles of administrative procedure. The failure to give reasons may turn out to be one of the most effective of the procedural defenses, particularly if the courts extend it fully to the non-conscientious objector cases.

C. *Improper Action of the Board During the Classification Process*

1. *Prejudicial Effect*

In this section a number of defenses can be summarized which arise from the day-to-day action of the boards and which often involve conduct on the part of board employees such as the clerk. Because of the routine nature of many of these actions and the likelihood of mistakes occurring in any large organization, the registrant will have to establish that he was potentially prejudiced by the action which he contends is improper. This is perhaps best illustrated by the pre-Vietnam case of *United States v. Lawson.*[334] Among other contentions, defendant alleged that the order to report was signed by the clerk with a rubber stamp in violation of the regulations.[335] In rejecting the assertion of this procedural defense, the Court stated:

> It is true that the signature of the Clerk on the order was by rubber stamp. It is equally true that the regulations disapprove rubber stamps. Failure, however, to conform to the regulations and to other similar procedural provisions cannot be held to deprive the Board of its jurisdiction as appellant contends. Absent some showing of prejudice to appellant due to the failure on the part of the Board to comply with the formal procedural directive of a regulation, an order of the Board, otherwise within its power to issue, will not be invalidated.[336]

The burden of showing such prejudice has traditionally been put on the registrant. Thus when a registrant, contending that the names of the advisers to registrants were not conspicuously posted in the board's offices as required,[337] did not show that he was not informed about his rights or that he could have presented his case more completely than he did, it was held that he could claim no violation of procedural rights.[338] Other examples of harmless error include the

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[334] 337 F.2d 800, 812 (3d Cir. 1964).

[335] *Id. See* 32 C.F.R. § 1606.24 (1971).

[336] United States v. Lawson, 337 F.2d 800, 812 (3d Cir. 1964).

[337] 32 C.F.R. § 1604.41 (1971).

[338] *See* United States v. Sturgis, 342 F.2d 328, 331 (3rd Cir. 1965). *See also* United States v. Heljenek, 275 F. Supp. 579, 581 (E.D. Pa. 1967), wherein the court found that the registrant was not prejudiced by the failure of the board to notify him of the availability of the government appeal agent.

failure to specifically notify the registrant that his appeal has been sent to the National Appeal Board,[339] the sending of a reclassification notice on Selective Service Form 110,[340] and the failure to notify a registrant of the board's decision not to reopen when the registrant knew his status at all times.[341] The extent to which the requirement of prejudice can extend is illustrated by *Yeoman v. United States*,[342] wherein the board failed to notify the registrant that his request for reclassification as a minister was denied.[343] The Court found that the registrant was not prejudiced by the board's failure to notify him since the only recourse open upon a refusal to reopen was to ask review by the state and national director, both of whom had reviewed his file. In addition, the Court said that he should have known of the board's refusal to reopen when he received the order.[344]

One situation in which prejudice may be presumed occurs when adverse information has been placed in the registrant's file when it is sent to the appeals board and the registrant has no knowledge of that information or opportunity to rebut it. The principle of *Gonzales v. United States*,[345] requiring the opportunity to reply to adverse information, is not limited to the former procedure for classifying conscientious objectors. The fair hearing requirement is equally applicable to board proceedings. Thus, in *United States v. Cabbage*,[346] when an FBI report concerning certain political activities of a registrant was sent to the appeals board considering the registrant's claim for conscientious objector classification, there was "a denial of a fair hearing required by the due process clause of the Federal Constitution," which rendered the notice to report for induction void.[347] The report stated that the registrant was trying to organize Black-power followers and was being watched by the FBI. In *United States v. Gustavson*,[348] also involving a conscientious objector claim, the clerk included in the file sent to the appeals board an Oral Information Report. The report stated that the "[b]oard knows that registrant was in a fight while going to Illinois State University and resulted in

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[339] United States *ex rel.* Lipsitz v. Perez, 372 F.2d 468, 469-70 (4th Cir. 1967).

[340] Thompson v. United States, 380 F.2d 86, 88 (10th Cir. 1967).

[341] Jones v. United States, 387 F.2d 909, 912 (5th Cir. 1968).

[342] 400 F.2d 793 (10th Cir. 1968).

[343] *Id.* at 796. Such action is required of the board whenever it denies a request for a reopening. 32 C.F.R. § 1625.4 (1971).

[344] *Id.*

[345] 348 U.S. 407 (1955).

[346] 430 F.2d 1037 (6th Cir. 1970).

[347] *Id.* at 1041. *See also* Nevarez Bengoechea v. Micheli, 295 F. Supp. 257 (D.P.R. 1969), wherein the State Director sent statements to the appeal board which were prejudicial to the registrant's claim for an occupational deferment. *Id.* at 259.

[348] No. CR 69-374 (N.D. Ill., Dec. 23, 1969), 3 SEL. SERV. L. REP. 3099 (1971).

breaking a Wesleyan student's jaw." In *United States v. Owen*[349] the board, in clear violation of the regulations, had allowed a minister to see the registrant's file, and when the appeal board was considering the registrant's conscientious objector claim the minister's adverse comments were forwarded to it.[350] In these cases it was the inclusion of the adverse information without allowing the registrant the opportunity to rebut, which furnished the basis of the due process violation. Presumably if the registrant has been advised of the information and given the opportunity for rebuttal, there will have been nothing improper in sending the information to the appeals board.[351] Moreover, when it has been established that the communication contained nothing derogatory to the registrant or prejudicial to the classification which he was seeking, the refusal to furnish him with a copy has been held not to violate due process.[352]

2. Rights of Appearance and Appeal

Sometimes a board may improperly deny the registrant the right to a personal appearance or an appeal, particularly if he has not clearly articulated which procedure he wants. Selective Service System Form 110 advises the registrant that he has the right to a personal appearance or an appeal, but does not make it clear that he is entitled to both. He may have a personal appearance[353] and, if that is unsuccessful, he has another 30 days in which to appeal.[354] In *United States v. Olkowski*[355] the registrant sent a letter in June stating that "[s]ubject to the right of personal appearance, I appeal my I-O classification to the local board of appeal."[356] The clerk treated this as a request

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[349] 415 F.2d 383 (8th Cir. 1969).

[350] *Id.* at 389. *See also* Striker v. Resor, 283 F. Supp. 923, 925 (D.N.J. 1968), where memoranda containing anonymous information, which allegedly the board did not consider, were placed in the file when it went to the appeal board.

[351] *See* United States v. Salamy, 253 F. Supp. 616 (W.D. Okla. 1966), *aff'd*, 379 F.2d 838 (10th Cir. 1967). As to the failure to include a reply submitted by the registrant, see United States v. Bellmer, 404 F.2d 132, 135 (3d Cir. 1968).

[352] *See* Storey v. United States, 370 F.2d 255, 258 (9th Cir. 1966); United States v. Mendoza, 295 F. Supp. 673, 680 (E.D.N.Y. 1969). *Cf.* United States v. Moore, 423 F.2d 556, 558-59 (9th Cir. 1970). In Winfield v. Riebel, No. 20292 (6th Cir., Dec. 24, 1970), 3 SEL. SERV. L. REP. 3534 (1971), the registrant was not informed by the board that the board had prejudicial information which was not in the registrant's file. The court held that this could constitute a denial of due process, but that the registrant was not prejudiced because the board reconsidered his case after he was made aware of the adverse information.

[353] 32 C.F.R. § 1624.1(a) (1971).

[354] 32 C.F.R. § 1626.2(c) (1971).

[355] 248 F. Supp. 660 (W.D. Wis. 1965).

[356] *Id.* at 663.

for a hearing before the local board. The registrant was retained in the same classification in August and did not subsequently appeal.

Following a conference between the clerk and the state director, the clerk wrote the registrant asking him if by his earlier letter he had intended to request both a personal appearance and an appeal. He replied that he did not want his August classification to be reviewed by an appeal board, and it was not. The court held that the June letter should have been treated as a request for review by an appeals board. It first pointed out[357] that section 1626.11 states that the written notice of appeal "need not be in any particular form" and that "the language of any such notice shall be liberally construed in favor of the person filing the notice so as to permit the appeal."[358] It found that the subsequent communications did not clarify what the registrant wanted in June. Because the registrant was denied the right of appeal, he was acquitted.[359]

The present regulations permit an appeal within 30 days after the board mails the Notice of Classification.[360] A registrant may also request a personal appearance within that time.[361] The sending of the form has been held to constitute sufficient notice to the registrant of his rights.[362] Likewise he is required to appeal within the specified time, and it is no excuse if the registrant, through his own neglect, fails to receive the notice in time to appeal.[363] The board has the discretion to permit a late appeal prior to the issuance of an order to report if it finds that the failure to appeal "was due to a lack of understanding of the right to appeal or to some cause beyond the control of [the person having the right to appeal]."[364]

3. *Failure to Provide Forms*

Procedural rights may also be violated by the failure to furnish a registrant with a Form 150 to enable him to apply for conscientious

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[357] *Id.* at 664.

[358] 32 C.F.R. § 1626.11 (1971).

[359] 248 F. Supp. at 665. As pointed out earlier, the same confusion existed on the part of Joe Mulloy's board when he sought to appeal from his classification in June, 1967. His board, however, eventually processed the appeal and cancelled the order to report. Compare United States v. Dyer, 390 F.2d 611, 612 (4th Cir. 1970), where an appeal was properly treated as a request for reclassification as a minister. The board denied the claim, and the registrant did not appeal further. Unlike the request for a personal appearance, there was nothing for the registrant to appeal until the board denied the claimed classification.

[360] 32 C.F.R. § 1626.2 (1971).

[361] 32 C.F.R. § 1624.1 (1971).

[362] *E.g.*, Carson v. United States, 411 F.2d 631, 634 (5th Cir.), *cert. denied*, 396 U.S. 865 (1969); United States v. Jones, 384 F.2d 781, 783 (7th Cir. 1967).

[363] United States v. Haseltine, 415 F.2d 334, 336 (9th Cir. 1969).

[364] 32 C.F.R. § 1626.2(d) (1971).

objector status. The failure to respond to a request for a reopening of the classification may also violate a registrant's rights. To some extent this is related to the matter of request for a reopening discussed earlier.[365] A registrant cannot have his claim for conscientious objector status considered unless he completes a Form 150. It has been held, therefore, that apart from any requirement that a registrant request a reopening, the registrant must be furnished with the form when the board is aware that a registrant may be trying to claim conscientious objector status. In *United States v. Sobczak*,[366] the board was informed that the registrant was a Jehovah's Witness, a sect whose members are classified as conscientious objectors. On at least two other occasions he notified Selective Service that he was in effect claiming conscientious objector status.[367] He was never advised to execute the Form 150. In holding that his procedural rights were violated, the court referred to section 1621.13 of the regulations,[368] which provides that "[w]hen a registrant's Classification Questionnaire . . . omits needed information, contains material errors, or shows that the registrant failed to understand the questions, the local board may return the Classification Questionnaire . . . to the registrant for correction and completion. . . ."[369] The court observed that the defendant's questionnaire "did omit needed information and did show that the registrant failed to understand his rights, but the board did not return to him Form 100 to be amplified, nor direct him to attach thereto Form 150."[370]

When the registrant has made a specific request to have his classification reopened, his rights may be violated by the board's refusal to respond to that request. In *United States v. Cioeta*,[371] the registrant requested a II-S classification under advanced graduate study status. He was not eligible for that classification. The board did not reply, but instead issued an order to report for induction. The court held that section 1625.4, which directs the board to advise the registrant when it has refused to reopen, required the board to reply to his request before it issued the order to report.[372] The government argued that the registrant was not prejudiced by the board's failure to comply with the regulation.[373] The court disagreed on the ground that "[a]

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[365] *See* notes 225-40 *supra* and accompanying text.
[366] 264 F. Supp. 752 (N.D. Ga. 1966).
[367] *Id.* at 754.
[368] *Id.* at 755.
[369] 32 C.F.R. § 1621.13 (1971).
[370] 264 F. Supp. at 755.
[371] No. CR 70-112 (D. Ore., July 1, 1970); 3 SEL. SERV. L. REP. 3309 (1971).
[372] 3 SEL. SERV. L. REP. at 3310.
[373] *Id.*

proper communication would have given [him] an opportunity to ask for a reconsideration of the board's decision. It would also have given him an opportunity to apply for a different classification for which he might have been eligible."[374] Thus the possibility of prejudice was sufficient. In *United States v. Seeley*,[375] the registrant claimed to have sent a letter to the board stating that he was a Jehovah's Witness. The board said that the letter was never received, and the court concluded that it must have been lost in the mail. Because the case involved a criminal prosecution, the court put the risk of loss on the board. Since the court believed that the registrant was telling the truth, it held that the letter was sufficient to require dismissal of the criminal charges in order to allow the board an opportunity to consider classifying the registrant as a conscientious objector.[376] The letter was sent prior to the issuance of the order to report. The court also held that when the registrant later asked the clerk for the Form 150, the clerk, who had told him that his induction date was imminent, had a duty to advise him of the necessity for prompt filing of the form and to assist him with it if he requested. At the very least the clerk should have told him about the availability of the government appeals agent. Finally, the court said that the clerk should have informed him that the form had to be received prior to the date of induction.[377]

In *United States v. Bowen*[378] the court dealt with the mailing of Form 150 by the board and the claim of the registrant that he never received it. There the board sent a Form 150 in response to the registrant's request, and when it was not returned after about four months, it sent another one. The registrant testified that he did not receive either of the forms, although he did not deny receiving other forms from the board. When no reply was received from the registrant, the board issued an order to report for induction.[379] The registrant did not comply, but after having been contacted by an FBI

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[374] *Id.*

[375] 301 F. Supp. 811 (D.R.I. 1969).

[376] *Id.* at 818.

[377] *Id.* A diametrically opposite result was reached in United States v. Price, 397 F.2d 384 (7th Cir. 1968). There the court held that even if the letter was received and was lost by the board, there was no denial of due process. *Id.* at 386. There was, however, no record of the letter having been received. *Id.* at 385.

[378] 414 F.2d 1268 (3rd Cir. 1969).

[379] The board also advised him that it had refused to reopen his classification, that he would be ordered for induction, and that other notices would be mailed to him. The court suggested that this letter might have caused him to be "uncertain about the continuing validity of the notice of induction," so as to give him a defense to a charge of willful refusal. 414 F.2d at 1270.

agent almost a year later, he went to the board and requested a Form 150. The clerk refused to give it to him and upon telephoned instructions from the state director, ordered him to report for induction the next day. The court first observed that the failure to give a registrant the Form 150 on or prior to the date of induction was improper and was sufficient to vitiate a conviction for failure to report.[380] It reversed the conviction, however, on the ground that the board violated its mandatory duty to furnish the registrant with a Form 150 at the earlier time.[381] Of course the government contended that the board had actually furnished the Form on the earlier dates. The district judge instructed the jury that under section 1641.3 of the regulations, the mailing of any form to a registrant constitutes notice to him of the contents *whether he actually receives it or not.*[382] The court held that the regulation was violative of due process of law insofar as it purported to create an irrebuttable presumption.[383] This means that a registrant may always show that he did not receive a communication which was purportedly sent.

4. Improper Advice

The cases just described indicate how the failure of the board to furnish the Form 150 or to respond to requests for reclassification may be successfully asserted as a defense, even when it may be unlikely that the registrant would have been able to obtain the desired classification on the merits. A registrant's rights may also be violated when he has received misleading advice from the clerk or other board officials on which he has relied to his detriment. Although the registrant is mailed certain information about his rights and duties after he registers, and a pamphlet and notice of personal appearance and appeal rights when he is classified,[384] in practice he will often rely quite heavily on advice he receives from the clerk and other board employees. Indeed, he is instructed to contact his local board for information and advice. It has been shown, however, that "institutionally" the registrant will not be informed about certain rights.[385] Although boards have discretion to appoint advisers to registrants,

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[380] *Id.* at 1271.

[381] *Id.* at 1271-72.

[382] *Id.* at 1272. The jury was also instructed that there was a presumption that mail was received. *Id.*

[383] *Id.* at 1273. Thus, the registrant was entitled to a new trial. The court suggested that it would be proper for the board to allow him to complete Form 150 and to consider his claim. *Id.* at 1278 n.19.

[384] *See* Note, *An Examination of Fairness in Selective Service Procedure,* 37 GEO. WASH. L. REV. 564, 572-3 (1969).

[385] *Id.* at 573.

the practice among boards varies considerably.[386] Therefore, while some registrants may be able to obtain outside counselling, it is fair to say that for the great majority of registrants their primary information about their rights and duties comes from personal contact with the clerk or other board employees.

A government appeal agent must be appointed for each local board, who, if possible, shall be a lawyer.[387] He does not act like a lawyer in the sense of owing undivided loyalty to a client, however, because the regulations require him to represent both the registrant and the Selective Service System.[388] He has the duty to appeal from any classification given a registrant which, in his opinion, should be reviewed by the appeal board. He is also the board's legal adviser. His duty is "[t]o be equally diligent in protecting the interests of the Government and the rights of the registrants in all matters."[389] In practice most boards will make an appointment with the government appeal agent at the registrant's request, and the registrant is advised of the right to an appointment when he receives the notice of classification.

a. Futility of Appeal

When the clerk of the board has improperly advised a registrant that an appeal or personal appearance or the filing of a claim would be futile, and in reliance on such advice the registrant has failed to exercise his rights, the action of the clerk has been held to be violative of due process of law.[390] This has meant not only that the registrant was not barred from obtaining judicial review of his substantive classification on exhaustion grounds, but that the order to report itself was invalid. In *United States v. Williams*[391] the registrant, who initially had been given a III-A fatherhood deferment, notified the board that he was a Jehovah's Witness and requested the Form 150. When he returned the completed form to the board he was advised by the clerk that the board could not consider the conscientious objector request since he was presently in a lower classification.[392] The registrant's wife later filed for divorce, employing as her attorney the

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[386] *See* Note, *Procedure and Objectives Within the Selective Service System*, 2 JOHN MARSHALL J. PRAC. & PROC. 122, 139-40 (1968).

[387] 32 C.F.R. § 1604.71 (1971).

[388] *Id.*

[389] 32 C.F.R. § 1604.71(d)(5) (1971). *See* Tigar & Zweben, *supra* note 50, at 524-25.

[390] United States v. Williams, 420 F.2d 288, 292-93 (10th Cir. 1970).

[391] *Id.*

[392] *Id.* at 289-90. 32 C.F.R. § 1623.2 (1971) provides that the registrant shall be placed in the lowest class below I-A for which he is eligible. I-O is higher than II-S.

board's appeal agent,[393] and the registrant was then classified I-A. After receiving a notice to report for a physical examination, the registrant went to the board and again requested the Form 150. His uncontradicted testimony indicated that the clerk advised him that "... it wouldn't make any difference ... that my efforts would be just wasting my time ... they (the draft board) wouldn't give me a conscientious objector classification."[394] He did not appeal the I-A classification and was subsequently ordered to report for induction.

The government contended that the failure of the registrant to exhaust administrative remedies precluded him from urging both a denial of due process and the invalidity of the substantive classification. The court recognized that "[t]he facts that would give rise to the exhaustion exception here, likewise go to the contention that a lack of procedural fairness was afforded the [registrant] by the board."[395] The court noted that the particular registrant believed that his local board and his appeals board were one in the same and that "a local draft board, in most instances, as far as a registrant is concerned, and from his contacts with it, is personified by the clerk of the board, acting as its executive secretary and running its office from day to day."[396] It then stated as follows:

> From the facts before us there would seem to be no question concerning the fact that the appellant was affirmatively misled by the clerk's statement concerning the futility of trying to obtain a conscientious objector's exemption. All the appellant knew, or should have known from reading the back of his classification card, was that he had the right to appeal. He also knew that his classification card referred him to any local board for information and advice regarding any questions he might have.... [He] was plainly justified in relying on her [the clerk's] advice and apparent agency and authority to render such advice.
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> In view of the fast sequence of the incidents of induction from the draft board level, appellant's belief that his wife's attorney was a member of the draft board, and the statement of the clerk of the board concerning the futility of a further effort to pursue the conscientious objector status, the groundwork was well laid in the subjective mind of the appellant that that he had exhausted his administrative remedies before the board, including appeal. The factual situation here presents a proper exception to the exhaustion rule.
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> It also appears from the same facts that the appellant was denied due process by the failure of the draft board to affirmatively consider his application for a conscientious objector's status, and the misleading statements of the clerk of the draft board.[397]

The court ordered that a judgment of acquittal be entered.

A similar situation was presented in *United States v. Bryan*.[398]

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[393] United States v. Williams, 420 F.2d 288, 290 (10th Cir. 1970). Apparently with "malice aforethought."

[394] *Id.* at 290.

[395] *Id.* at 291.

[396] *Id.* at 292.

[397] *Id.* at 292-93.

[398] 263 F. Supp. 895 (N.D. Ga. 1967).

There the registrant was also a Jehovah's Witness who had claimed conscientious objector status, indicating that he had done some "pioneering" and that he was trying to become a full-time Pioneer. The board denied the claim and advised him by letter of his right to appeal.[399] He then went to the board office and talked to the clerk. She talked about the Jehovah's Witness ministry and when he informed her that he was not yet at the "pioneering" level, she advised him that it would be fruitless to appeal.[400] The court found that the registrant was justified in relying on her advice, and that by failure to pursue his remedies further he lost not only an appeal but the opportunity for a personal appearance, all relative to his conscientious objector claim.[401] Thus, the board's discouragement of the registrant's perfection of his administrative rights constituted a denial of due process and rendered invalid the order to report.

b. Unavailability of Appeal

There may also be a denial of due process when the clerk erroneously advises a registrant that an appeal is not available, as in *Powers v. Powers*.[402] There the clerk advised the registrant that he could not appeal his I-A classification on medical grounds, but would have to wait until he was ordered for a physical examination or to report for induction.[403] Likewise in *Striker v. Resor*[404] the court found that the instructions concerning the right of appeal were thoroughly confusing.[405] It has also been held that due process is denied when a registrant is effectively discouraged from applying for a particular classification because of erroneous advice. In *United States v. Burns*[406] the registrant, who was discussing his classification with the clerk, asked what recourse one had if he were a pacifist and did not believe in killing.[407] The clerk asked him if he had any religion and the registrant replied that he had been raised as a Catholic.[408] The clerk then said that there were Catholic priests in the front lines, and that he "had

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[399] *Id.* at 897.

[400] *Id.* at 898.

[401] *Id.* at 898-99.

[402] 400 F.2d 438 (5th Cir. 1968).

[403] *Id.* at 440. The district court was instructed to make findings of fact concerning the registrant's claim. If it found against him on that issue, it was directed to consider whether the board was required to reopen the classification on the basis of the information that was presented to it. *Id.* at 441-42.

[404] 283 F. Supp. 923 (D.N.J. 1968).

[405] *Id.* at 926.

[406] 431 F.2d 1070 (10th Cir. 1970).

[407] *Id.* at 1071.

[408] *Id.*

no excuse."[409] She did not offer to give him the Form 150.[410] The erroneous nature of the advice was obvious, and the court concluded that the erroneous advice given by the clerk, "[s]o misled him that he believed it was useless to file a claim for exemption as a conscientious objector."[411]

On the other hand, the court refused to sustain the erroneous advice defense in *United States v. Lansing*.[412] On December 21, 1967, the registrant sent a letter to the board requesting the Form 150.[413] The board mailed the form with instructions indicating that it was to be completed and returned within 10 days from the date of mailing.[414] When it was not completed, the board sent what seemed to be essentially a form letter advising the registrant that his classification was not reopened.[415] The registrant was in the process of completing the form when he received the letter, and he testified that he ceased completing the form because of his feeling that "[i]t wouldn't do any good anyway, that they had already rejected me, and they hadn't seen any information or anything."[416] In an approach which seems totally contrary to the approach generally taken in erroneous advice cases, the court likened the erroneous advice to the defense of entrapment in the ordinary criminal case.[417] It stated that the registrant, like any other defendant accused of criminal conduct, had to show that his reliance on the misleading information was reasonable.[418] This would require an objective determination that a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries. The court observed that no such showing had been made, and concluded that:

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[409] *Id.*

[410] *Id.*

[411] *Id.* at 1074.

[412] 424 F.2d 225 (9th Cir. 1970).

[413] *Id.* at 226.

[414] *Id.* at 227. The indication was probably a "suspense date."

[415] *Id.* at 226 n.2. The letter read as follows:

> Re: SSS Form No. 150, Special Form for Conscientious Objector, not returned
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> Dear Sir:
>
> This will acknowledge receipt of your communication relative to your selective service status. The information contained therein has been considered by this board and it is of the opinion that the facts presented do not warrant the reopening or reclassification of your case at this time.
>
> Yours very truly,
>
> FOR LOCAL BOARD NO. 94 *Id.*

[416] *Id.* at 226.

[417] *Id.* at 226-27.

[418] *Id.* at 227.

> The SSS Form 150 clearly indicated on its face that it was to be returned within 10 days. The letter sent by the local board states prominently that its subject matter was "SSS Form No. 150, Special Form for Conscientious Objector, not returned." This was sufficient to put a person sincerely desirous of complying with the law on notice of the fact that the board's action reflected the failure to return the completed form within ten days, rather than an out-of-hand denial of the conscientious objector claim. Under these circumstances, and especially in view of the ease with which appellant could have inquired of the board and learned the true status of his claim, we do not think it unreasonable to hold that he had no privilege to remain in ignorance.[419]

The court, however, disregarded the fact that it would have been equally reasonable for the registrant to assume that it was too late to file the form since the 10-day period had elapsed. It would also have been equally possible to hold that the letter should have advised him of the fact that the classification was not reopened only because he had not filed the Form 150, and that he could still do so. The language in the opinion indicates that the court was not sympathetic toward the particular registrant, and this may have influenced its decision. The present tendency is to put the burden on the boards to properly advise registrants of their rights. It is difficult to reconcile the approach of the court in *Lansing* with the approach of most other courts dealing with the erroneous advice case.

Despite *Lansing*, however, it would appear that the defense of misleading advice will often be successful. In another case of mine, *United States v. Crump*,[420] I was prepared to argue misleading advice on the part of the government appeal agent who effectively prevented the registrant from taking an appeal. Again, this was both for the purpose of satisfying the exhaustion requirement to obtain judicial review of the substantive classification and of establishing an independent defense. John Crump's request for conscientious objector status was denied by his board in Maysville, Kentucky,[421] and he sought to appeal. He met with the government appeals agent, an attorney, and, according to John, was told that in order to appeal he had to write "about ten pages to the appeals board telling them why [he] should be classified I-O." Such advice would clearly be erroneous, since under the regulations an appeal may be taken merely by filing a notice with the board; a statement of reasons why the board erred is optional.[422] It is understandable why a 19-year old registrant would be deterred from taking an appeal after receiving such advice. I subpoenaed the appeals agent, and when he called me relative to the

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[419] *Id.* at 227.

[420] Crim. No. 10709 (E.D. Ky., Sept. 17, 1969).

[421] The denial was on the ground that he failed to produce supporting letters from a minister. I was also prepared to argue "erroneous interpretation of the law."

[422] 32 C.F.R. §§ 1626.11-.12 (1971).

subpoena, I explained why he was being called. Not unsurprisingly, he denied having made the statement. The potential lawyer-versus-lawyer cross-examination was avoided when John was acquitted on other grounds.[423]

I have not come upon any cases involving erroneous advice on the part of appeal agents. In *United States v. Davis*,[424] however, the court reversed a conviction on the ground that the local board failed to inform the defendant that an appeal agent was available to advise him of his rights, including the right of appeal. *Local Board Memorandum No. 82*, which had been issued to local boards 10 days before the registrant had been mailed his notice of classification, required that at the time such notice was mailed the board was to notify the registrant of the name of the government appeal agent and inform him that the agent was available to advise the registrant on his legal rights. The memorandum also required the board to arrange a meeting if the registrant desired. The court held that since the board failed to advise the registrant of his rights in this regard the latter was not barred by exhaustion grounds from challenging his classification. More importantly, since the registrant did not have the advice he was entitled to and thus may have failed in his appeal, the induction order was invalid and an acquittal was directed.

5. *Denial of Full and Fair Hearing*

Another area of improper action by the board during the classification process is seen in the denial of a full and fair hearing. This relates to the kind of consideration that the board gives to the registrant's claim and the way that a particular registrant is treated. This was one of the major issues in *Mulloy*, although as it turned out it was unnecessary for the Court to reach it.

When a board composed of unpaid lay volunteers meets, perhaps once a month, with many cases to consider, it cannot be expected that the board will be in a position to give detailed consideration to all of the cases. Since the majority of cases are routine and will have been screened by the clerk beforehand, it is understandable that many of these cases can be disposed of at a single sitting. But what of the more complex cases? Will the board members carefully review all of the information in the registrant's file before deciding those cases? Or will they, particularly when the registrant has appeared in person, base their decisions on their personal impression of him? In conscientious objector cases, will they carefully read the detailed answers to the questions on the Form 150 and the additional material many

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[423] See text accompanying notes 448-52 *infra*.

[424] 413 F.2d 148 (4th Cir. 1969).

college-educated registrants supply? Perhaps with some boards these questions can be answered in the affirmative. But when board members are questioned about the consideration which they gave to the claim of a particular registrant, as in *Mulloy,* it will often appear that scant consideration was given at best. This may lend credence to the position of many draft resistance lawyers that careful consideration of a claim is the exception rather than the rule.

When a court reviews the substantive classification under the basis-in-fact test, it assumes that the board members have carefully read the file. The government's attorney probably does carefully read the file, and usually can come up with a fact here, an inconsistent statement there, and argue that there is a basis in fact for the board's action. The court, confined to the basis-in-fact test, is limited in how far it can or will second guess the board. Therefore, even if the board has in fact not carefully considered the claim, or if it has not evaluated all of the relevant information in the file, the registrant may lose. If in conscientious objector cases the board has not read the Form 150 with any degree of care, it is still possible that nowhere in the administrative and judicial process will the merits of the registrant's claim receive full consideration. In no other area of federal administrative law are "life decisions" made in these circumstances. The right to a full and fair hearing is a matter of due process; it cannot be compromised on "the footing of convenience or expediency."[425] Presumably this applies to draft board hearings too. There is little precedent, however, for holding that a draft board has denied a registrant due process by the superficial consideration that it gave to his claim.

A lawyer defending a draft case would be well-advised to subpoena the draft board members and ask them about the case and how much consideration they gave to it. Very likely they will be unable to remember it. One lawyer has conducted a study of the board's proceedings on the day it decided his client's case and discovered that in 4½ hours the board passed on 643 cases, spending an average of less than 30 seconds on each.[426] The same kind of study can be done of the proceedings of an appeals board by obtaining the minutes of the particular meeting. In *United States v. Wallen,*[427] a study of this nature was conducted. The evidence indicated that 122 cases were disposed of in two hours—an average of 59 seconds each. The court, observing that the case "presented a novel question upon which there was no direct authority," concluded that the review, or lack thereof, was violative of due process.[428]

[425] Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 305 (1937).

[426] *See* Margolis, *supra* note 121, at 103.

[427] 315 F. Supp. 459 (D. Minn. 1970).

[428] *Id.* at 462.

The requirement of a full and fair hearing means that the board must receive and, theoretically, consider all new information offered by the registrant. In the Korean war case of *Davis v. United States*,[429] the registrant sought classification as a conscientious objector and as a minister. He requested a personal appearance, and when he appeared he told the board that he had prepared one-half hour of oral evidence. The chairman told him that he was not eligible for a ministerial classification, and when the registrant said that he wanted to discuss his conscientious objector claim, he was told to file a letter with the board for the appeal board and to file a notice of appeal. The court invalidated the induction order, stating: "If a local board refuses to consider new information offered by the registrant at the time of his personal appearance or refuses to receive new information which the registrant endeavors to offer, he is thereby denied due process of law."[430] The court emphasized that the essence of a personal appearance is the right of the registrant to talk over and explain his case to the board members. Likewise, another court held that the board could not refuse to decide the case and simply turn it over to the appeals board.[431] It was to receive the information the registrant wished to submit and to make an informed decision. In other words, the registrant had the right to have his case decided by his local board as well as the right to an appeal. However, the burden of presenting information was laid on the registrant. If he failed to take the initiative, he could not contend that he was denied a fair hearing because the board decided the case on the basis of what information it had in the file[432] or because they failed to ask him particular questions.[433]

Assuming that the board received the evidence and did not automatically refer the case to the appeals board, which is not likely to occur today, in order to show the denial of a full and fair hearing, the registrant would essentially have to show that either there was not time to consider the claim fully, as in *United States v. Wallen*,[434] or that in fact the board did not do so. In *Mulloy* I argued that Joe was

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[429] 199 F.2d 689 (6th Cir. 1952).

[430] *Id.* at 691.

[431] Bejelis v. United States, 206 F.2d 354, 358 (6th Cir. 1953).

[432] United States v. Davis, 279 F. Supp. 920, 922 (D. Conn. 1967), *aff'd*, 390 F.2d 879 (2d Cir.), *cert. denied*, 393 U.S. 896 (1968).

[433] Lingo v. United States, 384 F.2d 724, 726 (9th Cir. 1967). A separate defense is the bias of the board members against the registrant. In the rare case in which this can be successfully established, the registrant has been denied the right to a full and fair hearing. *See* Niznik v. United States, 173 F.2d 328 (6th Cir.), *cert. denied*, 337 U.S. 925 (1949). *See also* United States v. Peebles, 220 F.2d 114 (7th Cir. 1955).

[434] 315 F. Supp. 459 (D. Minn. 1970).

denied a full and fair hearing because the board members did not consider the claim fully. In particular I argued this because they did not read the Form 150 with any degree of care and because they lacked a minimum understanding of the applicable statute and regulations so as to be unable to pass intelligently on his claim. I have set out the testimony of the board members in the earlier discussion of the case[435] in order to place the case in the context of reality, and will not repeat it again here. As I pointed out earlier, Joe's courtesy interview lasted about 10 or 15 minutes. At the conclusion of the interview, the board decided not to reopen. It was brought out that no board member examined the Form 150 prior to the meeting and that, at best, it was scanned by some members during the interview. In other words, at least with Joe's board, and I would suspect with many others, the standard operating procedure is to look at the evidence only when the registrant appears or when the board is making its decision. If an administrative agency determined a public utility rate increase without advance consideration of the evidence, there would be no doubt that its action would be violative of due process. In *Mulloy* I argued that the same was true in conscientious objector cases, and that unless the board members carefully read the Form 150, they could not claim to have given the registrant a full and fair hearing.[436] The questioning from the bench during the Supreme Court argument indicated some agreement with this position. I also argued that the demonstrable incompetence of the board members denied Joe a full and fair hearing. I could not have asked for more cooperation in building the record on this score.[437] Although the Court decided the case on the narrow issue of reopening, I believe that the broad-based issue, which was the denial of a full and fair hearing, influenced the result at least as to the initial granting of certiorari. The decision in *United States v. Wallen*[438] should encourage draft resistance lawyers to review the actual meetings of local and appeals boards and to call board members to the stand in an effort to establish the denial of a full and fair hearing.

6. *Failure to Meet*

Finally, I want to discuss the procedural defense of failure to meet. This relates to an order of the board which is invalid because it was not preceded by a meeting as required by the regulations. The general

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[435] *See* notes 156-58 *supra* and accompanying text.

[436] I drew an analogy to Zenith Int'l Film Corp. v. City of Chicago, 291 F.2d 785 (7th Cir. 1961), where it was held that administrative officials had to view a film in its entirety before declaring it to be obscene. *Id.* at 789.

[437] *See* notes 164-69 *supra* and accompanying text.

[438] 315 F. Supp. 459 (D. Minn. 1970).

requirement of a meeting is set forth in section 1604.56 of the regulations, which provides in pertinent part:

> A majority of the members of the local board shall constitute a quorum for the transaction of business. A majority of the members present at any meeting at which a quorum is present shall decide any question or classification. Every member present, unless disqualified, shall vote on every question or classification.[439]

The board is also required to keep minutes of each meeting.[440] When a quorum is lacking, the board has no jurisdiction to act. So when four of the six members are present and one disqualifies himself in a particular case, the board's classification of the registrant would be invalid.[441]

I was presented with the "meeting" question in *United States v. Crump*,[442] when the board members acted over the telephone instead of at a formal meeting. John Crump had been ordered to report for a physical examination and failed to report. The clerk then called five of the six members by telephone and said in effect:[443] "John didn't show up for his physical today. Shouldn't we classify him as a delinquent and order him to report for induction?" They agreed, and the clerk issued the order to report. The criminal prosecution arose out of John's failure to comply with that order.[444] On this issue I argued essentially that the regulations precluded the board from doing business over the telephone. I pointed out that the board had discretion not to declare John a delinquent despite his failure to take the physical,[445] and I contended that this discretion could only be exercised by the board as a body coming together for a meeting as required in the regulations. Implicit in section 1604.56, I said, is that the board at all times must meet and act as a board. The court agreed, emphasizing the discretionary nature of the decision to classify John as a

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[439] 32 C.F.R. § 1604.56 (1971).

[440] 32 C.F.R. § 1604.58 (1971).

[441] Application of Shapiro, 392 F.2d 397, 400 (3d Cir. 1968). The court specifically held that a member who disqualified himself could not be counted as part of the quorum. *Id.*

[442] Crim. No. 10709 (E.D. Ky., Sept. 17, 1969).

[443] I brought this out in my cross-examination of the clerk. Since the government must always call the clerk to make out its case, defense counsel can begin to establish his defense during the government's case-in-chief, and may be able to obtain a judgment of acquittal at the close of the government's case.

[444] John reported for induction and went through with the physical examination. He was disqualified on the hearing test. They tested him two more times, and he still failed. While he was waiting for the bus to take him from the induction center, he was ordered to take it a fourth time, and he refused. It may have been significant that John told the personnel at the induction center that he intended to refuse to submit. The board issued subsequent orders to "complete processing," which John refused to obey.

[445] *See* 32 C.F.R. § 1642.4(a) (1971).

delinquent and to accelerate his induction,[446] and held that the order to report for induction was invalid.

The same situation was presented in *United States v. Walsh*,[447] involving a request for a reopening. The clerk discussed the request over the telephone with three out of the four members, but never read the registrant's letter in full. In holding the action improper, the court did not consider whether the registrant established a prima facie case for the classification. Again, the point was that the board could not do business over the telephone. In *United States v. Norman*,[448] however, the court found that the falure to meet to consider a request for an occupational deferment was not prejudicial where the alleged facts, even if true, did not justify an occupational deferment. The request to reopen had been made by the registrant's employer. The board minutes indicated that the chairman told the clerk that he had discussed the matter with the other board members and that all of them felt that the request should be denied. The court first observed that the registrant had failed to notify the board of his change in occupational status within ten days after it occurred.[449] It then found that the request did not make out a prima facie case for an occupational deferment because it did not state that the registrant could not be replaced. The decision was affirmed on appeal without discussion of this issue.[450] Apart from the fact that the court may well have been wrong on the prima facie issue,[451] its rationale totally ignored the thrust of the regulations. The regulations require a quorum present for a meeting and requires that the board meet and act as a board. There was no indication that all the members saw the letter or that they even considered whether the registrant made out a prima facie case. If, as the court went on to say, the responsibility for classification rests with the boards and not with the courts, it was for the board rather than the court to decide whether the registrant had made out a prima facie case. The regulations provide a procedure by which this is to be done. If a regulatory agency, for example, had denied a

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[446] With the decision in Gutknecht v. United States, 396 U.S. 295, 307 (1970), the issue cannot arise again in this precise form.

[447] 279 F. Supp. 115 (D. Mass. 1968).

[448] 301 F. Supp. 53, 60 (M.D. Tenn. 1968), *aff'd*, 413 F.2d 789, 792 (6th Cir. 1969), *cert. denied*, 396 U.S. 1018 (1970).

[449] *Id.* at 59. This is required by 32 C.F.R. § 1625.1(b) (1971). The 10-day requirement has generally not been enforced by either the boards or the courts.

[450] *See* United States v. Norman, 413 F.2d 789, 792 (6th Cir. 1969).

[451] It said that he did not make out a prima facie case for an occupational deferment because he did not allege that he could not be replaced. It would seem that, since the request for his deferment was made by his employer, this factor could be implied.

utility rate increase following a telephone discussion among its members, it cannot be imagined that a court would uphold its action. Why, then, should it do so when a selective service board is involved?[452] The decision in *Norman* is completely unjustifiable, and I would predict that most courts would agree with the approach in *Walsh* and *Crump* and the other cases that have prohibited the doing of business over the telephone. The requirement of a meeting, however, is only applicable to board action requiring an exercise of some judgment. A board meeting is not required for the issuance of ordinary induction orders. Induction is governed by the order of call regulations,[453] and the issuance of an induction order is a purely ministerial task which it is proper for the clerk to perform.[454]

Another aspect of the requirement of a meeting relates to the issuance of orders to report for civilian work. The procedure for issuing orders to report for civilian work is as follows. The registrant is directed to submit to the local board three suggested types of civilian work.[455] If he does so and the board deems any one of the three types of work appropriate, it can order him to perform that work or, more accurately, that job assignment.[456] If he does not, or if the board finds that the work suggestions he submitted are not appropriate, the board submits three possible types of work to the registrant. He must make a choice within 10 days.[457] If the board and the registrant are unable to agree, the State Director or his representative "shall meet with the local board and the registrant and offer his assistance in reaching an agreement."[458] If after that meeting the board and the registrant are still unable to agree upon a job assignment, the local board, with the approval of the National Director, designates appropriate civilian work and issues an order to report for such work.[459]

In *Brede v. United States*,[460] the meeting between the board, the registrant, and the State Director was held, but no agreement was reached. At that time, however, the board decided on a job assignment, and the clerk, at the direction of the board, made a request of the National Director for authority to order the registrant to perform it.

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[452] *See, e.g.*, United States v. Sloan, Crim. No. 42461 (N.D. Cal., March 26, 1969), 2 SEL. SERV. L. REP. 3004 (1970).

[453] *See* 32 C.F.R. § 1631.7 (1971).

[454] Segal v. United States, 423 F.2d 658, 659 (7th Cir. 1970); United States v. Baker, 416 F.2d 202, 204 (9th Cir. 1969); United States v. Powers, 413 F.2d 834, 839-41 (1st Cir.), *cert. denied*, 396 U.S. 923 (1969).

[455] As defined in 32 C.F.R. § 1660.1 (1971).

[456] 32 C.F.R. § 1660.20(a) (1971).

[457] 32 C.F.R. § 1660.20(b) (1971).

[458] 32 C.F.R. § 1660.20(c) (1971).

[459] 32 C.F.R. § 1660.20(d) (1971).

[460] 396 F.2d 155, *modified*, 400 F.2d 599 (9th Cir. 1968).

That authority was granted, and the clerk issued an order to report, with which the registrant refused to comply. The Court held that, "There was not an order issued or authorized by the board requiring the registrant to report."[461] In referring to the regulation which governs controversies between the board and the registrant in this situation, the Court stated: "This section requires the local board, after receiving such authorization, to meet and order the registrant to report for such civilian work."[462] This would imply that two meetings are necessary when the registrant refuses to accept civilian work: the meeting between the board, the registrant, and the state director;[463] and a meeting of the board to order the registrant to perform the civilian work after the board has received authorization from the National Director to choose a job assignment for the registrant. The court, however, also pointed out that the board had not authorized the clerk to issue the order subsequent to the receipt of the National Director's approval. At the request of the government on rehearing, the court agreed that the second meeting was not necessary if the board has previously decided that a particular type of civilian work is appropriate. If it has done so, "an implied conditional order to report was entered" and the action of the clerk in issuing the order to report is ministerial.[464] In the case at bar the court found that the record did not indicate that the critical exercise of judgment had been made at the first meeting and, therefore, upheld its earlier decision reversing the conviction.[465]

The *Brede* approach has generally been followed elsewhere. At the first meeting, then, or at some subsequent time, "[a] duly constituted majority of the board [must] deliberate upon and approve a reasonably definite and precise proposition, namely, that a given registrant is required to perform a given act."[466] There has been some disagreement as to how definite and precise this proposition must be. In *Brede* the court did not find the exercise of judgment in the record,[467] and in *Cupit v. United States*,[468] the district court held that such a judgment could not be implied from the board's practice in determining appropriate work at the time of the first meeting and making the request of the National Director. According to the district

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[461] 396 F.2d at 157-58.

[462] *Id.* at 157.

[463] This means the meeting as provided for by 32 C.F.R. § 1660.20(c) (1971).

[464] 400 F.2d at 600.

[465] *Id.*

[466] Cupit v. United States, 292 F. Supp. 146, 151 (W.D. Wis. 1968), *rev'd, sub nom.* Hestad v. United States, 418 F.2d 1063 (7th Cir. 1969).

[467] 400 F.2d 599, 600 (9th Cir. 1968).

[468] 292 F. Supp. at 151-52.

court in *Cupit,* the term "order" meant "an express and reasonably definite and specific motion or resolution deliberated upon and approved by a majority of the local board, whether unconditionally and after approval by the National Director, or conditionally and prior to such approval and set forth clearly and understandably in some readily accessible record maintained by the local board."[469] The contrary view is that a decision by the board at the time of the first meeting seeking the approval of the National Director to order the registrant to perform a particular job assignment constitutes the critical exercise of administrative judgment, and represents an implied conditional authorization for the order to report. This was the position of the Seventh Circuit in reversing *Cupit* and has been the position of other courts.[470] Under this view, where the board makes a specific finding at the first meeting such as, "The local board decid[ing] that registrant should be offered employment with Virginia Department of Highways, Ashland, Virginia, doing highway work," it will be found to have "exercised its administrative judgment on that date."[471] Since the board is not likely to hold a second meeting after receipt of approval from the National Director, the crucial question will be whether it has exercised its administrative judgment at the time of the first meeting. My guess would be that in the majority of cases the courts would hold that the judgment was made at the time of the first meeting.

In this section of the article I have reviewed a number of errors that can be committed by local boards during the classification process. In the next section I will consider errors that can be made in regard to the administrative appeal, and in the part following, particular defenses arising out of the issuance of the induction order itself. It should be remembered, however, that there is some overlap here, and the three sections should be considered together.

D. *The Administrative Appeal*

The appeals board reviews de novo those cases which are brought before it. Its consideration is limited to information contained in the record received from the local board and general information concern-

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[469] 292 F. Supp. at 152. *See also* United States v. Hicks, Crim. No. 1968-101 (W.D.N.Y., Mar. 27, 1969), 2 SEL. SERV. L. REP. 3123 (1970).

[470] *See* Hestad v. United States, 418 F.2d 1063, 1066-67 (7th Cir. 1969), *rev'g sub nom.* Cupit v. United States, 292 F. Supp. 146 (W.D. Wis. 1968); United States v. Crowley, 405 F.2d 400 (4th Cir. 1968), *cert. denied,* 394 U.S. 904 (1969); Davis v. United States, 400 F.2d 577 (5th Cir. 1968), *cert. denied,* 394 U.S. 908 (1969); United States v. Mendoza, 295 F. Supp. 673, 677-78 (E.D.N.Y. 1969).

[471] United States v. Crowley, 405 F.2d 400, 404 (4th Cir. 1968), *cert. denied,* 394 U.S. 904 (1969).

ing economic, industrial, and social conditions.[472] Earlier it was noted that the registrant's rights can be violated by the local board if it includes adverse information in the file it sends to the appeals board without advising the registrant of this fact and giving an opportunity of rebuttal.[473] Likewise, the omission of material facts in the file sent to the appeals board could violate the registrant's right to a fair hearing on appeal.[474] It should be noted, however, that the failure to include complete summaries of oral testimony before the board, has been held not to be improper when "all the material relevant to the merits of the [registrant's] classification was in writing in the file."[475]

The appeals board itself has been known to act in such a way as to violate the registrant's procedural rights. As pointed out earlier, in *United States v. Wallen*,[476] spending an average of 59 seconds in disposing of a case by an appeals board was necessarily violative of due process.[477] In *Forsting v. United States*,[478] a case which involved the former Department of Justice hearing procedure in conscientious objection cases, the registrant wrote to the appeals board claiming that the hearing officer was prejudiced and that his recommendations were based on inaccurate information. The appeals board classified the registrant I-A, and he was subsequently ordered to report for induction. The court found that the registrant "was denied basic procedural fairness before the appeals board" because there was nothing to indicate that the board examined the registrant's charge of bias and prejudice.[479] It concluded that where there were detailed and supported allegations of prejudice, the appeals board must examine them if the report of the Department of Justice were to be given any weight. Furthermore, the record must indicate that either the entire report and recommendation were disregarded, or that the charge of prejudice was examined and found to be without merit.[480]

The more significant aspect of violations of rights during the appeal process relates to whether errors committed by the local board are cured by the de novo review given by the appeals board. It is often stated that "prejudice on the local level is cured by a fair consideration on the appeal."[481] In practice, however, this will not be true as to

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[472] 32 C.F.R. § 1626.24(b)(2) (1971).

[473] *See* the discussion notes 345-52 *supra* and accompanying text.

[474] *See* Niznik v. United States, 173 F.2d 328, 333-34 (6th Cir.), *cert. denied*, 337 U.S. 925 (1949).

[475] *See* Landau v. Allen, 424 F.2d 668, 673 (6th Cir. 1970).

[476] 315 F. Supp. 459 (D. Minn. 1970).

[477] *Id.* at 462.

[478] 429 F.2d 134 (8th Cir. 1970).

[479] *Id.* at 137.

[480] *Id.*

[481] *See* Clay v. United States, 397 F.2d 901, 912-13 (5th Cir. 1968), *vacated sub*

many procedural errors, such as the failure of the local board to provide a personal appearance[482] or the absence of a quorum of the local board at the time of the registrant's classification.[483] Similarly, where: 1) the obvious bias of the board members toward the registrant's claim of conscientious objection was noted in the file; 2) the board asked the appeals board to give the case "quick action because of its [the case's] morale status in the community, which [the board felt was] undermining the integrity of the Selective Service and the Local Board members; and 3) the appeals board complied, denying the claim shortly thereafter without waiting for the Department of Justice recommendation; it was held that the prejudice was not cured.[484] As one court has observed, "A survey of the cases indicates that the rule [that errors of the local board are cured by an appeal] is applied only where it appears from the nature of the deficiency or from other circumstances in the record that it is reasonable to assume that the defect in local board proceedings was in fact cured by appellate reclassification."[485]

Most of the cases involving cure by de novo review relate to the application of an erroneous standard of law by the local board, a topic which is beyond the scope of the present article. Some courts, however, are now holding that the error is not cured unless the record supports the conclusion that the appeals board applied the correct standard. The Ninth Circuit has held that where the record is silent regarding the standard applied by the appeals board and there is nothing to support an inference that its standard differed from that

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nom. Giordano v. United States, 394 U.S. 310 (1969), and the authorities cited therein.

[482] Davis v. United States, 410 F.2d 89, 93-96 (8th Cir. 1969). *But see* Vaughn v. United States, 404 F.2d 586 (8th Cir. 1968), *vacated on other grounds,* 399 U.S. 506 (1970), where in a "unique factual situation" the board refused to reopen, but also allowed an appeal, which brought into play the Department of Justice hearing procedure. 404 F.2d at 593. In upholding the board's refusal to reopen because of failure to present a prima facie case, the court looked to the investigation in connection with the review by the appeal board, and found that it supported the conclusion "that the local board did not act arbitrarily." *Id.* The point was, as the dissent pointed out, that the registrant was denied a personal appearance and that this was not cured by de novo review. *Id.* at 395. The court would be clearly wrong in its interpretation of what is necessary to present a prima facie case in view of Mulloy v. United States, 398 U.S. 410 (1970). Presumably the "cure" part of the opinion is overruled by Davis v. United States, 410 F.2d 89, 93-96 (8th Cir. 1969).

[483] Application of Shapiro, 392 F.2d 397, 400 (3d Cir. 1968).

[484] United States v. Peebles, 220 F.2d 114, 118-20 (7th Cir. 1955); *cf.* Clay v. United States, 397 F.2d 901 (5th Cir. 1968), *vacated sub nom.* Giordano v. United States, 394 U.S. 310 (1969).

[485] United States v. Peebles, 220 F.2d 114, 118-20 (7th Cir. 1955).

applied by the local board, the error is not cured.[486] The Eighth and the Third Circuits have held that the error is not cured where the appeals board gave no reasons for its determination and where the local board's rejection of the claim was based, at least in part, on an erroneous standard of law.[487] The Sixth Circuit, on the other hand, has presumed that the error was cured by de novo review "unless there is evidence in the registrant's file that went to the appeal board showing that an erroneous standard had been applied."[488] In the absence of such a showing, "the presumption that the appeal board will review anew the entire record of a registrant and apply the correct standard in determining whether to grant a requested classification must prevail."[489] The issue is one which may be expected to arise whenever an erroneous standard of law has been asserted and an appeal has been taken. It is another tool with which the draft-resistance attorney may be able to defend his client.

E. The Validity of the Order to Report

Another area which may give rise to the procedural defense concerns the issuance of the order to report itself and the order of the call. An order to report may not be issued during the period in which a registrant may apply for a personal appearance or take an appeal or while such personal appearance or appeal is pending.[490] If it is issued during that period and the registrant exercises his rights, the order to report must be cancelled.[491] There may be some question, however, of whether or not such an order would be invalid if the registrant did not exercise his rights during the alloted time.[492] We have also seen earlier that in certain circumstances a lengthy postponement[493] may in effect amount to a cancellation.[494] An induction order must be cancelled upon a reopening of the classification, whether

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[486] United States v. Atherton III, 430 F.2d 741, 744 (9th Cir. 1970). *See also* United States v. French, 429 F.2d 391, 392 (9th Cir. 1970), involving a Department of Justice recommendation based upon an erroneous interpretation of law.

[487] *See* Caverly v. United States, 429 F.2d 92, 94-95 (8th Cir. 1970). For a similar holding in the Third Circuit see United States v. Carroll, 398 F.2d 651, 654 n.5 (3d Cir. 1968).

[488] United States v. Rose, 424 F.2d 1051, 1053 (6th Cir. 1970); *cf.* United States v. Tichenor, 403 F.2d 986, 990 (6th Cir. 1968).

[489] United States v. Rose, 424 F.2d 1051, 1053 (6th Cir. 1970).

[490] 32 C.F.R. §§ 1624.3, 1626.41, 1627.8 (1971).

[491] As was pointed out earlier, this is what happened in 1967 when Joe Mulloy was issued the "first" order to report.

[492] *Cf.* United States v. Spiro, 384 F.2d 159 (3d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); United States v. McDonald, 301 F. Supp. 79, 84 (N.D. Ill. 1969).

[493] The conditions under which a postponement may be granted are set forth in 32 C.F.R. § 1632.2(a) (1971).

[494] See the discussion notes 272-78 *supra* and accompanying text.

pre-induction or post-induction,[495] but the acceptance of a request for reclassification after the registrant has refused induction has no effect upon the original order.[496] The regulations require that the date of reporting shall be no less than 10 days after the order to report was mailed.[497] At least one court has held that a violation of this provision invalidated the order to report.[498]

One defense going to the induction order which has been completely unsuccessful has been an attack on the clerk's authority to sign the induction order. Under section 1604.59 of the regulations,[499] official papers issued by a local board may be signed by the clerk of the local board if he is authorized to do so by resolution duly adopted and entered in the minutes of the meetings. Registrants whose induction order was signed by the clerk have contended that the clerk lacked the authority to do so. The contention has been rejected on the grounds that the burden is on the registrant to overcome the presumption of regularity and show that the clerk was unauthorized to sign, the requirement is directory rather than mandatory, and the registrant is not prejudiced anyway.[500] Similarly, although the order-of-call regulation formerly referred to preparation of induction lists by the board,[501] the fact that the clerk rather than the board prepared the list was no defense. The preparation of the list per se was considered a ministerial task.[502]

Since the statute requires a knowing refusal to report or submit,[503] it is, of course, a defense that the registrant never received the order to report.[504] In one case, however, it was held that the fact that he was in jail at the time he was to report was not a defense, since he

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495 32 C.F.R. § 1625.14 (1971).

496 United States v. Smogor, 411 F.2d 501, 503 (7th Cir.), *cert. denied,* 396 U.S. 972 (1969). *See also* United States v. Kroll, 400 F.2d 923, 926 (3d Cir. 1968), *cert. denied,* 393 U.S. 1069 (1969).

497 32 C.F.R. § 1632.1 (1971).

498 *See* United States v. Brown, 290 F. Supp. 542, 550 (D. Del. 1968).

499 32 C.F.R. § 1604.59 (1971).

500 *See* United States v. Crowley, 405 F.2d 400, 403 (4th Cir. 1968), *cert. denied,* 394 U.S. 904 (1969). *See also* United States v. Powers, 413 F.2d 834, 838-39 (1st Cir.), *cert. denied,* 396 U.S. 923 (1969); United States v. Smith, 291 F. Supp. 63, 67 (D.N.H. 1968).

501 32 C.F.R. § 1631.7(a) (1971) now provides that the clerk may prepare lists if so authorized.

502 Segal v. United States, 423 F.2d 658, 659 (7th Cir. 1970); United States v. Powers, 413 F.2d 834, 840 (1st. Cir.), *cert. denied,* 396 U.S. 923 (1969).

503 MSSA § 12(a), 50 U.S.C. App. § 462(a) (Supp. V, 1970).

504 *See* Graves v. United States, 252 F.2d 878, 880-81 (9th Cir. 1958). It is presumed that the registrant received the communication and the burden is on him to show otherwise. *See* United States v. Bowen, 414 F.2d 1268, 1276 (3d Cir. 1969).

could have informed the board of his situation prior to the reporting date.[505] The registrant who defends on the ground that he never received the order risks a subsequent prosecution for failure to keep the board informed of his address, but he cannot be convicted of that offense in the prosecution for failing to submit.[506]

It is now appropriate to consider the order-of-call defense. There are two aspects to the order-of-call regulations, one relating to orders to report for induction and the other relating to orders to report for civilian work. The order of call for induction is covered by section 1631.7 of the regulations, which now provides for induction of registrants in different categories according to lottery number. Formerly the order was determined according to date of birth, with the oldest being selected first.[507] The order of call for induction is applicable to orders to report for civilian work. Specifically, it is provided that no order to report for civilian work shall be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered.[508] It is not disputed that a violation of the regulations relating to the order of call invalidates the induction order. The problems have revolved around the burden of proof of violation.

In some of the earlier cases, lower courts held that the government had the burden of proving compliance with the order of call regulations and that its failure to do so entitled the registrant to an acquittal.[509] This idea was soon negated by the appellate courts, and it now appears settled that the burden of establishing the defense is on the registrant.[510] He must raise the issue at trial, and if he does not do so, the government can prevail on the basis of the presumption of regularity. Except in the rare case in which the registrant can show that someone who should have been called before him was not, his

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[505] United States v. Ebey, 424 F.2d 376, 377 (10th Cir. 1970).

[506] *See* Graves v. United States, 252 F.2d 878, 882-83 (9th Cir. 1958).

[507] 32 C.F.R. § 1631.7 (1971). Under the current regulations registrants below the First Priority Selection Group are not likely to be called in the "ordinary board."

[508] 32 C.F.R. § 1660.20(a) (1971).

[509] *See, e.g.*, United States v. Lybrand, 279 F. Supp. 74, 81 (E.D.N.Y. 1967).

[510] *See, e.g.*, Yates v. United States, 404 F.2d 462, 466 (1st Cir. 1968), *cert. denied*, 395 U.S. 925 (1969); United States v. Sandbank, 403 F.2d 38, 40 (2d Cir. 1968); United States v. Norman, 413 F.2d 789, 791-92 (6th Cir. 1969), *cert. denied*, 396 U.S. 1018 (1970); Greer v. United States, 378 F.2d 931, 933 (5th Cir. 1967). *See also* United States v. Weersing, 415 F.2d 130, 132 (9th Cir.), *cert. denied*, 396 U.S. 987 (1969); Little v. United States, 409 F.2d 1343, 1345 (10th Cir. 1969). This does not apply where the registrant was inducted as a delinquent. In such a case the government must prove that the registrant was inducted in the proper order without regard to his delinquency. *See* United States v. Dobie, 429 F.2d 32 (4th Cir. 1970).

only recourse is the examination of the clerk. Since the clerk must testify in any event, as was observed in *Yates v. United States*,[511] "There is little extra burden on the government to have him prepared to testify on the order of call."[512] The defense lawyer should subpoena the Form 102, which is a public register of all registrants and their current classifications, and the induction lists for the periods preceding and following the time his client was ordered to report. He must try to show that registrants who were I-A and who were higher in the order of call than the defendant were not inducted prior to the time that he was, then ask the clerk why this was so. The clerk usually can give various reasons such as "appeal pending" or "induction postponed" which would justify the failure to induct. It should be obvious that the burden of establishing the defense will not be an easy one.

One case in which the defense was successful was *United States v. Smith*.[513] At the time the registrant there was ordered to report for induction, the board had received a call for seven men. The board's procedure for ordering men for induction was as follows. All the files of registrants classified "I-A Acceptable" were put in a drawer arranged in chronological order by date of birth.[514] When the notice of call was received from State Headquarters, the clerk would physically take from the drawer in order a sufficient number of files to fill the notice of call. The clerk, however, had also removed from the "I-A Acceptable" drawer the files of those registrants who had not been given a physical examination for a year or longer or for whom information had been supplied which would indicate a possible change in their classification. It was the operating procedure of the board to require a second pre-induction physical for registrants whose last physical was one year or more prior to the date of notice of induction. The court held that there was nothing improper in removing the files of those registrants who might be reclassified (6 out of the 9 "non-inductees" who were older than the registrant were in that category). It found, however, that the practice of removing the files of those who had not been given a physical examination for a year or more was improper, since they would be examined at the induction center and since a second pre-induction physical was not authorized by the regulations. The practice of the clerk "had the inevitable effect of postponing the induction of some registrants and accelerating the induction of younger men further down on the list."[515] Since three men older

[511] 404 F.2d 462 (1st Cir. 1968), *cert. denied*, 395 U.S. 925 (1969).

[512] *Id.* at 466.

[513] 291 F. Supp. 63 (D.N.H. 1968).

[514] At that time induction was on the basis of "oldest first."

[515] 291 F. Supp. at 68.

than the registrant were not included in the call, the court found a violation of the order-of-call regulations.[516]

More recent decisions have talked in terms of the registrant's proving that the manner of selection was arbitrary and capricious. In *United States v. Weintraub*,[517] the examination of the Form 102 showed an apparent departure from the order of call in that the registrant was called prior to 18 others who appeared by the Form 102 to be subject to call before him. This was enough to call for an explanation, which the government sought to do by having the clerk testify from the registrants' files as to the explanation for each. Six were New Mental Standards Cases (registrants found acceptable under the post-Vietnam reduced standards) who were to be inducted under a "special order of call,"[518] eight were listed ahead of the registrant as a result of clerical errors in the Form 102, and four were registrants either with appeals pending or unresolved requests for hardship deferments.[519] The explanation was adequate to show that the manner of selection was not arbitrary and capricious. Likewise, it has been held not improper for the board to order the induction of delinquents in addition to the number of men necessary to meet the quota.[520] Since the experience in the state indicated that few delinquents responded to the orders, the alternative would merely have been to increase the calls.

The above discussion should demonstrate that the order-of-call defense will be very difficult to sustain. Still, it is one which should be tried, and cases may occur in which it can be successfully asserted.

F. Improper Composition of Local Boards

Section 10(b)(3) of the Military Selective Service Act of 1967 re-

[516] *Id.* In United States v. Baker, 416 F.2d 202 (9th Cir. 1969), the registrant produced evidence that six registrants older than he were carried in the Form 102, and were not inducted when he was. Since he was the youngest of the men included in the particular delivery list, he would not have been ordered to report at that time if any of the six had been called. The government then called the State Director who testified that reasons existed for each of the six, as indicated in their files. He refused to produce the files on the ground that their contents were privileged. The registrant objected when the Director attempted to orally give the reasons, and the government ceased further questioning. Since the objection was well-taken under the "best evidence rule," and since the government did not rebut the presumptive violation of the order of call, the order to report was held invalid.

[517] 429 F.2d 658 (2d Cir.), *cert. denied*, 91 S. Ct. 572 (1970).

[518] *See* 429 F.2d at 660-61.

[519] The court held that defense counsel was entitled to inspect the Form 102. *Id.* at 661. Although the lower court did not allow full inspection, this was found to be harmless error, since the basis for the board's determination in the case of each registrant passed over was sufficiently pointed out to counsel. *Id.*

[520] United States v. Jones, 431 F.2d 619, 621 (9th Cir. 1970).

quires that board members be residents of the county or corresponding political subdivision in which the board has jurisdiction.[521] By regulation in effect until September 2, 1970, it was also provided that: "The members of the local boards shall be citizens of the United States who shall be residents of a county in which their local board has jurisdiction and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction."[522] Quite early in the "Vietnam resistance" it was discovered that the statute and regulation simply were not followed in practice. Board members who, after their appointment had moved to suburban counties, remained on local boards within the city. In many cases in which there was more than one board within a county, as would be the case in all urban areas, scant attention was paid to the requirement of area residency. In San Francisco, for example, it was judicially established that *not one board was properly constituted.*[523] Judging by the frequency with which the claim is asserted, it is reasonable to assume that the same is true for many other boards. As pointed out earlier, very few Blacks serve on local boards,[524] and this is so even though the board is located in a predominantly Black area. These facts then would suggest the availability of the defense of improper composition of the board with respect to the residency of its members. In the case of Black registrants, the defense of racial exclusion, analogous to the exclusion of Blacks from jury service, would also appear to be available.[525]

I have had two cases involving this defense, *Collins v. United States,*[526] in which I was unsuccessful in securing Supreme Court review, and *United States v. Dudley,*[527] which is now on appeal to the Sixth Circuit. Walter Collins' board was Board No. 156 in New Orleans, Louisiana. It served an area which is at least two-thirds Black in population. Prior to May 1967, no Black person had ever served on the board. At that time the first Black was appointed, and he continues to be the token Black on the board. The chairman had moved from Orleans Parish, in which the board was located, to St. Tammany Parish some years previous.[528] Prior to May 1967, there

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[521] MSSA § 10(b)(3), 50 U.S.C. App. § 460(b)(3).

[522] 32 C.F.R. § 1604.52(c) (1970). The amendment simply removed the requirement of area residency.

[523] United States v. Machado, 306 F. Supp. 995, 1001 (N.D. Cal. 1969).

[524] MARSHALL REPORT 19.

[525] *Cf.* Strauder v. West Virginia, 100 U.S. 303 (1879).

[526] 426 F.2d 765 (5th Cir. 1970), *cert. denied,* 91 S. Ct. 172 (1971).

[527] Crim. No. 10110 (E.D. Ky., Feb. 1, 1971).

[528] After Walter raised the issue at his trial, the chairman was removed from the board.

were four members plus the chairman, only one of whom resided in the area served by the board. In May 1967 the membership was increased to five plus the chairman, and assuming that the new Black member lived in the area, there were now two out of a total of six who did so. Kenneth Dudley's board is in Lexington, Kentucky, and is one of two in Fayette County. At the trial I brought out that one member, a lawyer, lived on a farm in an adjoining county, although he claimed to have a legal residence in Fayette. Of the three other members present at the time the order to report was issued, only one resided within the area of the board's jurisdiction. I did not check the residence of the other member. It was undisputed, however, that three out of the five did not live within the area, and that another member was not a "resident" of Fayette County in the ordinary sense of the term.

Because of the implications resulting from the successful assertion of the defense that the order to report is invalid if the board was improperly constituted, the government has resisted it fiercely. There appear to have been five lines of argument used by government attorneys: (1) that a registrant may not assert improper composition of the board as a defense to a failure to report, since this is a collateral attack; (2) that a registrant who has failed to appeal from his I-A classification is barred from asserting improper composition by his failure to exhaust administrative remedies; (3) that a board improperly constituted is a de facto board whose orders are valid by analogy to the acts of a malapportioned legislature; (4) that the registrant must show prejudice resulting from improper composition of the board, either as to residency or exclusion of Blacks; and (5) against the attack of improper composition with respect to area residency, that the requirement of the regulation is discretionary rather than mandatory notwithstanding the use of the word "shall." While the collateral-attack argument has not met with any success for the government in cases in which board composition was at issue,[529] the others have proved effective in varying degrees.

It is difficult to see how exhaustion of remedies would be applicable here after the decision in *McKart v. United States*.[530] Not only could the defense of improper composition of the board not be raised during the administrative process, but the board would not even have furnished a registrant with the information on which to base such a claim. Under the applicable regulations, selective service officials must refuse to divulge the addresses and other personal data of the board mem-

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[529] *See* United States v. Williams, 317 F. Supp. 1363, 1367-1370 (E.D. Pa. 1970); United States v. Machado, 306 F. Supp. 995, 998-1002 (N.D. Cal. 1969).

[530] 395 U.S. 185 (1969).

bers even under court order to do so.[531] One should not, therefore, be charged with failing to pursue administrative remedies which do not exist.[532] In *DuVernay v. United States*,[533] however, the Fifth Circuit held just that with respect to a claim of systematic exclusion of Blacks. Since the registrant had failed to appeal from his I-A classification, he was barred from asserting such exclusion as a defense to the criminal prosecution.[534] The Supreme Court granted certiorari and set the case down for argument together with *McKart*. The government filed a single brief on the exhaustion question, covering its argument in both cases. Justice Fortas disqualified himself in *DuVernay*, and the decision was affirmed by an equally divided Court. In the opinion of counsel for the petitioner in *DuVernay*, the Court divided on the merits rather than on the exhaustion question,[535] and in light of its decision in *McKart*, it is difficult to see how it could have been otherwise. When I petitioned for certiorari in *Collins*, I argued that the Fifth Circuit had affirmed on exhaustion grounds both with respect to area residency and the exclusion of Blacks, in reliance on the decision in *DuVernay*. In its Brief in Opposition, the government argued that I had misread the Fifth Circuit's opinion and that "the basis of the decision was that petitioner's attack on the composition of the board did not entitle him to an exemption."[536] It may be assumed, then, that the government is no longer arguing exhaustion here.

Exhaustion came back to haunt me, however, in *Dudley*. In *United States v. Brooks*,[537] the Sixth Circuit, in reliance on *DuVernay*, held that the registrant was barred from asserting improper composition and exclusion of Blacks on exhaustion grounds,[538] although it also went off on the de facto board ground.[539] The district judge in *Dudley* was sympathetic to my argument that improper composition invalidated the order to report, but since Dudley had not appealed from his I-O classification (he had no basis for so doing), the judge felt bound by *Brooks* to reject the challenge on exhaustion grounds. This

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[531] 32 C.F.R. §§ 1606.62-.63 (1971).

[532] *See* United States Alkali Export Ass'n v. United States, 325 U.S. 196, 210 (1945).

[533] 394 F.2d 979 (5th Cir. 1968), *aff'd by an equally divided Court*, 394 U.S. 309 (1969).

[534] 394 F.2d at 981.

[535] Interview with Benjamin E. Smith, New Orleans, La., counsel for petitioner in *DuVernay*.

[536] Collins v. United States, 91 S. Ct. 172 (1971), Brief for the United States in Opposition to Certiorari, at 10, n.11.

[537] 415 F.2d 502 (6th Cir. 1969), *cert. denied*, 397 U.S. 969 (1970).

[538] 415 F.2d at 505.

[539] *Id.*

will be an important issue when I argue the case on appeal, and I hope to be able to avoid that hurdle.[540]

The de facto board argument has met with considerable success. It has been recognized by the Fifth,[541] Sixth,[542] Seventh,[543] Eighth,[544] and, in an earlier case, by the Tenth Circuits.[545] As the Fifth Circuit stated with respect to the argument of exclusion of Blacks:

> The Government argues—and we agree—that a draft board system which does not have a sufficiently representative number of Negro members is comparable to a malapportioned legislature. The acts of such a legislature are not invalid and the laws which it passes are not null and void. The acts of a malapportioned legislature or local or county commission or board are acts of a de facto political authority and valid despite their failure to be apportioned in accordance with *Baker v. Carr* . . . and *Avery v. Midland County, Texas* . . . .[546]

The other courts have simply made approving reference to the de facto analogy, although the Seventh and Eighth Circuits apparently limited the analogy to the requirement of area residency and may have implied that county residence is jurisdictional.[547]

The de facto board argument has been rejected by some district judges in the Northern District of California,[548] and in the Eastern District of Pennsylvania in the recent case of *United States v. Williams*.[549] These courts have emphasized that the theory of the Selective Service System is that the registrant will be classified by "little groups of neighbors,"[550] and that the residency requirement is designed to implement this theory. This being so, an improperly

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[540] *See* United States v. Williams, 317 F. Supp. 1363, 1366-67 (E.D. Pa. 1970).

[541] Clay v. United States, 397 F.2d 901, 911 (5th Cir. 1968), *vacated sub nom.* Giordano v. United States, 394 U.S. 310 (1969).

[542] United States v. Brooks, 415 F.2d 502, 505 (6th Cir. 1969), *cert. denied,* 397 U.S. 969 (1970).

[543] Czepil v. Hershey, 425 F.2d 251, 252 (7th Cir.), *cert. denied,* 91 S. Ct. 44 (1970).

[544] United States v. Chaudron, 425 F.2d 605, 611 (8th Cir.), *cert. denied,* 91 S. Ct. 93 (1970).

[545] Jessen v. United States, 242 F.2d 213, 215 (10th Cir. 1957).

[546] Clay v. United States, 397 F.2d 901, 911 (5th Cir. 1968), *vacated sub nom.* Giordano v. United States, 394 U.S. 310 (1969).

[547] In Czepil v. Hershey, 425 F.2d 251, 252 (7th Cir.), *cert. denied,* 91 S. Ct. 44 (1970) and United States v. Chaudron, 425 F.2d 605, 611 (8th Cir.), *cert. denied,* 91 S. Ct. 93 (1970), the courts referred only to area residency, and in *Czepil,* the Court specifically referred to the requirements of county residency as "jurisdictional."

[548] United States v. Lemke, 310 F. Supp. 1298, 1302 (N.D. Cal. 1969); United States v. Machado, 306 F. Supp. 995, 996 (N.D. Cal. 1969); United States v. Beltran, 306 F. Supp. 385, 388 (N.D. Cal. 1969). *Contra,* United States v. Nussbaum, 306 F. Supp. 66, 68 (N.D. Cal. 1969).

[549] 317 F. Supp. 1363, 1366-67 (E.D. Pa. 1970).

[550] United States v. Williams, 317 F. Supp. 1363, 1368 (E.D. Pa. 1970); United States v. Beltran, 306 F. Supp. 385, 387-88 (N.D. Cal. 1969).

constituted board cannot do what it is supposed to do. It cannot classify registrants based on the personal knowledge of the members which is deemed to follow from their residence in the area served by the board.[551] I also argued in the Petition for Certiorari in *Collins* that the residency requirement does not go merely to the qualifications of the individual board member or to the process by which board members are selected, as do the de facto-officer doctrine and the principle of validity of acts of a malapportioned legislature. I contended that the residency requirement goes to the essence of the Selective Service System and the power of local boards to classify registrants and order them for induction.

The recent Ninth Circuit decision of *United States v. Reeb*[552] in effect overruled the Northern District of California decisions both in regard to the mandatory nature of area residency and in regard to the showing of prejudice. *Reeb* held that, in the absence of a showing of prejudice due to improper composition, the defense cannot be sustained.[553] The contrary argument, as set forth in the now overruled case of *United States v. Beltran*,[554] is that:

> [A] violation of a regulation whose purpose is germane to insuring the accuracy of the decisional process should be considered prejudicial. While it is true that one cannot know whether a registrant's classification would have been different had the board been properly constituted, it is also true that the registrant's classification might have been different.[555]

Perhaps this is what the Ninth Circuit was trying to get at in *Reeb*, and thereby destroy the defense of an improperly constituted board entirely.

Since most of the cases involve a claim of area residency, the claim can easily be disposed of by a court if it holds that the requirement is discretionary rather than mandatory. This is what the Seventh,[556] Eighth,[557] and Ninth[558] Circuits have done. The Sixth Circuit, how-

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[551] However, this may not be true in practice. *See* United States v. Beltran, 306 F. Supp. 385, 387 (N.D. Cal. 1969).

[552] 433 F.2d 381 (9th Cir. 1970).

[553] *Id.* at 384.

[554] 306 F. Supp. 385 (N.D. Cal. 1969).

[555] *Id.* at 388. In my Petition for Certiorari in *Collins*, I argued that in a "racist" society, Blacks were necessarily prejudiced by the absence of Blacks on local boards. Ironically, another federal judge in New Orleans held that the requirement of area residency was mandatory and acquitted a white registrant whose board was improperly constituted. United States v. Clinton, Crim. No. 31857-C (E.D. La., April 24, 1970).

[556] Czepil v. Hershey, 425 F.2d 251, 252 (7th Cir.), *cert. denied*, 91 S. Ct. 44 (1970).

[557] United States v. Chaudron, 425 F.2d 605, 609-10 (8th Cir.), *cert. denied*, 91 S. Ct. 93 (1970).

[558] United States v. Reeb, 433 F.2d 381, 383-84 (9th Cir. 1970).

ever, has rejected this view and, in *United States v. Cabbage*,[559] held that the requirement was mandatory. The court stated:

> As we read the regulation it can by no means be treated as purely discretionary. The use of the word 'shall' is mandatory language. The phrase, 'if at all practicable' should be read, we believe, as meaning simply 'if there are qualified citizens available for appointment from the Local Board area.'[560]

Because it also found other errors and could reverse the conviction on that basis,[561] the Sixth Circuit did not have to decide the effect of improper composition upon the validity of the order to report. It directed that the government move to reconstitute the board in accordance with the regulations and said that the registrant would not be subject to reclassification until this was done. On September 2, 1970, the requirement of area residency was quietly removed from the regulations, and the only present requirement is that the board members reside in the county. However, since many cases will arise in the future involving prior classification and induction by boards improperly constituted as to area residency,[562] the issue is still a vital one for use in contesting induction orders.

The Supreme Court has so far refused to deal with the board composition issue, as evidenced by its denial of certiorari this Term in the cases arising in the Fifth,[563] Seventh,[564] and Eighth[565] Circuits. It may not be difficult to understand why the Court is hesitant to deal with the question. The essential thrust of the defense is that an improperly constituted board lacks jurisdiction to classify and induct registrants.[566] Thus, any order to report issued by such a board would be necessarily invalid. If, as it appears, many boards have been improperly constituted, a substantial number of registrants could avoid

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[559] 430 F.2d 1037 (6th Cir. 1970).

[560] *Id.* at 1041. As to the mandatory nature of the regulation, see also the discussion in United States v. Williams, 317 F. Supp. 1363, 1367-8 (E.D. Pa. 1970).

[561] 430 F.2d at 1041-42. For example, there was a failure to advise the registrant of adverse information in his file. *See* note 346 *supra* and accompanying text.

[562] *See* United States v. Reeb, 433 F.2d 381, 383 (9th Cir. 1970).

[563] Collins v. United States, 426 F.2d 765 (5th Cir. 1970), *rehearing denied*, 91 S. Ct. 451 (1971). In Clay v. United States, 430 F.2d 165 (5th Cir. 1970), *cert. granted*, 91 S. Ct. 457 (1970), this issue was excluded from the grant of certiorari.

[564] Czepil v. Hershey, 425 F.2d 251 (7th Cir.), *cert denied*, 91 S. Ct. 44 (1970).

[565] United States v. Chaudron, 425 F.2d 605 (8th Cir.), *cert. denied*, 91 S. Ct. 93 (1970).

[566] In most of the cases a majority of the members do not satisfy the residency requirements. One court has denied the defense on a ground that a majority of the members did satisfy the requirement. United States v. Fisher, 307 F. Supp. 7, 8 (D. Conn. 1969). I am prepared to argue that a board with a member who has not satisfied the residency requirements is infected with an alien presence and, therefore, loses jurisdiction.

induction on this basis. Both the lack of jurisdiction and the consequences of such a ruling were recognized in *Williams*,[567] when the court observed that:

> Thus confronted with an authorized regulation, promulgated by the President, mandatory in its terms to effectuate established policy, and presented with no facts to suggest that it would have been impracticable to abide by the regulation, we must find that the Board is not lawfully constituted. Deprivation of liberty by means of an order issuing from an unlawfully constituted body is a denial of due process, and in this case results in invalidating the induction order.[568]
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> . . . .
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> The defendant here cannot be judged guilty of a violation of 50 U.S.C. App. §§ 454, 462, unless there was a valid induction order. A prerequisite to a proper induction order is procedural due process. . . . Therefore, draft board compliance with the applicable selective service regulations is a necessary element of the Government's case. Consequently, (the defendant) in his criminal defense must be allowed to show the failure of the draft board to comply with the residence regulation.[569]
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> . . . .
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> Since we have found 32 C.F.R. § 1604.52(c) to be a mandatory requirement and that the Government has failed to prove its compliance with such regulation, it necessarily follows that the induction order, being issued by an illegal board, was invalid. Accordingly, the defendant's motion for judgment of acquittal is hereby granted.
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> The practical effect of our decision would appear to place in jeopardy all proceedings of Local Board No. 133, as it was constituted in this case. However, in our view, this result is dictated by law and policy and serves notice on the appropriate authorities that they are obligated to either abide by their own regulations or to prove why compliance with such regulations was impracticable.[570]

The issue is as simple as that.

Thus far, this view taken by the court in *Williams* has not commended itself to other courts except for some divisions of the Northern District of California, and their decisions have been overruled by the Ninth Circuit. The issue would appear to be still viable in the Sixth Circuit, despite *Brooks*, in light of *Cabbage*. I will be trying to persuade that court to adopt this point of view in *Dudley* if the matter has not been resolved before then. The question does not appear to have been passed on by the First, Second, Third, Fourth, and Tenth Circuits. I think that Supreme Court review is possible only if a court of appeals accepts the *Williams* view. When a district court invalidates an order of induction due to improper board composition, and enters a judgment of acquittal, its decision is not appealable.[571] The question, therefore, can arise at the court of appeals level only if a registrant, unsuccessful in the lower court, raises it on appeal. At present, then, the defense is, as a practical matter, foreclosed in the Fifth, Seventh, Eighth, and Ninth Circuits. The Sixth will have

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[567] 317 F. Supp. 1363 (E.D. Pa. 1970).

[568] *Id.* at 1368.

[569] *Id.* at 1369 n.7.

[570] *Id.* at 1371.

[571] United States v. Sisson, 399 U.S. 267, 307 (1970).

an opportunity to decide it in *Dudley*, if not sooner, and we can only await the decisions of the other circuits if the issue arises there. This defense has benefited some registrants when district judges have recognized it. Perhaps because of its potential impact, however, it has not been generally recognized. Most courts are not willing to carry the procedural defense to these lengths and are not disturbed by the fact that the government is itself violating the very law it demands that young men obey under pain of five-year prison sentences.

G. The Induction Center

The failure to process the registrant in accordance with Army regulations at the induction center may give rise to a defense to the prosecution for refusal to submit. Such a defense would not be possible when the registrant has refused to submit to processing[572] or has been ejected from the induction center following a disturbance which he created.[573] When he has gone through processing, however, there must be compliance with the Army regulations which, "like selective service regulations, constitute part of the procedural framework governing induction."[574] As with the selective service regulations, minor departures from the prescribed procedure do not constitute a defense so long as "the essential requirements of the induction process were properly met."[575] The test is whether the departure from the regulations was prejudicial to the registrant, and on the whole the courts have been fairly liberal in finding prejudice whenever a failure to follow the regulations has been shown.

When the registrant has received his pre-induction physical examination more than 180 days prior to the induction processing, the regulations require that at the time of induction he be given a physical "inspection," which is less rigorous than the physical examination.[576] In some instances induction station personnel have refused to give physical inspections to registrants who indicated that they were going to refuse induction.[577] This has been held to be a prejudicial violation of the regulations,[578] since there is a possibility, however slight, that

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[572] *See* United States v. Harris, 412 F.2d 384 (9th Cir. 1969).

[573] *See* Callison v. United States, 413 F.2d 133 (9th Cir. 1969), *vacated on other grounds*, 399 U.S. 526 (1970).

[574] Briggs v. United States, 397 F.2d 370, 373 (9th Cir. 1968).

[575] Edwards v. United States, 395 F.2d 453, 457 (9th Cir.), *cert. denied*, 393 U.S. 845 (1968).

[576] AR 601-270, ch. 3, § III, par. 69 at 3-23.

[577] The possibility of an error such as this at the induction center argues in favor of a registrant's reporting for induction and submitting to processing, although this is no longer necessary in order to exhaust administrative remedies.

[578] Briggs v. United States, 397 F.2d 370, 373 (9th Cir. 1968); United States v. Haifley, 300 F. Supp. 355, 357 (D. Colo. 1969).

the registrant might be rejected.[579] It should be noted, however, that a registrant ordered to report for civilian work is not required to be given a final physical inspection,[580] and is not considered to have been denied fair and equal treatment if not inspected since he "will not be subject to the rigors of military life in a combat zone."[581] It is also prejudicial to fail to give the registrant the DD Form 98,[582] which is a loyalty questionnaire, to fill out as required by regulations.[583] The rationale is that since the furnishing of certain kinds of information will abort the induction process "pending completion of a thorough investigation," it is possible that the registrant might be found unacceptable.[584]

Induction personnel are now pretty well attuned to the procedure to be followed when a registrant refuses induction, and it is not likely that a material violation of the procedures will occur with any frequency. I will, however, review the possibilities anyway. In essence, the registrant must be given a warning of the penalties and a second chance to step forward.[585] A failure to do so is considered prejudicial,[586] because following receipt of the warning and the second opportunity the registrant might change his mind.[587] It is not required of induction personnel that they give Miranda-type warnings before asking the registrant if he will sign a statement that he has refused to be inducted.[588] The theory is that at the time the statement is re-

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[579] The rationale from these cases is that he might be rejected and, therefore, that he is prejudiced by the refusal to perform the inspection.

[580] He must be given the pre-induction physical examination, however. *See* 32 C.F.R. § 1628.10 (1971).

[581] Shoemaker v. United States, 413 F.2d 274, 276 (9th Cir.), *cert. denied,* 396 U.S. 837 (1969).

[582] *See* Oshatz v. United States, 404 F.2d 9, 11-12 (9th Cir. 1968).

[583] AR 601-270.

[584] Oshatz v. United States, 404 F.2d 9, 12 (9th Cir. 1968).

[585] The procedures to be followed are set forth in United States v. Kroll, 402 F.2d 221, 222 n.2 (3d Cir.), *cert. denied,* 393 U.S. 1043 (1968).

[586] *See* Chernekoff v. United States, 219 F.2d 721, 725 (9th Cir. 1955).

[587] *Id. See* United States v. Kurki, 384 F.2d 905 (7th Cir. 1967), *cert. denied,* 390 U.S. 926 (1968). There the registrant appeared at the board, but refused to board the bus. The court held that it was not necessary that the clerk give him the felony warnings, and the second chance. *Id.* at 907. The dissent argued that the board personnel should have been required to follow a procedure similar to that required in *Chernekoff,* and that the failure to do so created a reasonable doubt as to the wilfulness of the registrant. *Id.* at 908.

[588] *See* Noland v. United States, 380 F.2d 1016, 1017 (10th Cir.), *cert. denied,* 389 U.S. 495 (1967); United States v. Kroll, 402 F.2d 221, 222 (3d Cir.), *cert. denied,* 383 U.S. 1069 (1968); United States v. Shermeister, 286 F. Supp. 1, 4 (E.D. Wis. 1968), *rev'd on other grounds,* 425 F.2d 1362 (7th Cir. 1970).

quested the registrant is "neither in custody nor deprived of his freedom."[589]

IV. Procedural Aspects of the Procedural Defense

In order to complete the analysis of the procedural defense, it is necessary to explore briefly how the assertion of the defense is affected by the requirement of exhaustion of administrative remedies. It is also necessary to consider whether the violation of procedural rights can be the subject of pre-induction review. Since both exhaustion of remedies and pre-induction review are quite complex areas,[590] I will not try to analyze either area in detail, but will confine the discussion to the relation which each has to the procedural defense.

A. Exhaustion of Administrative Remedies

The requirement of exhaustion of administrative remedies generally has been asserted by the government as a prerequisite to judicial review of the substantive classification. In this context the failure to pursue administrative remedies could be said to amount to a waiver of the right to judicial review. Because of his failure to pursue administrative remedies—specifically the failure to appeal from the I-A classification—the registrant could be said to have waived his right to judicial review of the classification.[591] In *McKart v. United States*,[592] however, it was held that the failure to appeal did not bar a registrant from challenging his classification on the ground that he should have received an exemption as a sole surviving son.[593] This demonstrates that even in the classification situation the requirement of exhaustion is not absolute. In *Gutknecht v. United States*[594] the Supreme Court held that failure to appeal from a delinquency classification did not bar an attack on the delinquency regulations because there was no right to appeal from a delinquency classification as such.[595] *Gutknecht*, I think, indicates the general inapplicability of the exhaustion of remedies principle to the assertion of the procedural defense. This is correct for any of three reasons. Either the error itself was sufficient to deny the registrant the right to appeal, the error was com-

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[589] Noland v. United States, 380 F.2d 1016, 1017 (10th Cir.), *cert. denied*, 389 U.S. 495 (1967).

[590] See the comprehensive treatment of pre-induction review in Donahue, *The Supreme Court vs. Section 10(b)(3) of the Selective Service Act: A Study in Ducking Constitutional Issues*, 17 U.C.L.A.L. Rev. 908 (1970).

[591] *See* United States v. Dunn, 264 F. Supp. 112, 114 (D. Mass. 1967).

[592] 395 U.S. 185 (1969).

[593] *Id.* at 192-94.

[594] 396 U.S. 295 (1970).

[595] *Id.* at 301-02.

mitted during the appeal process, or the error was committed after an appeal had been taken or was no longer available.

Thus, the exhaustion of remedies should be irrelevant when the issue is a failure to reopen, since upon the board's failure to reopen there is no right to a further appeal. It is the denial of the right to appeal which makes the improper refusal to reopen invalid. When, because of misleading advice, the registrant fails to take an appeal or to otherwise exercise his rights, the same factors which should excuse his failure to exhaust, provide the basis for the procedural defense.[596] In other words, unless administrative remedies are clearly available to correct the error complained of,[597] there can be no question of failure to exhaust.

As pointed out previously, however, the Fifth and Sixth Circuits have apparently held that the failure to appeal from a I-A classification bars an attack on improper composition of the board.[598] This appears to be somewhat incredible, since there is no way in the administrative process by which the error can be corrected. Furthermore, the Selective Service System will not even furnish the information by which such an attack can be made. With this possible exception, failure to exhaust administrative remedies should generally pose no problem with respect to assertion of the procedural defense unless the error complained of was one which could actually have been cured by the appeals board.

B. Pre-Induction Review and the Procedural Defense

The Supreme Court decisions on pre-induction review[599] have all involved challenges to substantive classifications. It is noteworthy that in the successful challenges the classification was I-A "Delinquent."[600] It can be argued that the language of section 10(b)(3) of the Act,[601] which provides that "[n]o judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution," refers only to the registrant's

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[596] *See* United States v. Williams, 420 F.2d 288, 291 (10th Cir. 1970); United States v. Davis, 413 F.2d 148, 151 (4th Cir. 1969).

[597] This might be the case, for example, in regard to the denial of a full and fair hearing. But here too, if the registrant is entitled to a full and fair hearing by his local board, it can be argued that the denial of same would not be "cured" by an appeal, so that the registrant should not be barred by failure to exhaust.

[598] *See* notes 533-34, 537-38 *supra* and accompanying text.

[599] Breen v. Selective Service Local Bd. No. 16, 396 U.S. 460 (1970); Clark v. Gabriel, 393 U.S. 256 (1968); Oestereich v. Selective Service Local Board No. 11, 393 U.S. 233 (1968).

[600] *See* Breen v. Selective Service Local Bd. No. 16, 396 U.S. 460 (1970); Oestereich v. Selective Service Local Bd. No. 11, 393 U.S. 233 (1968).

[601] MSSA § 10(b)(3), 50 U.S.C. App. § 460(b)(3) (Supp. V, 1970).

substantive classification. This would mean that section 10(b) (3) would not apply to violations of rights by the boards which render the order to report invalid. Thus, the section would not prevent pre-induction review of the procedural defense. Support for this view can be found in Mr. Justice Harlan's concurring opinion in *Oestereich v. Selective Service System*,[602] where he stated:

> At the outset, I think it is important to state what this case does and does not involve. Petitioner does not contend that the Selective Service System has improperly resolved factual questions, or wrongfully exercised its discretion, or even that it has acted without any "basis in fact," as that phrase is commonly used in this area of law. . . . He asserts, rather, that the procedure pursuant to which he was reclassified and ordered to report for induction—a procedure plainly mandated by the System's self-promulgated published regulations, 32 CFR, pt. 1642—is unlawful.
> . . . I take the phrase "classification or processing" to encompass the numerous discretionary, factual, and mixed law-fact determinations which a Selective Service Board must make prior to issuing an order to report for induction. I do not understand that phrase to prohibit review of a claim, such as that made here by petitioner, that the very statutes or regulations which the Board administers are facially invalid.[603]

Admittedly Justice Harlan was not dealing with the variety of procedural defenses which are the subject of the present article, and which usually do not involve an attack on the regulations. The contention in most cases is usually that the regulations were not followed. Nonetheless, such contentions do not generally involve discretionary, factual, and mixed law-fact determinations either. It is possible to argue that "classification" and "processing" should be read together to refer essentially to judicial review of the substantive classification only when the courts would be second guessing the board. This would mean that the regulation was not intended to prevent a court from making a pre-induction review of procedural violations and invalidating an order to report.

This view had been accepted by some district courts. Relying on Justice Harlan's language in *Oestereich*, the United States District Court for the District of Delaware allowed pre-induction review to challenge a violation of rights during the appeals procedure in *Wiener v. Local Board No. 4*,[604] stating:

> Here, then, is recognition that when the Selective Service administrative *procedure* is sufficiently irregular, pre-induction review, apart from that permitted in a criminal case, is warranted despite Section 10(b) (3) of the Act.[605]

The United States District Court for the District of Massachusetts

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[602] 393 U.S. 233 (1968).

[603] *Id.* at 240-41.

[604] 302 F. Supp. 266 (D. Del. 1969).

[605] *Id.* at 269 (emphasis in original). The procedure test apparently was the basis of pre-induction review in Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956).

has similarly held that a failure to reopen upon the presentation of a prima facie case is not within a board's authority and, therefore, that it may be the subject of pre-induction review.[606]

In *Hunt v. Local Board No. 197*,[607] a panel of the Third Circuit took the same position concerning a failure to reopen. The court referred to the language in an earlier Third Circuit decision allowing pre-induction review of a delinquency reclassification, which stated that section 10(b)(3) of the Act "bars pre-induction review only where there is a challenge to the System's resolution of factual questions in the classification or processing of a draft registrant."[608] It also referred to Justice Harlan's concurrence in *Oestereich*, discussed earlier, and his concurrence in *Breen* where he stated that under the test put forth in *Oestereich*, "The availability of judicial review turns, not on what amounts to an advance decision on the merits, but rather on the nature of the challenge being made."[609] The Third Circuit in *Hunt* observed that judicial review was authorized under either test and that it could not perceive any distinction between a challenge to the delinquency reclassification procedures and the ordinary reclassification procedures challenged there. Finally, it concluded that what was complained of "is not the board's determination of a factual issue, after a hearing in compliance with the statute, but a reclassification procedure which in numerous cases has been held to be invalid."[610] The decision in *Hunt*, however, was subsequently vacated, the opinion withdrawn, and the case returned for consideration by the court en banc. In a 5-2 decision the court en banc held that pre-induction review was proper.[611] Three judges treated the failure to reopen as involving simply "an undiluted question of law, which is an established basis for pre-induction review."[612] Judge Gibbons, who wrote the original panel decision, repeated its rationale in his concurrence.[613] Chief Judge Hastie viewed section 10(b)(3) of the Act as inapplicable to actions for mandamus and held that the allegations of the complaint were sufficient to make out a case for that remedy.[614] The dissenting judges took the position

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[606] Lulben v. Local Bd. No. 27, 316 F. Supp. 230 (D. Mass. 1970); Lane v. Local Bd. No. 17, 315 F. Supp. 1355 (D. Mass. 1970). *See also* Barker v. Hershey, 309 F. Supp. 227 (W.D. Wis. 1969).

[607] No. 18076 (3d Cir., Mar. 24, 1970), 2 SEL. SERV. L. REP. 3599 (1970).

[608] Bucher v. Selective Service System Local Bd. No. 2, 421 F.2d 24, 27 (3d Cir. 1970).

[609] Breen v. Selective Service Local Bd. No. 16, 396 U.S. 460, 468 (1970). *See also* Oestereich v. Selective Service Local Bd. No. 11, 393 U.S. 233, 239-45 (1968).

[610] *See* 2 SEL. SERV. L. REP. 3601 (1970).

[611] No. 18076 (3d Cir., Feb. 5, 1971).

[612] Judges Freedman, Seitz and Adams. *Id.* at 18-20.

[613] *Id.* at 2-18.

[614] *Id.* at 20-33.

that a failure to reopen and consider a claim for a hardship deferment involved an "exercise of discretion," thus precluding pre-induction review.[615]

The general view has been contrary to *Hunt*, however. Most courts have relied on section 10(b)(3) of the Act to deny pre-induction review of the procedural defense in the same manner as they have denied pre-induction review going to the substantive classification or other matters. In *Fein v. Selective Service Local Board No. 1*,[616] for example, the registrant claimed that the reversal of his conscientious objector classification by the appeals board was violative of due process. The registrant argued that he was not notified of the reasons for the appeal by the state director, he had no opportunity to present evidence to rebut the state director's appeal, and no reasons were given by either the appeals board or the National Appeals Board for denying his conscientious objector claim. The Second Circuit applied the blatantly lawless test for judicial review of administrative action and concluded that pre-induction review was not available, saying that "[a]llegations of constitutional infirmities in the classification procedures [do] not bring this case within any exception to the bar of § 10(b)(3)."[617] Pre-induction review has likewise been refused for a claim of violation of rights by a failure to reopen in the Second,[618] Fifth,[619] and Tenth[620] Circuits. It has also been refused for claims involving a violation of the order of call[621] and those involving improper composition of the board.[622]

All things considered, the confusion attendant to pre-induction review[623] has also applied to the assertion of the procedural defense. An argument can be made that procedural invalidity does not come within the prohibition of section 10(b)(3) of the Act, but so far this argument has met with limited judicial acceptance. If the procedural invalidity argument is ever accepted, pre-induction review would be greatly expanded.

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[615] *Id.* at 23-35.

[616] 430 F.2d 376 (2d Cir. 1970).

[617] *Id.* at 380. Chief Judge Lumbard, dissenting, adopted the "procedural violation" test, and concluded that judicial review was not barred in these circumstances. *See id.* at 381-84.

[618] Ferrell v. Local Bd. No. 38, 434 F.2d 686 (2d Cir. 1970).

[619] Edwards v. Selective Service Local Bd. No. 111, 432 F.2d 287 (5th Cir. 1970).

[620] Sloan v. Local Bd. No. 1, 414 F.2d 125 (10th Cir. 1969).

[621] Green v. Local Bd. No. 87, 419 F.2d 813, 815 (8th Cir.), *cert. denied*, 397 U.S. 1059 (1970).

[622] *See* Czepil v. Hershey, 425 F.2d 251, 252 (7th Cir.), *cert. denied*, 91 S. Ct. 44 (1970).

[623] *See generally* the discussion in Donahue, *supra* note 590, at 925-46.

V. Conclusion

In this article I have attempted to analyze the procedural defense in draft resistance cases and to demonstrate its effectiveness in protecting young men who have chosen to embark upon the path of draft resistance. I have traced its development and outlined the factors which I believe have contributed to the recognition of the procedural defense by the courts. I have then discussed in some detail the various procedural defenses "from without and within." It is my submission that in selective service prosecutions today the procedural defense has become far more significant than defenses going to the substantive classification of the registrant. If I am right, this is perhaps the most important legal consequence which has resulted from resistance to the "horror of Vietnam." In any event, the procedural defense has been shown to be an effective tool for the draft resistance bar in their efforts to defend those who have chosen not to submit.